PAPER 1

LEGAL IMPEDIMENTS TO PROVIDING WATER SERVICES TO INFORMAL SETTLEMENTS ON PRIVATE LAND

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ABSTRACT

The majority of South Africa's backlogs in the provision of water and sanitation are those in informal settlements, which are concentrated in urban areas. One of the major barriers to providing services in these areas is the perception that there are legal impediments to municipalities providing water and sanitation on privately held land, particularly where the private landowner is unwilling to recognise the settlement. However, the precise legislation that prohibits this has never been identified, nor tested through the courts. There is no legislation expressly covering this scenario, nor is there directly relevant reported case law. There are also conflicting legal opinions on the issue. All of this results in legal uncertainty for municipal engineers and undermines service delivery to informal settlements.

Research undertaken by the authors for the Water Research Commission sought to identify any legal impediments and to propose policy measures to resolve this issue definitively. The research included a legislative review, primary research with municipalities and key informants, and a stakeholder workshop. The research found that municipalities have a powerful duty to provide basic services, regardless of the lawfulness of occupation, according to section 27 of the Constitution (amongst other Constitutional and statutory duties). It is lawful to install fixed water services in permanent or semi-permanent settlements on private land (Categories A, B1, B2). No outright legal impediments to installing fixed services were identified, although some anomalies may arise in specific cases.

The paper unpacks each of the perceived legal impediments and provides the reasoning behind these important conclusions. The findings of the study are significant for the practice of municipal engineers and should provide them with the necessary confidence to provide these much-needed services. The paper also presents policy recommendations to improve certainty for municipal officials.

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INTRODUCTION

Background to the problem

The majority of water and sanitation backlogs in South Africa are those in urban informal settlements, which are growing daily. One of the major barriers to providing services in these areas is the perception that municipalities are legally unable to provide services on privately owned land, particularly where the private landowner is unwilling to recognise the settlement. However, the precise legislation that prohibits this has never been identified, nor tested through the courts. There is no legislation expressly covering this scenario, nor is there directly relevant reported case law. There are also conflicting legal opinions on the issue. All of this results in legal uncertainty for municipal engineers and undermines service delivery to informal settlements.

The Water Research Commission (WRC) commissioned a research project to provide clarity on the legal framework that governs the provision of services to informal settlements located on private land, to identify the circumstances in which municipalities may, or may not provide, services to informal settlements on private land, and to identify what legislative amendments may be necessary if legislative barriers exist. The intention is to provide municipalities with a clear view of the applicable legal framework and provide municipal engineers with the necessary confidence to provide these much-needed services. The research included a legislative review, review of three senior counsel legal opinions on the issue, primary research with municipalities and key informants, and a stakeholder workshop.

The research focused on a narrow, but common circumstance: informal settlement residents unlawfully occupying private land, where there is no contractual relationship between the residents and the landowner, and where the landowner does not consent to the provision of services by the municipality. The defined situation therefore excludes informal settlements on state-owned land, and farm workers in informal dwellings. An assumption is also made that the municipality is not willing or able to acquire the land in the short term; if this was the case then much of the legal uncertainty can be resolved. The situation also assumes settlements of reasonable scale and age, excluding small clusters of recently erected dwellings. The focus is on the installation of fixed water and sanitation services (e.g. pressure pipes, fittings, chambers, taps, sewers, manholes, toilet blocks and pumps), but many of the arguments will apply to other services as well. Temporary or mobile service mechanisms, such as water trucks, JoJo tanks or portable toilets, which are not fixed services, are excluded.

The paper makes reference to the Department of Human Settlements' National Upgrading Support Programme (NUSP) informal settlement categorisation framework to describe the various types of informal settlement:

- Category A (full upgrade): Permanent settlements on viable sites appropriate and ready for full upgrading;
- Category B1 (interim basic services): Permanent or semi-permanent settlements on viable sites but where full upgrade or other permanent solution will be delayed (e.g. because of the need to acquire the land or install bulk services);
- Category B2 (emergency basic services): Sites not suitable for full or incremental upgrading but where immediate relocation is not possible (i.e. 'semi-permanent' settlements). Relocation will eventually occur when time and resources permit;
- Category C (imminent relocation): Sites not viable for upgrade where there is an urgent need to relocate due to serious health and safety threats and an alternative site is available.

