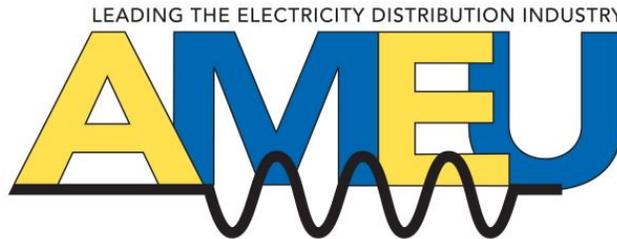


# SWITCHING OFF DANGEROUS ELECTRICITY CIRCUITRY IN TERMS OF THE OCCUPATIONAL HEALTH AND SAFETY ACT (OHSA) VS CONSTRAINTS OF SWITCHING OFF SERVICES IN TERMS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA)



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## 1. Introduction

The life of a Responsible Person, in terms of the Occupational Health and Safety Act (OHSA), General Machinery Regulations (GMR), can sometimes get quite nerve wracking when not only the requirements of the OHSA has to be adhered to but also the requirements of other legislation such as the Promotion of Administrative Justice Act (PAJA). The first deals with safety of people and second deals with the rights of people and sometime these requirements come into conflict.

## 2. Background

The paper deals with the unsafe condition of electricity circuitry found in a Caravan Park within the Municipality.

The Caravan Park is operated by an Association which leases the Caravan Park from the Municipality. The lease agreement is several years old and has been extended twice. The Association rents this property from the Municipality at no charge, but is required to attend to the upkeep of the property as well as the maintenance of all services within the property.

The maintenance of the networks, which include the maintenance of the electricity network, is required by the agreement. Since the municipality decided to look at the redevelopment of this property, it actively inspected the site to determine its condition. It found the property to be serious lacking in many instances.

Upon inspecting the Electricity Network it was found that the networks were in a severe unsafe state.



Fig. 2.1: Aerial View of the Caravan Park Site

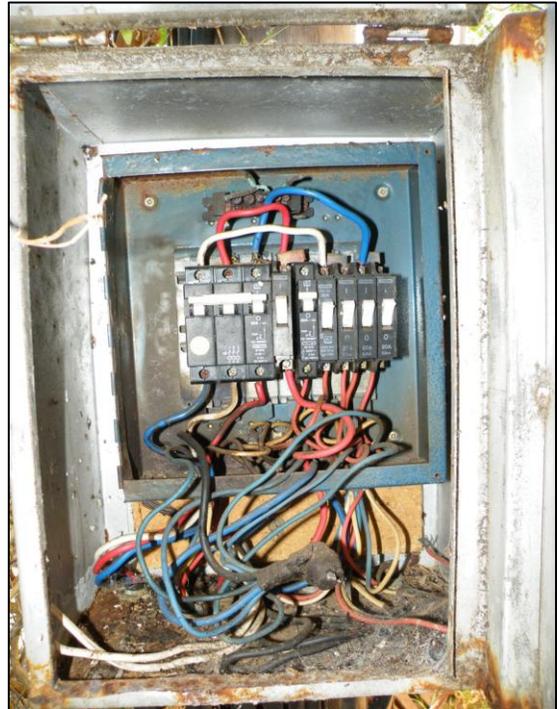


Fig. 2.2: Pictures of Unsafe Conditions of Electricity Circuitry within the Caravan Park (1)

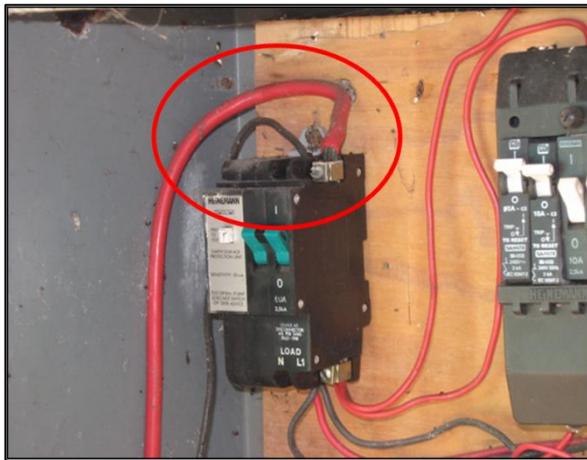


Fig. 2.3: Pictures of Unsafe Conditions of Electricity Circuitry within the Caravan Park (2)

### 3. Discussion

#### 3.1 OHS Safety Requirements

The inspection of electricity networks is performed as per the requirements of the OHS and as per the SANS 10143 Wiring Code. In the first round of inspections of the Caravan Park site, more than 100 cases of unsafe conditions were found.

