

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA  
(HELD AT BRAAMFONTEIN)**

**CCT NO: 43/2009  
HIGH COURT CASE NO: 08/22689**

**In the matter between:**

<b>LEON JOSEPH</b>	<b>First Applicant</b>
<b>VALERIE MOSES</b>	<b>Second Applicant</b>
<b>VICTOR MOKETE MOKOENA</b>	<b>Third Applicant</b>
<b>LURICIA VAN WYK</b>	<b>Fourth Applicant</b>
<b>SHANICE MAYEZA</b>	<b>Fifth Applicant</b>
<b>DIANA VAN ROOYEN</b>	<b>Sixth Applicant</b>

**and**

<b>CITY OF JOHANNESBURG</b>	<b>First Respondent</b>
<b>CITY POWER (PTY) LTD</b>	<b>Second Respondent</b>
<b>MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, GAUTENG</b>	<b>Third Respondent</b>
<b>THOMAS NEL</b>	<b>Fourth Respondent</b>

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**APPLICANTS' REPLYING AFFIDAVIT**

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I, the undersigned,

**TEBOHO MOSIKILI**

do hereby make oath and swear:

- 1 I am an adult, male attorney employed as such by the Litigation Unit of the Centre for Applied Legal Studies (“CALs”) at the University of the Witwatersrand Law Clinic. The CALs Litigation Unit has, together with the Wits Law Clinic, represented the applicants in this matter from its inception and I have been involved in it throughout that time.
  
- 2 The facts contained herein are within my personal knowledge, unless the contrary appears from the context, and are to the best of my belief true and correct.
  
- 3 For the sake of convenience, I depose to the present affidavit on behalf of the applicants given that it involves a number of legal issues. The first applicant has deposed to a shorter affidavit which is factual in nature and which is annexed as **Annexure TM1**. Confirmatory affidavits from the second to sixth applicants in respect of that affidavit are also attached hereto.

**THE NEED FOR THE PRESENT AFFIDAVIT**

- 4 The second respondent (City Power) filed an answering affidavit to the application for leave to appeal on Friday 15 May 2009. Notably, however, the

first respondent (the City of Johannesburg) has not filed any answering affidavit or indicated what its attitude is to the application for leave to appeal to this Court. This is despite the fact that the City of Johannesburg actively participated in the High Court proceedings.

5 I have read the answering affidavit filed by City Power. I am aware that the rules of this Court do not make provision for the applicants to file a replying affidavit in an application for leave to appeal.

6 However, there are four discrete issues raised by City Power's affidavit which are of acute concern to the applicants. In respect of each issue, the affidavit by City Power does not give an accurate portrayal of the facts and submissions before the High Court. The four issues are:

6.1 The ability of the applicants to find alternative accommodation;

6.2 The suggestion that the applicants were aware of the reasons for the disconnection of electricity and ought to have approached City Power of their own accord to make representations;

6.3 The issue of direct billing; and

6.4 The nature of the applicants' case before the High Court.

7 Accordingly, the applicants seek the leave of this Court to file this brief replying affidavit on those discrete issues only. I submit that it is plainly in the interests

of justice for this Court to be properly apprised of the true issues between the parties when it determines whether to grant or set down the application for leave to appeal.

- 8 Given the limited purpose of this replying affidavit, I will not traverse each of the factual allegations and legal contentions raised by City Power in its answering affidavit. This is not to say that the applicants accept the correctness thereof or that the failure to deal with them must be taken as an admission. Indeed, there are numerous legal submissions and factual allegations in the answering affidavit that the applicants contend are incorrect. The failure to deal with these is simply the consequence of the limited nature and ambit of this replying affidavit.

#### **THE DISCRETE ISSUES REQUIRING A REPLY**

- 9 The first issue concerns the ability of the six applicants to find alternative accommodation.

9.1 It was made clear in the founding affidavit that the six applicants before this Court remain living in the building, despite the lack of electricity and the resulting intolerable conditions, because they simply cannot find alternative accommodation.

9.2 At para 13 of the answering affidavit, City Power seeks to deny these allegations, despite the fact that they were effectively common cause on the papers before the High Court.

