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Foreword to the legal opinion re:

The obligations and powers of municipal governments to provide basic services for backyard dwellers on private land

provided by Geoff Budlender SC

Isandla Institute and the Development Action Group (DAG) have been working on the *Backyard Matters* project since October 2019. During this time, project partners (which initially included Violence Prevention through Urban Upgrading – VPUU) have conducted substantial research into various aspects of backyard rental housing in Cape Town, as well as produced a number of publications.

Throughout the research process, it became increasingly apparent that legal clarity was needed about the power, authority and obligations of municipalities to provide services to backyard residents living on private land. Arguments have frequently been put forward that the Municipal Financial Management Act (MFMA) prevents municipalities from providing services to backyard residents living on private land, but no detailed justification has ever been brought to our attention. While there have been examples of municipalities providing services to backyard residents living on public land, the provision of services on private land has remained something of a grey area. As a result, Isandla Institute and DAG sought a legal opinion on the matter from a Senior Counsel, which is attached herein.

As is stated in the opinion itself, the focus of this work is on service provision to backyard residents living on private land, and the opinion therefore does not speak to broader issues about service provision to informal settlement residents living on private land.

Process of commissioning the opinion

Isandla Institute contracted Ashraf Mahomed Attorneys to secure Senior Counsel to provide the opinion. Mr Mahomed recommended Advocate Geoff Budlender SC. His appointment was ratified by Isandla Institute's Board of Directors.

For:

ISANDLA INSTITUTE

Re:

THE OBLIGATIONS AND POWERS OF MUNICIPAL GOVERNMENTS TO PROVIDE BASIC SERVICES FOR BACKYARD DWELLERS ON PRIVATE LAND

OPINION

For:

Ashraf Mahomed Attorneys

Cape Town

GEOFF BUDLENDER SC

Chambers

Cape Town

4 October 2021

Introduction

1. The backyard dwelling sector provides an accommodation option for a rapidly increasing number of people in South African cities. Backyard dwelling takes place on both private and public land. The backyard dwellers often do not have adequate access to services. The question which has arisen is whether municipalities have the authority and the duty to redress this where the backyard dwellers are living on private land, and in particular through the provision of services infrastructure on that land.

2. This resolves itself to the following questions:

    2.1. What legal authority do municipalities have in respect of the provision of these services?

    2.2. What legal obligations do municipalities have in respect of the provision of these services?

    2.3. Do municipalities have the legal power to instal service infrastructure on privately owned land in order to provide these services to backyard dwellers?

3. I address each of these questions below. However, I first address some preliminary issues.

4. I have been briefed with a number of policy and research documents. Some of them deal with the provision of services to people living in informal settlements on private land.

The legal issues which arise in that situation are obviously related to the issues on which I have been asked to advise, but they differ in one fundamental respect:

4.1. It can be assumed that in virtually all cases of backyard dwellings, the occupiers are living there with the consent of the owner or tenant of the property. They often pay rent to the owner/tenant. Where they do not do so, they are usually part of the family or broader social network of the owner/tenant.

4.2. In informal settlements, the occupiers may not have the consent of the owners to be there at all. This gives rise to a potential tension between the rights of the owner of the property and the rights of the backyard dwellers. In particular, the owner may object to the installation of service infrastructure on the land for people whom the owner wants to have removed from the land.

5. This Opinion is limited to the question of the provision of services to backyard dwellers on private land in residential areas, who I assume are generally there with the consent of the owner.[1] I also assume that for the most part, the owners would have no objection to the installation of service infrastructure on their land. (I recognise that this may not always be the case.) I therefore do not address the question of whether the owners of the land could be <u>compelled</u> to permit a municipality to instal service infrastructure on the land. That is an issue which is likely to arise in respect of informal settlements.

[1] I include in the term "owners" those who are de facto owners but do not hve registered title - for example where they acquired the property through an informal sale. In what follows, for sake of convenience I refer only to the owners, and not also to the tenants of privately owned land.

Security of tenure

6. As my instructions note, the tenure of backyard dwellers can be insecure.

7. Security of tenure raises different legal questions from the provision of services. It is well-established that government has the power to regulate the circumstances under which people may be evicted from their homes. That power has already been exercised in the Extension of Security of Tenure Act 62 of 1997 (which addresses the eviction of occupiers of farmland) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (which regulates the eviction of people from land which they are occupying without the consent of the owner). The Interim Protection of Informal Land Rights Act 31 of 1996 limits the circumstances in which the holders of informal rights may be deprived of those rights.

