

THE ROLE OF ADMINISTRATIVE LAW IN ENFORCING SOCIO-ECONOMIC RIGHTS: REVISITING JOSEPH

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ABSTRACT

Joseph v City of Johannesburg has been both applauded by administrative lawyers, as a case in which formalism was rejected and a substantive model of administrative law adjudication was embraced, and condemned by human rights lawyers, as a case that focused on procedural fairness rather than ‘the hard rights of citizens and their plight’. I argue that because *Joseph* concerned a group of poor and vulnerable occupiers of an inner-city building deprived of their electricity, resulting in an inability to meet their basic needs: to cook, refrigerate their food, heat their homes, do homework, operate medical equipment, etc, *Joseph* is primarily a socio-economic rights case in which a requirement of the administrative law, procedural fairness, was invoked so as to protect and enforce a right to electricity. I critique the administrative law strategy invoked on behalf of the occupiers in *Joseph* to enforce the occupiers’ claim to have their electricity reconnected; the courts’ treatment of that strategy; and whether it is an effective and, if so, desirable tool for the enforcement of socio-economic rights in the future.

Key words: administrative law, adjudication, human rights

I INTRODUCTION

*Joseph v City of Johannesburg*¹ has been both applauded by administrative lawyers, as a case in which formalism was rejected and a substantive model of administrative law adjudication was embraced,² and condemned by human rights lawyers as a case that focused on procedural fairness rather than ‘the hard rights of citizens and their plight’³.

Viewed from the perspective of an administrative lawyer, it is not difficult to understand why *Joseph* is perceived to be a progressive judgment in its approach to the application of procedural fairness.⁴ However, one should not lose sight of the fact that *Joseph* concerned a group of poor and vulnerable occupiers of an inner-city building who, when their electricity was disconnected, had nowhere else to go, and who were forced to live in

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1 2010 (4) SA 55 (CC).

2 See G Quinot ‘Substantive Reasoning in Administrative-Law Adjudication’ (2010) 3 *CCR* 111, 123.

3 See D Bilchitz ‘Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in *Joseph*’ (2010) 3 *CCR* 45, 71.

4 See C Hoexter *Administrative Law in South Africa* 2 ed (2012) 402–4.

‘intolerable’ conditions without electricity for a significant period of time.⁵ For these occupiers, *Joseph* was not a case primarily about asserting rights to procedural fairness or requiring the state to act in accordance with principles of good governance. For them, primarily, it was a case about the deprivation of their electricity supply, and the resultant inability to meet their basic needs: to cook, refrigerate their food, heat their homes, do homework, operate medical equipment, etc. Viewed from this perspective, *Joseph* is a socio-economic rights case in which a requirement of administrative law, more specifically that of procedural fairness, was invoked so as to protect and enforce a right to electricity.

In this article I consider the administrative law strategy invoked on behalf of the occupiers in *Joseph* to enforce the occupiers’ claim to have their electricity reconnected; the different approaches towards that strategy adopted by the High Court and the Constitutional Court respectively; and whether the strategy employed is an effective and, if so, desirable tool for the enforcement of socio-economic rights in the future.

II THE JOSEPH STRATEGY

Joseph concerned the plight of occupiers of an inner-city building, Ennerdale Mansions, in Johannesburg. Their electricity had been disconnected by the City of Johannesburg’s electricity-service provider, City Power (Pty) Ltd, on the basis that the owner of the building, to whom the occupiers were paying rental plus the cost of their electricity usage, had fallen into arrears with the City.⁶ The occupiers were not afforded notice of the disconnection, nor were they afforded an opportunity to make representations before the disconnection took place.⁷

The occupiers applied for an order declaring the disconnection invalid because it was administrative action that occurred without them first having been afforded any notice or opportunity to make representations, these being the most basic procedural fairness requirements in terms of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁸ The occupiers argued that the effect of the City’s action was that their rights to adequate housing, human dignity and to receive electricity in terms of their contract with their landlord were ‘adversely affected’, as required by PAJA so as to trigger the procedural fairness protection they asserted.⁹ In addition to the short-term relief sought by the occupiers (the setting aside of the invalid disconnection of their electricity), the long-term relief sought was also limited to procedural fairness rights. The applicants sought an order in the form of a declaration that before electricity could lawfully be disconnected from a building or residence, the disconnection was required to be procedurally fair in terms of PAJA. This, the applicants argued, required that affected persons receive adequate notice,

5 *Joseph* (note 1 above) 9.

6 *Ibid* 1.

7 *Ibid* 7.

8 *Ibid* 1.

