

3. What are your rights? Legal aspects of Municipal services from the perspective of the domestic consumer

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INTRODUCTION

Many South African consumers experience an increasing number of frustrations in their dealings with their municipalities, such as:

- Problems with services: leaking pipes that are not repaired for days; new infrastructure without a consistent supply of clean water; water tankers with insufficient water for a community; concerns about the operational status of the water and wastewater treatment plants of smaller municipalities and the effect on water quality; power cuts;
- High increases in tariffs for water and electricity;
- Tariffs that are not clear or explained, for example fixed charges, penalty fees and sundries;
- Unintelligible and illegible accounts;
- Mistrust in the accuracy of accounts: estimated meter readings for long periods;
- Credit control actions: services cut off even though the account is disputed; no record of payment;
- Inaccessibility of customer care: phones that remain unanswered or consumers sent from pillar to post.

Consumers often feel powerless in the face of these frustrations. They are not aware that they have rights as municipal consumers or what their rights are. How much may municipalities charge for municipal services? What actions may citizens take when they are dissatisfied with services or dispute their account? What protection does the Consumer Protection Act provide municipal consumers? This paper will explore some of these issues from the perspective of the domestic consumer.

2. RIGHTS AND PROTECTION UNDER THE LAW

Several South African Acts refer to municipalities' duties towards consumers and consumer rights regarding municipal services. The provision of municipal services is rooted in the following Acts and their amendments:

- Constitution of South Africa Act, 108 of 1996;
- Local Government White Paper;
- Local Government: Municipal Structures Act, 117 of 1998;
- Local Government: Municipal Finance Management Act, 56 of 2003;
- Local Government: Municipal Systems Act, 32 of 2000;
- Water Services Act, 108 of 1997;
- National Environmental Management Act, 107 of 1998;
- National Energy Act, 34 of 2008;
- Local Government: Property Rates Act, 6 of 2004;
- Division of Revenue Act (Annual Legislation).

Since municipalities supply goods (water, electricity, gas, etc) and services for which they charge consumers, legislation that relates to billing also applies to them. This includes:

- National Credit Act, 34 of 2005; and
- Value-added Tax Act, 89 of 1991;

Consumer rights and the duties of municipalities towards consumers, as mentioned in the listed Acts, are further specified in regulations, guidelines and policies. Municipal by-laws and policies add another level of specificity. By-laws and municipal policy are subject to national legislation and regulation and should follow national guidelines and policies (South

Africa, 1996), section 153(3).

An example from water services illustrates this relationship for domestic water tariffs and credit control:

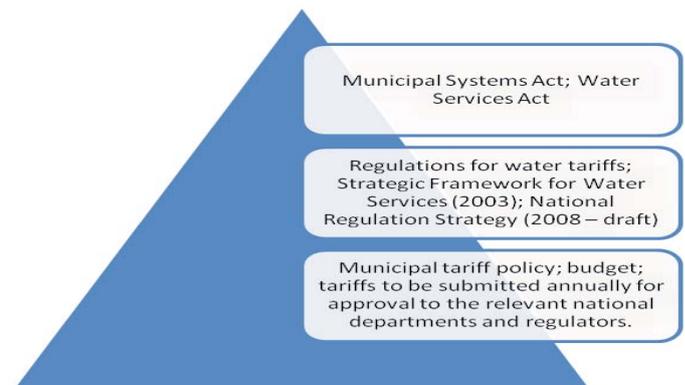


Figure 1: Levels of legislation and regulation

Different institutional arrangements regulate consumer rights and consumer protection in municipal services. Water services are regulated by the Department of Water Affairs; energy by the National Energy Regulator South Africa (NERSA).

The Consumer Protection Act (2008) which will come into effect in October 2010 strengthens consumer rights and consumer protection. Water, gas and electricity are defined as “goods” under this Act. In several respects, this Act is more specific on consumer rights and protection than previous legislation. The Act also provides consumers with opportunities to redress that have not been in place before. This paper discusses the following aspects of consumer rights and protection in terms of municipal services:

- The right to basic services;
- The right to free basic services;
- The right to control consumption;
- The right to affordable services;
- The duty to pay versus the right to receive quality service; and
- The right to information and participation.

