

PROTECTION EXTENDS BEYOND CONTRACT

Constitutional Court action establishes direct right to municipal services for tenants

Under normal circumstances a person, who is not part of a contract, does not have any legal right against, or an obligation to, the contracting parties. Parties to a lease contract can sue and be sued, and have a direct, mutual relationship which is referred to as privity of contract.

When an owner enters into a contract with the municipality for the provision of electricity and water to the dwelling, the owner is obliged to pay for the consumption and the municipality to provide the agreed services.

Should the owner fail to make the required payment for the consumption of the electricity or water, there is a breach and the municipality can suspend the services.

When a tenant does not have a contract with the municipality, the landlord may include the cost of the consumption into the rental as a fixed amount. Sometimes, a landlord and tenant may agree that the tenant will pay the consumption charges separately from the rent, based on the monthly municipal billing, or, if there are several tenants, to share the service charges between themselves.

Let us look at a multi-tenant block where each tenant pays the landlord for the electricity charges.

The landlord presents each tenant with a monthly municipal bill, which is on the landlord's name and receives the appropriate amount from each tenant.

The landlord is then expected to pay the municipality.

In the event the landlord fails to make payment, the municipality will issue a

warning notice of its intention to disconnect should payment not be made within a stipulated time. The warning notice with a final demand is issued to the landlord since the billing account is in the landlord's name.

Tenants will have no idea if the landlord makes full or part payment or no payment at all.

In other words, the procedure followed by municipalities in South Africa is to inform the account holder of her or his arrears, issue a warning notice to settle the account within a specified time or face disconnection of the relevant service.

It makes no difference to a municipality that the building is occupied by a number of tenants since it is not obliged to inform them that their landlord was in arrears or of the imminent disconnection.

There is no contractual relationship between the tenants and the municipality.

A disconnection, off course, means the tenants will have no legal or administrative recourse against the municipality. This has now changed.

This was the dilemma 30 families of Ennerdale Mansions, in Johannesburg faced when their landlord fell into substantial arrears.

The landlord failed to make a payment of R400 000.00 for the electricity consumption to the City of Johannesburg's electricity service provider, City Power (Pty) Ltd. A disconnection notice to the landlord was subsequently followed by the electricity supply to the building and each flat being suspended.

An urgent application before the South Gauteng High Court, Johannesburg to have the electricity supply restored immediately failed (*Darries and Others v City of Johannesburg and Others* (08/22689) [2009] ZAGPJHC 6; 2009 (5) SA 284 (GSJ) (3 April 2009)).

The Court dismissed the tenants' application on the basis that they did not have a *prima facie* right. The relationship was between the landlord Thomas Nel and City Power. Tenants needed to bring an action against their landlord. The second part of this application before the High Court also failed. The relief sought related to:

1. declaring unlawful the legal provisions that excluded occupants from being given prior warning of a disconnection, and
2. allowing the occupants to make representations in the event they do not have any contractual relationship.

The tenants, again with the assistance of the Wits Law Clinic, brought the case before the Constitutional Court (*Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30 (9 October 2009)). While no legal relationship existed between the tenants and City Power, the Constitutional Court in a unanimous judgment held that the tenants were entitled to procedural fairness before their household electricity supply were terminated and be given the opportunity to make representations to the municipality in the event of an impending disconnection.

At paragraph 24 of the judgment, Skweyiya J states:

'I am of the view that this case is similarly about the "special cluster of relationships" that exist 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, administrative law principles operate to govern these relations beyond the law of contract.'

The following Order was made: -

1. The application for leave to appeal is granted.
2. The appeal is upheld and the order of the South Gauteng High Court, Johannesburg in *Darries and Others v City of Johannesburg and Others*, delivered on 3 April 2009 under Case No 08/22689, is set aside.
3. The termination of electricity supply to Ennerdale Mansions on 8 July 2008 is declared to be unlawful.
4. The respondents are ordered to reconnect the electricity supply to Ennerdale Mansions forthwith.
5. The words "without notice" in by-law 14(1) of the Greater Johannesburg Metropolitan Council: Standardisation of Electricity By-laws (*Provincial Gazette* (Gauteng), GG 16 GN 1610, 17 March 1999), published in terms of section 101 of the Local Government Ordinance 17 of 1939, are declared to be unconstitutional and invalid and are severed from by-law 14(1).
6. The respondents are ordered to pay the costs of the applicants in both the High Court and in this Court, such costs to include the costs consequent upon the employment of two counsel.

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