8. The power of government to legislate to protect tenure security in respect of private land is sourced in the first instance in the Constitution. Section 25(6) provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. Section 25(9) provides that Parliament must enact that legislation. Security of tenure is also an element of the right of access to housing in terms of section 26(1) of the Constitution.[2] And section 26(3) regulates the circumstances under which an eviction

[2] Maphango and others v Aengus Lifestyle Properties (Pty) Ltd 2011 (5) SA 19 (SCA) para 26, citing Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) para 29 and Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) para 40.

may take place: No-one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances; and no legislation may permit arbitrary evictions.

9. Underpinning all of this, section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

10. It follows that there can be no dispute about the legal power and obligation of the state to promote security of tenure for occupiers of private land, whether as backyard dwellers or otherwise.

11. By contrast, there is not a consensus on whether the state has the legal power and obligation to instal service infrastructure on private land so as to provide services to backyard dwellers who are living there with the consent of the owner. It is that which is the focus of this Opinion.

12. I deal with this by addressing the three questions raised in paragraph 2 above. I then very briefly summarise my conclusions on those central questions.

A: What authority do municipalities have in respect of the provision of these services?

13. Government in South Africa is constituted as national, provincial and local spheres of government.[3] The Constitution creates an allocation of functions and powers amongst those three spheres.

14. Where a sphere of government wishes to act on a particular matter, two questions arise:

14.1. Does that activity fall within the constitutional function and authority of the particular sphere of government? If so,

14.2. Has that sphere of government been given the power to undertake the specific activity concerned? This usually requires national or provincial legislation, or a municipal by-law.[4]

15. The authority of municipalities is set out in section 156 of the Constitution:

> *(1) A municipality has executive authority in respect of, and has the right to administer –*
>
> *(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and*
>
> *(b) any other matter assigned to it by national or provincial legislation.*

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[3] Constitution, section 40(1).

[4] These are not the only sources of state power, but for present purposes it is not necessary to enter upon that question.

> *(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer*.

16. The local government matters listed in Part B of Schedule 4 include the following:

- *electricity and gas reticulation;*

- *water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems*.

17. It follows that municipalities have the power to make and administer by-laws in relation to these matters. More specifically, they may make a by-law relating to the installation of service infrastructure on private land, as long as it is for the effective administration of the provision of those services, is not inconsistent with the Constitution, and does not conflict with national or provincial legislation.[5] This is however subject to s 151(4) of the Constitution, which provides that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. A national or provincial law which does that is inconsistent with the Constitution and invalid.[6]

18. In contrast to this, housing is not a local government matter listed in Part B of either Schedule 4 or Schedule 5. A municipality therefore does not have legislative competence in that regard. Various national and provincial statutes assign certain executive authority

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[5] Section 156(3) of the Constitution.

[6] See for example Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others 2010 (6) SA 182 (CC);

to municipalities in respect of housing. The most significant of these is the Housing Act 107 of 1997.[7]

19. The issue of tenure security illustrates the consequences of this. A municipality does not have authority to make a by-law to strengthen tenure security, because it does not have legislative competence in respect of housing. Both the provincial and the national governments are empowered by the Constitution to do this, because housing is a functional area of concurrent national and provincial legislative competence.[8]

B: The legal obligations of municipalities in respect of the provision of these services

20. In the Joseph case,[9] which was concerned with the disconnection of electricity supply, the Constitutional Court observed:

> *[34] The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public-service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended*

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7 The functions of municipalities in terms of the Housing Act are summarised in J A Faris *"Housing"* in Joubert (Founding Editor) The Law of South Africa (3rd ed) Vol 21 paras 466 – 468. The provincial laws are summarised in Faris *opt cit* paras 479 – 487.

8 Schedule 4 Part A.

9 Joseph and others v City of Johannesburg and others 2010 (4) SA 55 (CC): emphasis added

otherwise. In Mkontwana Yacoob J held that 'municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty'. Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.

21. The Constitution and several statutes place specific obligations on municipalities with regard to the provision of municipal services.

The Constitution

22. Sections 27(1)(a) and (2) of the Constitution bear directly on this question. They provide that everyone has the right to have access to sufficient water; and that the state (which in this regard includes a municipality) must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of that right.