The last section of the paper discusses actions that consumers can take under the Consumer Protection Act (2008).

RIGHT TO BASIC SERVICES

According to the Municipal Systems Act (2000), section 73 (1) and (2), municipalities “must ensure that all members of the local community have access to at least the minimum level of basic municipal services”.

Water and sanitation

According to the Constitution of the Republic of South Africa (RSA) (South Africa, 1996), water is a basic right:

27(1) *Everyone has the right to have access to sufficient food and water.*

(2) *The State must take reasonable legislative and other measures to achieve the progressive realization of each of these rights*

The right to sanitation is not mentioned specifically in the Constitution, but relates to the right to a safe environment:

24 *Everyone has the right -*

(a) *to an environment that is not harmful to their health or well-being;*

The Water Services Act (1997) defines the ‘right to access to sufficient water’ as ‘a right of access to basic water supply and basic sanitation’. The legislation reads as follows:



3. (1) Everyone has a right of access to basic water supply and basic sanitation.
- (2) Every water services institution must take reasonable measures to realise these rights.
- (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.

The Water Services Act does not define 'basic'. Basic water and sanitation is defined in the Strategic Framework for Water Services (DWAF, 2003) in terms of quantity, quality, accessibility and availability.

Quantity:

- 25 litres of water per person per day with a minimum flow of 10 litres per minute (in the case of communal water points); or
- 6 000 litres of water per household (of 8 persons) per month in the case of yard or house connections.

Quality (clean and safe): Drinkable or potable water must meet the requirements of South African National Standard 241 (SANS 241).

Accessibility: Basic water should be supplied within 200 metres of a household.

Availability: Basic water should be available for at least 350 days per year and not interrupted for more than 48 consecutive hours per incident. Basic water services include the supply of water in the form of communal standpipes, yard taps and yard tanks; all of these measures constitute basic levels of service. Roof tanks provide an intermediate level of service, while house connections constitute a full level of service. The South African national standard for potable water, or water that is safe for drinking, is set out below:

ANNEXURE 1: SANS 241: 2005 DRINKING WATER SPECIFICATIONS

Table 1 — Microbiological Safety Requirements

| Determinand | Unit | Allowable compliance contribution ^a | | |
|---|--------------|--|---------------------|---------------------|
| | | 95% of samples, min. | 4% of samples, max. | 1% of samples, max. |
| Upper limits | | | | |
| <i>E. coli</i> ^b or Thermotolerant (faecal) coliform bacteria ^c | count/100 mL | Not detected | Not detected | 1 |
| | | Not detected | 1 | 10 |

^a The allowable compliance contribution shall be at least 95 % to the limits indicated in column 3, with a maximum of 4 % and 1 %, respectively, to the limits indicated in column 4 and column 5. The objective of disinfection should, nevertheless, be to attain 100 % compliance to the limits indicated in column 3.

^b Definitive, preferred indicator of faecal pollution.

^c Indicator of unacceptable microbial water quality, could be tested instead of *E. coli* but is not the preferred indicator of faecal pollution. Also provides information on treatment efficiency and aftergrowth in distribution networks.

Figure 2: Drinking water specifications

Basic sanitation is defined in the Strategic Framework for Water Services (DWAF, 2003) as follows:

A Basic Sanitation Facility is the infrastructure necessary to provide a sanitation service which is safe, reliable, private, protected from the weather, ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation-related diseases, and enables safe and appropriate treatment and/or removal of human waste and wastewater.

A Basic Sanitation Service is the provision of a basic sanitation facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and wastewater.

Energy/electricity

In terms of the Constitution, access to electricity is not a basic right. However, South Africa has set universal access as the goal of national electrification:

5. (1) The Minister must adopt measures that provide for the universal access to appropriate forms of energy or energy services for all the people of the Republic at affordable prices (National Energy Act 34 of 2008)

'Basic electricity', although not defined as such, is described in the Electricity Basic Services Support Tariff (Free Basic Electricity policy, 2003) as follows: "50kWh per month is considered adequate electrical energy to meet the needs for lighting, television and limited water heating and basic ironing (or basic cooking) for a poor household."

