

**THE CONTRIBUTION OF THE *JOSEPH* CASE TO THE
DEVELOPMENT OF PROCEDURAL FAIRNESS IN THE
REPUBLIC OF SOUTH AFRICA**

by

AVHANTODI NORMAN MUNYAI

Student number: 11297477

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Supervisor: Prof. Danie Brand

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Summary

This mini-dissertation deals with the contribution of *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC), hereafter referred to as *Joseph*, to the development of procedural fairness in the Republic of South Africa.

Section 33 of the Constitution of the Republic of South Africa, 1996, provides for fair administrative action and has also been given content and meaning by the promulgation of the *Promotion of Administrative Justice Act* 3 of 2000, hereafter referred to as PAJA. Section 3(1) of PAJA requires procedural fairness whenever administrative action “materially and adversely affects” a right or legitimate expectation of any person.

In this dissertation I explore what is meant by procedural fairness. I do so by explaining the importance of procedural fairness in the South African legal system and its application. I examine the *Joseph* case by focusing mainly on the facts, court decision and also on the reasoning behind the decision. I examine the content of procedural fairness and its application as the main rules that were raised in *Joseph* and investigate how they have developed procedural fairness. I also examine the right of individuals to be given adequate notice and to be afforded the opportunity to make representations with respect to decisions that materially and adversely affect their rights. I further deal with the sections of the Electricity By-law which were declared unconstitutional and whether the Debt and Credit Control By-laws can be read consistently with PAJA. I analyse the duty imposed on the Municipality by the decision of the court and examine the success of *Joseph’s* case and other relevant cases in the further development of procedural fairness in South African administrative law. I conclude by summarising on the new jurisprudence that the court has established. Finally, I consider the future of procedural fairness after *Joseph*.

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1. Introduction

After two successive and unsuccessful High Court case¹ bids, the tenants of Ennerdale Mansions in the City of Johannesburg approached the Constitutional Court for application for leave to appeal the High Court ruling.

This dissertation investigates the appeal case of *Joseph*² in relation to the disconnection of electricity, which was brought to the Constitutional Court direct from the High Court. The Constitutional Court in the first instance granted the leave to appeal, citing that the matter raises a constitutional issue because it concerns the interpretation of *Promotion of Administrative Justice Act* 3 of 2000, hereafter referred to as “PAJA”.³ The decision of the court deals with the relationship between the local government entity, City Power, and the end user of the service, being the members of the public residing in its area of jurisdiction. The *Joseph* case dealt with the right to fair administrative action (procedural fairness) and the core of the case is therefore to determine if the applicants are entitled to procedural fairness in the absence of a contract between them and City Power.⁴

The aim of my study is to answer basic research question by establishing in which ways and to what extent the *Joseph* decision has developed the law of procedural fairness in South African administrative law. I do so by first providing the facts and a full description of the case. This is where I demonstrate the infamous strategy that was adopted by the High Court in *Darries*.⁵ The High Court decided the case based only on the law of contract. I proceed to deal with the matter directly entering the Constitutional Court, by examining the legal issues that formed the basis for the arrival to the decision in *Joseph* by the Constitutional Court. This is where I argue that the strategy of the High Court was lacking in application of procedural fairness because it mainly focused on the contractual relationship that existed between the Municipality and the landlord. The decision disregarded the claim for providing notice to the tenants. I further investigate the success of *Joseph*, the court holdings that

¹ *Darries and Others v City of Johannesburg and Others* 2009 (5) SA 284 (GSJ)

² *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC)

³ *Joseph* para 17

⁴ *Joseph* para 2

⁵ *Darries* (note 1 above)

underline the bases for the decision, and the reasoning of the Constitutional Court in arriving at the decision. In this regard I analyse the strategy that the Constitutional Court has adopted in deciding this case which ended in giving rise to the further development of procedural fairness. This is where I elaborate on the comparison between the two judgements⁶.

Another area of development that was dealt with in *Joseph* is the content of procedural fairness. This has been outlined in *Joseph* as being dependent on case by case and mainly on the mandatory contents of procedural fairness as stipulated under section 3(2) of PAJA. In this part of my study, I deal with this aspect based on the case of *Joseph* and also make comparison with other applicable legislation and other applicable case law. I do so by exploring whether the Electricity By-law can be read consistently with PAJA as outlined in the case. I also examine the provision of section 14(1) of the Electricity By-law which provides that pre-termination notice must be afforded to the customers only. The content of procedural fairness as detailed in the case contributed greatly to the development of procedural fairness.

Another area in which *Joseph* has developed the law of procedural fairness concerns when procedural fairness applies. I expand on this area of development, namely the application of procedural fairness, by exploring the requirements of section 3 of PAJA⁷ and the imperativeness of being afforded a reasonable

⁶ Note 1 and note 2 above

⁷ Section 3 of PAJA provides:

- (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
- (2) (a) A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
 - (i) adequate notice of the nature and purpose of the proposed administrative action;
 - (ii) a reasonable opportunity to make representations;
 - (iii) a clear statement of the administrative action;
 - (iv) adequate notice of any right of review or internal appeal, where applicable;and
(v) adequate notice of the right to request reasons in terms of section 5.
- (3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—
 - (a) obtain assistance and, in serious or complex cases, legal representation;
 - (b) present and dispute information and arguments; and
 - (c) appear in person.

opportunity to make representation and also an opportunity to be given notice. In this area of development I deal with the application of procedural fairness. I further answer the question of whom procedural fairness applies to, as outlined in the decision of *Joseph*.

This case deals with the special relationship between the landlord and the Municipality as the contracted electricity supplier in the building, while there is also a contractual relationship between the landlord and the tenant. In relation to this issue, I substantiate the new public law right that the Court has developed together with the manner in which the Constitutional Court has decided the case by ignoring the fundamental rights that the tenants have raised and based their arguments on. I further deal with the legacy of *Joseph*, and its impact on administrative law adjudication. I deal with the Court's strategy on the decision of good governance and service delivery on the Municipality as the service provider and the duty imposed by the decision on the Municipality as mandated by section 152 of the Constitution.⁸ The other issue I deal with is how the administrators can avoid such review and the remedies to avoid unnecessary future litigation. I investigate the application of

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- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter;
and
(v) the need to promote an efficient administration and good governance.
- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

⁸ Section 152 (1) The objects of local government are—
(a) to provide democratic and accountable government for local communities;
(b) to ensure the provision of services to communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in the matters of local government.
(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).”

procedural fairness to the by-laws⁹. Before providing concluding remarks, I deal with the answer to the research question.

I conclude by discussing the success of *Joseph* in the development of procedural fairness in the Republic of South Africa, by elaborating on the jurisprudence developed by the Constitutional Court in reaching the decision which affected the further development of the procedural fairness. This focused on the Court's deviation from a formalistic approach to the adoption of flexible approach. I finally consider the future of procedural fairness after *Joseph*.

