

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

**CCT NO: _____
HIGH COURT CASE NO: 08/22689**

In the matter between:

LEON JOSEPH	First Applicant
VALERIE MOSES	Second Applicant
VICTOR MOKETE MOKOENA	Third Applicant
LUCRICIA VAN WYK	Fourth Applicant
SHANICE MAYEZA	Fifth Applicant
DIANA VAN ROOYEN	Sixth Applicant

and

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

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

SHAHEDA HASSIM MAHOMED

do hereby make oath and swear:

- 1 I am an adult, female attorney employed as an adjunct professor by the University of the Witwatersrand Law Clinic (*"the Wits Law Clinic"*). The Wits Law Clinic is the applicants' attorney of record in this matter.

- 2 The facts contained herein are, unless the contrary appears from the context, within my personal knowledge and are true and correct.

THE PARTIES

- 3 The first to sixth applicants are the only remaining parties to the High Court application that are still living in the building that is the subject of this application. They reside at Ennerdale Mansions, Stand 158 Percy Street, corner Sixth Avenue, Mid Ennerdale, Ennerdale, Johannesburg.

- 4 The first respondent is the City of Johannesburg, a Metropolitan Municipality duly established by law, having its principal place of business at the Metropolitan Centre Building, 158 Loveday Street, Marshalltown, Braamfontein.

- 5 The second respondent is City Power (Pty) Ltd, a company with limited liability incorporated in terms of the Companies Act 61 of 1973, with its principal place of business at 40 Heronmere Road, Reuven.

- 6 In the High Court, the main *lis* was between the applicants and the second respondent, because the first respondent has delegated the responsibility to provide electricity to the second respondent in the area in which the applicants reside. However, because the first and second respondents made common cause with one another in the High Court and are both responsible for the provision of electricity within Johannesburg, I shall refer to them collectively as “*the respondents*”, unless the context requires otherwise.

- 7 The third respondent is the Member of the Executive Council for Local Government, Gauteng, with the address for service being the State Attorney, 10th Floor, North State Building, 95 Market Street, cnr Kruis Street, Johannesburg. The third respondent is cited by virtue of the fact that, as part of this application, the constitutional validity of certain municipal by-laws is impugned. The third respondent did not participate in the proceedings in the High Court, despite having been joined as a party.

- 8 The fourth respondent is Thomas Nel, the owner of Ennerdale Mansions, whose address is 2 Thor Street, Ennerdale Extension 3. The fourth respondent is cited by virtue of his ownership of the affected building and no specific relief is sought against him. The fourth respondent was also a party to the proceedings in the High Court, although he did not participate in them.

INTRODUCTION

- 9 This is an application for leave to appeal to this Court against the judgment of His Lordship Mr Justice Jajbhay ("*Jajbhay J*"), in the South Gauteng High Court, handed down on 3 April 2009.

- 10 This application concerns a number of poor families living in a building in Johannesburg called Ennerdale Mansions. The average income of the households in the building is R3000.00 to R4000.00 and some of the households have no income at all.

- 11 The applicants rent their flats from the fourth respondent, Mr Nel. The applicants pay their electricity bill to Mr Nel as part of their rent accounts (although electricity is charged separately and is not part of the rent) and all have kept up to date with their payments on rent and electricity.

- 12 Notwithstanding this, on 8 July 2008, the electricity supply to the building was cut off by employees of the second respondent, City Power. It has remained cut off ever since, meaning that the applicants have now been without electricity for almost ten months.

- 13 There were approximately 30 tenants and their families living in the building at the time of the cut off. Many of these have now left the building due to the

intolerable conditions that have resulted from the electricity cut-off. They have been replaced by new tenants who play no part in the present application.

14 There are six of the original applicants and their families who remain in the building, notwithstanding the absence of any electricity and the severe discomfort and prejudice they have suffered as a result. They remain there because they simply have no option - they cannot afford to find suitable alternative accommodation elsewhere. They are the applicants who seek leave to appeal to this Court.

15 When the electricity was cut off, the applicants did not know why this had occurred. They learnt subsequently that the disconnection was due to the fact that, despite the applicants and their fellow tenants being up to date with their rent and electricity payments to Mr Nel, he had not been paying the building's electricity accounts to City Power. Accordingly, a debt in excess of R400 000 had accumulated to City Power.