CURRENT MUNICIPAL PERCEPTIONS AND PRACTICES

All interviewed metros acknowledge their moral obligation and constitutional mandate to provide services to informal settlements, but the treatment of informal settlements on private land differed from one metro to the next. Most metro officials believed that permission from the owner was required to install fixed services. In the absence of this permission, one metro would not install any services, while others provided only temporary services. These temporary services varied from Jojo tanks and portable toilets on the property, or fixed services installed just outside the property boundary. Temporary services are unlikely to meet the standards required for basic water and sanitation services and are expensive to operate.

Two metros used classification systems to determine which settlements would receive what services. These classification systems are variations of the NUSP classification system, but may include tenure status, likelihood of land purchase and age of settlement. eThekwini Metro Municipality has been trying to address the issue of informal settlements located on private land longer than the other metros. Previously the municipality used a 'Permission to Occupy (PTO)' certificate, a legally binding document, to enable the municipality to provide water and sanitation services. The municipality believed that the PTO meant there would not be any repercussions down the line should the owner sell the piece of land. However, the metro is now embarking on a more programmatic strategy following two legal opinions, which is broadly aligned to the proposals made in this paper.

While most municipal respondents had a vague sense of the legal impediments being related to the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) and the use of grant money on private land, others expressed concern about the precedent being set and then being unable to service all the settlements on private land, or even incentivizing private land invasion. All interviewees agreed that further clarity and direction from national government is required on this issue.

LEGISLATIVE AND POLICY FRAMEWORK

There is little debate that municipalities have a powerful duty to provide water services to all citizens. Sections 27(1)(a) and (2) of the Bill of Rights provide that everyone has the right to have access to sufficient water, and that the state (which includes a municipality) must take reasonable measures, within its available resources, to achieve progressive realisation of that right. Schedule 4 Part B of the Constitution gives local government executive authority for water and sanitation services. Municipalities have additional powers and duties relevant to water services under other statutes, including the Water Services Act 108 of 1997, the Local Government: Municipal Systems Act 32 of 2000, the Housing Act 107 of 1997 and the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). In the aforementioned legislation, no distinction is made between formal and informal residents and the tenure circumstance of the residents.

Under the constitutional scheme, we believe a municipality has original constitutional powers to install services on private land to deliver basic services, provided it does not do so in a manner that is inconsistent with the Constitution and does not conflict with national and provincial legislation. However, the constitutional duty to provide services is in tension with the constitutional protection of private property rights, in section 25. The landowner has a constitutional right not to be deprived of their property, except in terms of law of general application, and no law may permit arbitrary deprivation of property. Property may only be expropriated in terms of law of general application and only for a public purpose or in the public interest and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed or decided or approved by a court.

However, under South Africa's constitutional dispensation, a landowner no longer has unfettered power to demand vacant possession of its land. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) sets out the legal framework for eviction of unlawful occupiers, but also protects the rights of these residents under certain circumstances. There is no guarantee a landowner will be able to evict people from their property, regardless of the unlawfulness of the occupation. Where PIE applies, the owner may only evict unlawful occupiers if a court finds it is just and equitable to do so. Thus, arbitrary eviction is prohibited both under the Constitution and PIE. If a court orders that eviction is not just and equitable the informal settlement effectively becomes 'permanent', and the landowner is forced to tolerate the ongoing deprivation of their land.

It is clear that at the heart of this issue is the inevitable tension between the constitutional rights of an informal settlement community (housing and basic services) and the landowner's constitutional property rights. Determining what is lawful in the context of these competing rights can be a complex and fact-dependent exercise. The result is that installing services on private land may be lawful in one scenario but not another. The following section will outline the arguments for the legal provision of water services to informal settlements located on private land.

ADDRESSING THE PERCEIVED IMPEDIMENTS

Conflict between right to basic services and property rights

A municipality is constitutionally obliged to respect, promote and fulfil all rights, including both the landowner's constitutional property rights and the unlawful occupiers' rights to basic services and housing. The court in *Fischer* noted with respect to the rights of unlawful occupiers and landowners that:

> *'…there is no distinction between the state's obligation to respect, promote and fulfil the rights of both the occupiers and the applicants. That obligation remains the same. The fact that the state should give effect to these rights is undisputed.'* (*Fischer* 2017 at [177])

There is no automatic 'hierarchy' of rights obliging a municipality to prefer one constitutional right over the other.

The court has found that it is the landowner's responsibility to take reasonable measures to protect their property against unlawful invasion. In *Mkontwana*, the Constitutional Court noted that the owner is responsible to safeguard the property, take reasonable steps to ensure it is not unlawfully occupied and, if it is, take reasonable steps to evict. The courts do recognise, however, that a landowner may effectively be powerless to withstand a large-scale land invasion, as was the case in *Modderklip*.