23. In the Grootboom case, the Constitutional Court explained the content of the requirement of "reasonableness" in this context.[10] For the measures to be "reasonable", they must be capable of facilitating the realisation of the right. They must be reasonable both in their conception and in their implementation. A programme that excludes a significant segment of society cannot be said to be reasonable. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the

[10] Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 (CC) para 41, 42, 44.

most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

24. The Court noted however that the precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question will be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

25. A municipality might contend that it has taken reasonable measures which fulfil its obligations by providing external reticulation of services to the property in question, on the basis that internal reticulation will be provided by the owner; or they might contend that the backyard dwellers have reasonable access to the services at the main dwelling. Whether that was the case would depend on the facts.

26. A municipality might contend that it is reasonable for it to limit its services to the provision of external reticulation, because it is the obligation of the owner to provide services to its backyard tenant. It appears that there is not currently such a legal obligation on the owner. Section 15(1)(f)(xi) of the Rental Housing Act 50 of 1999

provides that the Minister may make regulations in relation to "unfair practices", which may relate to municipal services. In five provinces, this has been done by the relevant MEC.[11]

27. The Rental Housing Amendment Act 35 of 2014 will, if and when it is brought into operation, insert two relevant provisions into the Act:

27.1. Section 4B(11) will provide that a landlord must, where possible, facilitate the provision of basic services to the dwelling;[12] and

27.2. Section 15(1)(1A)(iii) will provide that the Minister may make regulations in relation to basic living conditions including access to basic services.

28. If such a legal obligation is created, the facts of the situation will determine whether it is reasonable for the municipality to rely on this to excuse it from providing service infrastructure on the property.

29. Finally in this regard, I note that access to basic services also implicates other elements of the Bill of Rights, with a concomitant obligation on the state, such as section 10 (human dignity), section 24 (environment) and section 26 (access to adequate housing).

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[11] Free State: Provincial Notices 152 and 153 in Provincial Gazette 65 of 25 July 2003; Gauteng: General Notices 4003 and 4004 in PG 124 of 2 July 2001; KwaZulu-Natal PN 464 in PG 6072 of 13 December 2001; Mpumalanga: Gen Notice 83 in PG 1060 of 12 March 2004; Western Cape: PN 21 and 22 in PG 5822 of 1 February 2002. In the Western Cape, regulation 8(1)(a) provides that a landlord "who is obliged by law or in terms of the express or implied terms of the lease to provide services to a tenant", must provide such services. The regulation addresses the question of payment for such services. I have not analysed the regulations which are applicable in each of the provinces.

[12] A "dwelling" includes (amongst other things) any shack, outbuilding, garage or similar structure which is leased: section 1.

Local Government: Municipal Systems Act 32 of 2000

30. Chapter 3 of the Systems Act deals with municipal functions and powers. Section 8 is a "General empowerment" provision:

> *(1) A municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution, and must exercise them subject to Chapter 5 of the Municipal Structures Act.*
>
> *(2) A municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.*

31. Section 4 sets out the rights and duties of the council of a municipality. Section 4(2) provides as follows:

> *(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to –*
>
> *(a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community; ....*
>
> *(d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner; ...*

> *(f) give members of the local community equitable access to the municipal services to which they are entitled; ....*
>
> *(i) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in ss 24* [environment], 25 [property, including tenure security]*, 26* [housing]*, 27* [healthcare, food, water and social security]*, and 29* [education] *of the Constitution*.

32. Section 5(1)(g) provides that members of the local community have the right *"to have access to municipal services which the municipality provides, provided the duties set out in subsection (2)(b) are complied with"*. (Section 5(2)(b) refers to the duty of members of the local community, where applicable, to pay promptly service fees etc imposed by the municipality.)

33. Section 73(1)(c) provides that a municipality must ensure that all members of the local community have access to at least the minimum level of basic municipal services. Section 73(2)(a) provides that municipal services must be *"equitable and accessible"*.

34. Section 1 defines a *"municipal service"* as *"a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether ... fees, charges or tariffs are levied in respect of such a service or not."*. A *"basic municipal service"* is *"a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided would endanger public health or safety or the environment"*.

35. The definition in section 1 of *"local community"* is of particular importance. In summary, the *"local community"* is the residents of the municipality and various other entities and person, *"and includes, more specifically, the poor and other disadvantaged sections of such body of persons"*. Its importance in this context is that:

35.1. The section 5(1)(g) right of members of the local community to have access to municipal services which the municipality provides, specifically includes the poor and other disadvantaged sections of the local community, and

35.2. The section 4(2) duty to give members of the local community equitable access to the municipal services to which they are entitled specifically includes the poor and other disadvantaged sections of the local community.

