

August 25, 2009 Daily News
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CONSTITUTION TRUMPS CITY BY-LAWS

Municipal authority may not circumvent the common law

eThekwini Municipality has made outstanding contributions through its water debt relief policy, writing off of rental and service arrears and upgrade of its housing stock. It won the Impumulelo Award for the most innovative idea, taking first place out of 2 000 participating cities in the world.

Strangely though, it seems that the municipality is ill advised by the drafters of its policies and laws that impact on the rights and dignity of its citizens.

We communicated with several eThekwini Municipal officials,

including those from the legal department and the city treasurer in recent months, inquiring about the right it has to disconnect services through its consolidation of several accounts (water, electricity, rental and rates), or deny a prospective tenant from transferring his or her electricity account to the premises where the owner owes rates.

We were referred to its policies and by-laws. No law, not even an Act of Parliament, the common or indigenous laws, can circumvent or replace the requirements set out in the country's constitution.

This is a dramatic and democratic shift from the apartheid government. Hence, all tiers of government, when renting to residential tenants, must also comply with the Rental Housing Act and other relevant legislation, while lease agreements cannot include unlawful clauses that still appear to exist.

As for indigenous laws, we have yet to investigate and understand its importance and to adapt our changing social needs to some of its finest values. Our courts rely on common law, our Roman Dutch and English laws, which have provided the solid foundation to our legal content and system.

Arising from our well established law, unlawful interference of possessory rights (right to uninterrupted services and occupation) is one way in which a person exercises unwarranted power and is not allowed in our law. It would appear that policies are used to avoid the common law and the provisions of the constitution that prohibits unlawful action. The municipality, as a landlord, is not exempt from the provisions of the country's constitution, and is subject to the rule of law. It cannot use its own laws and policies to circumvent or supplant the common law.

Disconnection of services for failing to pay the previous tenant's rental arrears

A case in point is a sub-tenant referred to as an "illegal", his landlord being the tenant of eThekweni Municipality, was made a legal tenant in terms of the municipality's regularisation policy regarding "illegal tenants". He signed a written agreement with the municipality as a new tenant, but subsequently fell into rental arrears and the electricity supply to his dwelling was disconnected.

The municipality was not willing to reconnect unless he arranged to pay approximately R28 000 in arrear rentals owed by the previous tenant. Written inquiries revealed that the tenant had not signed an acknowledgement of debt. In other words, the tenant had not agreed or undertaken to pay off the previous tenant's rental debt. There was also no reference to the previous tenant's arrears in the lease agreement.

The municipality was relying on its policy that made one person desperately in need of shelter pay the debt of another. This is immoral and unlawful. Tenant was denied the right to have his electricity deposit transferred. In June 2009 a tenant made arrangements to move into another dwelling, having signed a lease with the new landlord. When the tenant requested the eThekweni Municipality to transfer his electricity deposit to the dwelling he was to take occupation from July 1, 2009, he was informed that it was not possible since his (new) landlord owed rates.

The municipality showed him a breakdown of the landlord's debt and drew his attention to its legal provisions that stated the municipality cannot allow any transfer to a property where its owner had not settled an outstanding amount.

The tenant had to vacate the present dwelling and was placed in the invidious position of taking occupation of another without electricity.

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