

Municipal Terminations of Supply - Is a Court Order Necessary?

By **Maike Gohl** (Partner) and
Chantelle Gladwin-Wood (Partner)

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INTRODUCTION

This article considers the legal question of whether it is necessary for a municipality to obtain a court order before terminating the supply of electricity and/or water to a consumer's property for non-payment of municipal charges.

PRINCIPLES OF SPOILIATION

It is trite (accepted) law that if any person or entity (including a state entity such as a municipality or Eskom) unlawfully deprives another person of a thing (which includes the supply of services such as electricity and water), that the person so deprived has a remedy in our law based on the *mandament van spolie* for the immediate restoration of the thing deprived.

This is because our law frowns on self-help, and in the great majority of cases will only authorize the 'taking' of a thing from another after a court has considered the issue and granted an order authorizing the taking.

The taking of a thing without a court order or without the consent of the person in control of the thing is thus normally considered unlawful, unless there is another authorization in law for the taking (such as legislation authorizing it).

RESTRICTIVE INTERPRETATION OF STATUTES

It is an accepted principle of our law that statutes that authorize acts that can be potentially harmful must be 'restrictively interpreted', meaning strictly interpreted and adhered to, in order to ensure that the minimum amount of damage is done. This applies to any statute authorizing the termination by a municipality or Eskom of electricity and/or water supply – the most notable of which is section 97 of the Local Government: Municipal Systems Act 32 of 2000.

CASES LAW APPLYING A RESTRICTIVE INTERPRETATION

The above principle has been upheld in a number of reported and unreported cases, including *Midvaal Local*

*Municipality vs Meyerton Gold Club*¹, *African Billboard Advertising (Pty) Ltd vs North & South Central Local Councils Durban*², *Sithole vs Resettlement Board*³, *Minister of Finance & Others vs Ramos*⁴ and *George Municipality vs Wiener & Another*⁵.

This principle was most recently also upheld and reaffirmed by Judge Wepener of the Johannesburg High Court in the unreported case of *Shanike Investments 85 (Pty) Ltd v The City of Johannesburg Metropolitan Municipality*⁶, a copy of which can be accessed on the Safflii website at www.safflii.austlii.edu.au/za/cases/ZAGPJHC/2018/420.html. In his judgment Wepener J cited the above cases with approval, and found that the City of Johannesburg's actions in terminating the supply of electricity to a property without a court order was unlawful, because the statute upon which the municipality relied for authorisation to terminate the supply (when interpreted restrictively) did not expressly authorize the termination without a court order. Wepener J was thus of the view that a municipality was not lawfully entitled to terminate the supply of electricity or water to a property without the consent of the owner/occupant, or without a court order authorising it.

CONTRADICTORY OPINION

Unfortunately, Wepener J's judgment was overturned by a higher court in a later case. In *Rademan v Moqhaka Municipality & others*⁷ Judge Bosielo opined in para 16 (Judges Lewis and Petse concurring) that

"I am of the view that it would not be practical for municipalities to pursue these matters [obtaining court orders authorising termination] in court. It cannot be gainsaid that such a step would result in the municipalities being mired in such cases, losing precious time in the process and incurring high legal bills unnecessarily."

At para 27 he further concluded that:

"Having considered all the relevant legislation, it is clear to me that there is no statutory instrument which requires a municipality to obtain a court order authorising the discontinuation of a municipal service."

With the greatest of respect to the Supreme Court of Appeal judges referred to above, the authors hereof are of the view that their decision was flawed inasmuch as it did not take into account the precedents set, and up to that point of time, maintained for decades, in our law. It is possible that this principle was not argued before the Court and that this explains why it was not considered in this case.

Furthermore, in our constitutional democracy and with our dark past of oppression of the majority of our population by the government through legislative means, it does not behove our legal system to disregard a principle of law that exists in order to main order, avoid vigilantism, and protect possession. This is to say nothing of the fact that the government has for centuries been the oppressor in South Africa, and allowing “practicality” of debt collection to trump the principles of legality and centuries of law pertaining to spoliation, is not (in the view of the authors at least) justifiable.

While debt collection is undoubtedly an important process which our laws need to enable and protect, the protection afforded to municipalities (who occupy a “Goliath” in opposition to the citizens who occupy the position of “David”) should never be allowed to outweigh the personal protections of property accorded to citizens against government.

CONCLUSION

The principle that statutes that can cause people harm must be restrictively interpreted remains intact, and as such, all state action (including terminations of service supply by municipalities) must take place strictly in accordance with the authorizing legislation.

However, unfortunately, the Supreme Court of Appeal case in *Rademan* overrules all other precedents set in relation to the termination of services by a municipality. Accordingly, until such time that the *Rademan* case is overturned by another ruling in either the SCA or a higher court, a municipality may disconnect the municipal services to a property, without first having to obtain a court order authorizing them to do so.



Maike Gohl
(Partner)



Chantelle Gladwin-Wood
(Partner)

¹(A30338/14) 2014 ZA GPJHC 256 15 October 2014.

²2004 (3) SA 223 (N).

³1959 (4) SA 115 (W).

⁴1998 (4) SA 1096 (C).

⁵1989 (2) SA 263.

⁶(8187-2018) [2018] ZAGPJHC 420 (7 March 2018) (unreported).

⁷(173/11) [2011] ZASCA 244 (01 December 2011).