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Overturning Illegal "Fines" or "Penalty" Charges Levied by COJ

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INTRODUCTION

HBGSchindlers has written several articles over the last few years about different kinds of charges levied by the City of Johannesburg Metropolitan Municipality ("the COJ"), including "fines" or "penalty" charges typically plopped onto a customer's account when the COJ is alleging that the customer has done something naughty – the most common example being where a customer has allegedly bypassed a water or electricity meter, or tampered with a meter in some or other manner.

This article is an update and amalgamation of these prior articles, and includes the latest information on a recent court order obtained against the COJ ordering the COJ to reverse these unlawful charges.

WHAT ARE FINES AND PENALTIES?

A fine is a "sum of money paid as punishment for breaking the law"[1]. It is trite law now that a fine is a "once off" charge, whereas a penalty is a reoccurring fine for an offence that has not been remedied[2].

CRIMINAL FINES COLLECTED BY A MUNICIPALITY

Where a consumer commits a criminal offence as contemplated in a municipal by-law they can be fined or sometimes imprisoned. This type of offence is normally prosecuted by a municipal official acting under the authority of the National Prosecuting Authority[3]. However, fines/imprisonment for breach of a by-law can only imposed upon conviction by a court (which is usually a municipal court but can also be a Magistrate's or High Court).

RESTRICTIVE INTERPRETATION DUE TO ONEROUS CONSEQUENCES

Because fines and penalty charges operate quite harshly against the accused person (if that person is found guilty), our law provides that care must be taken to ensure that where a law imposes a penalty, that law is interpreted strictly so as to ensure that the least harsh consequences apply.

For example, a limit to a fine is imposed, then that limit must be strictly adhered to. You can't charge R 400,000 for a fine with a limit of R 1,500. In addition, proper procedure must be followed by the authority that is investigating and prosecuting the accusation of unlawfulness which leads to a fine or penalty being imposed. The maxim "innocent until proven guilty" applies here – a person must be treated as innocent until it is proven that they are guilty and given all the rights that a non-guilty person would have in the ordinary course to dispute or make presentations in relation to the accusation of impropriety.

TYPICAL EXAMPLES OF METER-RELATED LAWS THAT IMPOSE FINES OR PENALTY CHARGES

Typical examples of this type of fine are found in the City of Johannesburg's ("COJ's") Water Services By-Laws 2003, which provide in section 119(l) that it is an offence to fail to comply with any of the by-laws, in section 119(2) that any alleged defence must be investigated by the Johannesburg Metropolitan Police Department and in section 119(3) that if convicted such offender is liable to imprisonment not exceeding 6 months or a further fine of R 50 for every day that the default continues (the latter being a penalty rather than a fine because of its continuing nature). These must be read with the fines set out in the Schedule of Fines to the Water Services By-Laws 2003, which were published in 2004, and which provide for further "once off" fines for certain offences. These fines range from R 500 to R 1,500 per offence.

The Greater Johannesburg Metropolitan Council Standardisation of Electricity By-laws (which govern electricity in COJ) also contain a similar type of fine. Section 38(1) says that any person contravening these by-laws are guilty of an offence and upon conviction will be liable to a fine not exceeding R 2,000 or imprisonment for not more than 6 months.

Similarly, section 105(1) of the Local Government Ordinance 17 of 1939 empowers the local authority to make provision for the imposition of a fine in its by-laws should its by-laws be breached, but limits that fine to an amount of R2000[4].

DISGUISING FINES AS OTHER TYPES OF CHARGES

Because the levying of fines and penalties is very onerous on the accused person, the law requires that it be strictly interpreted in favour of the accused. Municipalities often attempt to disguise fines as other types of charges that they are entitled to levy without having first obtained a conviction against an offender. Typical examples include meter tampering charges which are levied against the offender's municipal statement thereby disguising them as part of the electricity or water charge. It is not uncommon to see fines notated as "bypass/tamp" in some municipalities, or even invoiced to customers on stand alone invoices by other municipal entities such as City Parks. This is unlawful and if the municipality is coercing you to pay these charges, when you dispute that they are lawfully levied, such conduct amounts to extortion. Any person who has suffered this can claim a refund in terms of the laws of unjust enrichment or sometimes in terms of empowering statutes that create the fines if they are paid under coercion or without prejudice.

In some cases, municipalities charge fines or penalty charges under the "sundry" section of their invoices, as if this makes them lawful (which it does certainly not). No matter what section of the invoice these charges appear in – the same laws apply.