16 The applicants do not contend that they have a right to free or unlimited electricity. They also do not contend that City Power is precluded from cutting off electricity in appropriate circumstances and after following a fair procedure.

17 The crux of the applicants' case is that the cutting off of electricity to Ennerdale Mansions could only occur after City Power had followed a fair procedure in relation to them. That procedure required City Power to:

- 17.1 Give notice to the applicants of the likely cut-off, perhaps by means of general notices posted in the foyer of the building;
 - 17.2 Allow the applicants a period to make representations to City Power in this regard; and
 - 17.3 Consider these representations before deciding to cut-off the electricity.
- 18 It is common cause that none of the above occurred. While notice was given to Mr Nel, no prior notice was given to the applicants. They were afforded no opportunity to make any representations to City Power.
- 19 This was no oversight by City Power. Rather, City Power and the City of Johannesburg contend vigorously that there is no duty on them at all to give persons such as the applicants any notice, to allow them to make any representations or to consider any such representations. This is despite the fact that the City of Johannesburg has constitutional duties to provide services at a local level and has delegated the responsibility of providing these services to City Power.
- 20 The lawfulness of the respondents' approach is what is at issue in the present proceedings. Accordingly, the issues raised by the present application are primarily:

- 20.1 The extent to which the respondents are obliged to give notice to people living in a building before the electricity supply to that residence is disconnected;
 - 20.2 The extent to which the respondents are obliged to give people living in a building an opportunity to make representations before the electricity supply to that residence is disconnected;
 - 20.3 The extent to which the respondents are obliged to take into account the personal circumstances people living in a building and other relevant considerations into account before the electricity supply to that residence is disconnected.
- 21 The applicants contended before the High Court, and continue to contend before this Court, that their entitlement to a fair procedure in these circumstances arises from:
- 21.1 section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA);
 - 21.2 the right to procedurally fair administrative action contained in section 33(1) of the Constitution;
 - 21.3 the right to human dignity contained in section 10 of the Constitution;
and
 - 21.4 the right of access to adequate housing contained in section 26(1) of the Constitution.

22 In the circumstances, I submit that there can be no question that the issues raised by the present application are all manifestly constitutional issues.

PROCEDURAL BACKGROUND TO THIS APPLICATION

23 The applicants' application to the High Court was in two parts:

23.1 Part A was an urgent application seeking to have the electricity supply to the building reconnected, pending the finalisation of Part B. That urgent application was dismissed with costs by his lordship Mr Justice Tsoka. A copy of the judgment is attached marked **Annexure A**.

23.2 Part B was the application for declaratory and ancillary relief that was ultimately dismissed by Jajbhay J and which is the subject of this application for leave to appeal. A copy of the judgment is annexed as **Annexure B**.

24 The relief sought in the court below was set out in the applicants' notice of motion, which is annexed as **Annexure C**.

24.1 It will be seen that the applicants' primary relief was to have the disconnection of electricity reviewed and set aside on the basis that it had not been procedurally fair.

- 24.2 In the alternative and to the extent necessary, the applicants sought to have the provisions of the relevant by-laws declared unconstitutional to the extent that they permitted City Power to engage in disconnections of electricity without following a fair procedure.
- 25 At the hearing of Part B of this application, the applicants' counsel applied for an amendment of the notice of motion to include a prayer that, should the application be upheld, the electricity supply to the building was to be reconnected. The application was not opposed by the respondents and was granted by Jajbhay J.
- 26 The record in this matter is relatively brief, consisting of just over 300 pages.
- 27 In the present application, the applicants seek leave to appeal directly to this Court, without the Supreme Court of Appeal first dealing with that matter. I deal below with why the applicants submit that this course is in the interests of justice. However, the applicants will also be delivering a notice of application for leave to appeal to the Supreme Court of Appeal. That application is conditional and will only be persisted with in the event that this Court refuses leave to appeal to it.

PRELIMINARY ISSUE – THE APPLICABLE BY-LAWS

28 Before proceeding to discuss the judgment of the High Court, it is important to note that there are two sets of by-laws that ostensibly deal with the disconnection of municipal services in Johannesburg. These are:

28.1 The City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-Laws, published in notice 1857 of 2005 in terms of section 13(a) of the Local Government: Municipal Systems Act 32 of 2000 (*“the Credit-Control By Laws”*); and

28.2 The Greater Johannesburg Metropolitan Council Standardisation of Electricity By-Laws, published in Notice 1610 of 1999 in terms of section 101 of the Local Government Ordinance, 1939 (*“the Electricity By-Laws”*).