Refuse removal

Refuse removal and the management of waste can also be expressed in terms of the right to a safe environment. According to the Constitution (South Africa, 1996):

24 Everyone has the right –

to an environment that is not harmful to their health or well-being;

The table below describes different levels of domestic refuse removal for urban areas (modified from Otto et al, 2008, as quoted in National Policy on Free Basic Refuse Removal).

Table 1: Levels of domestic refuse removal for urban areas

| Level of Service | Service Type | Details of the Type of Service |
|-------------------------------|--|--|
| Basic Level of Service | Communal dump site | (a) Households are required to transport their own waste to a dumping site outside of the settlement area. (b) The dumping site is provided and operated by the service provider or appointed contractor and is basically a small landfill site. |
| Intermediate Level of Service | Households transfer to communal bins (skips) | (a) Households are required to carry their own solid waste to a communal point in the neighbourhood where large bins (skips) are provided. (b) The skips are then removed to the landfill site and emptied by the district council or an appointed contractor |
| Full Level of Service | Kerbside collection | (a) Households put their separated waste out for collection once a week (or more frequently if required). (b) The municipality or appointed contractors collect the recyclable and residual waste from each household in trucks, or with tractors and trailers, etc. and transport it to the landfill and/or recycling handling facility. |

According to the Municipal Infrastructure Grant document (dplg, 2005), the government requires that "a refuse removal service" be provided at least once a week.

THE RIGHT TO FREE BASIC SERVICES

The Free Basic Services (FBS) programme policy was adopted in 2000 after President Thabo Mbeki announced government's intention to provide free access to basic services to the poorest of the poor to enhance the fight against poverty. The focus areas are water, energy, sanitation and refuse removal.

The Free Basic Sanitation Strategy (DWAF, 2009:10) states clearly that "the primary intended recipients of free basic sanitation are poor households... currently, a household with expenditure below R1100 is taken as a poverty benchmark at national sphere".

When FBS was introduced, many municipalities opted to give free basic services to all, and to use a stepped tariff structure to recover

the cost from those who can afford to pay for basic services. However, although all citizens have the right to basic water and sanitation, only registered indigents or poor have the right to free basic services.

THE RIGHT TO CONTROL CONSUMPTION

Consumers can control and limit their own consumption through various measures:

- Reading their own meters and sending it to the municipality in a short message service (SMS) or an email;
- Pre-paid electricity and water; and
- Comparative information: Research in Australia (Australia Natural Resource Management Ministerial Council, 2006) found that graphs that compare a consumer's water or electricity use with the area average are very effective in reducing high consumption.

No reference to this right could be found in South African legislation and municipalities seem reluctant to allow consumers to control their consumption. Very few municipalities give consumers the opportunity to SMS their own readings. Instead of encouraging pre-paid services as a measure to sustain affordable services, municipalities tend to penalise some consumers for using pre-paid services. Several municipalities exclude some categories of consumers (for instance non-permanent residents) from using pre-paid meters or charge some consumers extra if they buy coupons for the full month. Comparative information on municipal bills is the exception (the new Tshwane Metro bill has comparative graphs).

THE RIGHT TO AFFORDABLE SERVICES

Every water services authority has a duty to all consumers or potential consumers within its area of jurisdiction to ensure efficient, affordable, economical and sustainable access to water services.

(Water services Act, 1997, Section 11(1))

The cost of services

Municipalities are required to budget annually for income and expenditure (The Municipal Systems Act 32 of 2000).

The accuracy of municipal budgets is jeopardized by a number of factors:

- Uncertainty about the cost of a service, particularly services that are not ring-fenced;
- Inaccurate records of the number of municipal customers, both the paying customers for effective cost recovery, and indigent customers for accurate subsidisation;
- The effectiveness of cost recovery;
- Unaccounted for water, electricity and gas (leaks, inaccurate meters or meter readings and illegal connections).

Funding for municipal services

Income is generated from own resources and grant funding.

Own resources

Municipalities generate income by selling goods and services (e.g. water, electricity, sanitation services, waste removal services) to consumers.

Grant funding

Both conditional and unconditional grant allocations are made from the fiscus to supplement municipal programmes or functions. For

example, the Municipal Infrastructure Grant (MIG) is specifically designed for the purpose of allowing municipalities to roll out new infrastructure.