2. ANALYSIS OF JOSEPH¹⁰

2.1. Facts

This was an appeal case that was brought before the Constitutional Court for leave to appeal the High Court decision of *Darries and Others v City of Johannesburg and Others*¹¹ and the setting aside of the decision to that effect.

City Power is the utility of the City of Johannesburg that supplies electricity within its jurisdiction. City Power discontinued the electricity supply to Ennerdale mansions where the tenants (applicants in this case) reside. The disconnection of electricity was done without the knowledge of the tenants; the notice of disconnection was only served on the landlord who failed to convey the message to his tenants. This action on the part of the City was backed by its by-laws¹² which allow the City to deal only with its customers and also to disconnect the services without the notice. The facts of the case clearly state that the tenants were paying their electricity bills to the landlord, Mr Nel. Mr Nel is the owner of the company by the name of Ennerdale Mansions (Pty) Ltd, and this company has contracted City Power for electricity supply to the building. The unfortunate tenants were up to date with their payments

⁹ Greater Johannesburg Metropolitan Council: Standardisation of Electricity By-laws,(1999) and City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-laws, (2005)

¹⁰ *Joseph and Others v City of Johannesburg and Others (CCT 43/09) [2009] ZACC 30*

¹¹ 08/22689) [2009] ZAGPJHC 6; 2009 (5) SA 284 (GSJ); [2009] 3 All SA 277.

¹² Credit Control by-law (note 9 above)

but Mr Nel in turn had failed to utilise the money for the purpose intended, and the account had gathered arrears in the amount of R400 000.

In realising that their electricity supply had been disconnected, the tenants approached the City Council to have their electricity reconnected, wherein they were referred to South African Human Rights Commission. They were also referred to the Rental Housing Tribunal, but to no avail.¹³ In realising that they had exhausted all remedies immediately available to them, the applicants approached the High Court, making an urgent application, which was dismissed. The applicants made a second unsuccessful application seeking the reconnection of their electricity supply together with an order declaring that the disconnection of the electricity supply without notice was unlawful. Their second application was also dismissed by the High Court.¹⁴

The High Court, in arriving at its findings, has taken into consideration the provisions of the Municipal by-laws regulating the supply of electricity – namely, the Electricity By-laws¹⁵ and the Credit Control By-laws.¹⁶ The High Court found that “the Electricity By-laws had been impliedly repealed by the promulgation of the Credit Control By-laws and therefore did not have to be considered”.¹⁷ With respect to the Credit Control By-laws, the High Court found that “the applicants did not have any contractual relationship with them and as a result did not qualify to be regarded as customers and a pre-termination notice was not necessary in that regard”.¹⁸ It found further that, to the extent that the Credit Control By-Laws did limit any of the applicants’ rights, this was justified under section 36 of the Constitution.¹⁹ City Power

¹³ *Joseph* para 8

¹⁴ *Joseph* para 10

¹⁵ Greater Johannesburg Metropolitan Council: Standardisation of Electricity By-laws,(1999)

¹⁶ City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-laws, (2005)

¹⁷ *Joseph* para 13

¹⁸ “Customer” is defined in the Credit Control By-laws as -“any occupier of premises to which the Council has agreed to provide or is actually providing any municipal service, or if there is no occupier, the owner of the premises concerned”.

¹⁹ Section 36 of the Constitution provides:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

also indicated that the rights of the applicants were not adversely affected because there is no direct link as they do not have a contract with the tenants.

The applicants proceeded with the matter to the Constitutional Court applying for the leave to appeal the High Court decision of *Darries*²⁰. First, the Court granted the leave to appeal. The reason for granting the appeal was that “the case concerned the interpretation of PAJA and as a result raised constitutional issues to be addressed by the court”.²¹ The applicants’ argument was that the disconnection of electricity without notice was procedurally unfair in terms of section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000. The applicants depended on the following rights²² as contained in the Bill of Rights of the Constitution of the Republic of South Africa to support their claim: the right of adequate housing in terms of section 26 of the Constitution,²³ the right to human dignity in terms of section 10 of the constitution,²⁴ the contractual right to electricity in terms of their contract of lease with Mr Nel (the landlord who is contracted to City Power to supply electricity to Ennerdale Mansions). The tenants challenged the constitutionality of certain provisions of the City’s by-laws.²⁵

I now turn to the court decision to deal with the determination of law and establish the strategy that the Constitutional Court has adopted in reaching its decision.

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- (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

²⁰ *Darries* note 1 above

²¹ *Joseph* para 17

²² *Joseph* para 12

²³ (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions

²⁴ everyone has inherent dignity and the right to have their dignity respected and protected

²⁵ by-law 14(1) of the Greater Johannesburg Metropolitan Council: Standardisation of Electricity By-laws, and by-law 15 of the City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-laws,

2.2. Court decision

The first issue that the Constitutional Court had to decide on was for the leave to appeal the High Court decision in *Darries*²⁶. The respondents were not happy with the matter coming directly to the Constitutional Court; in their view, the matter concerned the principles of law of contract and should be heard by the Supreme Court of Appeal first before it could be referred to the Constitutional Court.²⁷ The Constitutional Court, responding to the version of the respondents, points out that “this matter concerns the relationship between a public service provider and consumers with whom it has no contractual relationship, and that principles of administrative and constitutional law – and not the law of contract – govern the issues that arise”.²⁸

The Court granted the leave to appeal because “the case concerns the interpretation of PAJA and its application to the municipal by-laws which necessarily raised a constitutional issue”.²⁹

To support the above sentiments, in *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* it was emphasised that “the control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles”.³⁰

The Constitutional Court observed that the “High Court failed to take into consideration the importance that PAJA may have with regard to individuals who are not contracted to the service provider, and whom the service provider does not regard to be customers as a result of absence of contractual relationship”.³¹ The Court further established that the “High Court misled itself because it didn’t take into consideration the connection between the contractual relationship that exists between Mr Nel and his tenants on the one hand, and that between Mr Nel and City

²⁶ *Darries* (Note 1 above)

²⁷ *Joseph* para 18

²⁸ *Joseph* para 17 and 18

²⁹ *Joseph* para 17

³⁰ 2000 2 SA 674 (CC) para 33

³¹ *Joseph* para 22

Power on the other who concluded a contract as a customer”.³² In this regard, Skweyiya J notes that “it is artificial to think of the contractual relationship between Mr Nel (the landlord) and City Power as being unrelated to the benefits that accrued to the applicants under this contract.”³³

The application was successful and the Court granted the following order: “The application for leave to appeal was granted and the appeal was upheld, setting aside the order of the High Court. The termination of electricity supply to Ennerdale Mansions was declared to be unlawful, and the City was ordered to reconnect the electricity supply to the building forthwith. The words “without notice” in by-law 14(1) was declared to be unconstitutional and invalid”.³⁴

In the paragraph below, I analyse the reasons for the decision of the Court: the main issue in this case is for the Court to decide whether tenants of Ennerdale Mansions were entitled to a pre-termination notice before the City Power disconnected the electricity supply to their place of residence.