Although we believe a municipality has authority to install fixed services on private land to deliver basic services by virtue of the powers it derives from the Constitution, when exercising these powers and functions, a municipality cannot act in a manner that is inconsistent with the Constitution. A landowner may argue that installing fixed services on its land, even if it is to deliver basic services, is a violation of its property rights, and the conduct is thus unlawful.

The Constitutional Court has noted that weighing up the rights of landowners and unlawful occupiers is not a mechanical exercise and the specific factors in each case need to be considered:

> *'…the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law…The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just*

a manner as possible taking account of all interests involved and the specific factors relevant in each particular case.' (*Port Elizabeth Municipality* at [23])

Also relevant is the evolving nature of ownership in South African law. Boggenpoel (2019) discusses the limitations of property ownership under South Africa's constitutional dispensation and observes that it is a common perception that ownership gives the holder of the right unfettered, absolute power to trump any other right or interest that may confront ownership. However, recent judgments confirm this perception of an owner's rights has become untenable and ownership as a 'trump' right has been challenged when other constitutional rights are at stake. In *Daniels*, Froneman J held that the approach of seeing ownership as the pinnacle right, with all other rights subordinate to it, is not feasible under the Constitution. He observed that ownership has a social dimension to it that cannot be ignored. The protection of ownership cannot be accepted without recognising the injustices of the past.

It is apparent from the above that a landowner's property rights do not automatically trump those of unlawful occupiers on its property and courts are recognising a social dimension to property ownership.

In considering whether a landowner's property rights have been violated by the installation of fixed services, a key question is the permanence, or otherwise, of the informal settlement. We believe a settlement can be regarded as effectively permanent if a court has declared it is not just and equitable to evict the unlawful occupiers. This means the landlord is forced to tolerate the unlawful occupation indefinitely. Alternatively, it may be self-evident from the nature of the settlement itself that it can be regarded as permanent or 'semi-permanent'. For example, the scale, duration, or other features of the settlement may make it clear that relocation is either impossible, or only possible in the medium to long term. In terms of classification, we would regard Category A, B1 and B2 settlements, by definition, as being permanent or semi-permanent for these purposes.

In the case of a permanent or semi-permanent settlement, it is hard to see how a landowner could argue that by installing fixed services it has been further deprived of its property in violation of section 25 of the Constitution. The landowner has already been wholly deprived of the use and enjoyment of the property by the unlawful occupation itself. The installation of underground pipes and some above-ground infrastructure, such as taps and toilet blocks, arguably has no effect on the deprivation the landowner has already suffered. To comply with its administrative law duties, the municipality would, in our view, be obliged to give the private landowner notice of its intention to install the services and the opportunity to provide written comments. If the landowner can demonstrate that it would suffer further deprivation or other prejudice by the installation of services, it would no doubt notify the municipality of this fact in its written representations. The municipality would be obliged to take these comments into account before making a final decision.

Thus, in the context of a permanent or semi-permanent settlement we do not believe installing fixed services would constitute a property deprivation for purposes of section 25 of the Constitution. Nor do we consider installing such services infrastructure to constitute an effective expropriation (if there is such a thing) requiring the payment of compensation. With regard to a Category B2 'semi-permanent' settlement, after relocation we assume the infrastructure, to the extent it may constitute a 'deprivation' (which is debatable), can be removed or remediated so as to no longer deprive the landowner of the use and enjoyment of the property. We doubt it would be legally justified for a municipality to install fixed services infrastructure to a Category C settlement (where relocation is imminent) and assume in any event this scenario is unlikely to occur, provided that relocation was indeed imminent, as per the definition of a Category C settlement.

Condoning illegal conduct

One of the concerns of municipalities is that installing services condones illegal land invasion. The rule of law is one of the founding values of the Constitution. Land invasions undermine the rule of law and property rights and may constitute a criminal offence under trespass legislation. In *Modderklip*, the landowner suffered unlawful occupation of its property on a massive scale (approximately 40 000 people). The Constitutional Court noted that land invasions should always be discouraged and that:

'Land invasions on this scale are a matter that threatens far more than the property rights of a single property owner. Because of their capacity to be socially inflammatory, that have the potential to have serious implications for stability and public peace. Failure by the State to act in an appropriate manner in the circumstances would mean that Modderklip, and others similarly placed, could not look upon the State and its organs to protect them from invasions of their property. This would be a recipe for anarchy'. (*Modderklip* at [45] and [49])

A landowner may argue that by installing fixed services on its land to service unlawful occupiers, the municipality is actively condoning and entrenching illegal conduct. While this argument may have merit in other circumstances, in the case of permanent or semi-permanent settlements we believe this argument falls away. A municipality is self-evidently unable to prevent the ongoing unlawful occupation if the settlement is legitimately regarded (or ordered by court) as being effectively permanent.