##### a. Responsibility of Safety

The first question to answer is to determine who is responsible for this unsafe condition. Regulation 2 of the Electricity Installation Regulations (EIR) state:

***"2. Responsibility for electrical installations***

*2. (1) Subject to subregulation (3), the user or lessor of an electrical installation, as the case may be, shall be responsible for the safety, safe use and maintenance of the electrical installation he or she uses or leases.*

*(2) The user or lessor of an electrical installation, as the case may be, shall be responsible for the safety of the conductors on his or her premises connecting the electrical installation to the point of supply in the case where the point of supply is not the point of control.*

*(3) Where there is a written undertaking between a user or lessor and a lessee whereby the responsibility for an electrical installation has been transferred to the lessee, the lessee shall be responsible for that installation as if he or she were the user or lessor.*

The underlined part, Regulation 2(3) states that this is the responsibility of the Lessee if an agreement has been reached in writing. Since the lease agreement carries this clause, the responsibility of the circuitry would in this case fall with the Lessee.

##### b. Responsibility to Act

The next question to answer is to determine what the owner should do if the network or circuitry is found to be unsafe.

The answer is found in the latest version of the OHS EIR under Regulation 7 in the case where the owner is also the supply authority:

***"Electrical Installation Regulations***

*7(7) If after an inspector, an approved inspection authority for electrical installations or supplier has carried out an inspection or test and has detected any fault or defect in any electrical installation, that inspector, approved inspection authority for electrical installations or supplier may require the user or lessor of that electrical installation to obtain a new certificate of compliance: **Provided that if such fault or defect in the***

***opinion of the inspector, approved inspection authority for electrical installations or supplier constitutes an immediate danger to persons, that inspector, approved inspection authority for electrical installations or supplier shall forthwith take steps to have the supply to the circuit in which the fault or defect was detected disconnected*** : Provided further that where the fault or defect is of such a nature that it may indicate negligence on the part of a registered person, the Inspector, approved inspection authority for electrical installations or the supplier, as the case may be, shall forthwith report those circumstances in writing to the chief inspector. “

Under less dangerous circumstances the Association of the Caravan Park can now be requested to obtain a fresh Certificate of Compliance. It was however found that the circuitry boxes were open and it would be very easy to accidentally touch live electrical circuitry. It was also found that the wiring was not designed properly and in many cases the wire thicknesses were completely undersized. The network was therefore considered extremely dangerous and could very easily cause electrical shocks. It is therefore clear that the highlighted part of Regulation 7 comes into play, where it is necessary to shut off the electricity power “forthwith”. Oxford dictionary translation of this word is: “At Once; Without Delay”

A further indication of the seriousness of the situation can found in the OHSA itself under Section 39(2)

*“(2) Any employer who does or omits to do an act, thereby causing any person to be injured at a workplace, or, in the case of a person employed by him, to be injured at any place in the course of his employment, or any user who does or omits to do an act in connection with the use of plant or machinery, thereby causing any person to be injured, shall be guilty of an offence if that employer or user, as the case may be, would in respect of that act or omission have been guilty of the offence of culpable homicide had that act or omission caused the death of the said person, irrespective of whether or not the injury could have led to the death of such person, and on conviction be liable to a fine not exceeding R100 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”*

Should a member of the Caravan Park be electrocuted after this dangerous situation was found, the Responsible Person, would be charged with Culpable Homicide and can be fined heavily and/or jailed if found guilty.

### 3.2 Promotion of Administrative Justice Act (PAJA)

Upon deciding to switch off the electricity, the Municipality was warned by its lawyers that a newer Act, the Promotion of Administrative Justice Act, (PAJA), requires that the user of electricity must first have a change to remedy the faulty condition prior to be allowed to switch off. The Lawyer claimed that there were many examples in case law to defend this stance.

