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

CCT NO: 43/2009
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

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

KARABO SEPHOTI

do hereby make oath and state that:

1. I am employed as a Legal Advisor of the second respondent. I am duly authorised to depose to this affidavit on behalf of the second respondent, and to oppose this application for leave to appeal directly to this court. The deponent to the High Court affidavits, Luke Ramasedi, is not available to depose to this affidavit. I will procure a confirmatory affidavit from him and it will be filed as soon as possible.

2. The facts contained in this affidavit are to the best of my knowledge and belief true and correct and are, unless otherwise stated or as appears from the context, within my personal knowledge.

3. I have read the applicants' founding affidavit in support of the application for leave to appeal directly 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. A copy of the judgment is annexure "B" to the applicant's founding affidavit.

4. The second respondent opposes the application for leave to appeal directly to this Court. It submits that:

4.1. leave to appeal should not be granted on the merits; and

4.2. leave to appeal directly to this Court is inappropriate – an appeal, even if it were found to have reasonable prospects of success (which I deny), should first be dealt with by the SCA before it comes to this Court.

5. The basis for the opposition to the application for leave to appeal directly to this Court appears below where I deal with the allegations and contentions made in the applicant's founding affidavit.

6. I proceed to deal with the applicants' founding affidavit. I am advised and respectfully submit that to the extent that the founding affidavit contains legal argument, these will be addressed further in written and oral submissions before this Court should it become necessary, but the substance of the second respondent's contentions is set out in this affidavit.

AD APPLICANTS' FOUNDING AFFIDAVIT

7. **Ad paragraphs 1-2**

Save to deny that all the allegations in the applicants' founding affidavit are true and correct, the remaining allegations are admitted.

8. **Ad paragraph 3 (The parties)**

The second respondent does not have knowledge of the allegations in this paragraph and cannot admit them.

9. **Ad paragraphs 4-8**

The allegations are admitted.

10. **Ad paragraph 9 (Introduction)**

It is admitted that this is an application to appeal directly to this Court but it is contested that the application should succeed.

11. **Ad paragraph 10**

11.1. The allegations in this paragraph must not be understood to suggest that any of the households are indigent. This is made clear in certain parts of the founding affidavit where it is conceded that none of them would qualify for assistance by the

second respondent in terms of its policy regarding indigent persons.

11.2. It is also important to note that the number of households involved in this application is limited to those that involve, or relate to, the six remaining applicants.

11.3. Save as stated above, the second respondent does not have knowledge of the average income of the households as alleged and cannot admit the allegations.

12. **Ad paragraphs 11-13 and 15**

12.1. The relationship between Mr Nel and the applicants; and between Mr Nel and the second respondent was addressed in detail in the affidavits filed by the second respondent in the High Court. The affidavits also addressed in full the circumstances relating to the disconnection of electricity to Ennerdale Mansions ("*the premises*"). I annex the answering and supplementary answering affidavits filed by the second respondent in the High Court (without annexures), marked "CC1" and "CC2" and ask that they be incorporated herein. I specifically refer this Court to paragraphs 6 to 26 of the

answering affidavit and paragraph 24 of the supplementary answering affidavit. The following is clear from these paragraphs:

12.1.1. the history of the disconnections, the arrears and the illegal reconnections;

12.1.2. that the residents of the premises were aware from time to time of the reasons for the disconnections and the illegal reconnections; and

12.1.3. the applicants have options that they have not taken steps to utilise or have not provided evidence of any such steps – i.e. to obtain direct billing or to leave the premises.

12.2. I accordingly deny that the applicants were not aware of the reasons for the disconnection. I also submit that the applicants' proper recourse is against Mr Nel.

13. **Ad paragraph 14**

13.1. The allegations made in this paragraph underscore the mobility of tenants in the position of the applicants and the difficulty for the second respondent to have to keep their details. They also

demonstrate the fact that the tenants have recourse if they choose not to pursue Mr Nel to rectify the position that he has placed them in.

13.2. The applicants make the bold allegation that the six of the original applicants remain at the premises simply because they have no other option. They do not place any facts before the Court to demonstrate any steps whatsoever that these applicants have taken to find alternative accommodation. This is despite the allegation that their average income is between R3000,00 and R4000,00 (presumably per month).