29 One of the issues in the High Court was which of these sets of by-laws governed the dispute between the parties. The doubt related to the fact that the Electricity By-Laws permit disconnections of municipal services without any notice whatsoever. The Credit-Control By-Laws, on the other hand, require disconnections to be subject to PAJA and provide that disconnections cannot be effected until notice has been given to a *“customer”*, which the respondents interpret as meaning only the party with whom they have contracted for the provision of municipal services (in this case, the fourth respondent).

30 Ultimately, both parties were agreed that, to the extent that they were inconsistent, the Credit-Control By-Laws repealed the Electricity By-Laws. Jajbhay J held that this was indeed so and, in doing so, dismissed the

applicants' alternative prayer asking for the Electricity By-Laws to be declared unconstitutional to the extent of their inconsistency with section 33 of the Constitution (see prayer 7 of the applicants' notice of motion before the High Court and paras 34—38 of the judgment). The applicants do not appeal this aspect of the judgment and order.

THE JUDGMENT OF THE HIGH COURT

31 As appears from the notice of motion in the High Court, the applicants impugned the legality of the disconnection because:

31.1 The disconnection took place without notice to the occupiers of the building, whereas they ought to have been given notice.

31.2 The disconnection took place without affording the occupiers the opportunity to make representations as to why the electricity supply should not be disconnected.

31.3 The respondents, before deciding to disconnect the electricity supply, ought to have taken the personal circumstances of the occupiers of the building and other relevant considerations into account.

31.4 Since no notice was given, the applicants did not have the opportunity to make representations. Since the applicants did not have the opportunity to make representations, they were unable to bring relevant considerations, such as their personal circumstances, to the attention of

the respondents. The disconnection, therefore, was effected without these relevant circumstances being taken into account.

32 The applicants' contention that they were entitled to notice and the opportunity to make representations is based on their right to procedural fairness, as envisaged in section 3 of PAJA and section 33 of the Constitution. The need for the applicants' personal circumstances to be taken into account is based not only on the duty of administrators to take all relevant circumstances into account before taking administrative decisions, but on the right to human dignity and the contention that the right to housing, in the urban context, includes the right of access to electricity. The requirement to take the personal circumstances and other relevant considerations into account is based on this Court's judgment in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)**.

33 In dismissing the application, the High Court reasoned as follows:

33.1 Municipalities have an important obligation to ensure the provision of services in a sustainable manner and, in doing so, to ensure proper debt collection in relation to the provision of municipal services (High Court Judgment at paras 18–26).

33.2 The Credit-Control By-Laws provide for the disconnection of an electricity supply as a mechanism to collect arrears (at paras 27—31).

- 33.3 Much of the applicants' argument is based on their contention that the applicants have a socio-economic right to electricity that flows from the right to housing. The right under section 26 of the Constitution is a right of access to adequate housing and it is not a foregone conclusion, in a particular case, that anything at all needs to be provided to a claimant. There is no absolute right of access to electricity, and certainly not a right to an uninterrupted supply of electricity when the municipality is not being paid and the consumers are not indigent (at para 39).
- 33.4 This case is different to the position regarding water, where statute prohibits disconnection in certain circumstances. In the present case, there is not such statutory prohibition and, in any event, the applicants are not indigent persons who qualify for assistance in terms of the by-laws (at para 40). As the High Court put it: "*The applicants can pay. They are not indigent. If they were indigent they would apply for assistance in terms of chapter 4 of the Credit-Control By-Laws (which deals with indigent persons) for assistance and would be provided with electricity on that basis. They are not like Grootboom*" (at para 46).
- 33.5 To the extent that the applicants have been deprived of electricity it is by the fourth respondent, against whom they have a right of recourse. The applicants have not been deprived of access to electricity by the respondents because they may either enforce their rights against the fourth respondent, arrange for direct billing with the fourth respondent's consent or move to other premises where electricity is supplied (at paras 41—43).