City of Johannesburg Sundry	VAT 4760117194	Sub - Total	Total Amount
Property Rates: Unauthorised Use Penalty Charge:		254,825.17	
Less property rates charge:		- 42,230.25	
Surcharge on business services, excluding property rates		- 3,682.10	
Surcharge on business services, excluding property rates		4,197.23	
VAT: 0%		0.00	
VAT: 15.00%		77.26	213,187.31

City of Johannesburg Sundry Charges	VAT No. 4760117194		
Pen Water Bypass/Tamp/Van CR		- 371,800.43	
VAT: 15.00% (Total Amount: - 371,800.43)		- 55,770.06	- 427,570.49

NOT WITHOUT A CRIMINAL CONVICTION

In the great majority of cases, the by-law (the law that creates the fine or penalty charge) provides that the fine is levied after conviction. If this is the case (as it invariably is) a person can only be held liable for a fine (or imprisonment), if you have been investigated by the Johannesburg Metropolitan Police Department and if you were then successfully prosecuted in relation thereto, and a Magistrate/Judge found the person guilty in a court. Any fine or penalty charge levied before conviction is unlawful and ought to be challenged and set aside.

WARNING NOTICES

The great majority of laws that provide for fines/penalty charges provide for a warning notice to be sent first, giving the person accused of doing wrong time to remedy the situation.

The requirement of sending an Infringement Notice warning of consequences of non-compliance would also be in compliance with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), in terms of which, when an administrator (the municipality) makes any decision that can adversely impact a member of the public, notice of same must be given first and an opportunity to object to same must be provided, before such action can be taken. If this opportunity to object to the administrative action is not provided, the action will normally be found to be unlawful and can be reviewed by a court, should same be necessary.

REMEDYING THE INFRINGEMENT

In the great majority of cases, the by-law creating the fine or penalty charge provides that if the infringement is remedied, no conviction will follow and thus no fine will be levied. This is the case where a warning notice is provided for - the notice given is a warning notice – it is intended to notify the consumer of the consequences of continued non-compliance. If the non-compliance is remedied, then the City would not be entitled to levy the penalty charges it generally threatens to levy in the Infringement Notice. As such, it is clear that any remedying of the alleged non-compliance would render the penalty charges inapplicable.

The case of **May 62 General Enterprise (Pty) Ltd v City of Tshwane Metropolitan Municipality**[5] the municipality alleged that the customer had bypassed a pre-paid electricity meter at the property because the municipality's records showed that pre-paid power had not been purchased in three years. The municipality raised a "tampering charge" of R 150,000 ex vat (so R173 317.79 in total) on the customer's account. The customer wanted to sell the property and needed to apply to the municipality for a rates clearance certificate and the dispute in court was whether the municipality was entitled to include the "tampering charge" within the ambit of the charges that the municipality insisted on being paid, to issue the rates clearance certificate.

At paragraph 36 of the judgment, the Court neatly explained why a municipality needs to follow proper procedure (which includes first obtaining a conviction) before a person can be held liable for a "tampering" fine or penalty charge in terms of the by-laws.

Firstly, this would permit a municipality to choose whether to fine a person or charge them criminally. This would enable a person who ought to be criminally charged to avoid justice by simply paying the fine. Secondly, there would be no point in prosecuting a person if the municipality can impose a fine of R 150,000 for tampering, rendering the criminal prosecution useless (which cannot have been what the by-laws intended).

Thirdly, allowing a municipality to fine instead of, or before conviction, permits a municipality to assume the position of a court and find a person guilty before they have been permitted all of the rights an accused person would have in criminal law. It permits an innocent person to be found guilty without trial. The court summed it up thus at paragraphs 26 and 37:

"If such a penalty fee were to be imposed without a criminal conviction, as part of an administrative exercise, as the City of Tshwane argued, that would amount to the imposition of a maximum criminal penalty on a property owner, without such person having been charged and convicted in criminal proceedings. The imposition of such a tampering fee would, in such circumstances, be an infringement of the owner's fair trial rights in Section 35 of the Constitution."

"If the City could lawfully recoup the maximum tariff for tampering administratively in terms of section 118(1)(b) of the Systems Act, that would remove any incentive for criminal prosecutions. This could lead to a proliferation of illegal connections since there would be no check on such criminal activity. Tenants and illegal occupiers of land would rest assured that the consequences of their illegal connections would be visited on the owner, and in practice, on the purchaser of such property. This is a rule of law consideration in favour of the retention of criminal proceedings as the means of recouping tampering fees."

The court at paragraph 50 thus concluded that the amount of R 150,000 which was referred to in the municipality's by-laws, was the maximum amount that a court could fine a person upon conviction (not the amount that the municipality could charge the customer for tampering).

The court's decision was thus that the municipality is not lawfully permitted to include the tampering charge in the ambit of charges that the customer needed to pay in order to obtain a rates clearance certificate, because the amount constituted the upper limit of a fine that a court could impose, rather than an amount that a municipality was entitled to charge. The court held thus:

"If a penalty of R150 000.00 were to be included in the clearance figures, that would not only constitute the imposition of a fine without a trial upon the property owner (which would be unconstitutional)".

and

"If the tamper fee was a mere tariff, then its inclusion in a clearance certificate would pass constitutional muster. By contrast, if it is a penalty that is imposed in criminal proceedings, and it were to be imposed without such a criminal trial or conviction, that would render the inclusion of such a penalty unconstitutional."