2.3. Reasons for the decision

The Constitutional Court reasoned that the “case is similarly about the ‘special cluster of relationships’ that exists between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. At this level, the relationship between the municipality and the citizens is governed by the administrative law beyond the law of contract requirements”.³⁵ The very same argument about the unusual relationship between the Council and the occupants was observed in *Residents of Joe Slovo*.³⁶

³² *Joseph* Para 23

³³ *Joseph* Para 23

³⁴ *Joseph* para 78

³⁵ *Joseph* para 25

³⁶ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2009) ZACC 16, Case No CCT 22/08

I argue that in deciding the case, the Constitutional Court did not use the fundamental rights that the applicants have relied upon but rather used the relationship between government and its citizens. This is substantiated by Bilchitz as follows: “Suitably developed, it shall be argued, the Court’s development of a ‘new’ right to basic services and the relational ethos underlying it can be seen as an exciting development that deepens the bonds between citizens and the government”.³⁷

The Constitutional Court further reasons that “when City Power supplied electricity to Ennerdale Mansions, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right”.³⁸

The requirement of the content of procedural fairness is that fairness needs to be determined in the light of the circumstances of a particular case. This was also mentioned in the case and had formed a basis for the arriving at and strengthening of the decision.³⁹ Another reason for the court decision is that the Electricity By-law can be read consistently with PAJA. I find that that, even though the tenants do not have a contractual relationship with City Power, they are entitled to a pre-termination notice and also to be afforded an opportunity to have made their representation before the disconnection occurred.

I agree with Murcott that the Court was able to define electricity as a rights issue by adopting a purposive interpretation of s 3(1) of PAJA,⁴⁰ in finding that:

³⁷ Citizenship and Community: Exploring the right to receive basic Municipal services in Joseph - Constitutional Court Review (2010) 3 by David Bilchitz- page 46

³⁸ *Joseph* para 47

³⁹ *Joseph* para 21

⁴⁰ administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair

The notion of 'rights' includes not only vested, private-law rights but also legal entitlements that have their basis in the constitutional and statutory obligations of government. The preamble of PAJA gives expression to the role of administrative justice and provides that the objectives of PAJA are *inter alia* to 'promote an efficient administration and good governance' and to 'create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function'. These objectives give expression to the founding values in s1 of the Constitution,⁴¹ namely that South Africa is founded on the rule of law and on principles of democratic government to ensure accountability, responsiveness and openness.⁴²

The court had moved away from a formalistic approach and adopt a flexible approach. As a result, a new right to electricity emerged. Some administrative law writers criticized the decision in that it failed to develop the rights that the applicants were relying on and only develop "procedural fairness mostly on good governance"⁴³ and the fact that the Constitutional Court "is the Court that is responsible for providing definitive interpretations of the Bill of Rights".⁴⁴

I am of the view that from the onset it was very difficult for the Court to decide on those issues. In order to arrive at a different decision, the Court expanded the application of procedural fairness and, as a result, it found a home under the Credit Control By-law which indicated that it may be read with PAJA. This was a departure from the Constitutional Court to link the applicability of the by-law with the PAJA.

In the next section, I deal with the content of procedural fairness to the extent that it has developed procedural fairness in South African administrative law.

⁴¹ The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

⁴² The role of administrative law in enforcing socio-economic rights Melanie Murcott (2013) 29 *SAJHR* page 486

⁴³ The role of administrative law in enforcing socio-economic rights, Melanie Macortt (2013) 29 *SAJHR* 495

⁴⁴ Citizenship and Community: Exploring the right to receive basic Municipal services in Joseph - Constitutional Court Review (2010) 3 by David Bilchitz- page 51

3. Content of procedural fairness

Section 3(1) of the Promotion of Administrative Justice Act provides, in the first place, that administrative action that materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair. In the case of *Zondi* it was indicated that:

The overriding consideration will always be what fairness demands in the circumstances of a particular case. The decision makers who are entrusted with the authority to make administrative decision are ... required to do so in the manner consistent with PAJA.⁴⁵

The right to a hearing is flexible in the sense that its content is dependent on the facts of a particular case. The main issue in this case was to determine whether the applicants were entitled to procedural fairness under section 3 of PAJA before City Power terminated the electricity supply to their building. This determination was made by establishing the content and application of procedural fairness required in the case.⁴⁶ Section 3 of PAJA was found to apply to the applicants and the content of procedural fairness required has been outlined below.

The notion of dependency on case by case is elaborated upon by Currie and De Waal who indicate that “section 3(2) (a) of PAJA restates the guiding principle of procedural fairness under the common law as well as under the Constitution: a fair administrative procedure depends on the circumstances of each case”,⁴⁷ while s3 (2) (b) sets out the minimum content of the right to procedural fairness as:

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.

These sentiments are echoed in the judgement of *Joseph* by Skweyiya J who indicates that:

⁴⁵ *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 114.

⁴⁶ *Joseph* para 21

⁴⁷ Bill of Rights handbook, fifth edition, page 667

Section 3(2) (a) must therefore be read as an empowering provision that allows courts to exercise a discretion in enforcing the minimum procedural fairness requirements under section 3(2) (b).⁴⁸

I have observed that the Constitutional Court in *Joseph* has dealt with the mandatory procedures that the administrator ought to comply with. There were two issues in *Joseph* that underpin the content of procedural fairness, namely adequate notice and reasonable opportunity to make representation. Adequate notice gives the administrators the opportunity to prepare intended action before the decision is taken, whereas reasonable opportunity to make representation concerns the period that will be given to allow the public to comment on the intended action.

According to Bynard ,

“the *content* of procedural fairness depends on the *context* of the administrative action or decision and varies from case to case. The context of procedural fairness is important in the sense that the application of fairness is not static but needs to be tailored to the particular circumstances of each case”.⁴⁹

According to Quinot,

in order for a court to fulfil its role in providing guidance to administrators on how they should go about taking decisions and avoiding the need for ‘circuitous litigation’, section 3 is read to confer a discretion on courts as to how the minimum procedural requirements must be enforced. This approach provides a clear basis for the continued variable application of procedural-fairness rules, which involves a substantive engagement with what a fair procedure would be in a given case. The focus is thus shifted away from a sterile enquiry of whether rules of procedural fairness apply at all and an automatic application of a fixed set of procedures if procedural fairness is held to apply.⁵⁰

I now turn to analyse the contents as outlined in *Joseph* and discuss how it has impacted on the development of procedural fairness.