33.6 The applicants are not “customers” as envisaged by the Credit-Control By-Laws. There is no requirement in the Credit-Control By-Laws that persons similarly situated to the applicants be afforded notice and the right to representations. This is because the respondents would not be able to require the tenants to make arrangements to pay any arrears. The requirement that notification be given only to customers, does not infringe any of the rights of the applicants as they are not customers of the respondents (at paras 44—45 and 47—48).

33.7 Even if the Credit-Control By-Laws do limit any rights of the applicants, the limitation is justified by section 36 of the Constitution.

GROUND OF APPEAL

34 The applicants contend that the High Court erred on the grounds set out below.

35 First, and most fundamentally, the High Court erred by focussing on the incorrect question:

35.1 The High Court approached this matter by considering whether the applicants were “customers”, as envisaged by the Credit-Control By-Laws.

- 35.2 Having found that the applicants did not fall under that definition, the High Court held that the applicants were not entitled to any notice and any other component of procedural fairness.
- 35.3 However, this was, with respect, the incorrect way to approach this matter. Moreover, it resulted in the High Court failing to deal at all with the applicants' primary contention that they are entitled to procedural fairness in terms of PAJA.
- 35.4 The approach contended for by the applicants before the High Court, and persisted in before this Court, is that what must first be considered is whether the applicants are entitled to procedural fairness in terms of section 3 of PAJA prior to a disconnection being effected.
- 35.5 If the applicants are entitled to procedural fairness under PAJA, the next question to be asked is whether the Credit-Control By-Laws preclude compliance with procedural fairness in respect of the applicants. In that event, questions arise as to the status and constitutional validity of the Credit Control By-Laws.
- 35.6 However, in the present case, the Credit-Control By-Laws do not preclude compliance with procedural fairness in respect of the applicants. At the very most, they are silent on the issue. In the circumstances, the respondents must fulfil their procedural fairness obligations in terms of PAJA. This is made clear by this Court's decision in ***Zondi v MEC for Traditional & Local Govt Affairs 2005 (3) SA 589 (CC)*** at para 101 which was to the effect that an administrator is bound

to apply the provisions of PAJA unless the relevant empowering legislation is inconsistent with PAJA.

35.7 The High Court failed to consider this issue at all.

36 Second, the High Court erred in finding that the applicants were not entitled to procedural fairness.

36.1 It is submitted that, had the High Court followed the correct approach, it would have found that the applicants were indeed entitled to procedural fairness prior to the disconnection of the electricity supply.

36.2 The disconnection of the electricity supply was clearly an administrative act, which adversely and materially affected the rights of the applicants. As such, they were entitled to procedural fairness as envisaged in sections 3(1) and 3(2) of PAJA.

36.3 Section 3(2)(b) of PAJA makes it clear that procedural fairness includes the right to receive adequate notice of administrative action and the opportunity to make representations. In this context, it is important to emphasise that section 3(2)(a) of PAJA makes clear that a fair administrative procedure depends on the facts of the case. The applicants repeatedly made clear before the High Court that procedural fairness in this case could be vindicated by the respondents simply putting up a clear, legible notice in the foyer of the building warning of the impending disconnection and the right to make representations and the applicants then being afforded the opportunity to make

representations in a letter to the respondents. The applicants have certainly never contended for an oral hearing or even notification for each tenant in the building.

36.4 Section 3(4) of PAJA permits an administrator to depart from the requirements of procedural fairness to the extent that it is reasonable and justifiable in the circumstances of the case. It is submitted that, if one has regard to the factors listed in section 3(4)(b) of PAJA, the departure from the requirements of procedural fairness contended for by the respondents is impermissible.

36.5 It is submitted that the High Court placed too much emphasis on the debt-collection obligations of the respondents. Given the relatively minor procedural obligations that the applicants contend for, the respondents were not able to explain why affording procedural fairness to the applicants would impede the debt-collection obligations of the respondents. Indeed, the applicants have never said that the respondents should be precluded from using disconnections as a debt-collection mechanism. The applicants simply contend that they should be heard before a decision to disconnect is made because it may be that, on the facts of a case, the respondents decide that it would be inappropriate to disconnect the electricity supply, taking into account relevant circumstances such as the occupants' personal circumstances. In fact, the only purpose advanced by the respondents to justify the failure to afford procedural fairness was that it would place too great an administrative burden on the respondents.