13.3. These bold allegations are denied.

14. **Ad paragraph 16**

14.1. I note what the applicants claim not to be contending for.

14.2. However, the effect of the relief they seek is precisely to provide them with free or unlimited electricity for an indeterminate duration. They want the Court (if it finds in their favour on the prior relief) to order the second respondent to reconnect electricity supply to the premises. Such reconnection

is to the benefit of all the tenants of the premises who include businesses as stated in the second respondent's affidavits in the High Court. Once reconnected the second respondent would have to grant them procedural rights before deciding whether or not to disconnect electricity supply. If the second respondent indicates an intention to disconnect electricity supply it may be faced with yet another round of litigation to review its decision and possible interdictory relief. All of these will take place without the second respondent having received nothing at all towards the arrears owed or without any arrangements by Mr Nel or the applicants to pay for electricity consumed.

15. **Ad paragraph 17**

15.1. Indeed this is the crux of the applicants' case.

15.2. The second respondent denies that it had the obligations contended for by the applicants or that the absence of such obligations in the circumstances of this case infringes the applicants' rights in terms of the Constitution or PAJA.

16. **Ad paragraph 18**

16.1. This is correct.

16.2. Notice was given to Mr Nel. He was afforded an opportunity to make representations or to make arrangements to pay the arrears and to have electricity reconnected. He was free to bring the personal circumstances of his tenants to the attention of the second respondent in such representations. As set out in the affidavits which are annexed, the second respondent would also have taken into account any representations by any of the applicants had these been made. It is made clear in the second respondent's affidavits that the applicants (or some of them) had been to the second respondent's offices previously where the matter of the non-payment and illegal reconnections were discussed with them.

17. **Ad paragraph 19**

17.1. The view of the first and second respondents is properly summarised in the first sentence of this paragraph.

17.2. The constitutional obligations of the first and second respondents include ensuring that services are provided on a sustainable basis. This requires the collection of payment for

services, including by the enforcement mechanism of disconnections of electricity supply. The applicants have not attempted, with the consent of Mr Nel (or to seek his consent), to enter into arrangements that would enable them to obtain electricity directly and to pay for such electricity directly. In that event, they would be customers to whom an opportunity to be heard would be given before any disconnection were to take place.

18. **Ad paragraph 20**

18.1. The issues are fairly summarised in this paragraph.

18.2. It is significant that the obligations that the applicants contend for are stated in a general and unqualified fashion. They would apply in circumstances where:

18.2.1. the owner of an ordinary residential dwelling has a number of tenants on the property and fails to pay for his electricity consumption; all the tenants would have to be afforded the opportunity to make representations that the applicants contend for;

18.2.2. the owner of a building with tenants (being also a customer of the second respondent) who, realising that he would never be able to pay for his electricity consumption and has run up arrears, decides to mitigate the situation and requests the second respondent to disconnect electricity supply; all the tenants would have to be afforded the opportunity to make representations as the applicants contend.

18.3. It is submitted that the applicants' contentions are not sustainable.

19. **Ad paragraph 21**

19.1. The applicants' contentions were, it is respectfully submitted, correctly dismissed by the High Court.

19.2. The second respondent submits that:

19.2.1. its obligation to give notice and to permit representations before disconnecting electricity supply is to the party with whom it has contracted to supply electricity and not to the occupants of such a person's building, i.e. his tenants;

19.2.2. where the second respondent has not contracted with individual occupants of a building, it does not obtain or keep such occupants' details – it simply does not know them, and they come and go;

19.2.3. the second respondent always, as in this case, gives adequate notice to the contracted party and affords an opportunity to make arrangements to pay or to make representations why the supply of electricity should not be disconnected;

19.2.4. in any event where, as in this case, the occupants were aware from time to time of the reasons for the disconnections of electricity supply, they were free to approach the second respondent and make any representations, which would be taken into account (although there is no legal obligation on the second respondent to invite such representations);

19.2.5. the occupants were also free, with the consent of their landlord, to make arrangements to open electricity accounts in their own name, in which event they would

acquire the right to be notified and afforded an opportunity to make any representations prior to the termination of electricity supply;

19.2.6. the conduct of the second respondent to give notice only to the contracted party is not in conflict with its governing legislation or with the Constitution;

19.2.7. the applicants' argument misconstrues the true constitutional issues at stake – their rights are rights only as against their landlord; action taken by the second respondent to disconnect electricity does not deprive them of their rights as against the landlord and it does not deprive them of access to adequate housing or to services; and

19.2.8. in the alternative, if it is found that the applicable legislation (i.e. by-laws) limit any of the applicants' rights, and thousands of similarly situated occupants, in not requiring notice to them and an opportunity to make representations prior to the termination of electricity supply, such a limitation is justifiable in terms of section

36 of the Constitution.

