IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A334/2011

In the matter between:-

THE ASSOCIATION OF BODY CORPORATES, OWNERS AND LESSEES OF TOWNHOUSES, FLATS AND RETIREMENT VILLAGES	1st Applicant
MRS MARTHA MAGRIETA BARROW	2nd Applicant
MRS ISOLDE MARIA OLIVIER	3rd Applicant

and

CENTLEC (PTY) LTD	1st Respondent
MANGAUNG METROPOLITAN MUNICIPALITY BLOEMFONTEIN	2nd Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA (NERSA)	3rd Respondent
THE MINISTER OF ENERGY	4th Respondent

CORAM:	KRUGER, *et* DAFFUE, JJ
HEARD ON:	4 NOVEMBER 2013
JUDGMENT BY:	DAFFUE, J
DELIVERED ON:	15 NOVEMBER 2013

I INTRODUCTION

[1] This application is cast in the form of a review and has been brought in accordance with the provisions of Rule 53. The essence thereof is the alleged discrimination between consumers staying in private dwellings/residences on the one hand and those staying in complexes such as townhouse developments, blocks of flats and retirement villages (hereinlater referred to as “complexes”).

[2] The applicants are aggrieved at the electricity tariffs introduced and implemented from 1 July 2010 in respect of complexes which caused dramatic increases in the electricity bills of these customers. Applicants attribute the increases to 1st respondent’s metering policy in terms whereof complexes are supplied with electricity through a single point of supply each with one meter per erf measuring usage and the implementation of a new Time of Use tariff (TOU). Consequently a bulk tariff is applied to complexes and individual customers, i.e. owners and tenants in complexes, do not receive the intended benefits of TOU tariffs.

II **<u>THE PARTIES</u>**

[3] The main protagonists are an association of body corporates, owners and lessees of townhouses, blocks of flats and retirement villages (ACBOT), the 1st applicant on the one hand and Centlec (Pty) Ltd, the 1st respondent and the Mangaung Metropolitan Municipality, the 2nd respondent on the other (herein later referred to as “the respondents”). Two individual owners, Mrs Barrow and Olivier have been

cited as 2nd and 3rd applicants. The National Energy Regulator of South Africa (NERSA) has been cited as 3rd respondent and the Minister of Energy as 4th respondent. No relief is claimed against 3rd and 4th respondents in the Notice of Motion although NERSA was eventually supposed to play a role in the proceedings as will appear later herein.

III **<u>THE RELIEF INITIALLY SOUGHT, THE RELIEF CLAIMED DURING ARGUMENT UNDER ALTERNATIVE RELIEF AND THE OPPOSITION THERETO</u>**

[4] In the Notice of Motion applicants seek the following relief:

> "1. Dat die besluit deur eerste en/of tweede respondente op of omtrent **17 Oktober 2007** om die meterbeleid bylaag **"B"** tot die funderende beëdigde verklaring goed te keur asook die beleid as sulks hersien, nietig verklaar en tersyde gestel word;
> 2. Dat die besluit van die tweede en/of eerste respondente ingevolge waarvan die 2011/2012 elektrisiteitstariewe vir Mangaung goedgekeur is en die tariewe as sulks hersien, nietig verklaar en tersyde gestel word;
> 3. Dat uit hoofde van die bepalings van artikel 3(2) van die Wet op Arbitrasie, Wet 42 van 1965 gelas word dat die geskille tussen die partye waarna in die funderende beëdigde verklaring van die applikant verwys word, nie na arbitrasie verwys sal word nie en dat geskilbeslegtingsprosedure soos in die vooruitsig gestel in die **"Electricity Regulations Act"**, nr. 4 van 2006 en in die besonder artikel 30 daarvan nie van krag sal wees op die geskille tussen die partye nie;
> 4. Dat die tydperk van 180 dae waarbinne aansoek gedoen moet word om hersiening van die besluit in smeekbede 1

hierbo en soos voorgeskryf in artikel 7 van die Wet op Bevordering van Administratiewe Geregtigheid, Wet 3 van 2000 verleng word ooreenkomstig die bepalings van artikel 9 van daardie Wet;

5. Koste van geding gesamentlik en afsonderlik teen eerste en tweede respondente asook sodanige ander respondente wat hierdie aansoek mag bestry;
6. Verdere en/of alternatiewe regshulp."

[5] Basically the applicants want this court to set aside the 1st respondent's metering policy.

[6] Respondents who oppose the application filed opposing papers relying on the following defences *in limine*:

6.1 There was an impermissible delay in instituting the application.

6.2 There are material and foreseeable disputes of fact.

6.3 Applicants should have used the mandatory statutory internal remedy available to them.

Pertaining to the merits, respondents contend that the metering policy adopted was as a result of second respondent's electricity by-laws to the effect that only one metering point is allowed per erf where the consumption exceeds 100 amps. The measures of respondents are reasonable and fair to developers and consumers in complexes with reference to a plethora of reasons provided.

[7] The respondents' answering affidavit and the points raised *in limine* apparently gave applicants' counsel reason to believe that the Notice of Motion, which had been issued as long ago as 7 December 2011, ought to be amended and consequently a Notice of Intention to Amend was filed on 26 October 2012, a month before the initial hearing of the application on 26 November 2012. I quote the following from the applicants' notice:

> "Deur na **smeekbede 2** (p.2) die volgende nuwe smeekbedes in te voeg:
>
> '3. Dat verklaar word dat die vasstelling van elektrisiteitstariewe vir elektrisiteitsverbruik deur inwoners van meenthuise woonstelle en aftreeoorde wat verskil van die elektrisiteitstariewe wat van toepassing is op elektrisiteitsverbruik deur inwoners van individuele woonhuise wat direk deur die eerste en/of tweede respondente van krag voorsien word, onreëlmatig, ontoelaatbaar en onwettig is.
>
> 4. Dat die eerste en/of tweede respondente verbied word om elektrisiteitstariewe vas te stel en van toepassing te maak op elektrisiteitsverbruikers wat woonagtig is in meenthuise, woonstelle en aftreeoorde wat verskil van die elektrisiteitstariewe wat vasgestel en van toepassing gemaak word op elektrisiteitsverbruikers wat inwoners is van individuele woonhuise waaraan die eerste en/of tweede respondente direk krag verskaf.
>
> 5. Dat die eerste en/of tweede respondente gelas word om dieselfde elektrisiteitstariewe vas te stel en van toepassing te maak op elektrisiteitsverbruikers wat inwoners is van meenthuise, woonstelle en aftreeoorde as wat vasgestel en van toepassing gemaak word op

kragverbruikers wat inwoners is van individuele woonhuise waaraan die eerste en/of tweede respondente direk krag verskaf.

6. Dat die tweede respondent gelas word om artikel 57(2) van sy elektrisiteits bywet te wysig tot die effek dat regspersone en beheerliggame van meenthuise, woonstelle en aftreeoorde in staat gestel word om die totale bedrag wat hulle ten opsigte van elektrisiteitsverbruik aan eerste en/of tweede respondente betaal, vanaf die elektrisiteitsverbruikers in sodanige meenthuise, woonstelle en aftreeoorde te verhaal.

2.

Deur paragrawe 3, 4, 5 en 6 te hernommer."

Respondents objected in terms of Rule 28(3). The grounds relied upon for objecting to the notice of amendment are the following:

"1. The notice of amendment was served late on the afternoon on 26 October 2012. The applicant's heads of argument are due on 2 November 2012. The period for objection by the respondents in terms of the High Court Rules expires on 9 November 2012. The respondents will not be able to file their heads of argument before the pleadings relevant to the applicants' application to amend its notice of motion has been finalized. This cannot be done without an application in terms of the provisions of Rule 28(4) by the applicants.

2. The applicants issued their application on 7 December 2011. The applicants have delayed unreasonably in

seeking amendment of the relief set out in the notice of motion.

3. The respondents are, in all the circumstances set out herein, materially prejudiced by the failure by the applicants to seek timeously to amend their notice of motion.

4. The Court itself is manifestly prejudiced by the late attempt to amend, given the fact that the lengthy heads of argument by the applicants do not deal substantively with their new case, while the respondents are not called upon to answer it until such time as the amendment is argued and should it be allowed.

5. The amendment sought is in any event in terms such that it cannot be entertained by a court: it simultaneously seeks a permanent interdict in futuro, irrespective of prevailing circumstances, and this in relation to all persons (including those not in any manner represented in these proceedings). Furthermore, it does so in terms which are in conflict with the provisions of the Electricity Regulation Act 4 of 1996.

6. In terms of the provisions of the regulations promulgated by the fourth respondent in government gazette no. 992150 of 18 July 2008 Notice R733, the second respondent is compelled to introduce Time Of Use tariffs, no later than 1 January 2012 to all consumers with a monthly consumption not less than 1000 KWh per month or 6 Amps drawn from the supplier per month.

7. The second respondent is in the process of complying with these provisions. As a result of financial constraints, the second respondent has not been able to comply fully and has obtained permission to implement the provisions of the regulations, in so far as it has not been able to do so financially and otherwise to date, after 1 January 2012.

8. The 2012/2013 tariff structure approved by NERSA authorizes the second respondent to apply this tariff to connections larger than 80 Amps until such time as all connections are replaced with Time of Use meters.

9. The first respondent's aim is to replace between 1000 – 3000 meters with Time of Use meters per year, at an estimated capital expenditure of ten to twenty million rands per year. The replacements thus far include all connections bigger than 150 amps which applies to all single connection points at townhouses and other similar developments.

10. Subject to the following, townhouses are entitled to install Time of Use meters in their individual units:

    10.1 That the distribution systems comply with the second respondent's standards.

    10.2 That the ownership of the distribution systems has been transferred to the second respondent.

    10.3 That the second respondent shall have access to the Time of Use meters installed in units, to enable it to maintain, replace and read such meters.

11. Presently there are approximately 250 000 complexes under the second respondent's jurisdiction.

12. The second respondent's bylaw 57(2) with regard to the compulsory installation of single points of supply was promulgated before the promulgation of the regulations by the fourth respondent introducing the Time of Use principle.

13. The consequence of this is that the distribution systems and meters in individual units in complexes have to be replaced to enable the first respondent to meter the monthly consumption of electricity in each unit separately.

14. The costs of this to the second respondent and body corporates will be prohibitive and wasted should an alternative solution to the problem that was created

nationwide be found. This problem is vexing in nature and the subject of national investigation by the third respondent.

15. Until such time as the third respondent has complicated (sic) its investigation, which has already commenced, and provided guidelines to resolve the problem, the amendment of the second respondent's bylaws will be premature and could lead to unnecessary and wasted costs to implement it.

16. The relief sought by the applicants will result in a situation where the second respondent will not be entitled to apply tariffs to complexes unless they differ from tariffs applied to single residential households. This would result in the second respondent being unable to adjust its tariffs in such a manner that complexes deserving of lower tariffs than those applicable to residential households, being set. The tariffs as proposed by the applicants will be discriminatory per definition.

17. The amendments sought by the applicants have not been fully canvassed on the papers before the Court and the Court will not be able to adjudicate these unless the parties have been afforded the opportunity to do so.

18. For the abovementioned reasons, the first and second respondents object to the proposed amendments by the applicants.

19. There have been important legislative and consultative developments between first, second and third respondents as well as other suppliers of electricity with regard to the solution of the problems arising from the regulations introduced by the fourth respondent which is essential that the Court should take note of and which impacts on the amended relief now sought.

20. The applicants have caused the respondents to incur additional costs by their notice and have not offered to

pay the wasted costs that the applicants occasioned by it. The respondents are entitled to these costs and shall seek an order compelling the applicants to pay such costs before it may proceed with the application for amendment.

21. The respondents shall move for the review application to be postponed to a date suitable for all parties and their counsel, due to the applicants' late application to amend."

As a result of this objection, applicants decided not to proceed with the proposed amendment. Applicants' attitude in withdrawing its intended amendment cannot be described as anything but an abandonment of the relief they intended to seek in addition to that set out in the Notice of Motion. This court was informed on 14 November 2012 by letter from applicants' attorneys as follows:

"Ons verwys na bovermelde aangeleentheid en die Kennisgewing van Voorgenome Wysiging wat op 29 Oktober 2012 namens die Applikant geliasseer is.
Ons sal dit waardeer indien u die Agbare Voorsittende Regters in kennis stel dat die Applikant nie met die voorgenome wysiging voortgaan nie."

Mr Danzfuss confirmed applicants' stance in court when the matter was initially heard on 26 November 2012. I have quoted the intended amendments and objections thereto fully in view of the developments during argument.

[8] During oral argument on 4 November 2013 Mr Danzfuss, appearing with Mr Rautenbach, submitted that we can and should come to the aid of applicants by granting orders

similar to those in the notice of intention to amend under alternative relief. Mr Gauntlett, who appeared with Mr Pelser for respondents, objected to such course being taken by the court.

[9] Mr Danzfuss asked for the following relief:

(1) Declaring the metering policy of the 1st respondent void and setting it aside;

(2) Declaring that the electricity tariffs charged for complexes may not be higher than the tariffs for residential houses.

[10] This relief, Mr Danzfuss said, is the same as the relief sought in the Notice of Amendment.

IV **GRANTING RELIEF UNDER FURTHER OR ALTERNATIVE RELIEF**

[11] In answer to the statement that annexure B, which the applicants in the Notice of Motion seek to have reviewed and set aside, Mr Danzfuss submitted annexure B constitutes a void document, according to which the respondents were working. He said it did not matter what you call it, it contained the principles according to which the respondents were working. He submitted we should give a declaratory order (as contemplated in the Notice of Amendment).

[12] In **SA Property Owners Association v Johannesburg Metropolitan Municipality and others** 2013 (1) SA 420

(SCA) the applicants claimed review, alternatively a declarator (para [66]). In this case the applicants in the Notice of Motion only claimed a review, no declarator. The prayer for a declarator was introduced in the Notice of Amendment, which Notice of Amendment was abandoned.

[13] A declaratory order was made in **Herbert Porter Co Ltd and another v Johannesburg Stock Exchange** 1974 (4) SA 781 (W) under the prayer for alternative relief (796C-F). The court held the order to be a variation in the form rather than the substance of the relief sought (796E). A similar approach was followed in **Luzon Investors (Pty) Ltd v Strand Municipality and another** 1990 (1) SA 215 (CC) at 229G – H. Here the court found that all relevant facts were before it and were dealt with in argument and therefore it was appropriate that a declaration be made in terms of the prayer for alternative relief.

[14] In **Eye of Africa Developers (Pty) Ltd v Shear** [2012] 2 All SA 32 (SCA) the High Court granted an order reviewing and setting aside a decision of the Gauteng Department of Agriculture, Conservation and Environment allowing Eye of Africa to use certain water resources to irrigate a golf course. The Supreme Court of Appeal held that review was not an appropriate procedure as the letter of the Department granting the consent did not constitute administrative action as contemplated by PAJA, and that the letter was without legal effect on the rights of Mrs Shear, the respondent in the appeal. Consequently the court dismissed the appeal with

costs, but the order of the court *a quo* was set aside and *inter alia* replaced by an order in terms whereof the 4th respondent's purported amendment dated 25 July 2008 (through the letter of the official) was declared to be of no force and effect. Mr Danzfuss argued that, just as review procedure was not appropriate in that case, but relief nevertheless granted, confirmed on appeal, this court can grant the relief now sought by the applicants. Three aspects that would have to be dealt with in order to consider Mr Danzfuss' arguments are first, the consequential relief that might or might not have to be given, second, that a declaratory order would have a negative impact on at least four budgets already approved, i.e. for the 2010/2011, 2011/2012, 2012/2013 and 2013/2014 financial years and finally it would have serious financial consequences for respondents and the public at large and consumers in complexes in particular insofar as the whole infrastructure pertaining to electricity reticulation would have to be revamped.

[15] In this case the applicants wanted to amend their prayers to include the relief now sought. The respondents objected, and the applicants withdrew the intended amendment. Now the applicants ask us to grant relief set out in the Notice of Amendment to which the respondents objected and indicated their prejudice.

V **THE FACTUAL MATRIX**

[16] In terms of a service delivery agreement entered into between respondents, 1st respondent is responsible for the reticulation of electricity to consumers within the Mangaung municipal area.

[17] 2nd Respondent promulgated by-laws relating to electricity supply in Local Government Notice 110 of 28 October 2005. The parties are at loggerheads as to whether the by-laws provide for the installation of one electricity meter and one single point of electricity supply per erf (also in the case of complexes), or a single point of supply per erf, but with separate electricity meters for each of the owners/tenants in the complexes. This aspect will be dealt with further later herein.

[18] On 17 October 2007 several senior officials of 1st respondent recommended the acceptance of a policy under the heading "Policy: The number of electricity meters per erf". *Ex facie* the document annexed as annexure "B" to the founding affidavit this "policy" was neither approved by the Chief Executive Officer, nor the Chairman of the Board of 1st respondent. In prayer 1 of the Notice of Motion applicants seek an order in terms whereof 1st and/or 2nd respondents' decision to adopt this "policy" be reviewed and set aside. The third paragraph under the heading "Introduction" in annexure "B" reads as follows:

> "On the 22nd June 2005 this policy was revised to provide only one meter per erf due to the fact that our core business is

distribution and not metering systems. The same amount of electricity would be sold through one meter but the maintenance of meters and boxes as well as the number of accounts would increase if the number of meters are not restricted. This however created much conflict between the owners of a sectional title consisting out of only two units."

In paragraph 7 of the document the following was recommended as a policy to be adopted:

"7.1 For sectional title erven with up to three units each unit will be supplied with a separate connection similar to a single registered erf;

7.2 For all flats, townhouse developments or sectional title erven with more than three units a single meter at the requested supply rating will be provided and all sub-metering and account/token management will be managed by the body corporate."

[19] What is clear from the documentation before us is that neither the 1st, nor the 2nd respondent adopted the recommendations of 17 October 2007 as a policy and no decision was taken in this regard by anyone of these two entities. Fact of the matter is that, as indicated in the introduction of annexure "B" and the third paragraph thereof in particular, one electricity meter per erf had been installed for complexes long before October 2007. Bearing in mind the number of complexes affected, 1st respondent and before it, 2nd respondent, probably adopted such policy even before the passing of the electricity by-laws of 2005.

[20] *Ex facie* the documents before us there was never any dispute between respondents and developers, complex owners/tenants or body corporates, save as stated in annexure “B”, concerning the approach adopted of installing one electricity meter per erf in respect of complexes. There is no indication on the papers that complaints were made by customers or received by respondents prior to 1 July 2010.

[21] From July 2010 and since the approval of 2nd respondent’s 2010/2011 budget, a disparity in tariffs became evident with particular reference to consumers in single residential dwellings on the one hand, and consumers in complexes on the other. The Home Power Bulk tariff was done away with from 1 July 2010 and in its place Inclining Block Tariffs (IBT) and Time of Use tariffs (TOU) were implemented. Applicants do not apply for the review and setting aside of the tariffs implemented as from 1 July 2010. They complain about the decision to approve the electricity tariffs for the 2011/2012 financial year, i.e. the financial year starting on 1 July 2011 and terminating on 30 June 2012. The tariffs implemented during this year differed from the tariffs implemented in the 2010/2011 financial year.

[22] Both IBT and TOU may be to the benefit of electricity users. IBT provides for four blocks. If a customer uses less than 50 kWh of electricity per month he/she is charged at the lowest level set out in block 1, but a customer using 600 kWh and more is charged at the highest level as set out in block 4. In between these blocks incremental increases in the tariff are

provided for in blocks 2 and 3 depending on the amount of electricity used. A customer who uses electricity sparingly, can save on his/her electricity bill. TOU has been introduced by the 4th respondent in regulations promulgated on 18 July 2008. In terms hereof an end user or customer with a monthly electricity consumption of 1000 kWh and above must have a so-called smart card system and be charged on TOU tariffs not later than 1 January 2012. Respondents had no choice but to introduce TOU. Although they could have delayed introduction of TOU for another year, they decided to implement it from 1 July 2010. TOU provides for peak, standard and off-peak periods. Off-peak periods are between the hours of 22h00 to 06h00 and during weekends and public holidays.

[23] One does not have to be an electrical engineer or accountant such as the deponents who filed affidavits herein on behalf of the parties to understand the benefits to be reaped by consumers if they make use of the savings measures introduced by these two types of tariffs, as and when they are applicable. A non-expert will also realise that several customers in a complex where electricity is supplied in bulk through one service connection and one electricity meter can never receive the intended benefits of the IBT tariffs as the consumption of complex will invariably be in excess of 600 kWh. As the electricity usage of a consumer in a complex is not individually measured with a TOU meter, it is also common sense that such person cannot save on electricity

unless everyone or at least the majority in the complex do likewise.

[24] Amendments of the applicable tariffs were also made in respect of the 2012/2013 financial year and it is common cause that during this financial year (2012/2013) consumers in complexes were much better off than during the previous two financial years insofar as complexes were not charged tariffs applicable to commercial properties as was the case during the previous two financial years. On 19 December 2011 the Electricity Regulation Second Amendment Bill was published in the Government Gazette which might afford the respondents a more flexible approach pertaining to the imposition of tariffs. Also at NERSA level, consultations and negotiations with relevant role players are apparently on-going pertaining to several aspects of electricity reticulation and the effect on consumers as is apparent from the NERSA documents attached to applicants' replying affidavit dated August 2011 and 14 October 2011 respectively.

[25] On 26 November 2012 the court made the following order by agreement:

> "1. Die aansoek word *sine die* uitgestel hangende die partye se pogings om deur bemiddeling van Derde Respondent 'n oplossing vir die geskilpunte te vind.
>
> 2. …..
>
> 3. …..
>
> 4. Derde Respondent word gelas om voor of op 28 Februarie 2013, op 'n wyse soos deur hul voorgeskryf en

met oorweging van die partye se voorleggings soos hierbo uiteengesit, 'n oplossing te vind ten aansien van die geskille tussen die partye en die implementering daarvan ten einde die aangeleentheid voor laasgenoemde datum af te handel.

5. …..

6. Die partye sal geregtig wees om hulle hofstukke aan te vul ten aansien van die mediasie proses minstens 4 weke voor die verhoordatum en sal die ander party daarop kan antwoord minstens 2 weke voor die verhoordatum.

7. Geen van die partye se regte word geraak ten aansien van die geskilpunte tans voor die hof nie.

8. Die koste van vandag sal oorstaan vir latere beregting."

[26] NERSA approached the court to obtain an extension of time to comply with the above order which was granted. A process was conducted at NERSA and the parties hereto took part therein by providing NERSA with their submissions. However NERSA did not make any decision notwithstanding several requests made on behalf of applicants. Consequently the matter was enrolled for hearing on 4 November 2013 and the parties filed further affidavits in accordance with the above order.

VI **<u>THE METERING POLICY</u>**

[27] The main thrust of Mr Danzfuss' argument concerns the metering policy of the respondents. The objection is against the principle that electricity is supplied to body corporates of complexes at the bulk tariff. If one has regard to the consumer in Parnon Court, referred to as an example by

applicants, she was charged R0,79 per kWh in April 2012 (which is not during the financial year applicants complain about), whereas the consumer in the Stellenryk Complex paid R1, 06 per kWh in the same month. Separate meters are installed for the consumers in Parnon Court and they are billed directly by 1st respondent as is the case with consumers in private residential dwellings. They are also afforded the advantages of IBT. Contrary thereto Stellenryk's electricity is supplied at bulk through one service connection and one electricity meter. The body corporate (not the consumer directly) is billed by 1st respondent and the individual consumer does not have the benefit of IBT. According to Mr Danzfuss the application of the metering policy together with TOU tariffs leads to an unfair result. Consumers in these complexes are not permitted by the system to save electricity. Electricity is supplied to the body corporate at the high bulk tariff. Mr Danzfuss submitted that section 21(2) of the Electricity Regulation Act, 4 of 2006 prohibits discrimination. He argued the metering policy makes it impossible for the users in complexes such as Stellenryk to be end-users such as is the case with private residential dwellings and those complexes where separate electricity meters (not sub-meters) have been installed by respondents. That he submitted is discrimination.

VII **APPLICABLE LEGISLATION AND AUTHORITIES**

[28] Although review proceedings are to be brought in accordance with the provisions of Rule 53 - parties

sometimes adopt the procedure prescribed in Rule 6 - the applicable test pertaining to the adjudication of motion proceedings remains the same. Refer to the following *dictum* from the recent judgment by Brand JA in **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others** 2013 (4) SA 539 (SCA) at para [3] p 542A – C:

> "…the observation by Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) … para 26 to the effect that motion proceedings such as these are aimed at 'the resolution of legal issues based on common cause facts'. They are simply not geared toward the decision of factual disputes. In consequence, so Harms DP reminded us, it is well established that, where in motion proceedings disputes of fact arise on the papers, the matter can only be decided on the respondent's version of the disputed facts, unless that version is so far-fetched or clearly untenable that it can justifiably be rejected merely on the papers. What is more, it makes no difference to this approach that, as in this case, motion proceedings have been dictated by the legislature. Neither does it make any difference where the legal or evidential onus lies."

[29] Applicants seek the review of certain administrative actions and they rely on a plethora of reasons why these administrative actions should be reviewed and set aside with specific reference to s 6 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Section 1 of the Act defines administrative action as

> "… any decision taken, or any failure to take a decision, by

(a) an organ of state, when

(i) ...

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include

(aa) …

(bb) …

(cc) the executive powers or functions of a municipal council...”

[30] Section 7(1) of PAJA stipulates a time bar of 180 days for the institution of proceedings for judicial review. Nugent JA explained in **Gqwetha v Transkei Development Corporation Ltd and Others** 2006 (2) SA 603 (SCA) at paras [22] and [23]:

“[22] It is important for the efficient functioning of public bodies… that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay…

[23] ...It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight.”

[31] As Brand JA put it in **Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency**

Ltd and Others, Case No 90/2013 [2013] ZASCA 148 (9 October 2013) ("OUTA") at para [26]:

> "…s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay (see eg *Associated Institutions Pension Fund* para 46). That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54)."

[32] A concerned person's awareness of administrative action that he/she seeks to set aside for one or other of the reasons set out in PAJA, is not sufficient. Again as Brand JA stated in the **OUTA** case at para [27]:

> "In its terms s 7(1) envisages asking when 'the person concerned' was informed, or became aware, <u>or might</u>

<u>reasonably be expected to have become aware, of the administrative action</u>. This admits of an answer where the act affects and is challenged by an individual, but does not readily admit of an answer where it affects the public at large…. It seems to me that in those circumstances [where the public at large is affected] a court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act." (emphasis added.)

[33] In para [36] of the **<u>OUTA</u>** case the SCA dealt with the legality argument as follows:

> "While it is true that the principle of legality is constitutionally entrenched, the constitutional enjoinder to fair administrative action, as it has been expressed through PAJA, expressly recognises that even unlawful administrative action may be rendered unassailable by delay."

[34] With reference to an argument by Mr Danzfuss that the metering policy was null and void *ab initio* and that the time limits set out in PAJA was not applicable in order to have it set aside, I quote the following from para [38] of the **<u>OUTA</u>** judgment:

> "[38] However, the passage in *Oudekraal* upon which the appellants rely is authority for the contrary. That passage makes it clear that, unless an invalid administrative act is set aside by a competent court, it is regarded as valid for the purpose of consequent acts. That is supported by the following statement in the unanimous judgment of the Constitutional Court in *Camps Bay Ratepayers' &*

Residents' Association and another v Harrison and another 2011 (4) SA 42 (CC) para 62:

'As was explained in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [para 31] administrative decisions are often built on the supposition that previous decisions were validly taken and, unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence.'"

[35] The delay rule, according to Brand JA in para [41] of **OUTA**

"gives expression to the fact that there are circumstances in which it is contrary to the public interest to attempt to undo history".

[36] The question to be considered in this case is as Brand JA put it, "whether the clock could be turned back", or as Mr Gauntlett has put it, "whether the omelette could be unscrambled". I shall consider this in the evaluation of the evidence and arguments. Fact remains that unless and until impugned decisions are reviewed and set aside they are regarded as valid in law.

[37] Although respondents throughout their affidavits tried to convince us that owners/tenants in complexes were not worse off than consumers staying in single residential dwellings or in those complexes such as Parnon Court where individual meters are installed, it is apparent that there is a disparity which was directly caused by the introduction of IBT

and TOU as from 1 July 2010, bearing in mind the historical situation that one electrical meter per erf had been installed also in the case of certain complexes such as Stellenryk. Mr Gauntlett relied in this regard on s 75 of the Local Government: Municipal Systems Act, 32 of 2000 which reads as follows:

> "(1) A municipal council must adopt by-laws to give effect to the implementation and enforcement of its tariff policy.
>
> (2) By-laws in terms of subsection (1) may differentiate between different categories of users, debtors, service providers, services, service standards and geographical areas as long as such differentiation does not amount to unfair discrimination."

This section cannot be read in isolation and must be read with s 74 which *inter alia* provides for the principle that users of municipal services should be treated equitably in application of tariffs. (See section 74(2)(a).) As indicated above Mr Danzfuss, on the other hand, relied on s 21(2) of the Electricity Regulation Act, 4 of 2006 which reads as follows:

> "A licensee may not discriminate between customers or classes of customers regarding access, tariffs, prices and conditions of service, except for objectively justifiable and identifiable differences approved by the regulator."

The regulator referred to is NERSA, the 3rd respondent in this application. It is not in dispute that NERSA has approved the tariffs applied by 1st respondent from time to time.

[38] It is important to heed the warning by Schreiner JA more than five decades ago in **Trans-African Insurance Co Ltd v Maluleka** 1956 (2) SA 273 (AD) at 278F – G where the learned judge stated that:

> "…technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

Although in a different context, the following *dictum* of Froneman J in **KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others** 2013 (4) SA 262 (CC) at para 80, relying on comments by Prof Cora Hoexter is apposite:

> "Formalism has many meanings, but Professor Cora Hoexter helpfully describes one of its meanings as 'a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense'.

Hoexter is further quoted as follows:

> 'In cases displaying formalistic legal reasoning the merits often seem strangely divorced from the outcome of the case, so that it is difficult and perhaps even embarrassing to explain the case to a layperson.'"

I shall consider this when applicants' claim that we grant relief under the heading of alternative relief is discussed.

VIII **MOOTNESS**

[39] Mr Gauntlett submitted that the dispute between the parties had become moot. Courts will not decide abstract, academic or hypothetical questions. Mr Danzfuss submitted that it is in the interests of justice for the court to decide this case, and said this judgment will give guidance to the respondents with reference to **SA Property Owners Association v Johannesburg Metropolitan Municipality** *supra* at para [63] (the minority judgment of Southwood AJA).

IX **EVALUATION OF THE EVIDENCE AND ARGUMENTS OF COUNSEL**

[40] Mr Danzfuss conceded that neither 1st nor 2nd respondent resolved on 17 October 2007 to implement the metering policy attached as annexure "B" to the founding affidavit. This should be the end of prayer 1 of the Notice of Motion, save insofar as further relief is also sought that the policy as such be reviewed, declared null and void and set aside. Insofar as the applicants tried to bring their case within the parameters of PAJA, the application of such policy can never be regarded as an administrative action which might be set aside on review. Therefore Mr Danzfuss opted for an argument that this court should come to the assistance of the applicants by granting a declaratory order in the form set out

above under the prayer for alternative relief in the notice of motion.

[41] To accede to Mr Danzfuss' request will probably cause severe prejudice to respondents. In this regard the objections raised in their notice of objection in terms of Rule 28(3) which I quoted fully above should be considered. It is not necessary to discuss these in any detail. Firstly, the relief is totally different from the case that respondents had to meet and secondly, applicants intended to ask for relief which would have had the same consequences applicants tried to achieve during the oral argument before us, but their counsel unequivocally abandoned reliance thereon by withdrawing the application for amendment. Furthermore, respondents have been supplying one service connection and one electricity meter per complex for a number of years and long before 2007 and, as they – respondents - say in accordance with the by-laws adopted in 2005. It appears as if this manner of supplying electricity has been carrying on for a considerable period prior to the passing of the by-laws in 2005, if one considers the vast number of townhouse complexes and retirement villages on the list provided, many of which must have been developed before 2007 or even 2005. The costs to be incurred and time needed to switch to a system where all consumers in complexes individually be provided with separate meters (not sub-meters as is the present position) and the manpower and costs if these meters are to be read by 1st respondent's personnel have not been fully canvassed. No doubt this will be a major

operation with serious financial implications as indicated by respondents in their answering affidavits..

[42] Bearing this in mind there can be no doubt that developers of complexes were aware for several years that respondents granted one supply point and one electricity meter per complex and it is also clear that the trustees of body corporates as well as the owners and tenants in these complexes were fully aware of the fact that the consumers did not receive their accounts from the 1st respondent (and earlier from 2nd respondent), but from the body corporates on the basis as explained in the applicants' papers.

[43] The different tariffs applied from 1 July 2010 with reference to the discontinuance of household bulk tariff and the introduction of IBT and TOU immediately had consumers in complexes up in arms, although they might not have known during that first month what exactly caused the severe increases as compared to the accounts of consumers in private residential dwellings. They could have established through investigation that their electricity was charged at tariffs applicable to commercial properties and thus different from consumers in private residential dwellings and those complexes where individual meters are installed. It would have become clear to them at an early stage and already in 2010 that instead of getting the advantages of IBT or TOU, the bulk supply of electricity to complexes with one electricity meter caused them to be negatively affected. Although conceding that there are factual disputes, Mr Danzfuss

submitted that these related to issues such as calculation to show that there were differences pertaining to the tariffs charged and that no material factual disputes exist. That might be so, and we accept that disparity pertaining to tariffs existed, but this does not mean that no other factual disputes exist. Applicants allege that there was no public participation pertaining to the acceptance of the 2011/2012 tariffs, but this has been denied by respondents who produced proof that a proper process had been undertaken and in any event that the tariffs for the particular year had been approved by NERSA. There is no application that NERSA's decisions in this regard be reviewed and set aside. In so far as Mr Danzfuss relies on section 21(2) of the Electricity Regulation Act, this does not assist him as NERSA approved the tariffs for the particular year and this court is not in a position to intervene and set aside those tariffs.

X THE STRIKING OUT APPLICATION

[44] Nothing really turns on the application for striking out certain paragraphs in the affidavit of Mr Kritzinger on behalf of respondents. Mr Danzfuss argued that respondents relied on an unsigned document apparently prepared by Mr Barnard, the applicants' expert, the status of which had not been proven and that respondents should not be allowed to testify pertaining to their version of the allegations contained in this document. It is applicants' submission that the allegations contained in this supplementary affidavit should have been contained in the answering affidavit and

respondents should not be given the opportunity to have the proverbial second bite at the cherry. Mr Barnard did not present an affidavit which formed part of the founding papers as his version was relied upon in the replying affidavit of applicants for the first time. The parties were in any event given leave in the court order of 26 November 2012 to file supplementary affidavits. Respondents were entitled to place further evidence before the court. It is not necessary to consider the procedural defect pertaining to the notice to strike out relied upon by Mr Gauntlett, namely that, these being motion proceedings, the application to strike out should have been brought under rule 6(15). The application for striking out should be dismissed.

XI **CONCLUSION ON THE REVIEW APPLICATION**

[45] The review application was issued on 7 December 2011. This is nearly 18 months after July 2010 when the applicants were confronted with the differentiation in tariffs and the enormous increases they complain about. Applicants rely on the fact that the respondents were obstructive in that they did not present them with the documents they needed to prepare an application for review. That might be so and the history indicates that applicants had to approach the court for the required information. However it is unnecessary to deal with culpability at this stage as it is apparent from the history of this matter that it is impossible to unscramble the egg now. A delay has taken place and history cannot be undone. Two further tariff changes have taken place and two further

budgets have been approved since the 2011/2012 financial year, to wit for the 2012/2013 and 2013/2014 financial years. The tariffs arrived at have been approved by NERSA as well.

[46] Mr Danzfuss submitted that there might be numerous people who have not paid their electricity bills for that financial year and for whom it might be relevant to obtain relief. I find it inappropriate that anybody would not have paid his or her electricity bills which should have been done more than 18 months ago and even before then. Insofar as it might be argued that people might be in a position to claim back monies paid in excess once the 2011/2012 tariffs have been declared invalid, this is again a matter where it would be impossible to unscramble the egg. It is water under the bridge and history cannot be turned around. Respondents' budgets were approved and expenditure incurred as a result thereof. It would cause havoc if relief is granted as requested. The **SA Property Owners' Association** judgment of the SCA is applicable *in casu* and lends support to my view in this regard. Refer to para [75] of the majority judgment by Navsa JA and the relief granted by the SCA in para [80]. The appellants in that case also had in mind the setting aside of municipal tariffs, but the court declined to assist them.

[47] It is apparent from the documentation that NERSA is in the process of consulting and negotiating pertaining to aspects of electricity reticulation with role-players. Furthermore a new Bill has been introduced and which will ensure a more

flexible regime that should be to the advantages of all consumers of electricity. It is in any event inappropriate for this court to intervene at this stage with the processes to be followed by NERSA and the legislature in view of the approach of the Constitutional Court in **JT Publishing (Pty) Ltd & another v Minister of Safety and Security & others**, Case CCT 49/95 (21 November 1996) (unreported).

[48] Although Mr Gauntlett submitted that applicants should have obtained a court order directing NERSA to comply with the court's order dated 26 November 2012 and because they are in default, they effectively did not comply with the requirement that internal remedies should have been exhausted prior to coming to court on review, I am of the view that it is not necessary to deal with the application on this basis. It is apparent that NERSA proved not to be helpful which is a pity bearing in mind the important role that it plays in electricity matters in this country. It was surely in a much better position than this court to deal with aspects such as tariffs and the reasons for differentiation in tariffs *in casu*, but it failed to be of any assistance.

[49] The Electricity Regulation Second Amendment Bill provides *inter alia* that the Minister may by Notice in the Gazette make Regulations regarding *inter alia* principles and procedures for the setting and approval of tariffs, maximum tariffs and guideline tariffs, including principles of costs recovery by licensees. See clause 35(4)(rA). This Bill has the interest of the wider community at heart and bearing in mind **JT**

Publishing, *supra*, this court should not make orders which may interfere with the legislative process. In this judgment the Constitutional Court refused to grant a declaratory order pertaining to the unconstitutionality of certain sections of the old Publications Act and stated that "(I)n all those circumstances there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become." This judgment is relevant *in casu*.

[50] Counsel for the parties interpret the by-laws of 2nd respondent differently and specifically clause 37(7) thereof and considering clause 21(4) and the various definitions. It should be remembered that it is respondents' stance that the supply of electricity has always been done in accordance with the 2005 by-laws in terms whereof one service connection per erf was provided. Mr Danzfuss differed from this and submitted that these by-laws did not provide for the installation of one meter per erf only. Mr Gauntlett submitted that clause 37(7) provided for one service connection in order to provide electricity in bulk form to complexes. This is an interesting aspect that need not be determined by us, save to say that it is apparent that respondents have acted, at least ever since these by-laws were passed, on the basis that one service connection and one electricity meter per erf be installed – also in respect of complexes - and there was no objection thereto at any stage prior to the institution of these proceedings.

[51] I am satisfied that bearing in mind the history of the matter and the fact that meters were installed on the basis as is common cause, respondents were entitled to differentiate between various classes of consumers in accordance with the provisions of s 75 of the Systems Act based on the ground raised by respondents in their papers and which I have to accept as factually correct. The 2008 regulations made it compulsory to change to a TOU tariff system and this had a direct, albeit negative affect, on consumers in certain complexes. No unfair discrimination has taken place and differentiation was caused as a result of the factors set out by respondents and which I cannot find to be far-fetched, untenable or unfounded. Under all these circumstances I cannot accede to the request of Mr Danzfuss to grant the declarator he seeks under further or alternative relief. The respondents never met that case because the proposed amendment was abandoned.

XII **COSTS**

[52] It is apparent from the respondents' notice of objection to the applicants' proposed amendment that the 1st respondent is in the process of amending its policy. The papers show that complex inhabitants are already reaping the benefits of adaptations to the policy. These changes to the metering policy have been brought to the fore by applicants' actions and this application. The respondents obstinately maintain that there is no differentiation relating to the charging of different households. The 1st and 2nd respondents could

have done more to ensure progress at the Nersa meetings. In the circumstances a costs order against the applicants would not be appropriate. By their actions the applicants brought it to the attention of the respondents that the tariffs were unfair (and in the meantime steps have been taken to make the tariffs or metering policy fairer).

The applicants tried to vindicate their constitutional right to fair treatment. Their conduct was not frivolous, vexatious or manifestly inappropriate (see the **OUTA** case par [43].) In accordance with the Biowatch principle (**Biowatch Trust v Registrar, Genetic Resources and others** 2009 (6) SA 232 (CC) paras [21] – [25]) the applicants should not be ordered to pay the costs of this litigation, also not the costs of 26 November 2012. The costs involved in the striking out application were so minimal and took up a few minutes of the court time that it would be inappropriate to make a costs order in respect thereof.

XIII **ORDER**

[53] The following order is made:

1. Applicants' application is dismissed, no order as to costs.

J.P. DAFFUE, J

I concur.

A. KRUGER, J

On behalf of applicants:	Adv F.W.A. Danzfuss SC With him: Adv S Rautenbach Instructed by: Rossouws BLOEMFONTEIN
On behalf of respondents:	Adv J. J. Gauntlett SC With him: Adv F.B. Pelser Instructed by: Phatshoane Henney BLOEMFONTEIN

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