9 Applicants’ heads of argument in *Joseph* para 37.

that they be afforded the right to make representations, and that all relevant circumstances be taken into account, including the personal circumstances of those affected.¹⁰ The relief sought therefore amounted to requiring government to ‘act in a manner consistent with good governance, and only that’.¹¹ To the extent that the existing by-laws did not impose a duty of procedural fairness, the applicants requested that they be declared unconstitutional and invalid.¹²

Prior to litigation, the first step taken by the occupiers’ attorneys was to write a letter demanding that the occupiers’ electricity supply be reconnected on the basis that disconnection was administrative action in terms of PAJA and must therefore be procedurally fair.¹³ The significance of this first step is that there can be no question that from the outset the occupiers’ attorneys, the Centre for Applied Legal Studies (CALs), characterised the occupiers’ case as one concerning a breach of the occupiers’ rights to administrative justice generally, and procedural fairness in particular.

This is contrary to the view expressed by some authors that the case was initially characterised as a right to electricity case, as implied by the right to housing.¹⁴ Jackie Dugard and Malcolm Langford assert that *Joseph* was a case about the right to electricity, as implied by the right to housing.¹⁵ These authors contend, therefore, that in contrast to *Mazibuko v City of Johannesburg*,¹⁶ *Joseph* was a ‘much riskier’ prospect because there is no explicit right to electricity in the Constitution of the Republic of South Africa, 1996, whereas there is express provision for the right of access to water (which is what *Mazibuko* was about). However, this assertion seems misplaced in light of the true – administrative law – characterisation of *Joseph*.¹⁷ The Constitutional Court’s penchant for ‘proceduralising’¹⁸ socio-economic rights also bolstered the prospects of success in *Joseph*. Such proceduralisation is characterised, inter alia, by the

10 Ibid para 11.

11 See D Brand ‘The Proceduralisation of South African Socio-economic Rights Jurisprudence, or “What are Socio-Economic Rights for?”’ in H Botha, AJ van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33, 37.

12 Applicants’ heads (note 9 above) para 11.

13 Ibid para 7.9.

14 J Dugard & M Langford in ‘Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism’ (2011) 27 *SAJHR* 39, 51 seek to lay the blame at the foot of the court for what they describe as the court’s ‘re-characterisation’ of *Joseph* ‘as a case about the negative infringement of administrative justice principles in relation to municipal services’ when that is in fact precisely how the case was characterised from the outset by the occupiers, represented by CALs. I say so because the applicants asserted their right to procedural fairness in the first instance and, as appears from the applicants’ heads (note 9 above) paras 34–7, the right to housing was raised in a secondary manner, merely to trigger an entitlement to procedural fairness (the applicants claimed that their right to housing was among the rights that were adversely affected by the City’s failure to afford the applicants procedural fairness before performing the administrative act of disconnecting their electricity, but did not seek to enforce the right to housing in any direct sense).

15 Ibid.

16 2010 (4) SA 1 (CC) in which litigants sought to enforce their right of access to water in terms s 27 of the Constitution.

17 Dugard & Langford (note 14 above) 42.

18 The term ‘proceduralising’ is taken from Brand’s work (note 11 above) discussing the court’s conceptualisation of its role in socio-economic rights litigation and subsequent publications.

court's propensity for awarding administrative law remedies to enforce negative constitutional duties.¹⁹

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

Notwithstanding the Constitutional Court's penchant for 'proceduralisation', there is no precedent indicating that *Joseph* had to be argued using a purely administrative law strategy rather than arguing that a direct infringement of the substantive right to housing had occurred. Other socio-economic rights cases indicate that where socio-economic rights are infringed, a reasonableness test (in contrast with what can be described as the 'procedural fairness test' employed in *Joseph*) is employed in a proceduralist manner.²⁰ The strategy employed in *Joseph* was thus more proceduralist than previous socio-economic rights precedent would seem to require.²¹ I argue that this ultimately led to a judgment more proceduralist than even the strategy envisaged; lacking in substance, in particular, in relation to the content of the right to housing.

III THE COURTS' TREATMENT OF THE JOSEPH STRATEGY

In the High Court (in applications for interim and final relief respectively) it was found that the occupiers had failed to establish that any of their rights had been affected.²² For the High Court, the occupiers' remedies lay against their landlord, with whom they were in a contractual relationship, and not against the City, since it was the landlord (having failed to pay the City) who

19 See for example *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC). This propensity may be contrasted with the court's reluctance to grant orders amounting to the enforcement of positive constitutional duties because of the inevitable evaluation of the substantive merits of government policy that this entails and the court's perceived institutional incompetence to do so. See for example, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); and more recently *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC).