⁴⁸ *Joseph* para 59

⁴⁹ Administratio Publica 124 | Vol 18 No 4 November 2010

⁵⁰ Substantive reasoning in administrative-law adjudication Constitutional Court Review,(2010) 3 by Geo Quinot page123

3.1. Adequate notice⁵¹

What is the meaning of adequate notice? According to common law, notice must allow sufficient time for the affected person to consider and prepare a case. It must also contain sufficient information about the intended action to be taken.⁵²

As indicated above, the intended notice must be adequate. In the circumstances of *Joseph*, the content of procedural fairness outlined was for notice to have been afforded to the tenants. City Power disconnected the electricity to the building without the knowledge of the tenants. The tenants claimed that the disconnection without notice violated their constitutional right of access to adequate housing and human dignity⁵³ as well as their contractual rights against the landlord of the property they are living in. The tenants contended that the disconnection of electricity had adversely and materially affected their right to electricity.

The core of this duty to provide adequate notice was set out in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture*:

It suffices if the person concerned is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.⁵⁴

I totally agree with the above sentiments because *Joseph's* reasoning has stressed the importance of adequate notice being afforded to the applicants. The Court went as far as declaring Electricity By-law 14(1) unconstitutional, because it did not make provision for notice to be afforded to the applicants. This by-law only provides for the disconnection of the service without notice.

Alternatively, City Power indicated that the applicants were not entitled to any form of procedural fairness because their rights were not materially and adversely affected

⁵¹ Section 3 of PAJA

⁵² The promotion of Administrative Justice Act: A commentary second edition by Ian Currie, page 105

⁵³ Section 10 and 26 of the Constitution of the Republic of South Africa, 1996

⁵⁴ 1980 (3) SA 476 (T), 486D-G

by the termination of electricity.⁵⁵ City Power also claimed that there was no relationship existing between itself and the tenants. The Court has stressed ignorance on the part of the Municipality, which ought to have known that the electricity it supplied to the building was not for the sole use of the landlord, but was rather for the tenants residing in the building.⁵⁶

In the midst of failure to provide adequate notice, the respondent complied with this requirement, but the notice was served on the landlord with whom they were contracted.

I have therefore observed that City Power was wrong to only consider its contractual relationship with the landlord. I say this because it was supposed to know that the landlord was a middle man between itself and the applicants. This is the simple reason that led the Constitutional Court to adopt the notion of “good governance between the Municipality and its citizens”.⁵⁷

In stressing the importance of affording people with the opportunity to make representation and giving of adequate notice, I agree with Melanie Macortt who indicates the following:

Suffice to state that the overtly administrative law strategy in *Joseph* involved seeking an order that declared invalid, for lack of procedural fairness, the disconnection of anyone’s electricity where no prior notice and opportunity to be heard had been afforded them. The objective of the declarator was to ensure that electricity that had been unlawfully disconnected was reconnected as quickly as possible. It also sought to ensure that in future, if the City intends to disconnect electricity, it first has to afford people notice and an opportunity to engage the City before it may lawfully do so. A further, important component of the strategy was to endeavour to compel the City to take into account the particular circumstances of people when considering their representations.⁵⁸

I argue that the notice that must be given to the applicant must be adequate. In *Joseph*, the Court arrived at a decision that, for the notice to be adequate,

it must contain all relevant information, including date and time of the proposed disconnection, the reason for the proposed disconnection, and the place at which the

⁵⁵ *Joseph* para 16

⁵⁶ *Joseph* para 23

⁵⁷ *Joseph* para 43

⁵⁸ The role of administrative law in enforcing socio-economic rights, Melanie Macortt (2013) 29 SAJHR 484

affected parties can challenge the basis of the proposed disconnection, at a minimum at least a 14 days pre-termination notice will suffice.⁵⁹

This is to enable the individuals whose rights have been affected to have time to prepare to make their side of the story heard.

To elaborate on the importance of adequate notice, in the case of *Nkomo v Administrator, Natal*, the following was observed:

Illiterate hospital workers were given 48 hours over a weekend to prepare written representations concerning their proposed dismissal- a period found to be wholly inadequate in the circumstances.⁶⁰

In *Joseph*, the Court has emphasised that at least 14 days' notice will suffice as adequate notice. It is clear from the *Nkomo* case above that the spirit of engaging one another in order to reach an informed decision was not observed. Below I deal with the reasonable opportunity to make representation.

3.2. Reasonable opportunity to make representation

In cases of individual rights, "fairness will usually require notice of the impending administrative action and an opportunity to make representations prior to a final decision being taken".⁶¹

In *Masetlha* it was pointed out that:

The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* (the *audi* principle). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness.⁶²

The South African Constitution provides in section 33(1) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Section 7 of the Constitution provides that:

⁵⁹ Joseph para 61

⁶⁰ (1991)12 ILJ 521 (N)

⁶¹ Administratio Publica-DJ Brynard. 128 | Vol 18 No 4 November 2010

⁶² *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC)

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.⁶³

The right to fair administrative action is enshrined in the Bill of Rights and every citizen has the right to enforce any infringed right mentioned in this bill. It is from the above section 7(2) that the citizen expects the state to respect, protect, promote and fulfil the rights as stated in the Bill of Rights. Failure on the part of the state will result in the citizen not having faith in the administration and the only option is to approach the courts for relief, thus by evoking section 38 of the Constitution.⁶⁴ These are the consequences of non-compliance with the mandatory procedures by the administrator.

The right to take the decision of an administrator on review is also supported by the common law principle of *audi alteram partem*, which indicates that the other side of the story must be heard before a decision is taken (opportunity to make representation). As we all know, the basic principle in a court of law is that even the magistrate is obliged to afford the accused person the right to tell their side of the story before being convicted. In order to comply with section 3 of PAJA, an administrator should not make a decision affecting someone without first hearing what they have to say.

In light of the above, it is imperative that if any person has been affected by the decision taken by the administrator exercising powers under PAJA, procedural fairness must be afforded. It is most unfortunate for the administrative action to be

⁶³ Constitution of the Republic of South Africa, 1996

⁶⁴ Section 38 provides that: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members

taken without affording such an opportunity to those who will be affected materially and adversely.

The individuals whose rights have been materially and adversely affected have the constitutional right to procedural fairness. In the case of *Premier of Mpumalanga*,⁶⁵ the Court made the following observations about the constitutional right to procedural fairness:

In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without., for example, affording parties an effective opportunity to make representation would flout another important principle, that of procedural fairness. Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision maker.⁶⁶

The quote from the above case was also used in the *Joseph* case, in which it was specifically stressing the issues raised by City Power regarding the burden on its administrative staff by following due process.⁶⁷

I have also observed that the imposition of obligation on the City of Johannesburg was more of a last resort because there was a need for upholding the constitutional rights of procedural fairness in section 33 of the Constitution read with section 3 of PAJA. In *Joseph*, Skweyiya observes that it is of a constitutional nature, hence it is allowed for the appeal to be heard in the court as such.