Water Services Act 108 of 1997

36. Section 3 of the Water Services Act provides:

> *(1) Everyone has a right of access to basic water supply and basic sanitation.*
>
> *(2) Every water services institution* [which include the municipalities] *must take reasonable measures to realise these rights.*
>
> *(3) Every water services authority* [which would include the municipalities] *must, in its water services development plan, provide for measures to realise these rights.*

(4) The rights mentioned in this section are subject to the limitations contained in this Act.

37. The regulations under the Act define the meaning of "basic water supply" as:

a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month-

(i) at a minimum flow rate of not less than 10 litres per minute;

(ii) within 200 metres of a household; and

(iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.[13]

38. I expect that most urban backyard dwellers have access to a basic water supply of this kind in those cases where the main residence on the property is connected to the municipal water supply system.

Electricity Regulation Act 4 of 2006

39. The Electricity Regulation Act also places certain obligations on municipalities. Section 27 of that Act provides:

[13] Regulation 3, Compulsory National Standards and Measures to Conserve Water: Govt Notice R509 of 2001 in Govt Gazette 22355 of 8 June 2001.

27 Each municipality must exercise its executive authority and perform its duty by-

(a) complying with all the technical and operational requirements for electricity networks determined by the Regulator;

(b) integrating its reticulation services with its integrated development plans;

(c) preparing, implementing and requiring relevant plans and budgets;

(d) progressively ensuring access to at least basic reticulation services through appropriate investments in its electricity infrastructure;

(e) providing basic reticulation services free of charge or at a minimum cost to certain classes of end users within its available resources; ...

40. I have not been able to find any definition of the "certain classes of end users" to whom basic reticulation services must be provided free of charge or at a minimum cost.

41. As I noted at the outset, the Constitutional Court has held in the Mkontwana and Joseph cases that the provision of electricity is one of those services that local government is obliged to provide. I have not been able to identify any national legislation which defines the extent of that obligation.

42. As a matter of practice, the provision of electricity services seems to be dealt with at a policy level. A research paper by Tissington[14] provides a comprehensive summary of the relevant national policies with regard to free basic electricity (and other municipal services), and the varying practices of municipalities across the country.

The Mshengu case

43. In the *Mshengu* case,[15] the applicants were two farm dwellers in KwaZulu-Natal and a non-governmental organisation which assisted them and other farm dwellers in the area. The first three respondents were two local municipalities and a district municipality.

44. The application was brought on behalf of and in the interests of farm dwellers and labour tenants who did not have access to sufficient water, basic sanitation and refuse collection services. They asserted that the failure of the first three respondents to provide farm occupiers and labour tenants in their areas of jurisdiction with access to basic sanitation, sufficient water and collection of refuse, was inconsistent with ss 9, 10, 24, 27(1)(b), 33. 152, 153, 195 and 237 of the Constitution.

45. The High Court declared that this failure was indeed so inconsistent with the Constitution. It directed the three municipalities (subject to the structural relief to which I refer below) to:

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14 Tissington (2013) Targeting the Poor? An Analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa para 3.1.3 pp 24 – 28.

15 *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] ZAKZPHC 52; [2019] 4 All SA 469 (KZP).

45.1. comply with the regulations under the Water Services Act (WSA) by installing a sufficient number of water user connections to supply the minimum quantity of potable water required by those regulations;

45.2. instal Ventilation Improved Pit toilets per each household;

45.3. provide the farm occupiers and labour tenants with refuse collection services;

45.4. ensure that the farm occupiers and labour tenants have access to basic municipal services, more specifically water, sanitation, and refuse removal.

46. The structural relief required the collection of information identifying the farm occupiers and labour tenants who were residing within the areas of jurisdiction of the three municipalities, and the preparation of a Plan explaining the steps that they would take in order to provide farm occupiers and labour tenants with access to water, sanitation and the collection of refuse. The Plan would be submitted to the Court which, after receiving comments from the applicants and other interested parties, would consider and determine the reports, plans, commentary and replies.