- 36.6 It is submitted that the High Court erred in accepting the contentions of the second respondent that because it has 13 000 large power users as customers and because many of them are in arrears, there are potentially thousands of people similarly situated to the applicants, who the respondents would need to notify prior to any disconnection. This is because the second respondent did not allege, anywhere in its papers before the High Court, that it performs a multitude of disconnections on a regular basis. The applicants accept that there are thousands of people in Johannesburg who are faced with the *possibility* of disconnections. The extent of the burden placed on the respondents must be assessed in the light of the amount of disconnections that are effected at a given time (or even within a given month) and not in the light of the potential disconnections that could take place at any time. The respondents failed to adduce any facts before the High Court that suggest that, if the applicants' submissions were to have been upheld, they would be required to give notice to so many people that they would be severely prejudiced.
- 36.7 Furthermore, organs of state are faced with various practical difficulties when it comes to discharging their constitutional and statutory duties. It is submitted that practical difficulties alone cannot justify non-compliance with constitutional and statutory duties.
- 36.8 In the light of the complete obliteration of the rights to procedural fairness contended for by the respondents in this case, the relatively minor procedural burdens contended for by the applicants, and the

failure of the respondents to advance a proper purpose for the limitation, it is submitted that the High Court ought to have held that the respondents had failed to justify a departure from the requirements of procedural fairness in terms of section 3(4) of PAJA.

36.9 Had the High Court adopted this approach, it would have found that the disconnection of the electricity supply on 8 July 2008 was indeed unlawful, as contended by the applicants, because it was effected without affording the applicants the relevant components of procedural fairness. To the extent that it did not, it is submitted that it erred.

37 Third, the High Court erred in the manner it dealt with question of a right of access to electricity.

37.1 The applicants' case has always been that, regardless whether the right to housing includes the right of access to electricity, they are entitled to the components of procedural fairness contended for. This is by virtue of PAJA, the right to fair administrative action in terms of section 33 of the Constitution and the right to human dignity in terms of section 10 of the Constitution.

37.2 However, the High Court correctly pointed out that a significant component of the applicants' case was that the right to housing does indeed contain the right of access to electricity. This argument is based both on the position in international law and on this Court's remarks in *Grootboom* (supra) at para 37.

37.3 The High Court judgment is not altogether clear on whether it upheld the applicants' argument based on paragraph 37 of *Grootboom*. It is submitted that, on a proper approach to this question, it would be necessary to enquire first whether the right of access to housing includes the right of access to electricity.

37.4 It would then be necessary to consider whether, if the answer to the first question was positive, that access is limited by the impugned measure. The approach of the High Court in paras 39—43 seems to focus on the second question only, and finds that the respondents are not responsible for inhibiting the applicants' access to electricity. However, to the extent that the High Court rejected the applicants' argument that electricity forms part of the right to housing, at least in the urban setting, or did not make a finding in this regard, it is submitted that the High Court erred. Should leave to appeal be granted, the applicants will argue that the right to housing does indeed have this interpretation.

37.5 It is, in any event, submitted that the High Court was wrong to find that the respondents are not responsible for impeding the applicants' access to electricity. This is because:

37.5.1 In the first place, it is clear that it is the respondents who disconnected the electricity supply, acting pursuant to legislation. This is analogous to the position in the decision of this Court in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)***. In that case, it could be argued that the proximate cause of the debtors

losing their homes was the decision of their creditors to execute against their immovable property. Even so, this Court had no difficulty in finding that the Magistrates' Court Act 32 of 1944, which is the legislation that permitted execution against immovable property, limited the right of access to housing. By the same token, even if the proximate cause of the disconnection was the fourth respondent's failure to pay his arrears, there is no doubt that, to the extent that legislation permits the disconnection of electricity, that legislation permits limitations to access to electricity.

37.5.2 Secondly, the High Court was wrong to hold that there is no nexus between the applicants and the respondents. It may be that there is no contractual nexus. However, the respondents were providing electricity to the building in which the applicants lived and then, acting pursuant to the relevant legislation, disconnected that supply. It is clear, therefore, that the disconnection limited the applicants' access to electricity.