20. **Ad paragraph 22**

The second respondent does not contest that the application indeed raises constitutional issues, subject to what is stated below regarding the suitability of the appeal first being dealt with by the SCA (subject to leave being granted).

21. **Ad paragraphs 23-26 (Procedural background to the application)**

The allegations are admitted.

22. **Ad paragraph 27**

22.1. It is correct that the applicants seek leave to appeal directly to this Court. They have also lodged a conditional application for leave to appeal to the SCA.

22.2. The second respondent submits that the appeal should first be heard by the SCA (if leave is granted by the High Court or on application by the SCA).

22.2.1. The applicants' first and main contention in the High Court was that upon their proper interpretation, the Credit

Control By-Laws required the second respondent first to give the applicants notice and afford them an opportunity to make representations before disconnecting electricity supply to the premises. This is clear from the judgment of Tsoka J (page 43 of the application lines 4 to 8) and the judgment of Jajbhay J (page 48 para [6]). It follows that the applicants' case can be determined without reaching the constitutional issue or by means of an indirect application of the Constitution (in the interpretation of the relevant provisions of the Credit Control By-Laws).

22.2.2. Furthermore, the relief that electricity be reconnected to the applicants implicates both the constitutional obligations of the second respondent as well as its contractual obligations. The reconnection will not only benefit the applicants, in circumstances where no money has been received by the second respondent to reduce the arrears; it will benefit Mr Nel and his other tenants, including his business tenants. But there are contractual obligations that Mr Nel owes towards the second respondent which he has simply failed to honour and

which he has not, in any manner whatsoever, indicated he is prepared to honour. These contractual obligations were always known by the applicants who chose to be Mr Nel's tenants on the terms that they pay him for electricity and he in turn pays the second respondent. These contractual obligations have a bearing on the relief that the applicants seek.

22.2.3. The SCA's insight regarding the common law rules of contract makes it likely that this Court would derive benefit from such insight in determining the appropriateness of the relief for immediate reconnection.

22.3. This Court has previously said that in circumstances such as those set out in the preceding two paragraphs, it is appropriate for an appeal to be dealt with first by the SCA, before it comes to this Court. This Court would benefit from the insights of the SCA in the circumstances.

23. **Ad paragraphs 28-30 (Preliminary issue – the applicable by-laws)**

The allegations are admitted.

24. **Ad paragraph 31- (the Judgment of the High Court)**

These are the applicants' contentions. The second respondent denies them and submits that they have no merit and should not entitle the applicants to the relief that they seek.

25. **Ad paragraph 32**

25.1. The circumstances of this case are distinguishable from those in *Jaftha*'s case which the applicants rely upon.

25.2. The applicants' argument is based on the premise that the applicants have a socio-economic right to electricity, and that this is part of the right to adequate housing. It is respectfully submitted that this premise is clearly wrong.

25.3. The applicants place reliance on paragraph 37 of the judgment in *Grootboom*. As that makes clear, the right under section 26 of the Constitution is a right of access to adequate housing, which will depend on the circumstances of each case. In a particular case, it is not a foregone conclusion that anything at all is required to be provided to a claimant. In some cases, it

may be required that a claimant is provided with a piece of land, in others with the means to erect a structure, while in others it may require access to services, facilities and the like. There is no absolute right of access to electricity – let alone a right to an uninterrupted supply of electricity where the municipal provider is not being paid and where the consumers are not indigent persons.

25.4. By disconnecting electricity, the second respondent is not denying the applicants' right of access to adequate housing or, indeed, to municipal services. The second respondent would restore the supply of electricity, provided that suitable arrangements are made for payment of the arrears that, it is common cause, are owing in a substantial amount and over a lengthy period. To the extent that the applicants have allegedly paid for electricity to their landlord (fourth respondent) and he has not paid this over to the second respondent, the applicants have rights of recourse against the fourth respondent.

25.5. Nothing that has been done by the second respondent has deprived the applicants of their rights in terms of their contracts

with the fourth respondent. They are able to enforce those rights against him (and not against the second respondent).