20 S Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* (2010) chapter 4. Also see *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Grootboom* *ibid*; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); and *Mazibuko* (note 15 above).

21 *Ibid*.

22 *Joseph* (note 1 above) 10–1.

had deprived the occupiers of electricity.²³ It is undoubtedly this approach in the High Court that led to the Constitutional Court identifying the ‘crux’ of *Joseph* as the nature of the relationship between the City and the occupiers: given that the occupiers were not in a contractual relationship with the City, the Constitutional Court had to determine whether any other legal relationship between them would entitle the occupiers to procedural fairness before the City could disconnect their electricity.²⁴

The Constitutional Court described the relationship between the parties as one between ‘a public-service provider and consumers’.²⁵ That the High Court overlooked this obvious relationship is troubling.²⁶ As the Constitutional Court pointed out, the High Court ought to have taken into account PAJA’s role in relation to persons who have no contractual relationship with a service provider.²⁷ It described as ‘artificial’ the High Court’s treatment of the relationship between the landlord and the City as unrelated to the benefits accruing to the occupiers.²⁸ Moreover, people in the position of the occupiers of Ennerdale Mansions are invariably not landowners. Such people are accordingly forced to occupy (whether lawfully or unlawfully) property owned by others, more often than not in the absence of any contractual relationship with municipal service providers. Often these people will rely heavily on services provided by municipalities to meet their basic needs.

Given the important role that municipal services play in meeting the basic needs of the poor and vulnerable in our society, it is disappointing that the High Court chose to disregard the important relationship between the occupiers and the City. The Constitutional Court was also at fault in its failure to acknowledge the vulnerability of the particular litigants before it. The manner in which this blind spot influenced the Constitutional Court’s approach to the application of procedural fairness standards is dealt with later in this article. For now I deal with the manner in which the Constitutional Court was prepared, through a progressive approach to the principles of procedural fairness, to order the restoration of the occupiers’ electricity supply, at least for the short term, until such time as notice of the disconnection and an opportunity to make representations to the City had been afforded to the occupiers. Through what has been referred to as an ‘innovative approach’ to the meaning of ‘rights’ in s 3(1) of PAJA, the court held that the occupiers of Ennerdale Mansions were entitled to procedural fairness protection.²⁹

At the heart of the Constitutional Court’s finding that the occupiers of Ennerdale Mansions were entitled to procedural fairness protection was what

23 Applicants’ heads (note 9 above) para 21.

24 *Joseph* (note 1 above) 2.

25 *Ibid* 18.

26 The characterisation of the occupiers as ‘consumers’ is itself not uncontroversial, since it raises the questions of whether rights to basic services accrue only in commercial consumer relationships rather than more pertinently as a result of constitutional duties, in acknowledgment of the basic needs of the poor in our country.

27 *Joseph* (note 1 above) 22.

28 *Ibid* 23.

29 Quinot (note 2 above) 122.

it described as a relationship between the occupiers and the City ‘cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of persons living in its jurisdiction’.³⁰ The recognition of this relationship is important because it formed the basis for the recognition of a public law right to receive electricity as a basic municipal service, which extends ‘to all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public-service provider’.³¹ The court thus ‘defined electricity as a rights issue’.³² As Cora Hoexter points out,³³ the court was able to define electricity as a rights issue by adopting a purposive interpretation of s 3(1) of PAJA (which provides that ‘[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair’), in finding that:

[T]he notion of ‘rights’ includes not only vested, private-law rights but also legal entitlements that have their basis in the constitutional and statutory obligations of government. The preamble of PAJA gives expression to the role of administrative justice and provides that the objectives of PAJA are *inter alia* to ‘promote an efficient administration and good governance’ and to ‘create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function’. These objectives give expression to the founding values in s 1 of the Constitution, namely that South Africa is founded on the rule of law and on principles of democratic government to ensure accountability, responsiveness and openness.³⁴

Hoexter aptly applauds *Joseph* for embracing ‘an anti-formalistic characterisation of the relationships between the parties and a broad, creative view of the nature of the rights in question’.³⁵ The Constitutional Court’s approach represents an important and refreshing shift away from the ‘excessive conceptualism and consequently formalism’ which have plagued our administrative law both prior to and during the constitutional era.³⁶ This is because, as the above passage of the judgment demonstrates, what was important to the court was not a narrow conceptual understanding of ‘rights’ in the traditional sense of private law rights.³⁷ Rather, what was important was whether the sort of relationships in question were those that ought to give rise to procedural protection in terms of s 3(1) of PAJA.³⁸ In essence, the public law right to electricity emerged from a recognition that public law relationships coupled with ‘constitutional imperatives of good governance flowing from foundational principles of the rule of law and public administration values in the Constitution’ are worthy of procedural protection.³⁹

30 *Joseph* (note 1 above) 25.