Unlawful access to property

A landowner may argue that the act of entering private property to install, maintain or repair the fixed infrastructure without express statutory authority or consent to do so is unlawful. Under the Water Services Act municipalities have entry and inspection powers over private land. These powers mostly relate to checking existing water works, but a municipality may, after reasonable notice, enter property 'to establish the suitability of any….site for the construction of a water services work'. A municipality could, by virtue of this power, lawfully enter private property to assess the suitability of installing services to an informal settlement on that land. Municipal bylaws may include similar powers. These powers in the Water Services Act do not, however, extend to the construction, installation and maintenance of infrastructure on the land.

The *Mshengu* case is support for the view that a landowner should not unreasonably impede the municipality in the process of installing infrastructure. *Mshengu* concerned the provision of services on private land to lawful occupiers regulated under the Extension of Security of Tenure Act 62 of 1997. The municipality argued that it cannot enter private property to install a connection. However, the court found the municipality had a duty to ensure the landowner provided access to basic services to those 'living legally on their land' and the landowner was obliged to act reasonably in reaching agreements with the municipality for the provision of services. The court held that the landowner 'cannot unreasonably deny the municipality access to his farm in order to install necessary infrastructure to ensure the provision of services'. Arguably this principle could, or should, in appropriate circumstances be extended to unlawful occupiers on private land who are constitutionally entitled to basic services.

Servitudes are typically used to establish the rights of a municipality to install and access infrastructure located on private land, so the question arises whether a municipality needs to register a servitude for these purposes. A servitude is a limited real right in land registered in the Deeds Office. It does not involve the transfer of ownership. Servitude rights could be temporary or permanent. Depending on the nature of the settlement and the contemplated infrastructure, the normal process of registering a

servitude may be difficult or impractical. For example, the location and nature of pipes, taps and other infrastructure may make surveying and registering a servitude impractical (e,g, where the informal settlement is not re-blocked and pipes will not be laid in a neat grid-like pattern). In addition, a servitude is usually concluded by agreement. Assuming the landowner does not agree to a servitude, the question arises whether the municipality may proceed to install the infrastructure based on its original powers under the Constitution, or whether it would be obliged to expropriate a servitude in terms of the Expropriation Act and pay compensation to the landowner.

The *Rand Water* case concerned water pipelines installed over private land under now-repealed legislation (Rand Water Board Statutes (Private) Act 17 of 1950). The landowner claimed Rand Water had laid pipes over its land without its consent and without any servitude or other limited real right being registered over the property. The landowner argued this infringed its rights to the exclusive use of its property. The Supreme Court of Appeal noted that at the time of laying the pipes, Rand Water had the power to lay pipes over private land without registering a servitude (under the aforementioned Rand Water Act), but this was before the Water Services Act was promulgated and 'the procedures for exercising that power may now be different, and may require it to expropriate servitutal rights over the property'. The Rand Water case can be interpreted to suggest that under the current legislative regime a municipality is expected to register a servitude if it wishes to lay services infrastructure over private land.

The question of whether a servitude is necessary in these circumstances is a complex one and it appears there are different views on this issue. It is possible a court would find that a municipality can install fixed infrastructure based on its original powers under the Constitution and that a servitude is not required in these circumstances. However, given the complexity of this issue and the developing law, we believe the risk-averse approach would be for the municipality to either attempt to agree or expropriate a servitude or, as suggested in one of the senior counsel opinions, to promulgate a bylaw to permit 'statutory servitudes'. A statutory servitude would entitle the municipality to lay pipes and other services infrastructure over private land in clearly defined circumstances, without the need to register a servitude. This is similar to the power granted to licencees under section 22 of the Electronic Communications Act 36 of 2005. This could be a practical solution to a potentially complex issue, and we believe it should be explored by municipalities as one of the mechanisms to de-risk the installation of services on private land.