Currie and De Waal provide the following with regard to the concept of procedural fairness:

Beyond providing a statutory duty to provide procedural fairness, an important innovation of the PAJA is to separate procedural fairness into compulsory elements (adequate notice, opportunity to make representations, clear statement of the administrative action, notice of any right of review or internal appeals and notice of

⁶⁵ Premier, Mpumalanga v Executive committee of the Association of Governing Bodies of state-aided Schools: Eastern Transvaal 1999(2)SA (CC)

⁶⁶ The Bill of rights handbook fifth edition by Ian Currie and Johan de Waal,

⁶⁷ *Joseph* (note 2 above) para 62

right to request reasons) and discretionary elements (legal representation, opportunity to make representation and appear in person). The compulsory elements must be provided by an administrator, while the discretionary elements may be provided if necessary to achieve procedural fairness in particular case.⁶⁸

In *Joseph*, the Constitutional Court reached a conclusion that the City Power should have afforded the applicants procedural fairness in a form of a pre-termination notice although they did not have any contract with the Municipality. Their entitlement only came as the residents within the jurisdiction in which the Municipality has to provide service as mandated by the Constitution. The applicants were entitled to procedural fairness in the exercise of the right, and the Court found that this included “adequate notice of at least 14 days before disconnection”.⁶⁹

For any administrative decision to be taken, the administrator has a duty to inform the affected individual of such a decision. This is done to enable the aggrieved individual to have reasonable time to make representations. The decision of an administrator is subject to judicial review and every citizen has the right to access any court of law. The only qualification is that such a matter must fall within the jurisdiction of that court. In the case of *Joseph*, different pieces of legislation were put to the test in order to develop the law of procedural fairness and upholding the constitutional principles of transparency and accountability.

In the *Premier of Mpumalanga* case, the Constitutional Court considered the following on the right to be heard:

“The validity of a decision to terminate, with retroactive effect, a long standing scheme of payment of bursaries to schools. The Court held that, in making the decision without giving reasonable notice of the contemplated termination or an effective opportunity to the schools to make representations before the decision was made, the provincial government had acted unfairly”.⁷⁰

4. Application of procedural fairness

The question which I address in this section is; when does procedural fairness apply and to which category of people? This is mainly focused on the events that took

⁶⁸ The Bill of rights Handbook ,fifth edition, Ian Currie and De Waal, page 667

⁶⁹ *Joseph* para 61

⁷⁰ The Bill of rights Handbook, fifth edition, Ian Currie and De Waal page 663

place in *Joseph*. I explore what the Court has decided in respect of the application of procedural fairness.

In terms of section 33(1) of the Constitution, it is provided that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, while on the other hand section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Procedural fairness applies to any person when their rights have been materially and adversely affected. I now turn to the application of procedural fairness with respect to *Joseph*.⁷¹

4.1. Materially and adversely affected

This is one of the issues that was raised in *Joseph*. The applicants depended on the following rights⁷² as contained in the Bill of Rights of the Constitution of the Republic of South Africa to support their claim: the right of adequate housing in terms of section 26 of the Constitution,⁷³ and the right to human dignity in terms of section 10 of the Constitution.⁷⁴ The applicants stressed that their right to procedural fairness had been affected and also their contractual relationship with the landlord.

I have observed that the Court deviated from using the rights invoked by the applicants but rather focused on the relationship that exists between the Municipality and its citizens.⁷⁵ City Power had failed to provide the applicants with a notice before termination of the electricity and, as a result the action, materially and adversely affected their rights. The Constitutional Court employed a very interesting strategy in *Joseph*, this being the right to receive electricity as a basic service that they must obtain from the local municipality.

⁷¹ *Joseph*(note 2 above)

⁷² *Joseph* para 12

⁷³ (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions

⁷⁴ everyone has inherent dignity and the right to have their dignity respected and protected

⁷⁵ *Joseph* para 24

In light of the above, the real issue is:

whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of section 3 of PAJA. As a result, the Municipality had to provide the service as a matter of service delivery to its community.⁷⁶

In terms of sections 152(1) and (2) of the Constitution,⁷⁷ it has been stipulated to what extent a municipality has to meet its obligation with regard to service delivery. Section 152 of the Constitution provides for the object of local government and it focuses on the accountability of local government, promotion of a safe and healthy environment and on ensuring the provision of services to communities in a sustainable manner.

The principles that have been outlined in this case are very clear. The residents do not need to be in any contract with the municipality. The municipality is obliged to supply electricity and as stated above, residents are entitled to the electricity because the municipality has a duty to provide it to them.

The question to be answered is whether the rights of tenants have been adversely affected by the disconnection of the electricity. The underlying principle is that an administrator is always required to follow the principles of PAJA before taking any decision of an administrative nature. I agree with Skweyiya's judgement in that the residents are entitled to receive basic municipal services as stipulated above in section 152(1) (b). The object is to ensure the provision of services to communities in a sustainable manner. This by itself also includes the services of providing electricity to every household by municipalities within their area of jurisdiction.

The rights of the tenants had been affected because the tenants were never informed about the disconnection of the electricity. City Power is an organ of the state and the decision that it took was of an administrative nature and constituted an administrative action that requires allows the need for a review.

In these circumstances, although City Power was not contracted to the tenants, it owes the tenants a pre-termination notice to allow them to make representation. The principle of procedural fairness is that the affected party must be afforded an

⁷⁶ *Joseph* para 33

⁷⁷ Constitution of the Republic of South Africa, 1996

opportunity to make representation and this has always been the position in common law. In *Joseph* the tenants were never afforded an opportunity to make representation.

Electricity has been described in the case as something which the tenants are entitled to by right as a basic municipal services that they must receive in terms of section 152 of the Constitution. This disconnection not only affects their right to receive electricity, but it also extends to social life in that electricity is a basic need for each and every family. Procedural fairness was supposed to have been afforded so that the tenants could make alternative arrangements to ensure that they prepared themselves to make meaningful contributions on the proposed action.

Procedural fairness has to be adopted in all spheres of government. There are situations under which administrative action affects only one person, and other instances when it affects the public at large. For instance, an increase in the fee to obtain a drivers licence affects everyone, but a denial of a drivers licence only affects one person. In all those instances, written reasons must be furnished.

It is my view that City Power has failed to apply procedural fairness in the sense that vigorous consultations were required in order to uphold the requirements as stated in section 33 of the Constitution read with section 3 of PAJA. City Power based its ignorance of the Credit Control By-laws⁷⁸ and on the contract it had with the landlord which does not require engagement with anyone but the “consumer”.

The real issue is that a decision that is procedurally fair will pass the test of review because all the facts will indicate whether or not fair procedures in terms of PAJA have been followed. In this regard, the proper procedures were not followed because the people who were affected by the decision of an administrator were not consulted about the intended disconnection of the electricity supply.

This is a significant landmark case in the administrative law sphere, in that procedural fairness has prevailed and the constitutional rights of individuals have been protected in conjunction with the reading of the abovementioned by-laws. The tenants were supposed to have been informed about the disconnection of the

⁷⁸ Credit Control By-laws (note 9 above)

electricity and also of the reasons for its disconnection to allow them to make a proper engagement with City Power. As a result, it has failed to comply with section 3 of PAJA.