25.6. The second respondent has taken action against the fourth respondent, not against the occupiers. This is because the fourth respondent is in breach of his obligations under his contract with the second respondent and under the relevant by-laws. The fourth respondent (Mr Nel) – and not the occupiers – has the right, in terms of the contract and the by-laws, to electricity supply being restored, provided that he pays. If he does not, the second respondent is entitled to take action against him (as it has done), provided that it does so lawfully and fairly. The occupiers' rights are against Mr Nel, and not the second respondent. There is no nexus between them and the second respondent.

25.7. If the applicants have their electricity supply disconnected because of Mr Nel's default, they can enforce their rights against Mr Nel, or arrange for direct billing (with Mr Nel's consent) or move elsewhere to premises where electricity is supplied. They are therefore not deprived of access to electricity supply services.

25.8. The second respondent accordingly submits that its action does not infringe the applicants' rights to dignity or to housing. Jajbhay J was, with respect, correct in rejecting the applicants' contentions in this regard.

26. **Ad paragraph 33**

26.1. The reasoning of Jajbhay J which is summarised in this paragraph is, with respect, correct.

26.2. With regard to the question of justification under section 36 of the Constitution, I respectfully refer the Court to paragraph 47 of the second respondent's answering affidavit in the High Court (annexure "CC1" hereto) and paragraphs 12, 18, 21, 23 and 24 of the supplementary answering affidavit in the High Court (annexure "CC2" hereto).

27. **Ad paragraphs 34-40**

27.1. The contentions in this paragraph were rejected by the High Court. It is submitted that their rejection was warranted.

27.2. I attach a full copy of the Credit Control By-Laws for convenience, marked "CC3".

27.3. I turn now to the inquiry as to the proper construction of the Credit Control By-Laws (paragraph 35 of founding affidavit)

27.4. The applicants' first and main contention in the High Court was that on a proper construction, the Credit Control By-Laws require the second respondent to comply with PAJA in respect of the applicants before disconnecting electricity supply to the premises. The Court *a quo* was entitled to start with this inquiry.

27.5. On a proper interpretation of the provisions of sections 7(2), 13 and 15 of the Credit Control By-Laws, it is clear that:

27.5.1. notice prior to termination must be given to a customer;

27.5.2. a customer is a person who has entered into a written agreement with the second respondent for the provision of electricity as is required by section 3(1) of the Credit Control By-Laws;

27.5.3. it is such a customer who should be afforded an opportunity to make arrangements to pay or to make representations as to why (despite failure to pay)

electricity supply should nevertheless not be terminated; and

27.5.4. to the extent that it applies, PAJA should be complied with by the second respondent in its dealings with a customer whose supply of electricity is to be terminated.

27.6. There is no requirement in the Credit Control By-Laws for the second respondent to give notice to tenants of a building owned by a customer and to afford such tenants an opportunity to make representations. Evidently, and unlike in the case of a customer, the second respondent would not be able to require the tenants, with whom it is not contracted to supply electricity, to make arrangements to pay any outstanding arrears. Generally, it will not even know who those tenants are not only because there are no contractual (or other) arrangements between them but also because tenants come and go.

27.7. The next question is whether the failure of the Credit Control By-Laws to require the second respondent to comply with PAJA in the circumstances of the applicants infringed any of their rights

27.8. The requirement that notification be given to a customer does not infringe any of the rights of the applicants, as they are not customers of the second respondent.

27.9. Even if the failure arguably infringes the applicants' rights, including their contended right to fair administrative action under PAJA (which I deny), the issue of **justification** arises.

27.10. It is important to emphasise in this regard that the second respondent did not rely on an entitlement to depart from the procedural fairness requirements of PAJA as contemplated in section 3(4) of PAJA. It could not rely on this departure when its approach was that it was not required to comply with the procedural requirements of PAJA. The second respondent relied specifically on the contention that in the event that the Court found that any rights of the applicants were infringed, including any rights to fair administrative action, it should find that such an infringement was justifiable in terms of section 36 of the Constitution. Due to this approach, the Court was perfectly entitled to consider the argument on justification, even if only in the alternative.

27.11. The Credit Control By-Laws are a law of general application as contemplated in section 36(1) of the Constitution.

27.12. To the extent that the by-laws may (despite earlier submissions) be found to limit any right of the applicants (which is disputed), it is submitted that the limitation is justified under section 36 of the Constitution.