It should be noted that the MIG is only funding up to a basic level of service. If a municipality opts to provide a higher level of service, the community or municipality must provide counter funding for the difference in cost between a basic level of service and the selected higher level of service.

The Equitable Share funds free basic services. The Equitable Share is an unconditional grant calculated on a yearly basis according to a determined formula. The Equitable Share supplements existing municipal revenue whilst taking into account fiscal capacity, fiscal efficiency, developmental needs, extent of poverty and the current backlogs in municipalities.

The Equitable Share should cover a municipality's full cost of providing free basic services to indigent consumers. If the municipality does not keep sufficient record of indigents, or does not know what services cost, the grant would not cover the cost.

The price of goods and services

The price of municipal services is regulated by legislation and supported by regulations, guidelines, policies and by-laws. According to the Free Basic Electricity policy (2003) and the Municipal Systems Act (32 of 2000) municipal tariffs must:

- reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs and interest charges;
- be set at levels that facilitate the financial sustainability of the service, taking into account subsidisation (grants or cross-subsidisation) and the income that could be generated from the service concerned;
- make provision for a surcharge on the tariffs for a service and promotion of local economic development through special tariffs for categories of commercial and industrial users;
- encourage the economical efficient and effective use of resources;
- encourage the recycling of waste, and other appropriate environmental objectives; and
- disclose in full the extent of subsidisation of tariffs for poor households and other categories of users.

Tariffs may differentiate between the different categories of users, debtors, service provider's services, service standards and geographical areas (The Municipal Systems Act 32 of 2000). This implies that a municipality must verify the relative homogeneity of a category in terms of socioeconomic status. A single tariff structure for a mixed housing area, or an area with large numbers of students, for example, could make services unaffordable for some residents.

Municipalities must have a tariff policy that is aligned to national legislation and policies (The Municipal Systems Act 32 of 2000). The tariff policy of a municipality is a public document, which must be made available to consumers.

However, the calculation of the retail price of water, electricity and gas is not simple and it is very difficult for consumers to judge the fairness, or contest the tariffs that their municipality charges for goods and services. This is illustrated with the price of water and fixed charges.

By law, tariffs must cover costs, but the cost of water, for example, is made up of variable components. The cost of water includes the cost



of raw water or bulk potable water, overhead and operational costs, capital costs, replacement plus refurbishment costs, minus subsidies (DWAf, 2005).

For example, the retail price of water, even though regulated, differs substantially from municipality to municipality. The major contributing factor is the variable cost of bulk water, as Table 2 (National Treasury, 2003) illustrates. Bulk water forms the major component of the cost of retail water.

Table 2: Pricing and tariffs: water and sanitation: 2002-2003 budgeted

| R per Kl | Matikena | Rustenburg | Msunduzi |
|--|----------|------------|----------|
| Tariff paid to Water Service Provider category | R 1,64 | R 2,31 | R 2,29 |
| Domestic/ Residential Consumers | R 4,20 | R 4,70 | R 5,62 |
| Commercial Consumers | R 2,30 | R 4,05 | R 5,86 |
| Industrial and Mining Consumers | R 4,20 | R 4,05 | R 5,86 |
| Irrigation & Agricultural Consumers | R 4,20 | N/A | N/A |
| Number of connections to consumers | 12 000 | 43 965 | 400 |
| Number of cut-offs/ Disconnections | N/A | 6 000 | N/A |

Source: National Treasury Survey (March 2003).

In addition to the charge for water used, any tariff set by a water services institution for the supply of water services to a consumer may include a fixed charge for employing staff, maintaining equipment and infrastructure, metering, billing, and managing offices (Regulations under section 10 of the Water Services Act (1997).

Fixed charges for the purposes mentioned in the previous paragraph overlap with the uses of property rates. From a consumer perspective, it is therefore not clear exactly what these charges are for, which makes it very difficult for a consumer to evaluate the fairness of fixed charges. A statement in a booklet on norms and standards for water services tariffs (DWAf, 2005) describes fixed charges as “a suitable mechanism for recovering costs from owners of holiday homes, where the annual water use may be too low to recover costs by only using a volume based charge”. This seems to suggest that fixed charges are used to generate extra income from high income consumers for cross-subsidy purposes.