In light of the above discussion, it is the common course that administrative action taken by the administrator exercising powers under PAJA must be procedurally fair. The administrative action is subject to review if the decision taken is of an administrative nature and has materially and adversely affected the rights of an individual. The different scenarios about the case discussed above provide an understanding of what constitutes administrative action and under what circumstances a decision can be regarded as procedurally unfair.

The Constitutional Court introduced a public law-right in *Joseph* that will be discussed in the section that follows.

4.2. The legacy of *Joseph*

The strategy of flexible approach adopted in *Joseph* has broadened the content and application of procedural fairness. The public law right that was developed in *Joseph* gives rise to effective service delivery. The public law duty and its corresponding right greatly improves an applicant's chances of being able to trigger the application of section 3(1) of PAJA.⁷⁹ This milestone approach of doing away with the formal approach to the substantive reasoning was substantiated under *Logbro Properties v Bedderson*.⁸⁰

The impact of *Joseph* was stressed by the birth of a new right of public law that the court has established. According to Dugard and Langford the following has been observed:

“The public law right to electricity that was indirectly stated in *Joseph* was a significant advance in the interpretation and enforcement of socio-economic rights. The judgement has a direct implication for the functioning of service providers who are acting within the powers of administrative action as they must always adhere to the principle of procedural fairness. The Socio-Economic Rights Institute of South

⁷⁹ The Bill of rights Handbook Currie and De Waal sixth Edition page 677

⁸⁰ 2003 2 SA 460 (SCA).

Africa managed to acquire the reconnection of electricity for some of the residents in Soweto.⁸¹ Such reconnections were relying on the judgement of *Joseph* and, as a result, it is safe to say that the decision of *Joseph* had an impact on the future of application of procedural fairness. It is also possible that utilities will in future be required to act reasonably in deciding whether or not to disconnect an electricity supply”.⁸²

The decision of *Joseph* has indeed further developed procedural fairness in the Republic of South Africa. the Court concluded that “the words ‘without notice’ in By-law 14(1) of the Greater Johannesburg Metropolitan Council: Standardisation of Electricity, are declared to be unconstitutional and invalid and are severed from By-law 14(1)”.⁸³

The Constitutional Court further indicated that Credit Control By-laws should be read consistently with the PAJA. Regarding the constitutional validity of the by-laws which require the disconnection of electricity without notice, the Court held that “the Credit Control, (1999) and Debt Collection By-Laws (2005) can be read consistently with PAJA to require procedural fairness for any person materially affected”.⁸⁴

In this case, after the landlord had failed to keep up with the payments for electricity to City Power, the utility disconnected the electricity on the basis that the tenants did not have any contract with City Power. This was derived from the City’s Credit Control and Debt Collection By-laws dealing with the issue of who the customer is. In terms of these by-laws,

the disconnection of electricity supply is a legitimate method for the collection of arrears and may be followed by legal action to recover payment. Notice must be given to the customer and the customer is afforded adequate opportunity to make arrangements to pay or to make representations why the supply should not be discontinued. This requirement complies with provisions of PAJA.⁸⁵

One of the most important factors to be taken into consideration is that most of the legislation in South Africa was enacted during the apartheid era and gave powers to Parliament to do as it pleased without any form of external control. After the

⁸¹ Art or Science (2011) 27 SAJHR- Jackie Dugard and Malcolm Langford page 40; *Residents of Chiawelo Flats v ESKOM Holdings Limited and City of Johannesburg* case no 2010/35177; seri-sa.org. Accessed on 19 October 2015

⁸² Docs.escr-net.org. Accessed on 19 October 2015

⁸³ *Joseph* para 78

⁸⁴ *Joseph* para 76

⁸⁵ Credit Control By-laws (note 9 above)

promulgation of the Constitution which gave rise to the Bill of Rights, most of the South African statutes became redundant. Another shift that was seen worldwide was the change in the public law branch of administrative law. As such,

in finding that once the 14 days' notice had been afforded the occupiers, they would then have sufficient time to make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wish.⁸⁶

This case, in my opinion, deals with the issue of review. In the first instance the applicant is concerned with the errors that the High Court made, and this has led them to apply for leave to appeal. The issue of review is involved because of the procedure that was followed by the City of Johannesburg when it failed to notify the tenants, which then amounted to ignorance and failure to apply the provisions of the law.

The Constitutional Court has in this case focused more on the development of procedural fairness. In the case relating to eviction of *Joe Slovo*,⁸⁷ the Constitutional Court reached a decision which I feel lacked the process of procedural fairness when compared to *Joseph*. Section 26(3) of the Constitution provides that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”.⁸⁸

According to Sandra Liebenberg,

Cases such as *Port Elizabeth municipality*⁸⁹ and *occupiers of 51 Olivia Road*⁹⁰ have emphasised the importance of procedural fairness and the need for parties to seek dialogic solutions to eviction conflicts through mediation or meaningful engagement. The Court in *Olivia Road* held that, prior to seeking an eviction, an organ of state will normally be required to show that it has engaged individually and collectively with the occupiers who may be rendered homeless by an eviction and to respond reasonably to the needs and concerns articulated in the process.⁹¹ However the willingness of

⁸⁶ The role of administrative law in enforcing socio-economic rights, Melanie Maccott (2013) 29 SAJHR 487-489

⁸⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2009) ZACC 16, Case No CCT 22/08

⁸⁸ Constitution of the Republic of South Africa, 1996

⁸⁹ *Port Elizabeth municipality v various occupiers* 2005(1) SA 217 (CC), 2004(12) BCLR 1268(CC)

⁹⁰ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008(3) SA 208(CC), 2008(5) BCLR 475 (CC)

⁹¹ *Occupiers of 51 Olivia Road* (note 88 above) para 18

the Constitutional Court in *Joe Slovo*⁹² to effectively condone the lack of procedural fairness and manifestly inadequate engagement process raises concern about the extent of the Constitutional Court's commitment to these principles".⁹³

My observation of the *Joseph*⁹⁴ case is that it also deals with socio-economic issues. The rights of individuals were on centre stage for the Court to arrive at the decision. Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. The right to dignity was infringed by the disconnection of electricity. Although the Court failed to deal with this right, by implication, the constitutional rights of individuals had been observed. As a result, an indirect right to receive electricity as a duty of the Municipality was introduced.

The effect of *Joseph*⁹⁵ is that the tenants had been deprived of their basic needs for running their day-to-day household functions. Without electricity, the tenants could not use any electrical appliance. The decision of this case was significant because it highlighted municipal failure to adhere to the PAJA read with section 33 of the Constitution and the applicable common law principles.

4.3. Duty imposed on the municipality

The Constitution of the Republic of South Africa has played a major role in the development and advancement of procedural fairness in South Africa. After 1996 the Constitution reigns supreme and courts were given enough muscle to fight the abuse of administrators who failed to take the administrative decision in a manner as prescribed by the law.

