

Finding the balance

FAIRNESS AND EQUITY, DISCONNECTIONS, CREDIT CONTROL AND DEBT COLLECTION

City of Cape Town v Strümpher
(104/2011) [2012] ZASCA 54 (30
March 2012)

While service delivery is one of the most important functions of local government, the Municipal Systems Act and case law make it clear that the duty to collect revenue and service fees is equally important to ensure the financial and environmental sustainability of service delivery.

The importance of debt collection was recently highlighted in National Treasury's latest *Local Government Revenue and Expenditure Report (1 July 2011–31 March 2012)*. The report indicates that approximately R76.6 billion is collectively owed to municipalities in consumer debt, with households accounting for the largest component of such debtors (R49.8 billion). The disconnection of services in terms of credit control and debt collection policies and by-laws is therefore one of the most important tools that municipalities are able to use in dealing with rising consumer debt.

However, the recent Supreme Court of Appeal judgment in *City of Cape Town v Strümpher* (104/2011) [2012] ZASCA 54 (30 March 2012) highlighted that the disconnection of services must not only comply with the legislative framework for disconnections but must also adhere to principles of fairness and equity.

Facts

The facts of this case revolve around the decision of the City of Cape Town (hereafter the City) to unilaterally terminate the water supply to Mr. Strümpher's property in the Strand.

Significantly, for the past 37 years the property was operated as a caravan park for permanent residents. The termination of the water supply therefore not only impacted on Mr. Strümpher's right of access to water but on the right of access to water of all of the residents of the caravan park.

The decision to terminate the access to water was taken on the basis that Mr. Strümpher failed to settle arrears on his water account amounting to R182 000. Mr. Strümpher, however, disputed that he owed the City the full amount of R182 000 on the basis that the City was aware of a defective water meter as well as a number of leaking pipes on the property, which had contributed to unusually high water usage during certain months.

Not only was the City aware of this problem but it had taken steps to remedy the situation by removing a defective water meter and directing Mr. Strümpher to replace certain water pipes, actions that all contributed to reducing the excessive water usage.

At the time of issuing a letter of demand for the R182 000 in arrears, the City was therefore aware of the history of water usage and the problems experienced with recording actual water usage on the property.

Despite a response from Mr. Strümpher's attorneys disputing the arrears and setting out the history of the dispute, the City proceeded to unilaterally terminate the supply of water to the property. Mr. Strümpher challenged this action in the High Court, which duly issued a *mandament van spolie*, a remedy which ensured the immediate restoration of the water supply to Mr. Strümpher's property.

The City then appealed the decision to the Supreme Court of Appeal.

Supreme Court of Appeal

The City defended its actions on a number of grounds. The first related to the nature of the relationship between itself and Mr. Strümpher. The City claimed that it was purely a contractual relationship and, as such, it was well within its rights to terminate the supply of water when Mr. Strümpher failed to pay his arrears. The City based this argument on the fact that the Water Services Act 108 of 1997 requires a consumer to conclude a user agreement with water authorities setting out the terms of usage.

The Court correctly stated, however, that irrespective of user agreements, the right of access to water is, fundamentally, a constitutionally entrenched right which is also protected in the Water Services Act. The contractual rights in terms of user agreements must therefore be interpreted in the context of the rights conferred by the Constitution and Water Services Act.

Secondly, the City argued that terminating Mr. Strümpher's water supply was fully sanctioned by its water by-law and by its credit control and debt collection by-law. It argued that the monthly statements of account sent to Mr. Strümpher clearly stipulated that 'even in the event of a dispute' an accountholder must continue to pay the account.

The Court found that this stipulation not only infringed the requirement set out in section 4(3)(a) of the Water Services Act, which requires that any limitation or discontinuation of water services must 'be fair and equitable', but that it also violated the procedures set out in the City's own by-laws. The City's by-laws correctly set out a procedure for dealing with disputes, which includes written acknowledgment of receipt of the dispute, a decision on the outcome of the dispute within 30 days, as well as the opportunity to appeal such a decision using the appeal mechanism set out in section 62 of the Systems Act.

The Court also refused to entertain technical arguments raised by the City that it failed to respond to Mr. Strümpher's communication of the dispute or to follow these procedures because Mr. Strümpher had failed to quote the correct account number.

The Court therefore held that not only were the procedural aspects of the City's by-laws ignored, but the actions of the City went against basic principles of fairness. To expect a consumer to pay for an amount (an exceptionally high amount in this case) that he/she is disputing goes against principles of

fairness. The Court held that in this case, principles of fairness would have been served if an agreement was reached whereby Mr. Strümpher simply continued to pay the average amount for his monthly bills until such time as the disputed amount was correctly determined.

The Court therefore dismissed the appeal by the City and confirmed the decision of the High Court, including the issue of a *mandament van spolie*. A *mandament van spolie* is issued where it is evident that a clear, existing right has been terminated in a manner that has not complied with principles of law. In this case, it was not merely a disputed contractual right that was limited, but rather the right of access to water, which is a constitutionally protected right and was also considered to be incidental to Mr. Strümpher's property rights. As such, the unilateral termination of these rights by the City did not satisfy legal requirements.

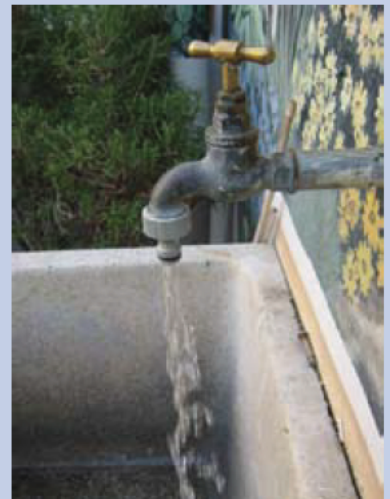
The Court therefore confirmed that a *mandament van spolie* allowing for the immediate restoration of the right of access to water was an appropriate remedy.

Comments

The judgment has highlighted the nature of the relationship between municipalities and the residents it serves. Any decision to disconnect services, particularly basic services such as water, must be viewed in the context of the constitutional rights that underpin them. Secondly, procedural and substantive fairness requirements contained in sector legislation and credit control and debt collection by-laws must be adhered to.

Lastly, principles of fairness require that the history and context of the relationship between the municipality and the specific consumer it is dealing with must inform the municipality's actions in the context of disconnections.

Failure to take these different considerations into account may make the actions of municipalities vulnerable to challenge.



Annette May
Managing editor