47. The Court was alive to the fact that the farm occupiers and labour tenants were living privately owned land. The Court held as follows in this regard:

> *"[62] ... the first respondent is the water services authority and such the obligation to provide water and sanitation for farm occupiers and labour tenants rests on it, not the landowners. The landowners have no direct statutory*

obligation to provide such services unless contracted to do so by the water services authority in terms of s 19 of the WSA …

[63] … the first respondent has a duty to ensure the landowners or other intermediaries provide access to a basic level of sanitation service to those living legally on their land. In some instances the first respondent may have to fulfil that obligation through the landowners by engaging with them to reach the agreement for these services on their land, but what the first respondent cannot do is shift that obligation to the landowners by requiring the landowners to make applications. Accepting that a landowner has a secondary obligation under ss 8 and 27 of the Constitution and the WSA, a landowner cannot unreasonably deny the municipality access to his farm in order to instal necessary infrastructure to ensure the provision of the services. …

[69] Under the WSA and the Regulations, the water services authorities have an obligation to provide water and sanitation services to farm occupiers and labour tenants. …"

48. It does not seem that any of the municipalities raised the defence that it did not have the legal power to instal service infrastructure on privately owned land in order to provide these services to farm residents and labour tenants.

C: Do municipalities have the legal power to instal service infrastructure on privately owned land in order to provide these services to backyard dwellers?

49. In summary, in parts A and B of this Opinion I conclude that:

49.1. a municipality has executive authority in respect of, and the right to administer, and the power to make by-laws for the effective administration of electricity and gas regulation, and potable water supply systems and domestic waste-water and sewage disposal systems;

49.2. a municipality has a duty under the Constitution to take reasonable measures to give effect to the right to water;

49.3. a municipality has a duty under the Systems Act to give members of the local community equitable access to the municipal services to which they are entitled;

49.4. a municipality has a duty under the Water Services Act to take reasonable measures to realise the right of access to basic water supply and basic sanitation;

49.5. a municipality's duty in this regard specifically includes the poor and other disadvantaged sections of residents of the community;

49.6. a municipality has a duty under the Electricity Regulation Act to progressively ensuring access to at least basic electricity reticulation services;

49.7. a municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.

50. There may be a variety of mechanisms though which a municipality may seek to fulfil these obligations. My brief is to provide an Opinion on the legal powers of a municipality to fulfil these obligations through one specific mechanism, namely by installing additional services infrastructure on private land. I do not address the question of whether this is the only or best mechanism for fulfilling these obligations. This involves technical and policy issues which are to be answered by those better equipped to do so.

51. Against that background, I now address the legality of the municipal provision of services infrastructure on privately owned land.

Local Government: Municipal Finance Management Act 56 of 2003

52. It is often said that a municipality may not incur expenditure in respect of privately owned land, and in particular by installing services infrastructure on it.

53. The key statute regulating municipal finances is the MFMA. There appears to be no provision of the MFMA which prohibits this. I have not been directed to any such provision.

54. It is suggested however that to do this would be inconsistent with the spirit or principles of the MFMA. There is room for argument as to whether this is correct. However, that does not bear on the question which I have been asked to address. Conduct which is not prohibited by a law does not become unlawful in terms of that law because it is

inconsistent with the "spirit" or "principles" of the law. If there is no provision in the law which explicitly or implicitly prohibits the activity in question, then it is not prohibited by the law. At most, it can be argued that the activity should be prohibited by the law.

55. For what it is worth, my own view is that it cannot be demonstrated that the provision of services infrastructure by a municipality on private land is *per se* inconsistent with the spirit or principles of the MFMA. It depends on how this is done.

56. I have identified two principal objections to this in the literature with which I have been briefed. I address them briefly.

57. The first objection is that the funds of a municipality may not or should not be used to increase the value of privately owned property. I do not think this argument can be sustained at the level of principle. Municipalities undertake many actions which increase the value of the land which is owned by its residents:

    57.1. The most obvious actions are rezoning and the granting of development rights, which frequently result in an increase in the value of the land concerned. It is true that this does not involve any direct investment by the municipality in the property, but the administration of municipal planning is far from cost-free; and the fact remains that the action of the municipality creates unearned wealth in the hands of a private person.

57.2. Further, municipalities frequently increase the value of private property by providing public infrastructure and services which make an area more desirable for residential or business or commercial purposes.

58. At the level of principle, it seems to me impossible to avoid the conclusion that it is far from unusual for the decisions or actions of a municipality to increase the value of privately owned property.

59. The second objection is that while these actions may increase the value of privately owned property, they apply to all of the property in an area, and are not targeted at particular properties. These actions therefore differ from the provision of services infrastructure on a particular property. That is generally but not always the case.