Impact on landowner's right to evict under PIE

The installation of services on private land could theoretically impact on a landowner's ability to apply for eviction under PIE, and if so, the landowner could argue this constitutes a further unconstitutional deprivation of its property rights. This situation only arises if the landowner has not already instituted proceedings under PIE.

This aspect was considered by the various Constitutional Court judges in *Joe Slovo*. In this case, the municipality decided to provide basic services to unlawful occupiers on its own land, while not conceding the lawfulness of the occupation. The question arose whether by providing such services, the municipality was impliedly consenting to the unlawful occupation. If so, this would mean the occupiers no longer fell within the definition of 'unlawful occupiers' under PIE and could not be evicted. The judges expressed different views on this issue. Yacoob J held that the intention not to concede right of occupation is wholly consistent with provision of services and noted:

> *'All the City was doing here was carrying out its constitutional mandate and moral duty with responsibility and care. If this conduct were to result in an inference that an enforceable right of occupation had been conceded, it would mean that the performance of a constitutional duty by the City would inexorably lead to the concession of a right of occupation.'* (*Joe Slovo* 2009 at [78] and [79])

Moseneke J considered the provision of services a relevant factor, pointing to acknowledgement and acceptance of the occupation of the residents. He said the 'provision of basic services (with other factors) lead to the irresistible inference that the City had tacitly given its permission for the occupation'.

Sachs J held that by providing services, the municipality was not giving charitable assistance; it was functioning as government itself, fulfilling its specific constitutional and statutory duties. He noted that if this case were brought by private landowners, it may have been possible to contend the evidence fell short of showing anything other than conduct of a good Samaritan but went on to say:

> *'Yet even in relation to a private landowner, I believe the prolonged character of the occupation, coupled with the creation of infrastructure to provide water and electricity, would have indicated to any objective observer that there was actual consent to the occupation.'* (*Joe Slovo* 2009 at [151])

In the later judgment of *Odvest*, with reference to the *Joe Slovo* judgment, the court addressed the differing facets to tacit consent on the part of landowners, holding that '[w]hile an owner's failure to take action against occupiers over a lengthy period may in appropriate circumstances justify an inference of consent, the mere lapse of time does not suffice' (*Odvest* 2016 at [57]). The court concluded that if the owner 'tolerated' the occupation, it was because it did not have the resources or inclination to take legal action.

Based on the above, it appears at least possible that if a landowner consents to the installation of services infrastructure on its land, or even if it does not actively oppose the municipality doing so, this could be construed as tacit consent to the unlawful occupation itself. If so, the landowner would lose its right to evict the unlawful occupiers under PIE.

While we flag this as a possible consequence of installing fixed services on private land, we think the risk of this arising is probably quite remote. Assuming a municipality would only install fixed services to informal settlements that can be regarded as permanent or semi-permanent, one would expect a landowner to have long before exercised its rights under PIE, if it had any intention or prospects of successfully doing so.

MFMA fruitless and wasteful expenditure

The MFMA defines fruitless and wasteful expenditure as 'expenditure that was made in vain and would have been avoided had reasonable care been exercised' (MFMA section 1). Accounting officers have a duty to take reasonable steps to prevent fruitless and wasteful expenditure. Municipal officials are guilty of financial misconduct if they deliberately or negligently make or permit such expenditure. They may also become criminally liable. Given these powerful provisions, municipal officials are understandably cautious about incurring expenditure that may risk being classified as fruitless and wasteful.

A reported concern from municipalities is that installing fixed infrastructure to service an informal settlement that will ultimately be relocated (Category B2 or C settlements) may constitute fruitless and wasteful expenditure. This is because, after relocation, the infrastructure will be redundant and need to be pulled up. The concern does not arise for a Category A or B1 settlement where relocation is not planned.

We understand that services delivered by way of fixed infrastructure are inevitably preferable to those delivered by temporary mechanisms, which are less convenient and efficient for consumers, and very often more expensive (PDG, 2017). However, the risk of expenditure being classified as

fruitless and wasteful is a valid concern if relocation is imminent (Category C). In that case alternative, temporary service delivery mechanisms may well be more appropriate. However, if relocation is only planned in the medium or long term (Category B2), we do not believe it can be 'fruitless and wasteful' to incur expenses in providing basic services to the desperately poor. It would, in our view, be anomalous for such expenditure to be regarded as 'fruitless' when it is incurred in fulfilment of a municipality's central constitutional mandate.