27.13. The purpose served by the provisions of the Municipal Systems Act (Local Government: Municipal Systems Act, 32 of 2000) and the Credit Control By-Laws, which permit the termination of electricity supply, is to ensure that municipal services are provided in a sustainable manner. If customers of the second respondent are permitted to run up substantial arrears without the termination of services, the first respondent would fail in its constitutional duty to provide sustainable municipal services as emphasised in the *Mkontwana* case (*Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) paras 52 to 62).

27.14. The obligation of the second respondent to collect payments for services rendered is in relation to its customers, i.e. those who

have contracted with it for the provision of electricity. The obligation does not arise in relation to tenants of buildings with whom the second respondent is not contracted to provide electricity. The tool of termination can never be aimed at them in order for them to rectify any arrears accumulated by their landlord. Where they make payment to the landlord for electricity consumed by contract between them, the second respondent is not involved as this is an internal matter. When the landlord, as is the position with the fourth respondent, breaches the contractual obligations between him and the tenants by failing to maintain payments with the second respondent, and thereby to ensure uninterrupted electricity supply, the remedy that the tenants have (in this case the applicants), is to proceed against their landlord and enforce their contractual rights.

27.15. To return to the facts of this case:

27.15.1. the fourth respondent and his Company ran up substantial arrears and showed no serious intention (nor any intention at all) to correct the position;

27.15.2. tenants on the premises have, over a period of time, been made aware that the terminations of electricity supply that happened were in part due to the substantial arrears that the fourth respondent and his Company had accumulated – as is clear from annexures “CC1” and “CC2”;

27.15.3. the terminations were also due to illegal and unsafe reconnections of electricity supply – as is made clear in annexure “CC1”;

27.15.4. as at 28 November 2008, when the second respondent filed an answering affidavit to the applicants’ supplementary founding affidavit, it was owed substantial amounts of monies by customers – more than R171 million, of which more than R60 million had then been outstanding for a period of not less than 121 days;

27.15.5. it is clear from the amounts outstanding from customers that if the second respondent did not terminate the supply of electricity where customers do

not pay it could run the risk of breaching its constitutional obligations to supply electricity to the residents of the first respondent in a sustainable manner. This would work hardship on other residents. As the Court emphasised in the *Mkontwana* case, the second respondent cannot permit the accumulation of arrears without enforcing collection.

27.16. It is, with respect, not an answer for the applicants to say (as they did in their papers in the High Court and suggest in this Court, albeit somewhat indirectly, when they question what the second respondent has done to collect the arrears from Mr Nel) that the second respondent should first institute legal action to recover arrears before terminating supply. The by-laws themselves recognise the need to terminate supply, which may be followed by the institution of legal proceedings. The institution of legal proceedings without the termination of supply would permit the accumulation of further arrears. Legal proceedings cost money, which ought to be utilised for the provision of services. Litigation will also cause unnecessary delays. Disconnection of supply is a far more effective and

practical means to address the problem and it is legally permitted.

27.17. The applicants (like any other tenants) would be notified of intended terminations of electricity supply if they were to apply for and conclude direct billing arrangements with the second respondent. In that event they would be contracted to the second respondent directly for the provision of electricity. Electricity would be provided to them on a pre-payment basis.

27.18. In order to put in place direct billing arrangements, the applicants require the consent of the fourth respondent in order to make application to the second respondent. This is dealt with in section 5 of the Electricity By-Laws. The requirement for consent by the landlord (in this case the fourth respondent) is imperative. The second respondent cannot lawfully enter the premises to effect the modifications required, such as the installation of meters, for purposes of direct billing without such consent. It is also the landlord who is ultimately responsible for charges run up for services provided to his premises. He must consent to this risk and be prepared to monitor it.

27.19. The significance of direct billing is that the applicants are provided with an avenue to help themselves. If they contend that the fourth respondent refuses to give them the required consent (whilst simultaneously pocketing their payments for electricity consumed), surely their remedies are to come to Court to compel the fourth respondent either to:

27.19.1. comply with his obligations to pay the second respondent for electricity supplied; or

27.19.2. 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 landlord's account.

27.20. The applicants also have a further remedy, which had been adopted by about 21 of the original applicants by the time the matter came before Jajbhay J. It is clear that more have adopted this remedy as only 6 of the original applicants remain at the premises as the applicants allege. This remedy is to leave the fourth respondent's premises and seek accommodation elsewhere. The applicants cannot remain at the premises to

assert their rights to remain wherever they wish and, simultaneously, require the second respondent to continue supplying electricity without being paid and run the risk of not being able to provide sustainable electricity supply to all the residents of the City. The arrears run up by the fourth respondent add a burden to the second respondent and contribute to the more than R171 million in outstanding payments for electricity supplied. The allegation that the applicants are not able to move elsewhere is not backed up by any facts. Nothing is said about what they have attempted to do in this regard but failed. It is simply a bald allegation.