60. In my view, the question is this: If a municipality invests public funds in the provision of services infrastructure in this manner for a legitimate purpose (to fulfil the obligations to which I have referred above), and this has the by-product that particular individuals are enriched because the value of their property increases, does this render the activity unlawful? In my opinion, while this may impact on whether the activity is considered desirable, it does not impact on the legality of the activity. Desirability may depend on whether this is regulated so as to limit undesirable unintended consequences. An essential first step would be to structure this in such a way as to avoid favouring particular individuals or groups of individuals.

61. I conclude that whatever the merits or demerits of the objections, they do not bear on the legality of the use of municipal funds for this purpose. They bear on its desirability, and on how it should be regulated if it is to be done.

62. However, this does not mean that there is nothing in the MFMA which might bear on this question. Section 171 of the MFMA deals with financial misconduct by various municipal officials with regard to unauthorised, fruitless and wasteful expenditure. Section 173 creates certain offences in that regard. This is obviously a matter which a municipality would have to consider and address if it were minded to use municipal funds to provide services infrastructure on privately owned land.

63. Section 1 of the MFMA defines *"fruitless and wasteful expenditure"* as *"expenditure that was made in vain and would have been avoided had reasonable care been exercised"*.[16] If, for example, municipal funds are used to instal services infrastructure on private property, and this does not have the intended consequence of fulfilling the duties of the municipality to which I have referred above, it may be contended that the expenditure was fruitless and wasteful. Whether that was the case would depend on all of the circumstances, and in particular what the consequences would have been if reasonable care had been exercised.

64. The use of municipal funds for this purpose might also be fruitless or wasteful where the owner is financially able and likely to do this at its own expense. A programme of this

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[16] MFMA section 1.

kind would need to be based on the identification of areas where there are backyard dwellers who do not receive access to municipal services.

65. *"Unauthorised expenditure"* includes *"a grant by the municipality otherwise than in accordance with the provisions of"* the MFMA.[17] I have considered whether the use of municipal funds for this purpose would constitute a "grant". The term "grant" is not defined in the MFMA.

66. A grant by a municipality would ordinarily connote a gift or donation, whether conditional or otherwise. In my opinion expenditure of this kind, to enable the municipality to provide services, would not constitute a "grant" to the owner, even though it would result in an improvement in the property, to the financial benefit of the owner. It would however be prudent for a municipality to define the purposes for which such expenditure may be incurred; the circumstances in which this may be done; the consequences of such expenditure; and the rights and obligations which flow from it. This should then be addressed in a by-law relating to the provision of services.

Procurement of goods and services

67. Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government *"contracts for goods or services"*, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[17] Subparagraph (f) of the definition in section 1 of the MFMA.

68. If a municipality were to employ contractors to undertake the installation of services on privately owned land, it would obviously have to comply with section 217(1) of the Constitution and Chapter 11 of the MFMA. But beyond that, the provision by a municipality of services infrastructure does not appear to amount to contracting for goods or services.

69. I have noted that the procurement law is triggered if an organ of state contracts with an entity to provide goods or services to a third party. An example of this is *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*.[18] In that case, ACSA rented car-rental kiosks and parking bays at airports to car-hire companies. The court held that ACSA was contracting with the car rental companies to provide a public service at its airports. ACSA was accordingly required to act consistently with section 217 of the Constitution and the Preferential Procurement Act when it invited tenders from car-hire companies.

70. In my opinion it is difficult to apply this principle to a case where a municipality achieves its goal of providing municipal services to backyard dwellers by installing services infrastructure on private land. In any event, it is not as though any person other than the owner of the property in question could provide the service. The municipality could not sensibly invite the owners of other properties to tender to provide these services to the backyard dwellers.

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[18] 2020 (4) SA 17 (SCA).

D: Conclusions

71. A municipality has substantial constitutional and statutory obligations to take reasonable measures to provide services to its residents in respect of potable water supply, domestic waste-water and sewage disposal, and electricity and gas reticulation. Those obligations apply also in respect of backyard dwellers living on private property. They apply specifically to the poor and other disadvantaged residents of the community.

72. I have not been able to identify any provision in the Constitution or the MFMA or the Systems Act which makes it impermissible for a municipality to fulfil some of those obligations by installing services infrastructure on private property on which backyard dwellers are living.

73. It is not within my competence to express a view on whether this is the appropriate means of fulfilling the obligations of a municipality in this regard, and if so, how this should be structured so as to avoid or minimise unintended consequences.

GEOFF BUDLENDER SC
Chambers
Cape Town
4 October 2021