31 *Ibid* 34.

32 Dugard & Langford (note 14) 46.

33 Hoexter (note 4 above) 403.

34 *Joseph* (note 1 above) 43.

35 Hoexter (note 4 above) 403 (footnote omitted).

36 Quinot (note 2 above) 118 as well as 120 & 115–8.

37 *Joseph* (note 1 above) 43.

38 *Ibid*.

39 Quinot (note 2 above) 122.

Both Hoexter and Geo Quinot emphasise the significance of the court's approach to the 'variability' of the application of the procedural fairness standards in *Joseph*.⁴⁰ In considering what procedural fairness required in the circumstances of the case, the court indeed refused to adopt an 'all-or-nothing approach'.⁴¹

Having found that the occupiers were entitled to procedural fairness protection in terms of s 3 of PAJA (since their public law right to electricity had been materially and adversely affected by the City's conduct) the court was confronted with a situation where the City had failed to rely on s 3(4) of PAJA as the basis upon which it had departed from the requirements of s 3(2). Section 3(4)(a) provides that an administrator may depart from any of the requirements of s 3(2) only if it is 'reasonable and justifiable' to do so in the circumstances, whilst s 3(2)(b) provides on the face of it for 'mandatory' and 'minimum requirements' of procedural fairness which 'must' be complied with.⁴² The City had incorrectly adopted the position that it was unnecessary to comply with any of the requirements contained in s 3(2)(b) vis-à-vis the occupiers, by virtue of its (discredited) position that none of the rights of the occupiers had been affected.

In considering whether it had a discretion in relation to which of the procedural fairness requirements of s 3(2)(b) ought to be imposed on the City's conduct in circumstances where the City had failed to justify a failure to depart from such requirements, the court thought it obvious that providing a mere 14 days' notice to the occupiers before disconnecting their electricity would not place too great an administrative burden on the City. However, the court was sensitive to the undue strain that would be placed on the City were it to force the City to take representations from every tenant receiving electricity pursuant to a contract between their landlord and City Power. Given this sensitivity, the court found that it indeed had a discretion as to which of the requirements of s 3(2)(b) ought to be imposed on an administrator where that administrator had failed to justify a departure from those requirements in terms of s 3(4) of PAJA.⁴³ As such, in finding that once the 14 days' notice had been afforded the occupiers, they would then have 'sufficient time to make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wish',⁴⁴ the court held that:

The nature of the notice described above implies that, upon receiving the notice, it remains open to the users to approach City Power to challenge the proposed termination or to tender appropriate arrangements to pay off arrears. It is, however, incumbent on the applicants to approach City Power within the notice period to raise any challenges they may have. Where a grievance is valid, rendering the proposed disconnection untenable, or where suitable

40 Hoexter (note 4 above) 405–6; and Quinot (note 2 above) 122–3.

41 Hoexter (note 4 above) 405; and *Joseph* (note 1 above) 56–64.

42 *Joseph* (note 1 above) 57.

43 Ibid 57–63.

44 Ibid 61.

payment is made, it must be presumed that City Power, acting in good faith, would not proceed to effect the proposed disconnection.⁴⁵

Though the court's acknowledgment of the variability of procedural fairness standards cannot be faulted, one cannot help wondering where the standard of procedural fairness imposed leaves people in the position of the occupiers of Ennerdale Mansions. Can it truly be said that good governance standards are promoted by a judgment that requires nothing more than notice and the *possibility* of a hearing, on the assumption that the City will act with 'good faith' towards its citizens? In addition, the court's hands-off approach seems somewhat out of place in the context of the complete absence of good faith shown by the City towards the occupiers, which gave rise to the litigation in the first place.