37.5.3 Thirdly, the respondents have constitutional and statutory obligations to fulfil the socio-economic rights of those in their jurisdiction. At the very least, these obligations preclude the respondents from limiting pre-existing access to socio-economic rights without sufficient justification. Therefore, if one accepts the proposition that the right of access to housing includes the right of access to electricity (which, it is at least

possible to argue, the High Court accepted), then it is clear that the respondents deprived the applicants of pre-existing access to a socio-economic right.

- 37.6 If it is accepted that the right to housing includes the right to electricity, then it is submitted that the by-laws, as interpreted by the respondents and the High Court, facilitate a limitation of the right of access to electricity by permitting disconnections. As such, it was incumbent on the High Court to apply the approach of this Court as established in *Jaftha* (supra) to deal with limitations of the negative component of the right to housing. As this Court held in *Jaftha*, sometimes a limitation of access to housing will be justified and sometimes it will not. In *Jaftha*, the Court held that an appropriate remedy would be to require judicial oversight of the execution process to ensure that there was an adequate enquiry in each case as to whether execution would be justified. In this case, the applicants did not go so far. The applicants argued that the respondents themselves are simply obliged to take the personal circumstances of those in the position of the applicants, and all other relevant considerations, into account before disconnecting the electricity supply. That would allow the respondents to decide whether, taking all relevant circumstances into account, it would be justifiable for the occupiers of the building to be deprived of their access to electricity.
- 37.7 If this approach were to have been adopted, it would have been clear that the question whether the respondents are under a positive duty to supply electricity to poor persons living within Johannesburg does not

arise in this case. All that is relevant here is how the relevant legislation ought to be read to ensure that deprivations of pre-existing access to electricity are justifiable, which includes that they must be procedurally fair.

38 Finally, it is not clear why the High Court embarked on a limitations analysis in terms of section 36 of the Constitution, given that it did not find that any rights were limited by any legislation. Nevertheless, it is submitted that, to the extent that section 36 of the Constitution was relevant to any limitations of the right of access to housing or the right to administrative justice, the High Court erred in finding that any limitations were reasonable and justifiable.

39 It is further necessary to address a number of issues on which the High Court made findings in the course of its judgment.

39.1 The High Court erred in over-emphasising the constitutional obligation to collect debt, as established in this Court's judgment in ***Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC)*** and the notion that civil remedies are ineffective for the respondents.

39.1.1 The applicants have never suggested that the respondents should be denied the use of disconnections as a debt-collection mechanism. They simply argue that the right to disconnect ought to be subject to certain safeguards, aimed at protecting constitutional rights.

39.1.2 In addition, the applicants submit that the respondents cannot be heard to rely on their duty to collect arrears when, in the period of 10 months since the disconnection took place, they have failed to pursue a civil remedy against the fourth respondent. I invite the respondents to set out, in their answer to the present application for leave to appeal, what steps (if any) they have taken to recover the debt said to be owing by the fourth respondent.

39.2 The High Court erred in finding that the need to prevent illegal electricity connections was relevant in the present case.

39.2.1 The applicants do not dispute that, in certain contexts, it might be necessary for a municipal authority to disconnect an electricity supply without notice. As the applicants argued before the High Court, this would be in circumstances where the danger inherent in the situation requires urgent action.

39.2.2 In the present case, however, there was insufficient evidence on the record to support the respondents' belated contention that they had disconnected the electricity supply as a result of illegal connections.

39.2.3 Indeed, in the notice of the disconnection that had been sent by the second respondent to the fourth respondent. In that notice, the sole justification for the disconnection was the non-

payment of arrears and there was no reference to any alleged illegal connections.

39.2.4 Moreover, there was a three-month delay between the notification of the impending disconnection and the actual disconnection. This is hardly indicative of an urgent need to disconnect, justifying non-compliance with procedural fairness.

39.2.5 So, while the applicants accept that an illegal and dangerous electricity supply might warrant urgent action in certain cases, they submit that the High Court erred in finding that this was such a case.

39.3 The High Court erred in placing reliance on the supposed alternative remedies that the applicants had.

39.3.1 Even if this were relevant to the question of procedural fairness (which is denied) none of the remedies suggested by the High Court judgment are, with respect, remotely practical for the applicants to pursue.