- 9.3 Whatever the appropriateness of this denial now by City Power, and for the avoidance of all doubt, I refer to the attached affidavit of the first applicant in which he sets out his position and that of the second to sixth applicants.
- 9.4 That affidavit (at para 7.4) and the confirmatory affidavits from each of the other applicants makes plain that:
- 9.4.1 The applicants' living conditions are practically intolerable.
- 9.4.2 They have all looked for alternative accommodation in the area, but have been unable to find anything that they can afford which is, at the same time, suitable for them and their families.
- 9.4.3 They have remained in the building, despite the lack of electricity, because they simply have no choice.
- 10 The second issue concerns the suggestion (at para 16.2 and 19.2.4 of the City Power affidavit in this Court) that the applicants were aware of the reasons for the disconnection of electricity, particularly the illegal connections, and therefore ought to have approached City Power of their own accord to make representations.
- 10.1 The full papers before the High Court make quite clear that this contention is unsustainable.

10.2 The present disconnection occurred on 8 July 2008. City Power relies on an incident where electricity was cut off and residents approached City Power and were told of the reason for the disconnection. That event occurred in 2004, some four years before the present disconnection.

10.3 The attached affidavit of Mr Joseph makes clear that:

10.3.1 The second, third, fifth and sixth applicants only came to live at the building after that event occurred in 2004; and

10.3.2 The first and fourth applicants had no knowledge of the alleged visit by an official employed by City Power to the property in 2004. In addition, it had never been suggested to them, prior to the proceedings in the High Court, that there had been illegal electricity connections on the property.

10.4 In the circumstances, even if knowledge of an event four years previously were relevant to City Power's duty to give notice and a fair hearing under PAJA (which is strongly denied), this does not affect any of the six applicants who remain in the building and who are before this Court.

11 The third issue relates to direct billing.

11.1 At various points in the answering affidavit before this Court, City Power contends that the applicants have an alternative remedy available –

they can seek the fourth respondent's consent to engage in direct billing arrangements with City Power. Even leaving aside the question of whether the owner would provide such consent, this remedy is with respect entirely illusory.

11.2 This is because before direct billing arrangements could be concluded and electricity restored, the existing arrears owed by the fourth respondent to City Power would have to be paid off.

11.3 This is made clear by By-Laws 16(1) and (2) of the Credit Control By-Laws, which make clear that electricity may not be reconnected until "*the full amount of arrears has been paid*" or an agreement for the payment of arrears has been concluded.

11.4 It is also confirmed by City Power's heads of argument before the High Court where its counsel stated (at para 54.2) that the applicants should compel the owner to:

*"give them consent to approach the second respondent for direct billing – subject to suitable arrangements being made regarding the payment of the arrears outstanding on the Company's account."*

*(emphasis added)*

11.5 To avoid unduly burdening the papers, I have not attached the heads of argument in question.

11.6 In the circumstances, the suggestion of direct billing is entirely academic. Neither the applicants nor City Power have been able to get

the fourth respondent to pay off the arrears. Until that occurs, direct billing arrangements for the purpose of electricity would be impossible

12 The final issue concerns the focus of the applicants' case before the High Court.

12.1 City Power contends (at para 27.4 of its affidavit) that the applicants' "*first and main contention*" before the High Court was that it was the Credit Control By-Laws that required City Power to comply with PAJA in respect of the applicants.

12.2 That is simply incorrect. The applicants' case as stated in its heads of argument was always that the obligation to afford them a fair hearing derived first and foremost from PAJA itself. The only question about the Credit-Control By-Laws was whether, on a proper interpretation, they precluded such a fair hearing being given or could be read together with the PAJA obligation. It was contended that they could indeed be read together with PAJA, as was required by this Court's judgment in ***Zondi v MEC for Traditional & Local Govt Affairs 2005 (3) SA 589 (CC)*** at **para 101**.

12.3 This also makes it quite clear that the issues before this Court are not about the common law of contract. The applicants accept (and have always accepted) that they have no contractual right to be heard – indeed they have no contract with City Power.



12.4 The core question is whether the absence of a contract absolves City Power of its duty under PAJA to afford the applicants a fair procedure before engaging in administrative action that affects their constitutional rights. That requires an interpretation of PAJA and is manifestly a question that does not require the intervention of the Supreme Court of Appeal.

12.5 Indeed it is notable that nowhere in its answering affidavit in this Court does City Power ever put up a single principled argument as to why it is that the applicants do not have such a right to a fair hearing in terms of PAJA. The judgment of the High Court, likewise, fails to deal with this issue, the central issue of the case.

13 In the light of the above, the applicants submit that it would be in the interests of justice for this Court to grant leave to appeal.

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**TEBOHO MOSIKILI**

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_ this \_\_\_\_ day of \_\_\_\_\_ 2009 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

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**COMMISSIONER OF OATHS**