By placing the burden solely on the occupiers to pursue the opportunity to make representations, without imposing any correlative duty (other than to act in good faith) to listen to the occupiers and take their particular circumstances into account, the Constitutional Court overlooks the City's callous treatment of the occupiers in refusing to acknowledge any relationship with them. More importantly though, the court fails to recognise the vulnerable position of the occupiers: poor people, including children and elderly people, who continued to live in Ennerdale Mansions in 'intolerable' conditions long after their electricity had been disconnected because they had nowhere else to go.⁴⁶ As such, the occupiers' need and deprivation is ignored, as is the impact of the City's conduct on poor and vulnerable people in our society.⁴⁷ This is not merely by virtue of a failure to afford procedural fairness protection, but more so because the particular circumstances of the occupiers, and the specific impact that disconnection would have on them was not seriously weighed in the balance.⁴⁸ By permitting the City to disregard these important issues, the court failed to define and take seriously the interests driving the occupiers' complaint and the experiences of poverty and deprivation upon which they were based.⁴⁹

Further, the procedural fairness protection envisaged fails to provide for 'meaningful engagement' to give effect to what the court characterises as the important relationship between the citizen and the state.⁵⁰ The court, to avoid placing undue strain on the state administration, ordered that municipalities need do no more than give notice to occupiers whose electricity is imminently to be disconnected, and only have to listen to their views if they make the (no doubt mammoth and daunting) effort to bring a 'valid grievance' to them.⁵¹ It is questionable whether this kind of relief in fact gives effect to the objectives

45 Ibid 63.

46 Ibid 9.

47 S Wilson & J Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights' (2011) 22 *SLR* 664, 673.

48 Ibid.

49 Ibid.

50 On 'meaningful engagement' see B Ray 'Proceduralisation's Triumph and Engagement's Promise in Socio-economic Rights Litigation' (2011) 27 *SAJHR* 107.

51 *Joseph* (note 1 above) 63.

of PAJA described in *Joseph*:⁵² to ‘promote an efficient administration and good governance’ and ‘create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function’. Moreover, as Brian Ray argues, in order for procedural/administrative law remedies to be effective, courts must define the parameters for when and how the state must engage.⁵³

The weak standard of procedural fairness protection contemplated in *Joseph* fails to define any parameters for when and how the state must engage with citizens. *Joseph* therefore seems to have missed an opportunity to develop procedural remedies in administrative justice cases such that they may operate as a ‘legitimacy-creating mechanism’,⁵⁴ which would require the state, instead of regarding the making of representations by its citizens as a hindrance, to begin to develop a bureaucratic structure focused on engagement: an approach to engagement that is broad and systemic, rather than project or issue specific.⁵⁵ As Ray argues:

developing engagement’s promise as an effective remedy will require considerable effort and sustained attention by the courts, civil society and government. Government must commit to developing a robust infrastructure for engagement and to institutionalise engagement policies and procedures across the board. To ensure that institutionalisation, the Court itself must be willing to at times step out of its purely managerial role and occasionally make substantive determinations of what these rights require as well as to prevent government from proceeding with policies where engagement was clearly inadequate.⁵⁶

Joseph locates engagement in the administrative law procedural fairness requirements in relation to this specific case, rather than a systemic unwillingness to engage, and thus fails to take up the mantle of developing engagement’s promise as an effective remedy by yielding too easily to concerns over the burden this would place on the state administration.⁵⁷ As such, it is arguable that the short-term gains that have been achieved for occupiers in similar situations to those in *Joseph*⁵⁸ may well result in nothing more than municipalities beginning to mitigate their litigation risk by affording notice and an opportunity to make representations before disconnecting their electricity, as opposed to fostering a culture of openness, transparency and accountability through meaningful engagement.

Lastly, as Hoexter points out, it is ‘most remarkable’ that the court chose to create a new public-law right within which to locate the occupiers’ right to electricity (which in turn gave rise to their right to procedural fairness), rather than give content to the right to housing by treating the right to electricity as

52 Ibid 34.

53 Ray (note 49 above) 112.

54 Ibid 115.

55 Ibid 116–9.

56 Ibid 125.

57 Ibid. The court’s approach can be contrasted with the more substantive engagement imposed in eviction cases such as *Olivia Road* (note 18 above); and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) which were argued on the basis of a breach of the right to housing rather than on the basis of administrative justice.

58 See Dugard & Langford (note 14 above).

a component of the right to housing.⁵⁹ The ‘remarkable’ nature of the court’s approach is underscored by the court’s refusal in *Soobramoney v Minister of Health, KwaZulu-Natal*⁶⁰ to allow the applicant in that case to invoke a broad right (s 11 right to life) in order to seek relief, on the basis that the applicant’s claim ought to be located within a more specific socio-economic right to access to health-care services, in terms of s 27(1) and (2) of the Bill of Rights.

David Bilchitz, in his useful analysis of the court’s ‘refusal to develop the fundamental rights expressly recognised in the Constitution’ and election instead to create a public law right to receive basic municipal services in *Joseph*, concludes that the court’s approach is inexcusable.⁶¹ Bilchitz states ‘there is no good reason for the Court to refuse to develop the fundamental rights expressly recognised in the Constitution in this case’ by incorporating a right to electricity in the right to adequate housing, instead preferring to create ‘a “new” right’ not argued by the parties before it.⁶² I agree with Bilchitz.⁶³ My focus, though is on the (‘no good’) reason for the court’s refusal to develop the right to housing.