To assess a potential fruitless and wasteful expenditure risk in a Category B2 context, the municipality will have to consider the expected relocation date in the context of the cost of installing (and possibly removing) the services infrastructure versus the costs of alternative services mechanisms. Research by the WRC indicates that temporary sanitation solutions are more costly than permanent solutions after 3-6 years (PDG, 2017). Municipalities could undertake a similar costing exercise to inform the decision to provide services to Category B2 or Category C settlements. There is a sliding scale of legal risk - the less imminent the relocation date, the more appropriate it is to install fixed services. We believe if relocation is only likely to occur in the medium to long term, an MFMA fruitless and wasteful expenditure risk does not arise. This risk could also be mitigated by providing only essential fixed services to informal settlements scheduled for relocation and, if technically feasible, installing infrastructure that can be easily removed and possibly even used elsewhere.

The findings above do not relate to 'irregular' expenditure, which the MFMA defines as expenditure incurred in contravention of supply chain management requirements, the MFMA and certain other statutes. Municipalities must ensure that expenditure on infrastructure services to informal settlements is planned and budgeted for in terms of the requirements of the MFMA and follows proper supply chain management process in order not to be classified as 'irregular'.

Creating assets on private land

A possible concern when installing fixed infrastructure on private land is the risk the infrastructure accedes to the land and so vests in the private landowner. This would be undesirable for many reasons. Capital expenditure, by definition, is expenditure to create or acquire physical or non-consumable assets and the Generally Recognised Accounting Practice (GRAP) Standard for Property Plant and Equipment (GRAP 17) requires that the value of the assets created or purchased be disclosed in the municipality's financial statements. The municipality also needs to operate, control and manage the infrastructure to fulfil its constitutional mandate. Section 14 of the MFMA prohibits a municipality from transferring ownership or otherwise disposing of a capital asset needed to provide the minimum level of basic municipal services. Water and sanitation services infrastructure required to provide basic services to an informal settlement would classify as capital assets for purposes of section 14.

However, the Water Services Act defines 'water services works' as infrastructure 'built, installed, or used by' the municipality to provide water supply and sanitation services (including pumphouses, pipelines, meters, fittings or other apparatus). Section 79(1) provides that:

> *'Any water services work placed in good faith by a water services institution in or on property not owned by it, remains the property of that water services institution, whether the work is fixed to any part of that property or not, and may be removed by it'.*

A municipality routinely runs pipes and services infrastructure over private land, with its rights to access and maintain that infrastructure registered by way of servitudes. Subdivision applications are typically approved subject to the registration of services servitudes for municipal sewers, water pipelines and the like over the private land. It is not our understanding that the infrastructure thereby loses its status as a municipal capital asset.

When a municipality removes a water services work from land not owned by it, the owner or occupier may require the municipality to restore any physical damage caused to the property by the removal, as far as reasonably possible. Other than that, the owner or occupier has no other claim against the municipality. In addition, municipal bylaws typically provide that water and sewerage reticulation infrastructure required to deliver services vests in the municipality.

Some of the confusion on this issue may derive from the 2003 Strategic Framework for Water Services which states under the heading 'Investments on private land, in the case of intermediaries':

> *"There is no legal impediment to the use of government grants to fund infrastructure for a poor household on private land not owned by that household, provided that the intermediary (private land owner) makes a financial contribution. (This is because the intermediary becomes the owner of the infrastructure once it is installed)."* (DWAF, 2003:28)

However, if the residents are occupying the land without the owner's consent, the owner does not qualify as a water services intermediary in terms of the Water Services Act. A 'water services intermediary' is a person obliged to provide water services to another in terms of a contract.

In conclusion, we believe ownership of infrastructure installed in good faith on private land to deliver basic water and sanitation services will vest in the municipality by virtue of the Water Services Act and possibly also by virtue of municipal bylaws. Any legal issues triggered by a deemed passing of ownership, including a contravention of section 14 of the MFMA, should thus not arise. However, unless the municipal bylaw already provides as such, we recommend the municipality promulgates a bylaw that specifically provides that ownership of the services infrastructure placed on private land when servicing an informal settlement remains vested in the municipality.

Municipal funds used to increase value of private land

Another reported municipal concern is that it is impermissible to use municipal funds to increase the value of private land. The argument, as we understand it, is that the installation of services infrastructure on private land increases the value of that land, and this (for unclear reasons) is not permissible. We cannot find an MFMA or other statutory provision that directly deals with this issue.