It is not always easy for consumers to see the fixed charge on municipal bills as they are referred to as “fixed charge”, “basic charge”, “service charge” or an “availability charge”.

Consumer discomfort about fixed charges is exacerbated by charge variability, as the table below illustrates:

Table 3: Variability of fixed charges for municipal services (2009)

| Date | Municipality | Fixed/Service or Basic charge (Water) | Fixed charge (Electricity) | Fixed charge (Sewage) |
|------|-------------------|---------------------------------------|----------------------------|-----------------------|
| 2009 | City of Cape Town | R 0.00 | R72.50 | R 0.00 |
| 2009 | Ekurhuleni | R 0.00 | R 13.50 | R 0.00 |
| 2009 | Nkomazi | R 59.40 | R 40.10 | R 0.00 |
| 2009 | Mosselbaai | R 90.23 | R 136.78 | R 0.00 |
| 2009 | Mantsopa | R 63.85 | R 0.00 | R 0.00 |
| 2009 | Govan Mbeki | R 22.90 | R 32.38 | R 15.29 |
| 2009 | Ga Segonyana | R 0.00 | R 44.79 | R 44.86 |
| 2009 | Hessequa | R 52.14 | R 213.35 | R 0.00 |

As far as could be established, fixed charges are not regulated. Indigent consumers who receive free basic services are exempt from fixed charges (Department of Mineral and Energy Affairs, 2003; Norms and standards for water services tariffs, 2005).

Although the price of municipal goods and services might be complex to evaluate, consumers have the right to a full disclosure of the tariff

structure of a municipality, as a document, and reflected on their municipal bills. Consumers also have the right to know how the income that a municipality generates is spent (The Municipal Systems Act 32 of 2000; National Credit Act 34 of 2005; Value-added Tax Act 89 of 1991).

Different levels of service – different tariffs

Municipalities are required to differentiate between different service levels when they set tariffs, as the quote (Norms and standards for water services tariffs, 2005) below illustrates for water services:

- (2) A water services institution must, when setting tariffs for providing water services to households, differentiate, where applicable, between at least the following levels of service -
- the supply of water to a household through a communal water services work;
 - the supply of water to a household through a water services work or consumer installation designed to provide a controlled volume of water;
 - the supply of water to a household through a water services work or consumer installation designed to provide an uncontrolled volume of water;
 - the provision of sanitation services to a household not connected to a sewer; and
 - the provision of sanitation services to a household connected to a sewer.

What are the implications for the cost of services if a high level consumer wants to downgrade to solar energy, self-removal of refuse, a biological toilet and the re-use of grey water? As far as could be determined, legislation does not make provision for consumers to choose to downgrade the level of service in order to afford municipal services or to change to a greener lifestyle.

As the price of municipal services soars, it is predicted that more and more South Africans will want to exercise the right to downgrade their level of service in order to be able to afford municipal services. Some municipalities (for instance Bitou LM, Amathole DM (WIN-SA/dplg, 2008/9)) have already found that low income consumers who earn too much to qualify as indigents, but too little to afford the normal tariffs, “fall between the cracks”.

THE DUTY TO PAY VERSUS THE RIGHT TO SAFE, GOOD QUALITY GOODS AND SERVICE

According to the law, consumers have a duty to pay for municipal services, unless they can prove that they cannot afford to pay. In the latter case, they would be declared indigent and would receive free basic services.

Does this duty apply if the municipality fails to deliver basic services?

A basic water supply or service cannot be delivered if there is no water, or if the water does not meet the SANS 241 quality standard. Similarly, when the power is out or unavailable, basic electricity cannot be delivered.

Protest action against the lack of service delivery has taken many forms in the past year. There have been several instances of violent protest and in a number of South African towns, ratepayers associations have declared disputes with their municipalities and paid their rates and service charges into a trust (Naidoo, 2010).

According to section 102 (1) and (2) of the Municipal Systems Act, 32 of 2000, a municipality may:

- (1) (c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.
- (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the

municipality from that person.

The issue seems to be: may a municipality claim money for bad service?