A plausible basis for the court’s approach is that focusing on the relationships between the City and the occupiers,⁶⁴ viewed through the lens of granting procedural relief, made it possible for the court to avoid giving substantive content to the right to housing or the right to dignity, and instead focus on restoring the relationship between the occupiers and the City by ‘recognising the duty to provide [municipal] services and a corresponding right to receive them’.⁶⁵ In other words, as will be explored in more detail below, the court’s refusal to develop the substantive content of socio-economic rights amounts to a prime example of the problem of the proceduralisation of socio-economic rights,⁶⁶ no doubt invited by the litigation strategy adopted by the occupiers in *Joseph*.

For now, my point is that careful analysis of the court’s treatment of the occupiers’ administrative law strategy reveals that the occupiers’ success was limited. They were successful in securing an order that their electricity be reconnected (at least in the short term) and that they be afforded notice and an opportunity to make representations before their electricity could be disconnected in the future. However, arguably the most important component of the occupiers’ strategy, the endeavour to compel the City to take into account the particular circumstances of people when considering their representations, was not successful. This represents a failure of the court to define and take seriously the interests driving the occupiers’ complaint and

59 Hoexter (note 4 above) 404.

60 1998 (1) SA 765 (CC) 18–22.

61 Bilchitz (note 3 above) 55.

62 Ibid 54–5.

63 Ibid, where Bilchitz develops the argument for the inclusion of the right to electricity in the right to housing, which I do not repeat here.

64 *Joseph* (note 1 above) 2.

65 Bilchitz (note 3 above) 66–7.

66 Brand (note 11 above).

the experiences of poverty and deprivation upon which they were based.⁶⁷ Further, a weak standard of procedural fairness was imposed, which fails to develop meaningful engagement as a truly effective remedy in a manner similar to the body of emerging eviction law.⁶⁸ Finally, in giving effect to the proceduralist strategy, the court had nothing to say about the substantive content of the socio-economic rights to housing or dignity.⁶⁹ Given these drawbacks, I now turn to consider the effectiveness and desirability of the strategy invoked in *Joseph*.

III THE EFFECTIVENESS AND DESIRABILITY OF THE *JOSEPH* STRATEGY

Unfortunately, the Constitutional Court's order in *Joseph* was never enforced, because in the time the matter took to reach the Constitutional Court, vandals had stripped Ennerdale Mansions of its electrical wiring, and neither the landlord nor the City were prepared to incur the cost of replacing the wiring.⁷⁰ However, the Socio-Economic Rights Institute of South Africa (SERI) has successfully achieved the reconnection of electricity for occupiers whose electricity was disconnected in circumstances similar to those that arose in *Joseph*, relying on the *Joseph* precedent.⁷¹ That positive outcomes have been achieved for other occupiers reveals that the administrative law strategy invoked has practical value – municipalities can no longer disregard electricity as a rights issue, and must now at least give notice to occupiers before disconnecting their electricity supply, even if the owners of the occupiers' homes have fallen into arrears. Where they have not done so, occupiers will be entitled to have their electricity reconnected. In addition, although the mere opportunity to make representations to municipalities, who bear no onus to facilitate or encourage the making of such representations, constitutes a weak form of procedural fairness, *Joseph* at least creates the potential for dialogue.

The question remains, however, what the cost of these gains might be to our constitutional jurisprudence and its overall transformative mandate. It is important to understand these costs in making strategic choices in public interest litigation, which is concerned not only with outcomes favourable to particular clients, but also to others in similar situations, and the public as a whole.

As early as 2003, Danie Brand highlighted how proceduralisation of socio-economic rights could result in the Constitutional Court focusing on 'structural rather than concrete guiding values and ends: structural good governance standards such as legality (rationality and non-arbitrariness), coherence, coordination and inclusivity in government policy formulation and decision-making' such that the purpose of socio-economic rights becomes 'watered

67 Wilson & Dugard (note 14 above).

68 Ray (note 49 above). Also see also *Olivia Road* (note 18 above); and *Joe Slovo* (note 56 above).

69 Brand (note 11 above).

70 Dugard & Langford (note 14 above) 46.

71 *Ibid.*

down' as being only to require government to act in a manner consistent with good governance, and nothing more.⁷²