27.21. In contrast to the position of the applicants, it would be wholly impractical and onerous for the second respondent to have to give notice to each and every tenant of a building to which it supplies electricity, and to afford such tenants an opportunity to be heard, prior to terminating supply of electricity on account of:

27.21.1. non-payment and the accumulation of arrears; and/or

27.21.2. unsafe illegal connections (or reconnections) of

electricity supply.

27.22. Such a burden would also defeat the purpose of utilising the threat of disconnection of supply to compel payment and to prevent serious hazards as a result of illegal and unsafe connections and reconnections. The contention that such a requirement can be satisfied by simply putting up a notice in a building (and every other residential property that is similarly affected) is not an answer. The second respondent would still have the burden of considering any number of representations that are made by tenants in such position and taking into account each of the tenants' personal circumstances. The second respondent would also have the burden to ensure that such notices come to the attention of the affected tenants – otherwise the notices would serve no real purpose. It must be obvious to anyone that given the number of residents that are affected when electricity supply to large buildings is disconnected, the burden on the second respondent will be huge. This is complicated by the fact that tenants come and go. The second respondent faces a huge and unmanageable challenge of significant arrears. It disconnects electricity

supply to contain this and to compel residents to pay up. This happens almost on a daily basis.

27.23. It is also important to highlight a concession made by the applicants in paragraph 47.3 of their founding affidavit in the High Court with regard to alleged illegal connections. They say in this paragraph that:

> "It is conceded that there may be circumstances, such as when it is alleged that the electricity supply to a particular building constitutes a hazard, when it would be inappropriate to afford residents of a building the right to make representations prior to a disconnection. However, it is submitted that when the basis for the disconnection is the alleged failure of the owner of a building to keep up with the required payments, there is no basis to deprive affected parties the right to make representations."

27.24. The concession is significant as the reasons for the disconnection on 8 July 2008, as set out in annexure "CC1", included illegal connections. That is the reason why the feeder cable was completely cut to avoid further illegal reconnections.

27.25. When this unlawful conduct (illegal connections) is accompanied by non-payment over a long period of time and the accumulation of significant arrears, there is no basis for the supply of electricity to be continued. This is particularly the

case when the applicants themselves have known over a long period of time of the illegal connections and then the non-payment by the Nel and his company. To permit the continued supply of electricity in these circumstances would significantly undermine the first respondent's constitutional obligations to deliver electricity services (through the second respondent) to residents in its jurisdiction in a sustainable manner.

27.26. The second respondent has set out (in annexures "CC1" and "CC2") sufficient facts and contentions to show the impractical nature of the obligation that the applicants contend for, as well as the justification for any limitation of their rights.

27.27. It explains that it supplies electricity to about 13 192 large power users. Large power users are customers who consume 100 kva (kilo volt amperes) of electricity and above. These include buildings occupied by tenants such as the applicants, shopping centres, filling stations, workshops, etc. Out of the number of 13 192, a significant number of the large power users are buildings occupied by tenants. These include large and small buildings.

27.28. The premises in issue fall under the category of large power users.

27.29. The second respondent does not have the details of the tenants who occupy these buildings or other persons who could potentially contend that their rights or legitimate expectations would be adversely affected by the disconnection of electricity to premises as contemplated in PAJA for purposes of procedural fairness. These tenants (and other persons) are also not constant – they move in and out of buildings.

27.30. The reason the second respondent does not have the details of the tenants is because the tenants are contracted to their landlords (and not the second respondent) for accommodation and the provision of services such as electricity. The second respondent does not interfere with or have any involvement in the contractual relationship between the tenants and their landlords.

27.31. In the circumstances, it would be impractical for the second respondent to fulfil the obligations sought to be imposed on it by the applicants, i.e. to give notices to each and every tenant

of a building in respect of which the landlord is in arrears with electricity, and to afford such tenants individually an opportunity to be heard before electricity is disconnected. This does not change simply by the contended expedient of putting up notices on affected premises. As stated above, the second respondent would still bear the burden to ensure that the notice does come to the attention of each and every affected resident and to consider each of their personal circumstances before disconnecting electricity supply.