According to sections 54, 55 and 56 of the Consumer Protection Act, 68 of 2008, consumers have the right to quality goods and services. If goods and services do not meet the standards that people generally are entitled to expect, the supplier must either remedy the service or replace the goods or refund the consumer.

Does the duty to pay apply when a consumer complains about the correctness of a bill?

Most municipalities expect consumers to pay first, before a complaint is investigated. Section 102 of the Municipal Systems Act (32 of 2000) implies that a municipal account is a statement of money received and expended, with balance; it is not an obligation to pay until it is accepted by the customer within a specific period.

This reasoning on the legal status of municipal accounts has implications for current credit control policies that municipalities apply, even in the case where a consumer challenges the correctness of the account.

THE RIGHT TO ACCESSIBILITY

Most legislation emphasises the consumer's right to accessibility, as the excerpt from the Municipal Systems Act below illustrates:

A municipality must ...

(f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;

(g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;

(1-r) provide mechanisms to monitor the response time and efficiency in complying with paragraph (g);

As far as could be determined, the "accessibility of mechanisms" that the Act refers to is nowhere defined in precise terms nor has it been tested in court.

The Consumer Protection Act (2008) adds a new, more precise dimension to accessibility. Article 22 states that consumers have the right to consumer information in plain and understandable language. "Plain and understandable" is defined from the perspective of the consumer:

(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance, and import of the notice, document or visual representation without undue effort,

A recent study by the Water Research Commission (Slabbert, S., 2010) found that municipal accounts do not meet international norms of plain English nor do they comply with the Act. The ordinary South African consumer struggles to find basic information on municipal accounts.

Many consumers pay their municipal account every month without a clue as to how much water or electricity they have used, or what the cost per kilolitre or kilowatt-hour is. Many consumers do not even understand the difference between litre and kilolitre. Nor do they know what "balance brought forward", "arrears" or "consumption" means. Codes, abbreviations and acronyms make these accounts even more difficult to understand.

In a national urban survey that was conducted as part of the study, 35% of respondents disagreed with the statement that 'they trust their

municipal accounts to be correct'. 17% totally disagreed with the statement.

On the positive side, the study proved that simple changes significantly increase consumer understanding of municipal accounts and trust in the correctness of the account.

THE RIGHT TO INFORMATION AND PARTICIPATION

Legislation relating to municipal services emphasises the right of consumers to information and to participative government as the example below illustrates:

4. (2) The council of a municipality has the duty to-

(c) encourage the involvement of the local community;

(e) consult the local community about (i) the level, quality, range and impact of municipal services ...

5. (1) Members of the local community have the right to -

(a) contribute to the decision-making processes of the municipality; and

(c) to be informed of decisions ... affecting their rights, property and reasonable expectations;

(The Municipal Systems Act 32 of 2000)

ENFORCING CONSUMER RIGHTS

It is expensive for consumers to take municipalities to court for the infringement of their rights; therefore consumers' rights in terms of municipal services are seldom disputed in court. The new Consumer Protection Act, 68 of 2008, provides for a Tribunal and a Consumer Protection Commission which will be more accessible to the ordinary consumer, as the quote below, from the Act, illustrates:

4. (1) Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission, alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

(a) A person acting on his or her own behalf;

(b) an authorised person acting on behalf of another person who cannot act in his or her own name;

(c) a person acting as a member of, or in the interest of, a group or class of affected persons;

(d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and

(e) an association acting in the interest of its members

CONSUMER RIGHTS AND CONSUMER PROTECTION: ESSENTIAL TOOLS FOR SUSTAINABLE SERVICES

Municipal services are not sustainable without satisfied customers who trust the service provider and who are willing to pay for services.

The rights highlighted in this paper are fundamental to customer satisfaction, trust and willingness to pay for municipal services.

Municipalities should comply with consumer rights, not only to protect themselves against litigation, but, in the true spirit of Batho Pele, they should take up compliance as an opportunity to include consumers as partners to improve service delivery. Municipalities in South Africa are already struggling to deliver services on their own; now is the time for them to demonstrate that they can reverse this situation in partnership with the people they serve.

The success of the FIFA World Cup 2010 proved that a partnership of government and South African citizens can deliver goods and services that compete with the best in the world. Let us do the same to deliver quality municipal services to all South Africans.



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