Brand warned that by treating its role in the adjudication of socio-economic rights as formal, structural or procedural rather than substantive, the Constitutional Court was succeeding:

in removing itself one (or more) step(s) away from the concrete and particular realities of hunger, homelessness, disease and illiteracy that socio-economic rights are meant to deal with ... by proceduralising its adjudication of socio-economic rights.⁷³

Joseph was, from the outset, a case where the court was asked to order the City to act only in accordance with good governance standards, with the benefit that the fact the City not having done so meant that the occupiers could also ask for their electricity to be reconnected. The characterisation (by the occupiers and the court) and outcome of *Joseph* are doubtless symptomatic of the courts' penchant for proceduralisation. Put bluntly, the administrative law strategy invoked in *Joseph* facilitated proceduralisation, rather than substantive engagement in socio-economic rights. Viewed in this light, it is not surprising that the court in *Joseph* chose to remain in its procedural comfort zone and thus chose not to develop the right to housing or dignity, or the value of ubuntu. Since the court was, first and foremost, asked to consider merely whether the any right of the occupiers was 'adversely affected' so as to trigger s 3 of PAJA – notice and the opportunity to make representations, rather than meaningful engagement – the court was able to avoid these matters of substance.⁷⁴ Given the obvious relationship between municipalities and citizens, as well as the duty on municipalities to provide basic municipal services, there was simply no need for the court to break from its tendency to shy away from providing satisfactory descriptions of the substantive content of socio-economic rights, in this case the right to housing.⁷⁵ In the circumstances it is arguable that the administrative law strategy invoked in *Joseph* (albeit successful in securing a favourable order for the occupiers, which if enforceable, would have resulted in their electricity being temporarily reconnected) must shoulder much of the responsibility for the court's 'assiduous avoidance of substance'.⁷⁶ Such

72 Brand (note 11 above) 36–7. Sometimes, as I have argued above, even good governance may be compromised where a weak form of procedural fairness is imposed.

73 Ibid 36.

74 For example, in paras 38.5 to 38.6 of the applicants' heads (note 9 above) it was argued: 'Of course, the fact that electricity forms part of the right of access to adequate housing in the present context does not mean that the residents are constitutionally entitled to free electricity. Nor does it entail an absolute prohibition on electricity disconnections. What it does mean is that an electricity disconnection to an apartment block results in the residents' right of access to adequate housing being adversely affected *for purposes of PAJA*.' (Original emphasis omitted and my emphasis added.) In addition, para 39.5 states '... this is not to suggest that no disconnection of electricity is permissible. Rather the point made is a narrower one – that *for purposes of PAJA* it is beyond doubt that the right to dignity of the applicants was materially and adversely affected by the disconnection in question' (my emphasis).

75 Brand (note 11 above) 45–6.

76 Ibid 48. For a discussion on how the court could have given substance to the rights of the poor in *Joseph* see Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nkotyana v Ekurhuleni Metropolitan Municipality*: notes' (2010) 127 SALJ 597.

avoidance entailed failing to develop the right to housing, and retreat to proceduralisation, by granting people in the position of the occupiers no more than the right to notice and an opportunity to make representations in terms of s 3 of PAJA.

Thus, the success of the strategy invoked in *Joseph* in securing an order that has enabled other vulnerable occupiers to have their electricity reconnected has come at a cost.⁷⁷

First, *Joseph's* proceduralist litigation strategy has resulted in precedent limited in its transformative scope by virtue of its failure to say anything about the rights to housing or dignity, and its failure to define and take seriously the interests driving the occupiers' complaint and the experiences of poverty and deprivation upon which they were based.⁷⁸ In dealing with the occupiers' public law right and good governance, nothing is said about how the disconnection of the occupiers' electricity would impact on them: the fact that they would be unable to refrigerate their food, operate their medical equipment, or study for exams without electricity, and the inherent indignity in this state of affairs. The occupiers were regarded by the court as 'ordinary citizens', not people in desperate need, who require the protection that our Constitution and courts are supposed to offer, in order that our society might transform, to achieve social justice.

Second, *Joseph* gives credence to Brand's prophecy that proceduralisation would limit 'the potential for the creative use of litigation to effect social change' since only procedural recourse (notice and the opportunity to make representations) to restore the status quo is available to litigants.⁷⁹ If litigants in the position of the occupiers in *Joseph* can hope for nothing more than 14 days' notice of disconnection and a mere opportunity to make representations to their local municipality, 'there will be very little incentive for desperately deprived persons to submit themselves to the arduous legal process ...'.⁸⁰ If the occupiers were found to have been deprived of their right to housing by virtue of the unlawful and unfair disconnection of their electricity, the occupiers could be said to have been granted more meaningful, substantive relief. This is not what was asked for in *Joseph*.