The court also determined that a property owner cannot be saddled with a fine by a municipality simply by the municipality levying it to the property owner's account, because the municipality had not had the property owner convicted of the offence of tampering. Perhaps it was not the property owner but another person (such as a tenant, or squatter) who committed the crime and ought to be held liable for the fine upon conviction. This is another reason, according to the court, why such a charge is not lawfully chargeable by a municipality to a property owner on that property owner's invoice.

CONCLUSION

It is absolutely critical to take expert legal advice before paying a 'fine' or 'penalty' charge levied by a municipality (especially the COJ), as it may not have been lawfully imposed and thus might not be due and payable.

There are various legal and administrative "hoops" that the COJ need to jump through, in order to send a legally sound Infringement Notice to a consumer, regarding non-compliance or illegal actions that have been taken by the consumer. Should the COJ send you a notice as explained above, the most important thing for you to do is see if there is an infringement going on and to remedy same if it is. You should also request written reasons for the notice from the COJ in order for you to be able to ascertain what it is complaining of and for you to be able to make representations in this regard, should same be necessary.

Only after the notice has been given and you have not complied with the content thereof and regularised your alleged misconduct, could the COJ issue another "notice" on you to appear in court, for a court to prosecute the matter and determine the fine in question.

OTHER CASES CURRENTLY PENDING BEFORE COURT

The authors are prosecuting (excusing the pun) several other cases in court against the COJ where it has unlawfully levied fines or penalty charges to customer's accounts without having followed proper process and without conviction having taken place. In the latest of these cases, an order was obtained against the municipality compelling it to reverse the tampering charges.

The most important thing is to ensure that the relevant legislation has been complied with, and most importantly, that consumers are not bullied into paying penalty charges that they do not owe. Recovering money paid for an unlawfully levied 'fine' is much more difficult and expensive than obtaining the correct legal advice to fight it in the first place before making payment of an amount you are not legally liable for.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case by case basis and you should consult an attorney before taking any action contemplated herein.

[1]*Paragraph 21, Radius Projects (Pty) Ltd / City of Tshwane*
[2]*Kenrock Homeowners Association v Allsop and Another (A224/2011) [2012] ZAWCHC 31 (28 March 2012) (available at http://www.saflii.org/za/cases/ZAWCHC/2012/31.html) and Walker and Walker v Cilantro Residential Estate Home Owners Association Unreported judgment of the Johannesburg High Court by Keightly J, case no A3067/2016) (available at http://www.saflii.org/za/cases/ZAGPJHC/2016/299.rtf.*
[3]*In terms of s 22(8)(b) of the National Prosecution Authority Act 32 of 1998 and s 112(a) of the Local Government: Municipal Finance Management Act 1 of 1999.*
[4]*Paragraph 18, Radius Projects (Pty) Ltd v City of Tshwane Metropolitan and Another (7813/07) [2007] ZAGPHC 127 (28 June 2007).*
[5]*(037830/2023) [2023] ZAGPPHC 549 (12 May 2023)*

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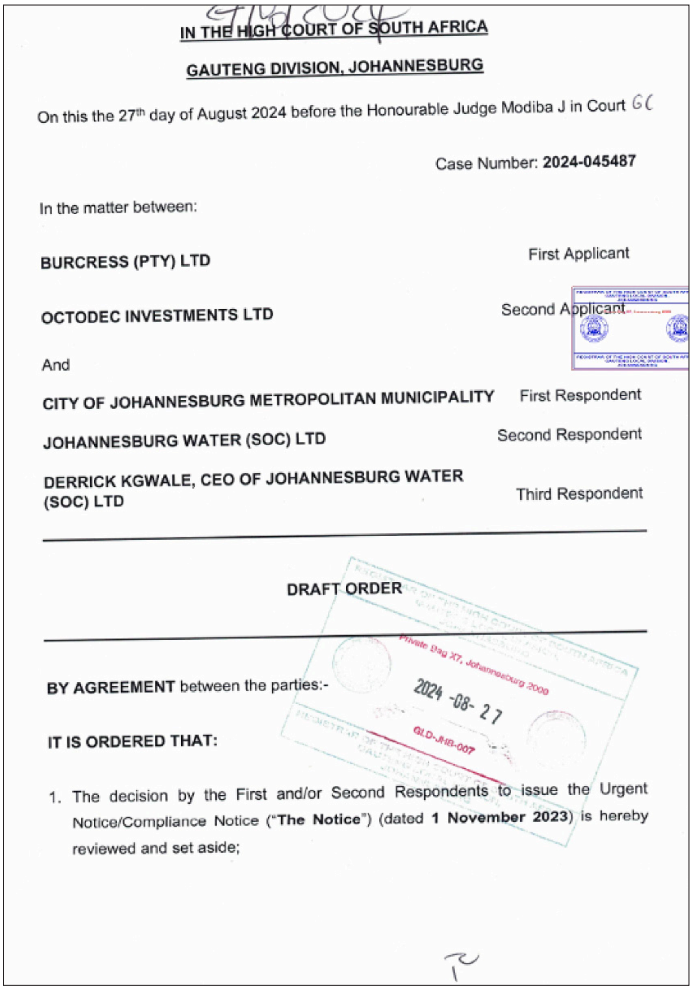


IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

On this the 27th day of August 2024 before the Honourable Judge Modiba J in Court GC

Case Number: **2024-045487**

In the matter between:

BURCRESS (PTY) LTD First Applicant

OCTODEC INVESTMENTS LTD Second Applicant

And

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

JOHANNESBURG WATER (SOC) LTD Second Respondent

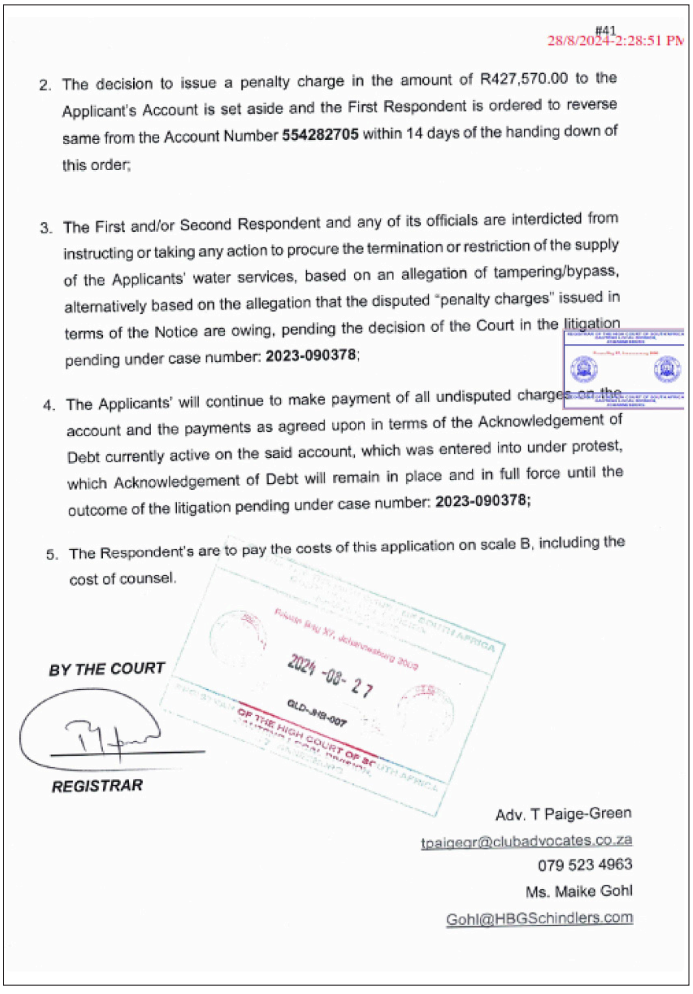
DERRICK KGWALE, CEO OF JOHANNESBURG WATER (SOC) LTD Third Respondent

DRAFT ORDER

BY AGREEMENT between the parties:-

IT IS ORDERED THAT:

1. The decision by the First and/or Second Respondents to issue the Urgent Notice/Compliance Notice ("**The Notice**") (dated **1 November 2023**) is hereby reviewed and set aside;



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2. The decision to issue a penalty charge in the amount of R427,570.00 to the Applicant's Account is set aside and the First Respondent is ordered to reverse same from the Account Number **554282705** within 14 days of the handing down of this order;

3. The First and/or Second Respondent and any of its officials are interdicted from instructing or taking any action to procure the termination or restriction of the supply of the Applicants' water services, based on an allegation of tampering/bypass, alternatively based on the allegation that the disputed "penalty charges" issued in terms of the Notice are owing, pending the decision of the Court in the litigation pending under case number: **2023-090378**;

4. The Applicants' will continue to make payment of all undisputed charges on the account and the payments as agreed upon in terms of the Acknowledgement of Debt currently active on the said account, which was entered into under protest, which Acknowledgement of Debt will remain in place and in full force until the outcome of the litigation pending under case number: **2023-090378;**

5. The Respondent's are to pay the costs of this application on scale B, including the cost of counsel.

BY THE COURT

REGISTRAR

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