This issue was considered by senior counsel in an opinion on installing services to backyard dwellers. Even if factually the value of the owner's premises were enhanced by the installation of services, counsel concluded this did not constitute a contravention of the MFMA nor was it otherwise unlawful. Counsel noted, and we agree, that if a municipality invests public funds on private land for a legitimate purpose and particular individuals are enriched, this in itself does not impact on the legality of the activity. Many municipal decisions have the effect of increasing the value of private land (for example rezoning decisions or decisions to provide public infrastructure or amenities in a particular area that makes that area more desirable). This does not make those decisions unlawful.

It is in any event questionable whether installing infrastructure in this context increases the value of the land. What is the value of land that is already subject to permanent or semi-permanent unlawful occupation? A landowner will hardly be able to sell the land on the open market. The landowner's only hope for realising the value of its land is if the municipality purchases or expropriates it. It is hard to see how installing fixed services infrastructure in this context would increase the property value. We do not believe this is a legal impediment to installing fixed infrastructure on private land.

Local Government: Municipal Systems Act section 118 prevents transfer of ownership

The Municipal Systems Act prohibits the transfer of immovable property unless the municipality issues a certificate confirming all amounts due for municipal services, rates and other municipal taxes for the past two years are fully paid. If a municipality imposes service fees on the residents of the informal settlement located on private land, and these charges are unpaid, this could impact on the owner's ability to transfer the property. Typical practice is for municipalities not to charge for services in informal settlements, but it is at least possible the municipality could charge a fee for services in some cases (e.g. a flat rate per household for individual services).

In *Mkontwana* the Constitutional Court confirmed section 118 applies even in the case of unlawful occupiers. However, as is apparent from other cases, the reality is that land may be subject to large-scale invasion and unlawful occupation despite the best attempts of the landowner. And, even if a landowner brings an eviction application, the court may find it is not just and equitable to evict.

The effect of section 118 of the Municipal Systems Act is that if a municipality intends imposing charges for services provided to residents of an informal settlement on private land, the owner becomes liable for settling any unpaid charges if it wants to sell the land (otherwise it cannot get the necessary certificate to effect transfer). This will constitute a further deprivation of the owner's property, albeit according to the courts not an 'arbitrary' one. A landowner may raise this as part of its argument against permitting the installation of services on its property without its consent, as it seems anomalous that the owner could be held liable for debts in the face of a large-scale informal settlement.

This scenario will only arise if the municipality imposes services charges and in the unlikely event the landowner finds a third party willing to buy its land. This would presumably only occur if the informal settlement were scheduled for relocation or has been relocated (Category B2 or C). Presumably in this case the municipality can find a practical solution to mitigate this risk, for example by writing off the debts or imposing charges in a manner that they do not constitute services in connection with the property or are not deemed 'due' as contemplated in section 118. If the municipality itself acquires the land, we assume it could take similar steps to avoid prejudicing the landowner. Thus, we consider the likelihood of this situation arising as remote and, even if it does, we expect a practical and fair solution can be found to address it.

Unintentional barriers created by municipal water bylaws

Water bylaws often provide that water will only be supplied to a premises if the owner makes written application for supply. This is naturally anomalous in the case of an informal settlement on private land. The bylaws may also place specific burdens on the owner when applying for a service connection, for example, having to pay a fee for a pipe connection. The *Mshengu* case involved the failure of the municipality to provide services to farm labourers and tenants on private land. The municipality argued in defence of not providing the services, that under its bylaws the landowner is obliged to apply for the connection of water services, which it had not done. The court held that a municipality cannot shift the obligation to the landowner to make applications for water supply and found the municipality's failure to supply services contrary to its constitutional obligations. The *Joseph* case also confirmed the municipality's obligation to provide services to occupiers, regardless of whether there is a contract for service provision as contemplated in the municipal bylaw.

Bylaws will typically place various obligations on owners of premises to which services are delivered, including duties relating to the physical water installations on their premises. These provisions are typically drafted to assume a household with internal plumbing which vests in the owner and assumes the owner wants services delivered to the property. The owner may also be deemed to be the 'consumer' for certain purposes under bylaws. Some bylaws make the owner jointly and severally liable for services charges on the owner's property. Many of these provisions are anomalous in the case of an informal settlement on private land.

The fact that a bylaw only contemplates service delivery if the owner applies for services, does not in our view detract from the municipality's constitutional duty to provide basic services. However, a municipality may be reluctant to provide services in the absence of clear authority under its bylaw to do so, or if providing such services creates anomalies under the bylaw. This may pose at least a perceived legal impediment to the installation of services on private land without consent.