Third, the strategy invoked in *Joseph*, by entrenching proceduralisation, is likely to result – in difficult cases, where policies are not irrational and good governance issues do not arise – in the courts having nothing to say.⁸¹ Some would argue that *Mazibuko* is precisely such a case. A full exposition of the issues in *Mazibuko* is beyond the scope of this article. Suffice it to say that by the time *Mazibuko* came before the Constitutional Court, although the policies that were subject to challenge had been significantly re-worked and improved, the claimants involved were still aggrieved because the realisation

77 The sort of dangers to which I refer are dealt with more fully by Brand (note 11 above) 51–6.

78 Brand *ibid* 52; and Wilson & Dugard (note 47 above).

79 Brand *ibid* 52–3.

80 *Ibid* 52.

81 *Ibid* 53.

of their socio-economic right to access to basic water remained affected. It was arguably the court's 'focus on rationality and other structural principles of good governance and its steadfast avoidance of the need to describe substantive standards emanating from socio-economic rights' that meant that the court could find no reason to come to the aid of the claimants.⁸² What this tells us is that whilst cases like *Joseph* are effective in a most basic sense, the entrenchment of proceduralisation could leave other litigants, where policies are not irrational, or good governance issues do not arise, quite literally, in the dust. The occupiers in *Joseph* could have argued that the disconnection of their electricity amounted to an unconstitutional *infringement* of their right to housing (even if only in the alternative), as opposed to merely arguing that their right to housing had been *affected*, so as to trigger a right to administrative justice.

As Brand points out, at the level of theory, proceduralisation creates the impression that courts engaged in judicial review are merely examining form (involving neutral, legal principle) as opposed to content (involving subjective political questions).⁸³ Thus the court sets itself up as an 'impartial regulator' rather than 'active participant' in the 'inevitably contested nature of the meaning and role of socio-economic rights'.⁸⁴ The effect of *Joseph* (had the court's order been capable of enforcement) would have been to force the City to continue providing electricity to the occupiers of Ennerdale Mansions, despite not having been paid for it (as much as R400,000 was owed to the City when it disconnected the electricity from Ennerdale Mansions). The court sidestepped this substantive aspect of its decision (and its political nature), however, by focusing on procedural fairness. As Brand argues, when the court adopts this 'apolitical stance' it:

hides its own predilections – the background political philosophy that in fact informs its judgment – and so insulates them from rigorous evaluation and debate.⁸⁵

For this reason also, attractive as it may seem at first glance because of its basic effectiveness, the administrative law strategy adopted in *Joseph* is undesirable, because it enables courts to conceal the political nature of their role in the adjudication of socio-economic rights, which in turn renders our constitutional jurisprudence less transparent and accountable than it ought to be. In light of the transformative mandate of our courts, judgments that conceal the political nature of their role are inherently problematic.

The costs of the strategy employed in *Joseph* could have been mitigated by arguing that the City's conduct amounted to an infringement of the occupiers' right to housing in terms of s 26 of the Constitution, and by raising the City's failure to follow a fair process in the alternative. In this way the Constitutional Court may have been more inclined to consider, in a substantive sense, what the right to housing ought to entail, rather than considering merely whether

82 Ibid.

83 Ibid.

84 Ibid 55.

85 Ibid.

any right was 'affected' for purposes of s 3 of PAJA. In addition, as a direct breach of the right to housing, the court may have been more prepared to require meaningful engagement in a more substantive sense than 14 days' notice and an (unstructured) opportunity to make representations, as has arguably been imposed in eviction cases such as *Olivia Road*.⁸⁶ Such an approach could arguably have achieved the short-term goal of reconnection of the occupiers' electricity, as well as more meaningful socio-economic rights jurisprudence for others in their position.

IV CONCLUSION

Whilst the administrative law strategy invoked in *Joseph* is likely to achieve short-term gains in the enforcement of socio-economic rights – with the potential to promote good governance – it also serves to exacerbate the problem of proceduralisation, which is undesirable. To mitigate these problems, where socio-economic rights have been infringed, litigants ought to make clear that the imposition of standards of good governance is not enough. To avoid the dangers of proceduralisation, substantive content ought still to be given to the socio-economic rights in issue, and the courts ought to be charged to take seriously and engage with the need and deprivation driving litigants' complaints. Where procedural recourse is appropriate, it should be aimed at rendering meaningful engagement an effective remedy. *Joseph*, though innovative and progressive from a purely administrative law standpoint, represents a missed opportunity on all of these fronts.

86 Note 18 above.