It is my view that the Municipality failed in its constitutional duty to deliver basic services as indicated in Schedule 4B of the Constitution. Section 156(1) of the Constitution provides that the municipality has exclusive authority in respect of, and has the right to administer local government matters listed in part B of Schedule 4

⁹² *Joe Slovo* (note 85 above)

⁹³ Socio-Economic Rights, adjudication under a transformative constitution by Sandra Liebenberg page 314

⁹⁴ *Joseph* (note 2 above)

⁹⁵ *Joseph* (note 2 above)

and part B of Schedule 5. The matters to be administered include the provision of the electricity. It clearly means that municipalities have a duty to supply electricity to the residents of Ennerdale Mansions. On this issue, Skweyiya notes the following:

When City Power supplied electricity to Ennerdale Mansions, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in the City. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. Accordingly, in depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right.⁹⁶

The right to be afforded an opportunity to be heard is related to the notice that the administrator must give to the affected individuals. This case has an implication on the operation of municipalities and other organs of the state. Not only must they give notice to individuals to clearly state their side of the story, but there must also be a reasonable opportunity to make such representation.

It is my submission that there must always be a rational relationship between the notice and the purpose of such an intended action to be taken. In *Joseph* it was also indicated that a notice in the building was going to suffice. This is supported by the case of *Sokhela*. With regard to that case, Wallis J points out that

if the occasion identified as the opportunity to make representation is a meeting, but the participants are unaware that it is intended to serve the purpose of enabling representations to be made, and the ultimate decision-maker does not disclose the concerns that might lead him or her to take an adverse decision, it seems to me that no opportunity to make representations has been given.⁹⁷

It is a really good initiative to have a legislative tool like PAJA to use when one has been aggrieved. As a democratic state, it has been seen as a move to uphold the South African constitutional democracy by promulgating PAJA with the mandate of promoting fair administrative justice to all the citizens of the country. This also has a fundamental impact on the transparency of government and its related state agencies, meaning that for any decision of an administrative nature that constitutes administrative action, the organs of state are at all times subjected to the PAJA and good governance will always prevail.

⁹⁶ *Joseph* para 47

⁹⁷ *Sokhela v MEC for agriculture and environmental affairs*, kwazulu natal 2010(5)SA 574(kzp) paragraph 55

According to Ian Currie,

PAJA is general administrative law, meaning that it applies to and binds the conduct of administrators at all levels of government-national, provincial, and local and that of administrators who are not part of government but who exercise public power or perform public function.⁹⁸

Government administrators are always expected to comply with section 195⁹⁹ of the Constitution that deals with the basic values and principles governing public administration. The system of government in South Africa is divided into three spheres: national, provincial and local government. In most cases, service delivery is done at a local government level (close to the people). This is in relation to the sentiments of the court that “compliance by local government with its procedural fairness obligations is crucial ... to facilitate trust in the public administration and in our participative democracy”.¹⁰⁰

It is essential for an administrator to follow the processes as stated in PAJA. In *Walele*, the court held that the “City had failed to comply with mandatory procedural requirements as set out in the Building Standards Act when read together with Promotion of Administrative Justice Act 3 of 2000 (PAJA)”.¹⁰¹

⁹⁸ The promotion of Administrative Justice Act A commentary page 3[1.3]

⁹⁹ 195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—

- (a) administration in every sphere of government;
- (b) organs of state; and
- (c) public enterprises.

¹⁰⁰ *Joseph* para 46

¹⁰¹ *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC).

Administrators have, in terms of PAJA, the responsibility to give reasonable opportunity to individual whose rights will be materially and adversely affected by the proposed action, to make representation before the administrative action may be taken. In a case where the action has already been taken, reasons for such must be furnished to the affected individual.

In *Walele*¹⁰², O'Reagan points out the following:

In this case a more general provision (the definition) is in conflict with a specific provision (section 3(1)). The specific provision is aimed at giving direct effect to the constitutional right to administrative action that is procedurally fair. The apparent contradiction between the two provisions should be resolved by giving effect to the clear language of section 3(1) which expressly states that administrative action which affects legitimate expectations must be procedurally fair. Thus, the narrow definition of "administrative action" in section 1 must be read to be impliedly supplemented for the purposes of section 3(1) by the express language of section 3(1). If this were not to be done, the clear legislative intent to afford a remedy to those whose legitimate expectations are materially and adversely affected would be thwarted.

It is a duty for the municipalities to act within the ambit of law and any omission to act on the part of the administrator will amount to administrative action. In the application of the law, the administrators must take into account all the applicable legislation within their sphere of government. Public service officials have a duty to apply the rules of procedural fairness and this has been observed by Brynard:

The right to procedurally fair administrative action is clearly aimed at purposefully facilitating accountability on the part of the decision-maker and should thus be one of the fundamental features of an accountable public administration. However, there is also a need to balance the interests of the individual affected by the administrative action against the public interest of having an efficient and effective public administration. This balance is indeed to be found in the flexible approach which is allowed by the PAJA in practising procedural fairness in public administration.¹⁰³

The Constitution allows for the rights to procedural fairness and to have a legislation effected to give rise to such a right as enshrined in section 33 of the Constitution. Taking into consideration the imbalances of administrative law in the past, I can reach a conclusion that the promulgation of PAJA came as a relief and also to give

¹⁰² *Walele* (note 99 above)

¹⁰³ *Administratio Publica* 140 | Vol 18 No 4 November 2010 Prof Dirk J. Brynard page 139

effect to section 33 of the Constitution. Moreover, the constitutional right to procedural fairness was extended by the promulgation of PAJA.¹⁰⁴

PAJA provides all the mechanisms for the aggrieved person to be afforded an opportunity to be heard and also to be given reasons for the decision of the administrators. Adequate notice is also part of the administrative system that was used in *Joseph's* case, in that City Power was supposed to have given the tenants notice of the intended administrative action that was about to be effected and also an opportunity to make representation regarding the same issue of electricity disconnection.

The provision in section 33 of the Constitution is an empowering provision for the enactment of PAJA. PAJA is primarily there to protect the rights to a fair administrative action, as a result the municipality was ordered by the court to afford the tenants with a notice.

As observed in the case of *Joseph*, the rights to a fair administrative action were triggered and the Court came to a conclusion based on the provisions of PAJA. This further confirms that PAJA has played a significant role in the development of the right to procedural fairness and effective good governance on the part of the local government.

In *Joseph*, “the Court’s reasoning is ultimately designed to restore the notion of a relationship between the lessees and the city: it does so through recognising the duty to provide services and a corresponding right to receive them”.¹⁰⁵

4.4. Application of procedural fairness in the by-laws

Another area of development is the application of procedural fairness. In *Joseph*, the City of Johannesburg By-laws were the ones that the High Court had used to reject the claim by the tenants of Ennerdale Mansions. Electricity By-laws provide for the disconnection of electricity without notice, and Credit Control By-laws allow for the pre-termination notice to be afforded only to customers. This is one area that the

¹⁰⁴ Act 3 of 2000

¹⁰⁵ Citizenship and Community: Exploring the right to receive basic Municipal services in *Joseph* - Constitutional Court Review (2010) 3 by David Bilchitz- page 67

Court had developed because the Court arrived at a decision that the words “without notice” in the Electricity By-law were unconstitutional when read together with the provisions of section 3 of PAJA.