CONCLUSIONS

Municipalities have a powerful duty to provide basic services, regardless of the lawfulness of occupation, according to section 27 of the Constitution. The findings of the research lead us to conclude that there are no outright legal impediments to installing fixed services on private land, although some anomalies may arise in specific cases.

It is lawful to install fixed services in informal settlements located on private land, but the categorisation of the settlement is important - services can legally be provided to permanent or semi-permanent settlements on private land (Categories A, B1, B2).

In our view, a municipality can lawfully install fixed services infrastructure on private land without the landowner's consent, where: a) a court has ordered it is not just and equitable to evict the unlawful occupiers or in any other case where the settlement is otherwise justifiably regarded as permanent or semi-permanent (Categories A, B1 and B2); and b) the landowner has been given prior notice and opportunity to comment on the proposed installation.

The above conclusions assume the municipality has reasonably and realistically categorised the informal settlements as Categories A, B1, B2 or C. We understand, for example, some municipalities may classify settlements as Category C when relocation is in fact not imminent or not possible.

RECOMMENDATIONS

Recommendations for municipalities

As a matter of urgency, if municipalities have not done so, they must categorise settlements (realistically) as required by SPLUMA.

Municipalities may wish to amend the Municipal Property Rates Policy to enable rates rebates to owners whose land is unlawfully occupied to provide some form of compensation to the landowner for the ongoing deprivation of its land. It is anomalous for a landowner to have to pay property rates for land which is subject to permanent unlawful occupation, particularly where the municipality has not acquired to expropriated the land as, we believe, it is obliged to do.

Municipalities should promulgate a bylaw that expressly provides for installation of services in the context of informal settlements located on private land, including specifying when and how such services will be installed and the rights and duties of the municipality and landowner in the process. This would include the duty to give the landowner prior notice and the opportunity to comment before fixed services are installed. Such a bylaw should also do away with anomalies that arise in existing bylaws,

such as only contemplating provision of water services on contract. The bylaw should also permit 'statutory servitudes' entitling the municipality to lay pipes and other services infrastructure over private land in clearly defined circumstances, without the need to register a servitude in the Deeds Office.

Municipalities could also consider identifying an appropriate test case to take through the courts to obtain clarity on the parameters of a municipality's authority and duty in these circumstances.

Recommendations for national government

National government should provide clear direction to municipalities on the lawfulness of installing services on private land. Further clarity could be provided using existing legislative instruments. For example, the Minister of Human Settlements could gazette additional principles for housing development under section 2(2) of the Housing Act, to clarify the housing development principles applicable to informal settlements on private land and the duty to provide access to basic services to such persons regardless of the lawfulness of their occupation. The Department of Human Settlements could also amend the Housing Code on upgrading of informal settlements to make it clear that grants can be used to install fixed services on private land and other existing legal instruments.

National Treasury should issue an MFMA circular or practice note to clarify the accounting treatment and financial consequences of investing capital expenditure on private land. National Treasury should also clarify with the Auditor-General of South Africa that expenditure on basic services to informal settlements on private land should not be classified as fruitless and wasteful expenditure.

REFERENCES

Boggenpoel ZT 2019. '(Re) defining the contours of ownership: moving beyond white picket fences'. Stellenbosch Law Review 234.

Department of Water Affairs and Forestry (DWAF). 2003. Strategic Framework for Water Services: Water is life, sanitation is dignity. September 2003. DWAF: Pretoria

PDG 2017. 'A review of the challenges and constraints associated with the provision of sanitation services in urban informal settlements'. Water Research Commission Report No. K5/2486. Water Research Commission: Pretoria.

CASES REFERRED TO

Iris Irelda Fischer and Others v City of Cape Town and Others (case numbers 9443/14, 11705/15, 14422/14) judgment of the High Court of SA Western Cape Division judgement delivered on 30 August 2017

Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC)

President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others 2005 (8) BCLR 786 (CC)

Port Elizabeth Municipality v Various Occupiers 2002 (1) SA 217 (CC)

Daniels v Scribante and Another 2017 ZACC 13

Jordaan v City of Tshwane Metropolitan Municipality 2017 (6) SA 287 (CC)

Mshengu and Others v uMsunduzi Local Municipality and Others 2019 (4) All SA 469 (KZP)

Rand Water Board v Big Cedar 22 (Pty) Ltd 2017 (1) All SA 698 (SCA)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2009 (9) BCLR 847 (CC)

Joseph and others v City of Johannesburg and Others 2010 (4) SA 55 (CC)