39.3.2 The applicants pursued their remedies via the Human Rights Commission and Rental Housing Tribunal before approaching the courts. These efforts were entirely unsuccessful. The Rental Housing Tribunal, for example, has ruled that it cannot take this matter any further and has removed the matter from its roll. A copy of its order is annexed as **Annexure D**.

39.3.3 Quite obviously, the applicants want electricity restored and would take all practical available measures to achieve this. There are none available.

39.4 The High Court erred in placing significant emphasis on the ability of the applicants to pay for electricity.

39.4.1 It is not entirely clear how the High Court saw this as relevant. However, if one has regard to para 46 read with para 39 of the judgment, it seems as if the High Court was of the view that the applicants would not have qualified for free electricity under the respondents' indigency policy.

39.4.2 However, this misconstrues the applicants' case. They have never suggested that they are entitled to any government assistance when it comes to the provision of electricity. Their reliance has always been on the negative component of the right to housing, as set out by this Court in *Jaftha*.

40 For all of these reasons, it is submitted that the judgment of the High Court ought to be set aside and replaced with an order upholding the application with costs.

LEAVE TO APPEAL

41 Having set out the applicants' grounds of appeal, I now proceed to set out the basis upon which it is contended that it would be in the interests of justice for this Court to grant leave to appeal.

Constitutional Matter

42 It is submitted that this application clearly raises a constitutional matter. It concerns the constitutional duties on the part of the respondents when they disconnect the electricity supply to a residence.

43 In particular, the application concerns the extent of the procedural duties on the part of the respondents before an electricity supply is disconnected, which concerns the proper interpretation of PAJA. This Court has held that, since PAJA is legislation that had to be passed in order to give effect to section 33 of the Constitution, its proper interpretation is a constitutional matter. In any event, the applicants have challenged the constitutionality of the by-laws as part of their application, which clearly raises a constitutional matter.

44 Furthermore, the applicants base certain of their arguments on the contention that the right of access to housing includes, at least in the urban setting, a right of access to electricity as well as the right to human dignity. These aspects of the application clearly raise constitutional matters.

45 It should be noted that the High Court rejected an argument of the first respondent to the effect that, because the applicants had contractual remedies, the applicants enjoyed a “*non constitutional*” remedy (at para 63 of the judgment). The High Court held, further, that the application raised important constitutional issues.

Interests of Justice

46 It is submitted that it is in the interests of justice for this Court to grant leave to appeal directly to it in view of the following considerations:

46.1 This matter does not concern the development of the common law. Rather it involves issues of constitutional and statutory interpretation. As far as the latter is concerned, the case concerns the correct interpretation of a statute that was enacted to give effect to constitutional rights. This is patently an area in respect of which this Court is less likely to require the views of the SCA.

46.2 The applicants continue to live, 10 months down the line, without electricity. They are unable to afford suitable alternative accommodation. It is submitted that this operates strongly in favour of this matter being resolved once and for all by this Court, rather than requiring the applicants to approach the Supreme Court of Appeal first.

46.3 The applicants have, all along, been represented by the Wits Law Clinic. The litigation has been pursued at significant cost to the Clinic,

which is a public-interest, non-profit organisation that litigates free of charge. It is submitted that it would not be in the interests of justice for the applicants to be required first to approach the SCA, with the attendant additional costs involved, when the matter raises issues that will inevitably require the attention of this Court.

46.4 This application raises important constitutional matters, which have the potential to affect many poor people living in Johannesburg. In particular, there is a stark contrast between the approaches contended for by the applicants and the respondents. The applicants contend that a disconnection of an electricity supply is an administrative act that affects them. As such, they argue that PAJA is applicable to electricity disconnections and that they, as the persons affected by the disconnection, are entitled to procedural fairness before a disconnection is effected. By contrast, the respondents focus on their contractual relationships with their customers and take the view that only those with whom they have contracted are entitled to the protections of PAJA. It would be in the interests of justice for the issues raised by this application to be dealt with authoritatively by this Court.

46.5 The applicants have reasonable prospects of success on appeal. It is submitted that, if regard is had to the grounds of appeal set out above, there are various conclusions reached by the High Court that could be overturned on appeal. In particular, the applicants submit that there are strong prospects that this Court will find that they were entitled to procedural fairness before the disconnections were effected.

CONCLUSION

47 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.

SHAHEDA HASSIM MAHOMED

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.

COMMISSIONER OF OATHS