The effect of *Joseph* is that the public law right was sufficient to entitle the applicants to procedural fairness under section 3(1) of PAJA.

The Electricity By-law in terms of section 14 contains the words “without notice”. This is inconsistent with the contents of procedural fairness as enshrined in section 3 of PAJA which requires mandatory notice to be afforded to the affected person. This point was raised in *Joseph* to highlight the fact that the applicants are entitled to a minimum period of 14 days pre-termination notice.

Another issue that was dealt with was the application of By-law 15 of the Credit Control By-laws regarding the “customer”. The court concluded that:

By-law 15(3) must accordingly be read with By-law 15(4) (d) and in the light of PAJA to require that pre-termination notice must be sent to all persons whose rights may be materially and adversely affected by the termination of a municipal service. Practically, this reading protects the procedural fairness rights of affected persons.¹⁰⁶

5. Answer to the research question (findings)

The research questions can be answered in the manner that the *Joseph* case ignored the fundamental rights advanced by the applicants and used the relationship that existed between the Municipality and the citizens residing within its area of jurisdiction. Another issue is the application of procedural fairness in *Joseph* and also what the content of procedural fairness entails. From the outset, I have observed from the decision of *Joseph* that the Court had advanced a very interesting strategy. The above is substantiated by Hoexter who indicated that:

The judgement in *Joseph* is noteworthy for several reasons, not least of which is sharp contrast it makes with the reasoning of the majority in *Walele*¹⁰⁷ as we have seen, that judgement inclines towards the deprivation approach; *Joseph* seems to reject it. *Walele* is formalistic in its insistence on existing rights that are affected by the administrative action itself, *Joseph* embraces an anti-formalistic characterisation

¹⁰⁶ *Joseph* Para 75

¹⁰⁷ *Walele* (note 99 above)

of the relationships between the parties and a broad, creative view of the nature of the rights in question.¹⁰⁸

In *Mkontwana*,¹⁰⁹ the court held that “municipalities are obliged to provide water and electricity to the residence in their area as a matter of public duty”. This approach was adopted in *Joseph* as it was stated that the case concerned the special relationship between the Municipality and its citizens, “The City has to provide the electricity to its citizens because it is their right that they were already receiving”.¹¹⁰

I have also observed that the ways in which procedural fairness was developed by the Court’s decision are mainly with regard to the content. The Court made it clear that although the applicants did not have a contract with the Municipality, they were entitled to a pre-termination notice and also to be afforded an opportunity to state their case. This is one area that I feel has been developed by the decision of the Court, bearing in mind that the High Court in the first place had indicated that the applicants were not materially and adversely affected by the disconnection of electricity.

The application of procedural fairness was not only limited to the formalistic but rather substantive reasoning of the court.¹¹¹ In this case, service delivery was the biggest winner of the day. The Court has used the relationship between the Municipality and its citizens. This approach has expanded to include consideration of who the procedural fairness applies to. In this respect, the residents within the jurisdiction of City of Johannesburg are all entitled to electricity as a municipal basic service. In light of the above, I submit that the procedural fairness has further been developed by *Joseph*.

Furthermore, the Court has established that sections 152(1) and 153¹¹² of the Constitution give rise to a public law right. I have observed that the Court had deviated from the fundamental rights claimed by the applicants. Procedural fairness

¹⁰⁸ Cora Hoexter, *Administrative law in South Africa*, 2012, page 403

¹⁰⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality and another* 2005(2) BCLR 150 (CC)
¹¹⁰ *Joseph* para 47

¹¹¹ *Substantive reasoning in administrative-law adjudication: Constitutional Court Review (2010)* 3, by Geo Quinot page 123

¹¹² A municipality must—

- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.

is one of the most important aspects that the *Joseph* case has developed. Most importantly, emphasis on service delivery was confirmed by the Court.

The responsibility of service delivery by a municipality has also been outlined under section 73 of the Municipal Systems Act which provides that “a municipality must give rise to the provisions of the Constitution and give priority to the basic need of the local community”.¹¹³ In the case of *Joseph* this applies directly because the applicants were in need of a basic service of electricity supply.

6. Conclusion

The Court decision has yielded results which have led to further development of procedural fairness in the Republic of South Africa.

This case has had an effect on decision-making on the part of the executive and the legislature. Section 14(1) of the Electricity By-law was found to be unconstitutional and that put a burden on the legislature to amend the by-law in question to align it with section 33 of the Constitution and section 3(1) of PAJA

This case not only has an implication for the City of Johannesburg, but for all organs of state that are acting within the ambit of PAJA. This case has now become the precedent in the administrative law sphere in which all municipalities and organs of the state will need to go back to the drawing board to amend their by-laws. Another effect is that the culture of terminating electricity without notice will have to change as a result of this significant decision of *Joseph*. Members of the community and parties affected by decisions that are not communicated to them now have a case to rely on whenever they wish to take a municipality to task.

This case has indeed succeeded in developing procedural fairness, as it has set a new standard for the direct interpretation of PAJA and for the indirect interpretation of Section 33 of the Constitution. This was further confirmed by the declaration of the unconstitutionality of By-law 14 (1) of the Electricity By-laws and also ruled in favour of the applicant in that the disconnection of the electricity was unlawful and declared unconstitutional, and City Power was ordered to reconnect the electricity to

¹¹³ Municipal Systems Act 32 of 2000

Ennerdale Mansions.¹¹⁴ It is further evident that those who act as checking agents on government or whoever is exercising such powers will refer to this landmark case as a starting point for any case that invokes socio-economic rights issues.

The right to electricity is not mentioned in the Bill of Rights but the Court has used a strategy of moving beyond the “common-law conception of rights as strict boundaries of legal entitlement”.¹¹⁵ This emphasises the value of flexibility in a court which does not confine itself to a formalistic approach. This has also been confirmed by Quinot who makes the following observation:

The Joseph judgment thus makes an important contribution to the development of a substantive model of adjudication in administrative law. It breaks with the formalistic reasoning style of the past, but also breaks out of the formalism ostensibly reintroduced in our administrative law by PAJA and the fixation with threshold concepts under our constitutionalised administrative law. The judgment shows the proper way forward in adjudicating procedural-fairness disputes with reference to the substantive values and practical factors that motivate a particular view.¹¹⁶

The future of procedural fairness looks bright after *Joseph*. The Constitutional Court has established a new public law right to receive electricity by virtue of being a citizen of a respective municipality and the administrative law adjudication in relation to procedural fairness has been developed by *Joseph*.

¹¹⁴ *Joseph* para 78

¹¹⁵ *Joseph* para 40

¹¹⁶ Substantive reasoning in administrative-law adjudication: Constitutional Court Review (2010) 3 by Geo Quinot (2010) page 123

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