PAJA was established to enact a part of the Constitution which determines what rights individuals have as prescribed by the Bill of Rights.

Some extracts from PAJA are repeated below:

*““administrator” means an organ of state or any natural or juristic person taking administrative action;”*

***“Procedurally fair administrative action affecting any person***

***3. (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.***

*(2) (a) A fair administrative procedure depends on the circumstances of each case.*

*(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)*

*—*

*(a) adequate notice of the nature and purpose of the proposed administrative action;*

*(b) a reasonable opportunity to make representations;*

*(c) a clear statement of the administrative action;*

*(d) adequate notice of any right of review or internal appeal, where applicable; and*

*(e) adequate notice of the right to request reasons in terms of section 5.*

***3. (3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—***

*(a) obtain assistance and, in serious or complex cases, legal representation;*

*(b) present and dispute information and arguments; and*

*(c) appear in person.”*

From the above it is clear that in terms of PAJA Section 3 a person has a right to react prior to performing administrative functions.

### 3.3 Dilemma

The Responsible Person now finds himself in a dilemma. He is required to switch off the electricity due to the severe unsafe conditions that exist, but he may not switch the network off immediately since PAJA prevents him from doing so. He finds himself in a “Catch 22” situation.

It was therefore decided to approach the High Court and request an Interim Interdict to switch off the Network. In the preparation of this Interdict it was still felt that should someone be injured during the court proceedings that the OHS Act would still be used to act against the Responsible Person for omitting to act. In order to minimise the risk of prosecution, the situation was formally reported to the Department of Labour.

Section 30(3) of the OHS Act states:

*“(3) Whenever an inspector is of the opinion that the health or safety of any person at a workplace or in the course of his employment or in connection with the use of plant or*

*machinery is threatened on account of the refusal or failure of an employer or a user, as the case may be, to take reasonable steps in the interest of such person's health or safety, the inspector may in writing direct that employer or user to take such steps as are specified in the direction within a specified period."*

It was hoped that an instruction from the Inspector would override PAJA. Department of Labour was however satisfied with the route taken and mentioned that if the court delays were too long that they would issue an order to switch off.

It is however not clear whether a precedent exists whereby the instruction of an Inspector was considered more powerful than a restriction from PAJA.

### 3.4 Actions Taken

The Municipality took this matter to the High Court and was awarded an Interdict to shut off the electricity and only switch it back on when the necessary Certificate of Compliance was submitted as proof of a safe network.

### 3.5 Possible Relief in Such a Situation

Upon studying PAJA further clauses were discovered:

***"Procedurally fair administrative action affecting any person***

*3. (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).*

*(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—*

*(i) the objects of the empowering provision;*

***(ii) the nature and purpose of, and the need to take, the administrative action;***

*(iii) the likely effect of the administrative action;*

***(iv) the urgency of taking the administrative action or the urgency of the matter; and***

*(v) the need to promote an efficient administration and good governance.*

***(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."***

In looking at especially Sections 3(4)(b)(ii) and (iv) as well as 3(5) it is found that the Administrator may have the power to act immediately should certain circumstances arise, which situation could be urgent enough to take immediate action. Section 3(5) may also indicate that the OHS Act would be able to override PAJA when situation of severe danger exist.

## 4. Conclusion

With the creation of the Constitution many pieces of legislation had to be redrafted to fit into the requirements of the Constitution. The Occupational Health and Safety Act (OHS Act) was

considered to be one kind of Act that would not need to be redrafted. The Promotion of Administrative Justice Act, however, may threaten certain actions of the OHSA until persons against whom an action needs to be instituted, had time to react. It may however be allowed to act immediately in certain instances of severe danger to the people. A person not only has the right to be heard, but he also has a right to be kept safe and there would be instances when these rights are in conflict. In any event the risk of being found foul of the Promotion of Administrative Justice Act would probably be less than the Risk of falling foul of the Occupational Health and Safety Act when the lives of people are at stake due to a severe dangerous electricity circuit.

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