27.32. It is the obligation of the tenants to ensure that payments made for electricity consumed are paid over to the second respondent to ensure the continued supply of electricity. Where this is not done, the tenants have recourse against the landlord.

27.33. It is submitted that any limitation of the applicants' rights as they contend is minimal given the options open to them under the applicable law. It also, for the same reason, constitutes a less restrictive means to achieve the purpose of providing services in a sustainable manner.

Conclusion on the applicants' contentions

27.34. It is therefore respectfully submitted that :

27.34.1. the action taken by the second respondent does not affect the rights of the applicants of access to adequate housing or to municipal services;

27.34.2. even if it were to be found that the applicants' rights of access to housing and to services have been prejudicially affected, the cause of this is the failure by Mr Nel to comply with his contractual obligations to the applicants – and not the action taken by the second respondent; and

27.34.3. in any event, even if it were to be found that the second respondent's actions do limit the rights of access to adequate housing and services of the applicants, such limitation is reasonable and justifiable.

27.35. It is submitted with respect that the Court *a quo* was entitled to and correct in deciding to adopt this approach and to find against the applicants. It properly balanced the constitutional obligations of the second respondent as against the rights contended for by the applicants. It did not unduly place too

much emphasis on the second respondent's constitutional obligations as the applicants contend.

28. **Ad paragraph 41**

The second respondent contests the argument that it would be in the interests of justice to grant leave to appeal directly to this Court.

29. **Ad paragraphs 42-45 (Constitutional matter)**

29.1. The matter indeed raises constitutional issues. However, it also raises questions of the proper interpretation of legislation (i.e. the Credit Control By-Laws) – invoking the indirect application of the Constitution. It further raises issues regarding the implications of the contractual obligations of Mr Nel on the relief that the applicants seek. In this regard, it does not help the applicants that Jajbhay J rejected the argument advanced by the first respondent regarding the applicants' contractual remedies. This remains an issue which this Court or the SCA would have to consider and resolve.

29.2. As submitted above, the issues fall under the type of issues which this Court has previously held to justify an appeal going

to the SCA first before coming to it. This Court would indeed, in those circumstances, benefit from the insights of the SCA. The second respondent submits for this reason that it would be appropriate for the appeal to go to the SCA first (in the event that leave to appeal is granted to the applicants).

30. **Ad paragraphs 46-47 (Interests of justice)**

30.1. It is not correct that this matter does not involve the common law at all. The issue referred to in paragraph 45 of the applicants' founding affidavit makes it clear that one of the issues raised by the first respondent indeed concerns the common law of contract. In any event, the proper interpretation of the Credit Control By-Laws is a matter that the SCA's insights would benefit this Court and it involves the proper application of the common law rules of contract.

30.2. Electricity was terminated in June 2008. A considerable amount of time has elapsed since then. The applicants have not sought to prosecute the appeal on an urgent basis, either in this Court or in the SCA. Considerations of time that will be taken in prosecuting the appeal can thus not justify the appeal not

going to the SCA first. This is a matter of significant importance as an outcome contrary to that contended for by the second respondent would have far-reaching implications to its ability to ensure the sustainable provision of electricity to its residents – as contemplated in the *Mkontwana* decision. It justifies the insights of both the SCA and this Court.

30.3. The financial resources of the Wits Law Clinic can likewise not preclude the appeal from going to the SCA first. The High Court did not award costs against the applicants. It is unlikely that the SCA or this Court would ultimately award costs against the applicants even if they fail in their appeal.

30.4. There is no reason why the important constitutional and contractual issues that arise in the matter (as summarised in paragraph 46.4 of the applicants' founding affidavit) ought not to be dealt with authoritatively by this Court with the benefit of a judgment by the SCA. It is precisely for the reason that the matter raises a mixture of constitutional and contractual issues as the applicants emphasise in their paragraph 46.4 that the interests of justice would require that the SCA should deal with the matter first.

30.5. The second respondent denies for the reasons advanced above that the applicants have reasonable prospects of success in the appeal.

30.6. Leave to appeal should, with respect, be denied.

_____

DEPONENT

THUS SWORN AND SIGNED TO before me at Johannesburg on this the _____day of MAY 2009 the Deponent having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath which he considers to be binding on his conscience. The provisions of Regulation no R1258 published in Government Gazette no 3619 of 21 July 1972, as amended, were complied with.

_____

COMMISSIONER OF AOTHS

full names:
business address:
designation:
capacity: