REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26148/2013

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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DATE SIGNATURE

In the matter between:

YOUNG MING SHAN CC Applicant

And

AJAY CHAGAN NO First Respondent

FIKILE VUSI JELE AND 80 OTHERS Second Respondent

J U D G M E N T

COPPIN, J:

[1] This is an application to review and set aside the ruling of the Gauteng Housing Rental Tribunal ("*the Tribunal*") dated the 31st May 2013 in which, *inter alia,* the levying of an electrical service charge by the applicant on its

tenants, the second respondent, was declared an "*unfair practice*", as contemplated in the Gauteng Unfair Practices Regulations[1], and for an order that the second respondent (which comprises of Mr Fikile Vuzi Jele and 80 Others and who shall henceforth also be referred to as "the tenants") be ordered to pay the costs of the application jointly and severally. The applicant is essentially relying on certain of the grounds of review provided in section 6 of the Promotion of Administrative Justice Act ("*PAJA*")[2].

[2] The first respondent is alleged to be the Chairperson of the Tribunal and he is cited in that capacity. Neither he nor the Tribunal has opposed the application, but the tenants have and have asked that the application be dismissed with costs.

[3] The tenants are rental tenants of a building known as "Plettenberg", which is situated at 32 and 34 Bruce Street in Hillbrow, Johannesburg and that it is owned by the applicant (who, at times, shall also be referred to as "the landlord")

[4] Each apartment occupied by the respective tenants has its own electricity meter and the tenants are each liable to pay over to the applicant the amount charged for the electricity consumed by them. This is in accordance with the term of the standard lease agreement entered into between the applicant and the individual tenants, which provides that "*the tenant's liability for charges for electric current, gas and water … shall be in*

[1] Notice 4004 of 2001, 4 July 2001.
[2] Act No 3 of 2000.

accordance with separate sub-meters which the landlord shall be entitled to install at any time …".

[5] The lease also provides that the tenant shall be liable for and shall on demand pay to the landlord, or to the local authority, or body concerned, as the landlord may require, any charges (including basic charges and service charges in respect of sub-meters, if any) arising directly or indirectly out of its use of electric current, gas and water and all sanitary, sewer, refuse and rubbish removal fees (including basic charges) in respect of the premises or in respect of the building and which are attributable to the use of the tenant.

[6] It is not disputed that during about May 2009 the applicant started levying an electricity service charge in the amount of about R385,00 per month (including VAT) on each of the tenants of the building. This was an amount in addition to the costs of the electricity consumed by each of the tenants. The tenants were unhappy with this additional charge and queried it. It is also not disputed that the applicant's initial justification for the charge was that it was being charged a service charge for the entire building by the Johannesburg City Council, or "City Power", the utility service provider, which supplies electricity to the building. It is also common cause that this service charge by City Power was in an amount of about R337,50 per month for the entire building and that the applicant charged each tenant an amount of about R385,00,according to it, as an electricity service charge.

[7] It is further common cause that the tenants (i.e. 'the complainants') then brought an application in the Tribunal, established in terms of the Rental Housing Act[3] ("the Act"),seeking its ruling in the following terms:

> "*1. It is declared that the service charge levied against the complainants' electricity accounts ('the service charge') for their apartments at Plettenberg 32 and 34, Bruce Street, Hillbrow, Johannesburg ('the property') contravenes Regulations 30(1)(d), (e) and (f) of the Gauteng Unfair Practices Regulations 2001 (PGE 124 Notice 4004 of 2001), 4 July 2001;*
>
> *2. The respondent is interdicted and restrained from levying the service charge against the complainants' electricity accounts in future;*
>
> *3. The respondent is directed to provide to each of the complainants, on demand, a copy of its monthly account from City Power (Pty) Ltd in respect of the property;*
>
> *4. The respondent is directed to repay to the complainants all service charges levied against the complainants since May 2009;*
>
> *5. Further and/or alternative relief.*"

[8] In their application to the Tribunal the tenants, *inter alia*, mentioned that after they had queried the service charge with the applicant and it had issued a notice giving an explanation for the charge with which they were not satisfied, they lodged a complainant with the Tribunal, which scheduled a mediation in connection with the issue for the 29th February 2012; that the applicant and the tenants reached a settlement at the mediation in terms of which they agreed in respect of the service charge, *inter alia*, that at the meeting they would have with City Power, the service fee would be queried and clarified.

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[3] Act No. 50 of 1999.

[9] On the 15th March 2012 the applicant's representatives and those of the tenants met at the offices of City Power. There it was explained, in essence, that City Power levies one charge in respect of the entire building which is roughly equal to the amount the applicant was charging each tenant (i.e. about R337,50 per month).

[10] In the founding affidavit of their application before the Tribunal, the tenants complained about the fact that the applicant was not merely charging each tenant an equitable portion of the service fee that it was being charged by City Power for the entire building, but was charging each tenant the full amount, thus generating about R27 000,00, whereas it was only paying over about R337,50 to City Power. According to the tenants, at the meeting of the 15th of March 2012, held at the offices of City Power, a representative of that body accused the applicant of "*robbing*" the tenants and demanded that it should stop levying such charges and repay to the tenants those monies that had been paid by them in respect of such charges.

[11] In its answering affidavit the applicant (which was the respondent in the proceedings before the Tribunal) admitted being accused, at the meeting held at the offices of City Power, of robbing the tenants and being told to repay the money in respect of such charges, but went on to justify the amount that it was charging each tenant as a service charge (i.e. over and above the

consumption charge). It denied that it was robbing the tenants or otherwise acting unlawfully.

[12] The applicant, *inter alia,* averred in its answering papers before the Tribunal that it recovered approximately R27 000,00 from the tenants in respect of service charges, but denied that it was making a profit, or "*keeping the difference*" between the amount it was charged by City Power (namely the R337,50) and the R27 000,00. The applicant, *inter alia,* averred that it was permitted in terms of the Greater Johannesburg Metropolitan Council bylaws and the regulations to levy the said service charges in respect of each tenant; furthermore, that it uses "*the profit*" it makes in that regard "*to subsidise the work on water and other services which it supplies*"; that it re-invested the money into the electricity business or utilised it elsewhere, for example in the maintenance of the building where there was an under-recovery from the tenants.

[13] According to Mr Jason Tsai, the deponent to the applicant's answering affidavit in those proceedings, "*where re-sellers do make profits it can be viewed as a direct reward for their business effort and the risk taken*". Furthermore, he averred that the applicant "*is quite entitled to use profits of the service charges to cover the undercharging in other respects*"; that the applicant was charging tenants a lower consumption rate than what City Power was charging it; that it was operating in the ambit of the law and that it was not charging more than what City Power would have charged if it supplied each of the tenants directly with electricity.

[14] Mr Tsai then related how the applicant incurred extra costs because of late payers. He pointed out that it was unrealistic to expect the applicant to only charge each tenant a portion of the R337,50 that it was being charged by City Power. The applicant, in essence, in justification for its charges, averred and believed that it was a reseller of electricity and relied on the benefits such resellers received, as encapsulated in a concept paper of the National Energy Regulator of South Africa ("*NERSA*") on the resale of electricity in South Africa. The applicant on that basis requested the Tribunal to dismiss the application, averring that it was "*baseless*" and that a costs order against the complainants, which included some or all of the tenants, was warranted. The applicant also brought a counter-application, relying on its averments in the answering affidavit, to declare that it was "*entitled to levy a monthly service charge to each of the complainants' electricity accounts*". It also sought an order directing the complainants to pay all outstanding service charges levied by it within seven days of the order and that the complainants pay the costs of the counter-application jointly and severally.

[15] Subsequently the complainants in the Tribunal filed their replying papers in which they essentially denied the applicant's legal entitlement to levy the service charge, opposed the counter-application and persisted with the case they made out in their founding papers. The matter was eventually heard by the Tribunal and decided on the basis of the affidavits that had been filed as well as written and oral argument that has been presented before it by the parties.

[16] On the 31st of May 2013 the Tribunal handed down its written ruling with reasons (the applicant is referred to in this ruling as "*the respondent*"). The ruling was that:

> "*82. The service charge levied against the complainants' electricity accounts ('the service charge') for their apartments at Plettenberg 32 and 33, Bruce Street, Hillbrow, Johannesburg ('the property') contravenes Regulations 13(1)(d), (e) and (f) of the Gauteng Unfair Practice Regulations 2001 (PGE 124 Notice 4004 of 2001), 4 July 2001;*
>
> *83. The respondent is interdicted and restrained from levying the service charge against the complainants' electricity accounts in future;*
>
> *84. The respondent is directed to provide to each of the complainants, on demand, a copy of its monthly account from City Power (Pty) Ltd in respect of the property;*
>
> *85. The respondent is directed to repay to the complainants all service charges levied against the complainants since May 2009;*
>
> *86. Payment in terms of paragraph 85 above must be made within 120 days of date of this ruling and shall not include any amounts which had prescribed prior to the institution of these proceedings.*"

THE COMPLAINANTS' ARGUMENT BEFORE THE TRIBUNAL

[17] The arguments of the complainants (which included the tenants) in the Tribunal were briefly the following: the service charge was not provided for in the leases which they had entered into with the applicant; The amount in excess of R385,00, which the landlord was levied by City Power as a service charge for the entire building and the approximately R27 000,00, which the landlord charged the tenants, constituted a profit to which it was not entitled in

terms of Regulation 13 of the Unfair Practice Regulations[4], which, according to their argument, meant that a landlord may not recover more than the value of the electricity actually consumed by the tenants. Although it was conceded that the landlord was a re-seller of electricity in terms of the bylaws, it was submitted that the bylaws precluded it from making a profit. It could only make a profit as a trader, but was not a trader. In their argument the complainants went on to define the issue as not being about whether the service charge was reasonable, or about what the profit was being used for by the landlord, but whether there was a basis in law for the applicant to levy the service charge. According to the complainants' argument, there was no merit in the reasons raised by the landlord for levying the service charge, namely, the funding of maintenance, because maintenance had to be funded from the rental received and not from a separate service charge levy. It was also argued that "*the entire purport of Regulation 13 is to permit a tenant to cross-reference the charges levied by the landlord with that levied by the Utility*" and that taking all of the above into account, the service charge was unlawful.

[18] According to the argument of the complainants "*the most probable interpretation of Regulation 13(1)(d) is that the landlord may only pass on the actual costs levied by City Power to the consumer. A failure to do this would amount to an exploitative practice*". It was also argued that any attempt by the landlord to rely on clause 7 of the lease agreements, which it had concluded with the tenants, and which allowed for the levying of service charges, was "*unfounded*" when viewed in the light of the decision of the

[4] The Unfair Practices Regulations, 2001 made in terms of the Rental Housing Act, No. 50 of 1999 and published in the Provincial Gazette in General Notice No.4004 of 2001 on 4 July, 2001 and as amended by General Notice No. 1472 of 2002.

majority of the Constitutional Court in *Maphango v Aengus Lifestyle Properties*[5] , where it was, inter alia, clarified that the Tribunal had the power to set aside any provision in a lease agreement which it regarded as unfair.

THE APPLICANT'S SUBMISSIONS BEFORE THE TRIBUNAL

[19] The applicant's submissions are summarised in the Tribunal's ruling. They were briefly the following. Clause 7 of the lease agreements, which were concluded freely and voluntarily between the applicant and the tenants, allows for the levying of a service charge and that it had to be respected. It was submitted further that the issue was not one of profit, but about whether the landlord was entitled to levy the service charge in terms of the applicable legislation. The "*profit*" that it made had to be seen in the light of a NERSA proposal in its concept paper, that a reseller of electricity was entitled to a "*profit*". It was argued that there was no breach of the Unfair Practice Regulations and that those regulations were not applicable. The Regulations only dealt with consumption, whereas the complaint that was brought to the Tribunal did not relate to the consumption of electricity, but to the levying of a service charge. The profit was not a "*profit*" in the conventional sense, but money to which the landlord was entitled in terms of the applicable legislation. According to this argument, the applicant had indicated what those monies were being used for, but was not obliged to do so and only did so out of an abundance of caution. The service charges levied by it are what City Power would have levied each tenant if it had contracted with the tenants directly and

[5] 2012 (3) SA 531 (CC) especially paras [51]-[54].

individually. It was further submitted that in this instance the landlord (the applicant), which receives its electricity supply in bulk from City Power, was responsible for the electrical network at the premises, including the installation and maintenance of the network, meter reading, billing, administration, collection of revenue and customer services and was therefore entitled to levy a charge for those services in accordance with City Power's tariffs, which is an amount over and above the amount charged for the actual electricity consumed by the tenants.

[20] The applicant submitted further that the charges, which were the subject of the complaint, were in accordance with NERSA proposals and did not equate to a profit. It was further submitted that the applicable bylaws were not contravened because each tenant was not paying any more than what he, or she, would have paid had they contracted directly with the utility service provider (i.e. City Power). According to this argument, what was significant was the contention that it, as the landlord, was the service provider to the tenants, and not City Power. The applicant argued further that It did not require a licence to trade in electricity, because it was not supplying electricity to the tenants as a commercial activity. The applicant relied in this regard on section 7(2) especially point 3 of Schedule 2 of the Electricity Regulation Act[6] ("the Electricity Regulation Act"). According to the applicant, it could not have been the intention of the Legislature that the landlord was permitted to only "*pass on*" the service charge levied on it by City Power, by merely billing each tenant for a portion of that charge. It submitted, in summary, that the charges

[6] Act 4 No. of 2006.

were reasonable and lawful in terms of the Johannesburg Metropolitan Electricity Bylaws ("the bylaws'), the Electricity Regulation Act, the NERSA concept paper and the common law.

THE TRIBUNAL'S REASONING

[21] The Tribunal considered that the "*fundamental question*" before it was whether the service charge levied by the landlord (present applicant) "*is lawful in light of the applicable legislation and the authorities cited and the mandate of the Tribunal*". Having concluded that it had the authority to strike down any provision in a lease which it regards as an 'unfair practice' in light of the decision in *Maphango*, and that 'unfair practice' is a wide concept, the Tribunal went on to reason as follows. Although "*rent*" was not defined in the Act, its dictionary meaning was clear and that the payment for the use of a service provided by another may be described as "*rent*"; that a landlord is entitled to charge, over and above the rent, for services such as "utilities, security, parking and such like"; and that this was allowed by section 5(6)(h) of the Act.

[22] According to the Tribunal, the question was whether the service charges levied by the landlord were justifiable in light of the argument presented. The fact that the landlord may be regarded by the tenants as a re-seller of electricity was of no effect, because it was actually not a service provider. The ultimate service provider was City Power. The landlord could not be regarded as a service provider, because it did not have the power to

terminate the electricity supply to the tenants without a court order. According to the Tribunal, this was apparent from Regulation 13(1)(b) read with Regulation 7(1)(h) which requires a landlord, amongst other things, to maintain electrical systems of the leased premises. According to the Tribunal, the mere fact that the landlord maintained the electrical network and incurs other expenses, ancillary to the supply of electricity individual tenants, does not entitle the landlord to levy the service charge to recoup those other expenses and that those remain the prerogative of the municipality. The Tribunal found that the Act and Regulations were applicable and that the applicant's conduct was in contravention of them. The mere fact that parties have agreed that the landlord may levy the charges and that the agreement to that effect was entered into freely and voluntarily, did not preclude the Tribunal from striking down the agreed practice as being unfair, as held in *Maphango*.

[23] The Tribunal then went on to comment on the total amount recovered by the landlord in the levying of the service charge and stated that "*even if evidence was adduced to demonstrate that the money was ploughed into maintenance this practice clearly violates Regulation 13"* and that it must be struck down. Central to this reasoning was the view that the required maintenance cannot be funded from a levy of service charges, but had to come from the rental that was being collected by the landlord.

[24] The Tribunal commented again on the recovery by the applicant of R27 000,00 per month in respect of the service charge when it only incurred costs,

i.e. from City Powers' billing for service charges, in the amount of about R400,00, and expressed the view that it "*cannot be justified, either in terms of the spirit nor the letter of the Act*" and that the amount recovered by the applicant constitutes "*a profit to which it was not entitled*". The Tribunal held that the NERSA proposal constitutes "*no more than an opinion and did not assist the applicant*". On the strength of the aforesaid reasoning, the Tribunal went on to make the ruling which the applicant seeks to review and set aside. I have quoted that ruling earlier in this judgment.

THE REVIEW

[25] As I have pointed out at the outset the applicant seeks to review and set aside the ruling essentially on certain grounds set out in section 6 of PAJA. In the alternative, it seeks to review the ruling in terms of the Constitution and the common law, and still, further alternatively, in terms of section 24, in particular, sections 24(1)(a) and (c), of the Supreme Court Act[7].

[26] The applicant's main argument, however, is that PAJA is applicable, because the actions, including the ruling, of the Tribunal constitutes "*administrative action*" and that section 24 of the Supreme Court Act only applies to the review of inferior courts and not to tribunals such as the Rental Housing Tribunal (i.e. the Tribunal). The applicant then presented its argument on the assumption that PAJA applied. It was submitted that if PAJA

[7] Act No 59 of 1959.

did not apply, the decision was still reviewable in terms of sections of the Supreme Court Act that I have referred to earlier.

[27] In the written heads of argument counsel for the second respondent submitted that the decision of the Tribunal was not administrative action and that PAJA did not apply, although the said counsel appeared to concede the applicability of PAJA during oral argument. However, it was still submitted that the applicant could not rely on PAJA, the Constitution and the common law, simultaneously.

[28] I shall now briefly consider the legal position before considering the actual grounds of review relied upon, and firstly, with the submission that the applicant could not rely on PAJA, the Constitution and the common law, simultaneously, if PAJA was applicable. In my view there is merit in the point. Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) provides that national legislation giving effect to the rights embodied in section 33, that includes subsections 33(1) and 33(2), must be enacted to give effect to those rights and must (a) provide for the review of administrative action by a court or, where appropriate, an independent impartial tribunal; (b) impose a duty to give effect to the rights in subsections (1) and (2) and, (c) promote efficient administration. PAJA has been identified as that legislation. In *Minister of Health v New Clicks (SA) (Pty) Ltd and Others*[8]*;* Ngcobo J (as he then was) stated the position concerning reliance on PAJA and section

[8] 2006 (2) SA 311 (CC) at 446 para [46].

33(1) of the Constitution and the common law, where PAJA was applicable, as follows:

> "*Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on Section 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to Section 33, is applicable, is, in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under Section 33 and the common law. Yet this Court has held that there are not two systems of law regulating administrative action – the common law and the Constitution – 'but only one system of law grounded in the Constitution'. And in* Bato Star *we underscored this, holding that 'the Court's power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself.*"

The majority of the Constitutional Court seemingly agreed with this view.

[29] I now turn to the question of the applicability of PAJA. PAJA itself states in its long title and preamble that it is the legislation that is contemplated in section 33(3) of the Constitution. It is clear from the definition of the term "*administrative action*" in PAJA that it does not apply to the review of the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution, or of a special tribunal established under section 2 of the Investigating Units and Special Tribunals Act[9]. In terms of section 1 of PAJA, which defines "administrative action" for the purposes of that statute, such functions are not included in the definition of "*administrative action*".[10] The word "*court*" in terms of section 1 of PAJA means the Constitutional Court, High Court or a court of similar status or a magistrate's court, either generally, or in respect of a specified class of administrative actions.

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[9] Act No.74 of 1996.
[10] See section 1(ee).

[30] Section 7 of the Act empowers the member of the Executive Council of a Province, who is responsible for housing, to, by notice in the Gazette, establish a Rental Housing Tribunal in the Province. Such a tribunal is required to fulfil the duties imposed upon it in Chapter 4 of the Act and is obliged to do all things necessary to ensure that the objectives of the said chapter are achieved. Section 10 of the Act deals with the meetings of the Tribunal and provides, *inter alia,* that these meetings must be convened for the consideration of any complaint referred to it in terms of section 13 or any other matter which the Tribunal may, or must, consider in terms of the Act (section 10(4)). The decisions are taken by consensus and where consensus cannot be reached the decision of the majority of the members is a decision of the Tribunal. The section (section 10) also provides that minutes of the proceedings of the Tribunal must be kept.

[31] Section 13 of the Act deals with complaints and sets out the procedure that must be followed where a complaint has been lodged with the Tribunal by a tenant, or landlord, or groups of the same concerning an unfair practice. Through its staff it must conduct the necessary preliminary investigations to determine whether the complaint does relate to a matter which constitutes an unfair practice. The Tribunal must consider whether the dispute can be resolved through mediation and facilitate the same. Where the dispute cannot be resolved through mediation it must conduct a hearing and make such ruling "*as it may consider just and fair in the circumstances*" (section 13(2)(d)). In section 13(3) some of the Tribunal's powers in connection with the hearing are set out.

[32] In terms of section 13(11) of the Act a Magistrate's Court may refer a matter, concerning an unfair practice, to the Tribunal for resolution. The Tribunal in terms of section 13(12), also has the power to make a ruling on costs issues, spoliation, issue attachment orders and grant interdicts. Section 13(13) provides that:

> "*A ruling by a tribunal is deemed to be an order of the magistrate's court in terms of the Magistrate's Court Act, 1944 (Act 32 of 1944) and is enforced in terms of that Act.*"

However, section 13(14) provides that the Tribunal does not have jurisdiction to hear applications for eviction orders.

[33] Section 17 of the Act further provides for a review of the proceedings of these tribunals. The section provides:

> "*Without prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of a tribunal may be brought under review before the high court within its area of jurisdiction.*"

However, the Act does not spell out what grounds would be applicable to the review and whether it would be the Constitution, PAJA or the provisions of the Supreme Court (i.e. section 24). That is a matter that has to be decided.

[34] In *New Clicks*[11]*,* Ngcobo J (as he then was) held there that the starting-point in determining whether PAJA was applicable to the exercise of power, under consideration in that case, was section 33(1) of the Constitution and that the enquiry commenced by ascertaining whether the exercise of the

[11] See page 449 para [446].

power constituted "*administrative action*" as contemplated in section 33 of the Constitution. Having determined that it was, it then had to be considered whether PAJA nevertheless excludes such action (in terms of its exclusionary provisions). Ngcobo J emphasised that the provisions of PAJA in themselves "*cannot be used as an aid to determine the meaning of administrative action in the Constitution. At best they can be used to fortify the inference that PAJA excludes the exercise of this specific power from its ambit*".

[35] In considering whether particular action constitutes "*administrative action*" as contemplated in section 33 of the Constitution, the Constitutional Court has held that it was the nature of the action and not the actor that was determinative. In *President of the Republic of South Africa v South African Rugby Football Union ("SARFU")*[12] it was stated that:

> "*In section 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.*"

[36] From a review of the cases, some of which I will discussing later in this judgment, it is apparent that while the nature of the actor is not determinative of whether or not its functions are administrative, it is a relevant factor that is

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[12] 2000 (1) SA 1 (CC) (1999) 10 BCLR 1059 para [141]; also see the judgment of Ngcobo J (as he then was) in *Chirwa v Transnet Limited & Others* [2008] 2 BLLR 97 (CC) para [139].

taken into account in determining whether its function (or at least those that are in issue) are administrative or not.

[37] Thus the main enquiry in the present case is essentially about the nature of the tribunal's functions. In my view the functions of the tribunal that are in issue in this case and which are essentially sourced from section 13 of the Act, though *prima facie* of a judicial nature, are actually administrative. Having said that, it is acknowledged that the classification of functions is not a simple matter, as appears from several matters before the Constitutional Court.[13]

[38] In its early years the Constitutional Court in *Nel v Le Roux NO and Others*[14] had to, *inter alia,* decide what the nature was of the summary sentencing procedure contemplated in section 205 of the Criminal Procedure Act 51 of 1977. It held that the procedure was "*clearly judicial and not administrative action*". It said that it was subject to appeal in the same manner as a sentence imposed in any criminal case.[15] In *Bernstein v Bester NO*[16] the Constitutional Court considered aspects of the enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 (the so-called insolvency enquiry). Ackermann J, who wrote the majority judgment, concluded that he had difficulty seeing how the enquiry could be characterised as administrative action. It formed an intrinsic part of the liquidation of a company pursuant to a court order and in particular was part of

[13] See Cora Hoexter "Administrative Law in South Africa" 2nd Edition pp 175 et seq. for a detailed discussion of the topic.
[14] 1996 (3) SA 562 (CC).
[15] In this regard see at page 576 para [24].
[16] 1996 (2) SA 751 (CC), particularly para [97].

the process directed at ascertaining and realising the assets of the company and can be seen as part of the execution process. It was also stated that it could not fit into the mould of administrative action because it was not "*aimed at making decisions binding on others*". It was merely a mechanism to gather information to facilitate the liquidation process (i.e. it was investigative).

[39] In *Total Support Management (Pty) Ltd v Diversified Health Systems SA (Pty) Ltd*[17] the Supreme Court of Appeal held that a consensual arbitration was a form of private adjudication and that the function of the arbitrator was not administrative, but judicial in nature. It confirmed that decisions made in the exercise of judicial functions do not amount to administrative action[18]. The Supreme Court of Appeal also confirmed the correctness of the conclusion to that effect in *Patcor Quarries v Issroff and Others*[19]. In that case the court held that an arbitrator does not perform an administrative function when adjudicating a dispute in arbitration proceedings, but rather, a judicial function, because an arbitration is in the nature of litigation, in that it is about the resolution of a dispute between at least two parties, which could have been adjudicated upon by the courts, but was, in the interest of a speedy and less costly resolution, referred to arbitration. Another characteristic such an arbitration had in common with court proceedings, was the finality of the award.

[40] In the*Total Support* case Smalberger ADP did however mention that the position may be different in the case of statutorily imposed arbitrations and

[17] 2002 (4) SA 661 (SCA) (para [25]).
[18] See also *Nel v Le Roux NO (supra).*
[19] 1998 (4) SA 1069 (SECLD) at 1082G.

referred in that regard to the Labour Appeal Court's decision in *Carephone (Pty) Ltd v Marcus NO and Others.*[20] There is was held that the Commission for Conciliation, Mediation and Arbitration ("*CCMA*"), established in terms of the Labour Relations Act 66 of 1995 ("*the LRA*"), was an organ of state and that its proceedings amounted to "*administrative action*" for the purposes of the Constitution. It conducts compulsory arbitrations in terms of the LRA which "*involves the exercise of a public power and function because it resolves disputes between parties in terms of the LRA without needing the consent of the parties*". The LAC rejected the argument that the arbitration function of the CCMA was of a judicial nature and that it did not amount to "*administrative action*" for the purpose of the administrative justice section in the Bill of Rights.[21] One of the reasons for the LAC's decision was because even though the CCMA and other organs of state may perform functions of a judicial nature they are not courts of law and thus have no judicial authority under the Constitution. Referring to *Bernstein* Froneman DJP (as he then was) stated:[22]

> "*Their judicial functions do not transform them into part of the judicial arm of the State, nor does it make them part of the judicial process.*"

Froneman DJP went on to hold that the purpose of administrative justice section of the Bill of Rights was to extend the values of accountability, responsiveness and openness to institutions of public power which might not previously have been subjected to such constraints. Courts have always

[20] 1999 (3) SA 304 (LAC).
[21] See at 311 para [15].
[22] At 312F para [18].

been subjected to similar constraints and it would be incongruous to exempt public bodies which exercise judicial functions from those constraints.[23]

[41] In *Sidumo v Rustenburg Platinum Mines Ltd*[24] the Constitutional Court apparently accepted that the CCMA was an administrative body and that its functions, even though they resembled the functions of a court of law, were "*administrative action*" as envisaged in section 33 of the Constitution, although the LRA, instead of PAJA, applied[25]. In the majority judgment Navsa AJ pointed out that:

> "*In form, characteristics and functions administrative tribunals a wide spectrum at one end they implement or give effect to policy of the legislation at the other some tribunals resembled courts of law.*"[26]

Examples were given of other tribunals that resembled and performed functions similar to courts of law but which were regarded as administrative bodies, namely the Industrial Court, established under the Labour Relations Act 28 of 1956, the Amnesty Committee, established in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995.[27]

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[23] See per Froneman DJP at 312G-H para [19].
[24] 2008 (2) SA 24 (CC).
[25] Compare: *Chirwa v Transnet Limited & Others* [2008]2 BLLR 97 (CC) where the view was expressed by the majority that the termination of a public sector employee was not "administrative action" as contemplated in s 33 of the Constitution, because that section does not deal with labour and employment issues. The minority, however, did not exclude the possibility that there may be instances where the dismissal of public sector employees may constitute "administrative action" under PAJA (see Langa CJ's judgment para[194]).In *Gcaba v Minister of Safety and Security and Others* 2010 (1) SA 238 (CC) para 64, the Constitutional Court held that, generally, employment issues did not amount to administrative action under s33 of the Constitution and PAJA, because s23 of the Constituton dealt with those issues.
[26] See at 53 para [82] where reference was made to Baxter "*Administrative Law*" Juta, Kenwyn, (1984) at 24-6 and Hoexter "*Administrative Law in South Africa*" (Juta, Cape Town, 2007) at 52-3 and the case of *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) ((2005) 10 BCLR 931) paras [20]-[25].
[27] See at paras [82] and [83] pages 53-54.

[42] Navsa AJ mentioned the similarities and differences between the CCMA arbitrations and proceedings of courts of law. The similarities included, the process allowing for the adducing of evidence, questioning of witnesses and presentation of argument, the power to subpoena and the binding nature of the award and the consequences of failing to comply with an award as well as the powers to make costs orders. The differences included the power of a Commissioner to conduct arbitrations in an expeditious manner with very little formality, the absence in the CCMA of a blanket right to legal representation, the absence in the CCMA of a system of binding precedent and the different security of tenure enjoyed by CCMA Commissioners.

[43] O'Regan J, who concurred in the judgment of Navsa AJ (i.e. the majority judgment), points out in a separate judgment, *inter alia,* that:

> "*While independent and impartial tribunals may perform adjudicative tasks, it does not automatically follow that their functions are not within the contemplation of section 33. Nor does it necessarily follow that because independent and impartial tribunals are governed by section 34 they are not governed by section 33.*"[28]

O'Regan J then also discusses the decisions in, *inter alia, Nel* and the rationale for the Constitutional Court's decision in that case.

[44] The Rental Tribunal is not a court of law. Although its adjudicative functions have some similarities to judicial functions there are significant differences. Once an unfair practice complaint has been lodged with the Tribunal the Tribunal is obliged through its staff to conduct a preliminary investigation (section 13(2)(b)). If it is satisfied that there is a dispute as

[28] See at 63H-64A para [126].

contemplated in section 13 it must consider whether the dispute cannot be resolved through mediation and if so, it must appoint a mediator to mediate. However, if it resolves that mediation is inappropriate, or has failed, the Tribunal must conduct a hearing and then make such a ruling as it may consider just and fair in the circumstances (section 13(2)(d)). The Tribunal has specific powers for the purposes of conducting the hearing. These powers are set out in section 13(3)(a). It may, *inter alia*, require any Rental Information Office to submit reports to it and require an inspector to appear before it to give evidence, or provide information, or produce a report, or document. It may also require the rental information office to advise it concerning a dwelling, or complaint received and it may summon persons to give evidence, or provide information, or documents and may administer the oath or affirmation. It is obliged to keep a register of complaints and may make a ruling on costs (section 13(12)(b)). The Tribunal may also make a mediation agreement a ruling of the Tribunal (section 13(12)(b)). It may make spoliation and attachment orders and grant interdicts (section 13(12)(c)) but unlike a court of law, it may not hear applications for eviction orders (section 13(14)). The proceedings of the Tribunal are also not subject to appeal, but may be brought on review (section 17). Furthermore, the Tribunal does not have a formal system of binding precedent and the tenure of the officers presiding in the Tribunal, is different from that of judges.

[45] Although the functions of the Tribunal resemble those of courts of law in some respects, it is not a court of law. The mere fact that its ruling is deemed to be an order of the magistrate’s court in terms of the Magistrates

Courts Act and is enforced in terms of that Act (s 13(13)), does not make the Tribunal a court of law and does not make its adjudicative actions judicial acts. There are similar provisions in the LRA with regard to arbitration awards of CCMA commissioners or arbitrators[29], but that has not affected the administrative nature of those acts[30]. The Tribunal is, nevertheless, a state organ exercising public power. Its functions are essentially administrative in nature and its proceedings are expressly made reviewable and its rulings are not appealable. It is appropriate that the Rental Tribunal be held to the standards espoused by the Constitution in section 33, namely, lawfulness, reasonableness and procedural fairness. When all facts and circumstances are taken into account its functions, including those of an adjudicative nature, constitute "*administrative action*" as contemplated in section 33 of the Constitution.

[46] PAJA does not exclude the proceedings and funtions of the Rental Tribunal from its sphere of application. It expressly excludes those of courts of law and specific tribunals but not the proceedings of the Rental Tribunal established in terms of the Act. Since PAJA is the legislation contemplated to give effect to the rights contemplated in section 33 of the Constitution, it is applicable to the proceedings of the Rental Tribunal.

THE GROUNDS RELIED UPON BY THE APPLICANT

[29] See s 143 of the Labour Relations Act No. 66 of 1995.
[30] See *Sidumo v Rustenburg Platinum Mines Ltd.* (*supra*).

[47] The applicant relies on three, what it terms "*grounds of review*" against the ruling of the Tribunal, but which can more appropriately be described as "*heads of attack*", because several grounds of review are relied upon under each head. The first head relates to the Tribunal's finding concerning the standing of the complainants in the proceedings before it. The second relates to the issue of jurisdiction and, in particular, the Tribunal's acceptance that the regulations were applicable and the third heading relates to the Tribunal's ruling in respect of the merits of the complaint.

[48] Under the first, second and third heads of attack the applicant relies on the grounds set out in section 6(2) of PAJA. That section provides as follows:

> "*(2) A court or tribunal has the power to judicially review an administrative action if –*
>
> *(a) the administrator who took it –*
>
> *(i) was not authorised to do so by the empowering provision;*
>
> *(ii) acted under a delegation of power which was not authorised by the empowering provision, or*
>
> *(iii) was biased or reasonably suspected of bias;*
>
> *(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
>
> *(c) the action was procedurally unfair;*
>
> *(d) the action was materially influenced by an error of law;*
>
> *(e) the action was taken –*
>
> *(i) for reason not authorised by the empowering provision;*
>
> *(ii) for an ulterior purpose or motive;*

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful."

THE FIRST HEADING OF ATTACK (i.e. *LOCUS STANDI)*

[49] The applicant contends that paragraph 85 of the Tribunal's ruling was not competent as it relates to all the complainants, whereas the applicant did not concede at the hearing before the Tribunal that all the complainants had

standing and only made such a concession in respect of those complainants who had paid the service charge which it levied in terms of valid lease agreements.

[50] Paragraph 85 of the ruling states that the present applicant (respondent in that hearing) "*is directed to repay to the complainants all service charges levied against the complainants since May 2009*". The applicant's argument in this regard is based on an interpretation of that ruling to the effect that it relates to all complainants even those against whom no service charge was levied and/or who did not pay the service charge. The applicant contends, based on that interpretation, that the ruling is reviewable on the grounds set out in sections 6(2)(a)(i), 6(2)(e)(i) to (iii) and (vi), 6(2)(f)(i) and section 6(2)(f)(iii)(aa) to (dd), section 6(2)(h) and section 6(2)(i) of PAJA. The applicant does however aver that "*if it were to be accepted that the effect of the order in paragraph 85 is that only the complainants against whom it was so charged and who effected payments are to be re-compensated, then the locus standi point will no longer be pursued*".

[51] On behalf of the respondents it was submitted that there was no merit in the applicant's "*locus standi point because properly construed the ruling only related to those complainants who had been charged the service fee and who had paid it*".

[52] In my view there is merit in this contention of the respondents. The ruling requires the applicant to "*repay*". This can only mean to pay back to

those who have paid the service charge. That, of necessity, excludes those that may have been in the ranks of the complainants, but who did not pay the service fee, *inter alia*, because they were not levied. The applicant's first point of attack is based on a wrong interpretation of paragraph 85 of the ruling and cannot be upheld.

THE SECOND HEADING OF ATTACK (I.E. THE JURISDICTIONAL ISSUE)

[53] The applicant contends that it argued at the outset at the hearing before the Tribunal that the regulations were not applicable because the service charge does not constitute a "*service*" as contemplated in the Regulations; that the Tribunal never considered the point and that "*the sweeping statement*" made in its ruling that the Regulations are applicable, without furnishing reasons for that conclusion, indicates that the Tribunal "*did not direct its mind to this issue*" and, accordingly committed a gross irregularity.

[54] On the second respondent's behalf it was argued that the regulations were applicable and that the Tribunal applied its mind to the issue; was correct in that regard and did not commit an irregularity, let alone a gross irregularity.

[55] The applicant's argument was that the Act and the Regulations do not cover the complaints relating to the service charge, because only the word "*services*" is defined in the Regulations as "*the provision of water, electricity,*

gas services and refuse removal"; that it was "*clearly aimed at consumption*" and that the service charge which was the subject of the complaint was not a consumption charge but a fixed charge. It was submitted that as the Regulations did not apply the Tribunal had no jurisdiction to determine the matter and that the regulation of such service charge was in the domain of the the *NERSA* and the Electricity Regulation Act[31] *("the Electricity Regulation Act*"). The applicant averred that the Tribunal's finding that the regulations were applicable was reviewable in terms of a slew of provisions under section 6(2) of PAJA, namely, section 6(2)(a)(i), section 6(2)(c), section 6(2)(d), section 6(2)(e)(i) and (ii), section 6(2)(e)(iii), section 6(2)(e)(vi), section 6(2)(f)(i), section 6(2)(f)(ii)(aa), (bb) and (cc), section 6(2)(h) and section 6(2)(i).

[56] The second respondent's argument in response was briefly the following: The Regulations are applicable and the Tribunal correctly and reasonably found in that regard. The mere fact that the applicant was not satisfied with the Tribunal's finding is not a ground for review.

[57] It was argued that it is clear from the Tribunal's decision that it applied its mind to the question of the applicability of the Regulations. The mere fact that the Tribunal did not mention in its ruling every factor or circumstance that it took into account does not warrant a review of that ruling. In support of the

[31] Act No. 4 of 2006.

latter point reference was made to what the court stated in *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee*[32], namely: "[*e]ven a court of law is not required to show that it took every relevant consideration into account or that it went through every relevant thought process; and the court's failure to indicate that it did so does not, as a general principle, constitute a ground for interfering with the decision eventually arrived at … We do not believe that stricter formal requirements can be imposed upon administrative bodies not consisting of trained lawyers than those applying to judicial officers*".

[58] The second respondent further submitted that Regulation 13 was not definitive of the Tribunal's powers to entertain complaints under the Act. Section 10(4) of the Act does not confine the Tribunal's functions to the consideration of complaints about unfair practices. It is open to the Tribunal to consider any other matter which it may or must consider in terms of that Act. In any event, the powers of the Tribunal, to declare a particular practice or conduct unfair, are wide.

[59] I need not define the precise scope of the Tribunal's powers here, because, in my view, there is merit in the second respondent's point that the Tribunal's finding that the Regulations were applicable to the complaint, was correct and reasonable in the circumstances. It did not have to spell out in detail how it came to that conclusion.

[32] 2000 (4) SA 621 (C) at 634.

[60] Regulation 13 was intended to regulate, *inter alia,* the charging for electrical services by a landlord, who is by law, or in terms of a lease agreement, obliged to provide (*inter alia*) electricity services to a tenant. It does not only cover actual consumption costs, but all charges that the landlord may levy against the tenant in connection with *inter alia* its supply of electricity services to the tenant. Regulations 13(1)(e) and 13(1)(f) make it plain that it is not only electricity consumption that is being referred to, but the consumption of 'electrical services' . In the case of a dwelling which is not separately metered for such service the landlord is obliged to comply with the applicable law or obligations regarding the amount to be charged to the tenant. Regulation 13(f) provides that in a multi-tenanted building the landlord may not recover collectively from the tenants for the services rendered, in excess of the amounts "*totally charged by the utility service provider and the landlord*". Read with Regulation 13(d), in cases where the dwellings are separately metered, the landlord may only charge a tenant the exact amount for services consumed. The phrase "services consumed" is not confined to the electricity that has been consumed, but includes all "electricity services" that have been consumed by a tenant, that would include the portion of the service charge levied by the utility provider against the landlord. It would be untenable to expect a landlord, who is not only billed by the utility service provider for the actual amount of electricity consumed in the building (i.e. by the tenants collectively), but also a service charge, to not be legally entitled to pass on the service charge to the tenants. In my view, therefore, the Tribunal reasonably and correctly concluded that the Unfair Practice Regulations were applicable to the complainant of the second respondent.

THE THIRD HEAD OF ATTACK (I.E. THE MERITS)

[61] The applicant's attack is mainly aimed a the Tribunal's finding that the levying of the service charge in connection with the supply of electricity on each tenant was in contravention of the Regulations (in particular Regulation 13) and was unlawful.

[62] The Tribunal found in effect that the applicant could not levy a separate charge on the tenant for its own service to the tenant regarding the supply of electricity, such as for billing the tenant, or for maintenance of the electricity network. The Tribunal's view was that the landlord had to recover those costs by way of the rental. Thus in calculating the rental to be paid by a tenant for premises occupied or to be occupied, the landlord had to factor in the costs of such billing and maintenance and could not charge for those services "*in addition to the rental*" and, *inter alia*, in addition *to* the electricity services consumed by the tenant at the premises. The Tribunal's finding clearly implied that the services consumed would consist of the actual electricity used by the tenant at the premises and the *pro rata* share of the service charge which the utility service provider, in this instance, City Power, levied against the landlord for the entire building.

[63] The service charge levied by the applicant in respect of each tenant, but for the fact that it was close to the amount which the utility provider, City Power, charged it in respect of the entire building, according to the evidence

presented, bore little resemblance to the utility provider's charge and was not the recovery by the applicant of that charge, but the applicant's own charge levied against each of the tenants for the services it alleged it provided to the tenants, such as for billing and the maintenance of the electricity network, etc. In addition to the Tribunal's finding that the applicant could not levy such a charge as an additional charge, the Tribunal held that even if it could be shown by the applicant in respect of such a charge that the yield was utilised for maintenance, it was not legally permissible for the applicant to levy it.

[64] The applicant's attack on the Tribunal's finding on the merits was essentially the following: that the Tribunal made a mistake of law in finding that there had been a contravention of Regulation 13; that its ruling in paragraph 74, namely, that the Act and Regulations were applicable and that the present applicant (the respondent there) contravened them by levying its own service charge, was not supported by the evidence; that the Tribunal failed to give reasons why the Regulations were applicable and that such failure justified an inference of arbitrariness; that the Tribunal's findings were wrong and that no reasonable person would have come to the same conclusion as the Tribunal.

[65] One must bear in mind that this is not an appeal, but a review and the ultimate test is not whether the Tribunal was right or wrong, but whether its decision was so unreasonable that no reasonable person, or more

specifically, Rental Tribunal, could have come to that conclusion in the circumstances[33].

[66] I have already dealt under a previous heading with the Tribunal's conclusion that the Act and Regulations were applicable and stated my view that the Tribunal could reasonably have concluded that the Act and Regulations were applicable to the complaint. The Tribunal's finding in that regard cannot, in my view, be said to be so unreasonable that no reasonable person or tribunal would have come to the same conclusion as it. The fundamental weakness in the applicant's argument regarding the applicability of the Regulations and the Act resides in an erroneous point of departure, namely, that Regulation 13 only deals with the consumption (or use) of electricity, and did not cover electrical service charges, whereas Regulation 13 explicitly deals with the consumption (*inter alia*) of "*electrical services*", which is much more than the mere consumption of electricity. The Regulation deals with everything ancillary to the consumption of electricity which falls within the compass of "electricity services", including the service charges levied in connection with the use or supply of electricity.

[67] It is apparent from the Tribunal's ruling that it was alive to the issues and applied its mind to their resolution. As pointed out earlier in this judgment with reference to what was stated in *Hamata*[34], the mere fact that the Tribunal did not specifically mention in its written ruling every factor and circumstance

[33] See s.6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000. Compare: *Sidumo v Rustenburg Platinum Mines Ltd.* 2008 (2) SA 24 (CC), which, *inter alia*, deals with the test of review of the arbitration awards of CCMA commissioners.
[34] See at 634.

which it took into account, does not of its own warrant an inference that the Tribunal did not apply its mind, or did not take relevant factors into account, or that it took irrelevant factors into account. The Tribunal is not a court of law and to apply the same principles to its proceedings, such as the so-called "*Plascon-Evans rule*", that is a rule as formulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[35] is inappropriate. In any event, even if that rule could be applied to its proceedings (especially those in the form of applications accompanied by affidavits) the application of the rule was not appropriate in this instance. There was no factual dispute that required resolution. The dispute was essentially a legal and interpretational dispute.

[68] It stands to reason that in deciding upon the amount to charge as rental a landlord would and should take into account its expenses or overheads, including costs pertaining to maintenance of the building and infrastructure, such as the electricity network, the billing of tenants, etc.. Thus, the finding of the Tribunal that such costs were recovered or recoverable through the rental is not so unreasonable that no reasonable person could have arrived at it.

[69] Regulation 13 obliges a landlord, who is required by law or by the express or implied terms of a lease to provide, *inter alia*, electricity services to a tenant, to provide such services. It cannot interrupt, or cut off the service without a court order, except in an emergency, or if the interruption is in order to do maintenance, or for repairs, or renovations. But even in such instances reasonable notice must be given and the service must be resumed within a

[35] 1984 (3) SA 623 (A).

reasonable period after such emergency, maintenance, repairs or renovations. The mere fact that the parties to the lease agreement may have agreed that the landlord may levy such charge, or that the tenant would pay such a charge levied by the landlord, does not preclude the Tribunal from finding that such an act (albeit agreed to) constitutes a violation of the Regulations and is an unfair practice.[36] The Regulations furthermore oblige the landlord to maintain the building (Regulation 7) and, *inter alia*, the electrical systems (Regulation 7(h)). This obligation is not made subject to or conditional upon the tenant paying a service charge to the landlord for such maintenance, or for providing the electrical service.

[70] The Tribunal's finding, in effect, that the applicant could not be equated with the utility service provider (i.e. the municipality or City Power) is also reasonable and is not irrational. There are important and significant differences between the two. It is not unreasonable to conclude in light of the Regulations and the Act that the mere fact that the utility service provider could have charged each tenant a service fee if there was a direct relationship between them, does not entitle the landlord, who receives a supply of electricity from the utility service provider in bulk and is obliged to provide it to the tenants, to charge its own service fee, which is in addition to the rental, for doing so. The Tribunal did not ignore the fact that the applicant or landlord may have been responsible for the installation and maintenance of the electrical network and that it collects electricity payments from tenants and performs all administrative functions relating to the payment and collection for

[36] See *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 especially paras [51]-[54].

the supply of the electrical services, nor did it find that the landlord (or applicant) was not entitled to be compensated. However, it concluded, in effect, in that regard that the landlord could not levy its own service charge, which is in addition to the rental and the cost of consumption of the electrical services by the tenant. Those things would, or should, of necessity have been or should be factored in when determining the rental amount.

[71] It is reasonably conceivable that the levying of a separate service charge, such as that complained of, unless properly and effectively regulated, could be abused by landlords. The amount of the charge is not determined by agreement, nor is it fixed. The amount is entirely within the discretion of the landlord and may be determined at will by it. It could be used as a mechanism to generate profits, or to recover losses or expenses from all the tenants for which they otherwise would not be liable, such as those due to one or some tenants not paying their rent or electricity accounts. Such a practice would be inherently unfair to the paying tenants.

[72] It was apparent from its ruling that the Tribunal did consider whether the applicant was empowered in terms of other laws to levy its own service charge. In that regard it considered in effect whether the applicant could be equated with City Power and concluded that it could not be. In another context it also made reference to the proposal NERSA made in its concept paper.

[73] The applicant's argument before the Tribunal that it was entitled or empowered, in terms of the Electricity Regulation Act and the Greater Johannesburg Metropolitan Council Electricity Bylaws ("the bylaws"), to levy the service charge complained of, was fundamentally flawed in that its reliance on such legislation is misconceived. The applicants argument , basically, was that in terms of bylaw 17 read with the NERSA concept paper it was a 'reseller' of electricity; that the bylaw provided that if electricity is resold the charge of the reseller, for such electricity, shall not exceed that of the Council. Accordingly, so it was contended, the applicant was entitled to charge the tenants what the Council would have charged them if they had contracted individually and directly with the Council for the supply of the electricity.

[74] The applicant further argued that in terms of the Electricity Regulation Act it was a supplier of electricity, although it was not making a profit from the buying or selling of electricity. Section 15(1)(a) of that law allowed a licensee to recover the full cost of its licensed activities "including a reasonable margin or return". The applicant averred that it was exempted in terms of section 7(2), read with schedule 2 item 3, from being licensed, but section 15(1)(a) was, nevertheless, equally applicable to it.

[75] However, the applicant did not make adequate averments to establish that the Electricity Regulation Act, indeed, applied to it. That law regulates the operation of any electricity generation, transmission or distribution facility (s7(1)(a)), the import and export of electricity (s7(1)(b)), and the buying and

selling of electricity as a commercial activity (i.e. “trading” in electricity)[37]. Those are the activities for which licensing by the Regulator (NERSA) is required, unless the person involved has been exempted as envisaged in section 7(2) read with schedule 2. By alleging that it was exempted in terms of section 7(2) read with schedule 2 item 3, it implied that it is operating a “non-grid connected supply of electricity except for commercial use”. That is clearly not correct. It is stated in the NERSA concept paper that electricity supply activities, such as those engaged in by the applicant as landlord, are unregulated and that they are operating “under the radar screen” as it were.

[76] To the extent that it might be contended that the applicant could be a person that distributes electricity, since “distribution” is defined in section 1 of the Electricity Regulation Act as “the conveyance of electricity through a power system excluding trading”, the applicant did not make out a case before the Tribunal that that was in fact the case, that it was as a fact operating a distribution facility as contemplated in that Act. The NERSA paper equates the transmission of electricity, from the service provider (the Council) to the landlord and finally to the tenant (the consumer), to “trading”, for which a license is required. On its own admission the applicant was not “trading” in electricity as defined in The Electricity Regulation Act and was not licensed accordingly, or at all.

[77] Insofar as the applicant averred in the proceedings before the Tribunal that it performed a similar service to the Council in respect of the supply of

[37] Section 7(1)(c) read with the definition of “trading” in section 1.

electricity, it did not establish that it was a “service provider” as envisaged in the Electricity Regulation Act. In terms of that law “service provider” means “a person or institution of any combination of persons or institutions which provide a municipal service in terms of a service delivery agreement”. The term “service delivery agreement” is defined as “an agreement between municipality and an institution or person providing electricity reticulation (i.e. trading of distribution or electricity and includes services associated therewith), either for its own account or on behalf of the municipality”. Section 28 of that law lays down strict requirements for the conclusion of such agreements. The applicant did not aver that it concluded such an agreement with the Council.

[78] Insofar as the applicant relies on the electricity bylaws, they do not define “resale” or “reseller”. But the applicant purported to rely on the definition of those terms in the NERSA paper for its conclusion that it was a reseller in terms of the bylaws. In the NERSA concept paper the definition of the terms “resale” and “reseller” is acknowledged to be an attempt at defining those terms and did not purport to be ultimately definitive of those concepts. They are defined there merely for the purpose of the project engaged in by NERSA as envisaged in that paper. The paper states that its definition of “reseller” is derived from the definition of “trading” in section 1 in the Electricity Regulation Act and a “reseller” is treated in the paper as being synonymous with a “trader” as defined in the Electricity Regulation Act. According to the paper, it is a person or entity who buys electricity from a licensed distributor and sells it within the area of such distributor. However, the term “trader” is

not defined in the Electricity Regulation Act, instead, the term “trading” is defined. And it is defined as “the buying and selling of electricity as a commercial activity”. In its founding affidavit made in support of this review, Mr. Tsai, on behalf of the applicant, states“ [t]he [a]pplicant does not supply electricity as a commercial activity that is, making profit from buying and selling electricity”.

[79] It is not permissible to use the NERSA paper to interpret the bylaw or more particularly, to apply the NERSA definition as if it is the meaning intended by the bylaw. Particularly because the NERSA paper proceeds from the premise that this activity of landlords, of on-selling electricity to tenants, is as yet unregulated, presupposing that the bylaw does not apply to them. In any event, while the bylaw does not purport, at least, expressly, to apply to the situation between the landlord and the tenant in respect of the supply of electricity by the former to the latter, the Act and the Unfair Practice Regulations are specifically intended to regulate the entire relationship between landlord and tenant, including the rights and obligations pertaining to the supply and consumption of electricity services. Regulation 13 of the Regulations specifically deals with the supply of all the electricity services by the landlord to the tenant and the charging for those services.

[80] At best for the applicant, even if it were too be assumed that it was a “trader” as envisaged in the Electricity Regulation Act, it could not legally trade in electricity without a licence. Save for its say-so, it has provided no evidence of having been exempted from licensing, nor of being registered with

NERSA, as is required in terms of the Electricity Regulation Act. It is noteworthy that the NERSA paper raises concerns, *inter alia*, about the unregulated environment and the fact that "resellers", such as the applicant, operates "outside the radar screen" of the Energy Regulator; use electricity as a leverage to exact payment for other services; that tenants are at the mercy of such landlords and are "a captive customer base and [are] vulnerable to being charged exorbitant prices with minimal prospects of recourse".

[81] Under this head of attack the applicant raised another point which was refined and elaborated upon in counsel's argument, namely, that the Tribunal erred and unfairly made a ruling on the reasonableness of the service charge levied by the applicant in circumstances where it was agreed that the only issue for decision before the Tribunal was whether the applicant was entitled (i.e. legally) to levy the service charge. Counsel for the applicant, in elaborating on this point, submitted that as a result, the applicant was deprived of the opportunity of properly and fully ventilating the reasonableness of the amount of the service charge and that the Tribunal's act, of nevertheless dealing with the reasonableness aspect of the charge, was unfair and constituted a gross irregularity which justified the setting aside of its findings regarding the service charge.

[82] In terms of section 6(2)(c) of PAJA, the court has the power to review administrative action that was procedurally unfair. However, in my view, the applicant has not shown, nor can one find, that the Tribunal acted in a manner that was not procedurally fair. This argument of the applicant's is, seemingly,

based on a misreading of the Tribunal's findings. While it appears that the Tribunal was critical of the fact that the applicant, *prima facie,* recovered a lot more than what it had to pay to the utility service provider (i.e. as a service charge), it was prepared to assume that the applicant may even be able to show that the excess, i.e. the difference between the R27 000,00 and the amount of approximately R385,00 or R400,00, was used for maintenance. However, the Tribunal's finding was that even that would not entitle the applicant to levy the "*service charge*". This is consistent with its finding that the applicant had to recover its overheads in respect of (*inter alia*) the billing of tenants and maintenance, including of its electrical network, by way of the rental.

[83] The Tribunal considered the NERSA concept paper, as was pointed out earlier, and came to the conclusion that "*it amounts to no more than an opinion*" and was of no assistance to the applicant. This conclusion cannot be faulted. The NERSA paper states that it a concept paper and only serves as a basis for the compilation of an "issues paper on electricity resale" which is to be circulated for public comment. It does not create, nor does it purport to regulate, or to create rights or duties. It was an exploratory step in an investigative process that was envisaged by NERSA. It did not purport to be prescriptive or definitive on the issue of the resale of electricity and acknowledged that its definition of "reseller" was merely an attempt at a definition of the concept.

[84] The Act empowers the Tribunal to make such a ruling as it may consider just in such circumstances.[38] In my view the applicant has not shown that the Tribunal ruling was not fair and just in the circumstances and, in any event, has made out no case either in terms of PAJA, or otherwise, justifying the review and setting aside of the Tribunal's ruling. In the result the following order is made:

The application is dismissed with costs.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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INSTRUCTED BY	SERI LAW CLINIC
HEARING DATE	01 DECEMBER 2014
DATE OF JUDGMENT	02 FEBRUARY 2015

[38] Section 13(2)(d) of the Act.