

# CUTTING DEFAULTERS' LIGHTS ILLEGAL

## Constitution is supreme law

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There are trustees who believe that since the cables and meters were installed at the expense of the bodies corporate, they have the right to shut off the electricity supply to the units of defaulting levy payers.

Some owners, who have prepaid electricity meters and claim the sole right to sell the prepaid tokens or vouchers to their tenants, refuse the sale of such vouchers when their tenants are in rental arrears, or in the event of a dispute.

In a sense, such bodies corporate and landlords may claim that they have "consolidated" the accounts of the unit owner or tenant respectively.

Failure to pay one "account" may lead to the suspension of another service. In other words, a "wrong" action by one party is reciprocated with a wrong/unlawful action by the other.

The National Energy Regulator of South Africa (Nersa) has warned municipalities that the disconnection of

electricity supply to its consumers for other unpaid municipal services is unlawful in terms of the Electricity Regulation Act of 2006.

A municipality cannot use the argument that since it is responsible for installing the electricity cables, meters and entered into contracts with its customers, it can stop the electricity supply for other services that are in arrears, such as rates or water.

A conduct rule, a lease agreement or a municipal bylaw may have a clause that allows a party to resort to this kind of action.

The fact that parties have agreed to it, or that a provision exists in a by-law, does not make it legal.

Apart from the Electricity Regulation Act, and decided cases, it is unconstitutional.

What remedy would a unit owner in a sectional titles scheme, a tenant or a consumer have when an unlawful action is committed?

Illegal action to deprive possession or the continued supply of services is a quick-fix or self-help remedy that is not allowed in our law.

Our courts do not consider the reason for the illegal action, even if rental or levy is owed or other debt due to the owner or body corporate or municipality.

A separate legal remedy is available and the courts will not allow individuals or entities to take the law into their own hands. In terms of the broad legal principle, no one is allowed to benefit from his or her own bad faith action.

Farlam JA (in the case of Impala Water Users Association v Lourens NO and others 2004 2 All SA 476 (SCA)) states: "(T)he considerations set out in the judgment as to self-help are in any event buttressed by the provisions of section 34 of the constitution, which reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial forum.'

Spoliation is therefore a robust legal remedy, not against a threat to dispossess, but against every unlawful and involuntary loss of possession and the restoration thereof, and without entertaining any argument about the respective rights of the parties (Abbott v Von Theleman 1997 (2) SA 848 (C)).

What about the supply of electricity or water - does it relate to dispossession as well?

Possession in respect of property includes the supply of services such as water and electricity, as discussed in the case of Telkom SA Ltd v Xsinet (Pty) Ltd 2003 SCA 35 and First Rand Ltd v Scholtz NO 2006 SCA 98.

It is not allowed where a party wants to compel specific performance in the case of contractual dispute, as was decided in First Rand Ltd t/a Rand Merchant Bank et al v Scholtz NO 2008 (2) SA 503 (SCA).

In South Africa's constitutional democracy, where the constitution is supreme, everyone, including the government and its structures, are subject to the law.

In fact, a law or by-law can be fully tested by our courts, which have the powers to declare the contents of particular legislation invalid.

Cameron JA reminds us (in *Brisley v Drotsky* 2002 (4) SA 1 (SCA)): "All law is therefore subject to constitutional control, and all law inconsistent with the constitution is invalid. That includes the common law of contract, which is subject to the supreme law of the constitution."

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