

# Commentary on the Rademan Case by Advocate A. J. Murphy

Date: May 7, 2013

To: Mr. Jaap Kelder, National Taxpayers Association

From: Advocate A. J. Murphy

Subject: Re: Olga Rademan v Moqhaka Local Municipality (“The Rademan Case”)

Dear Jaap,

I have studied the Constitutional Court’s judgment in the Rademan case this past week and have come to the following conclusion:

The Olga Rademan case is precisely what the headline says it is; it is Olga Rademan’s case against the Kroonstad Municipality; it is nothing more and nothing less. Any other resident in Kroonstad can institute a similar action against the Kroonstad Municipality and get a different ruling under a different name.

As you know, I was skeptical at the time about the chances of success in this case, and my reservations are briefly expressed in a short message. I think, however, that there are valuable lessons to be learned from this case, and our time, effort, and money spent on this case have been worthwhile. I agree with your observation that you have won the field but not yet the war.

Olga may have lost her case, but the Constitutional Court has laid down strict rules that every Municipality in the country will have to comply with. A very important paragraph that is of great importance to all of us in the judgment is paragraph 42, where the Honorable Constitutional Court Justice Zondo makes the following remark:

“Before dealing with the question of what remedy a resident has in a case where the municipality is demanding payment for services not rendered, it is necessary to point out that in the present matter it was not Ms Rademan’s case that the Municipality claimed payment for services that it had not rendered.

Indeed, in the present matter it has not been proved that the Municipality was claiming payment for services that had been rendered poorly or inefficiently. However, where a municipality claims payment from a resident or ratepayer for services, it is only entitled to payment for services that it has rendered. By the same token, where a municipality claims from a resident, customer or ratepayer payment for services, the resident, customer or ratepayer is only obliged to pay the municipality for services that have been rendered. There is no obligation on a resident, customer or ratepayer to pay the municipality for a service that has not been rendered.”

The conclusion from this paragraph is that if a taxpayer, owner, or resident can prove that certain services were not delivered by the Municipality, or were of poor or insufficient quality, that person can declare a dispute with the Municipality and the pending outcome of the dispute, withhold payment from the Municipality. The case will ultimately be heard in the

High Court, but I cannot see how an internal process of appeal, where a Municipality must decide on its own services, can have any binding effect on complainants.

The important aspect for every taxpayer, owner, or resident is that the provision of services by the Municipality must be proven to be complete and of a certain standard; the focal point in his/her case against the Municipal defense is thus expanded, and in my respectful opinion, the advantage has always been with the Municipality, which is no longer the case.

In my opinion, this now gives a town that collectively acts and gets its energy and synergies together a certain chance to make use of the best engineers and experts to prove that the Municipality did not deliver the services, or delivered them below standard.

We all know that the vast majority of Municipalities do not properly fulfill their functions because they are in the first place incompetent and especially because they are corrupt. It has become a matter of expert white-collar and blue-collar people who know how the services are to be delivered and how local authorities should be managed. It is scientifically proven that they do not deliver the services or deliver them poorly, or that the media gives the Gored government reason to appoint expert people.

I do not come into every town in South Africa, but where I read in the media, approximately 75% of all Municipalities are in a state of proper or complete collapse. Owners in these towns must now surely realize that they must become involved in organizations such as the National Taxpayers Association to take collective and 'united front' actions.

I will immediately add that when I speak of collective action, I do not mean that joint actions must be taken in the so-called classic actions. Each town is unhappy and probably unique in its by-laws and credit control systems and its facts and circumstances regarding service delivery, and each town must therefore be heard as a separate and individual case.

What I mean by collective action and efforts is that different towns will probably have to come together to call the best expert witnesses to testify about the standard, quality, and absence of services in each town. It is not necessary for each town to reinvent the wheel; in most cases, the same facts and much other evidence will overlap, which will mean great savings in legal and other costs if neighboring towns come together to appoint a team of prosecutors, advocates, and expert witnesses to see what their cases are and what better cost-effective condition can be served with such a person.

In my opinion, every town, its residents, owners, and other stakeholders who are of the opinion that they are not receiving proper services from their Municipality, should not immediately run to court, but should decide to have a 'preliminary study' done by an expert to make a 'prima facie' case, and if this is not done, it is not carried out. When a 'preliminary report' is what is later fully proven, it can, in my opinion, be enough to declare a dispute with the Municipality and as soon as the dispute is declared, all payments regarding that part of the service that was not delivered or was poorly delivered, can be withheld from the Municipality, to be held back and not paid to the Municipality.

If services are partially delivered, it is my opinion that based on the expert evidence, a certain percentage of the services delivered must be determined and only that part must be paid to the government.

What is important to remember are the provisions of the Constitution regarding Local Government. I refer you briefly to some of these provisions to encourage you on what basis a 'Local Authority' ("PO") in terms of the Constitution is supposed to fulfill.

Firstly, the objectives of the PO in terms of:

- Art 152(1)(b): "to ensure that services are provided to communities in a sustainable manner;"
- Art 152(1)(d): "to promote a safe and healthy environment;"

Secondly, there are certain development duties of POs:

- Art 153(a): "a Municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community;"

In the execution of their duties, to name just a few laws, an important role is played by every PO, e.g., the Constitution of the Republic of South Africa Act 108 of 1996; the Municipal Systems Act 32 of 2000; the Municipal Financial Management Act 56 of 2003; the Municipal Structures Act 117 of 1998; the Municipal Property Rates Act 6 of 2004; Provincial By-laws, etc.

In the last-mentioned case, it has always been the case that by-laws must be properly promulgated. In *Kajee v Stanger Borough Town Council* 1994(3) SA 9 (A), the PO did not succeed in proving that a by-law was the cause of certain errors. There is a clamp on the procedures that must be followed for the adoption of by-laws.

This is an important aspect that residents in every town should investigate first according to their PO approach and payment aspects.

Another aspect that must always be kept in mind is the provision of Art 152(2) of the Constitution: "a Municipality must strive, within its financial and administrative capacity, to achieve the objectives set out in subsection (1)."

The last-mentioned provision, in my opinion, will be the pure reason why most POs will escape. In the first place, they will argue that they do not have sufficient funds to deliver the required services, and in the second place, they will argue that they are quasi-bankrupt because the cause is their administrative incapacity; in other words, that they are incompetent.

What the scope and standard of services are, is also debatable and must therefore be looked at, as Art 1 of the Local Government Municipal Systems Act 32 of 2000, which defines what is meant by basic Municipal services.

The definition in the Municipal Systems Act is as follows: "a municipal service that is necessary to ensure an acceptable and reasonable quality of life and that, if not provided, would endanger public health or safety or the environment."

Although this definition is something of a 'guideline', in the case of each Municipality, it will depend on the applicable circumstances. In *Mangele v Durban TMC* 2002 (6) SA 423 (D), the provisions of the Water Act 108 of 1997 are discussed.

In Art 2(a), one of the main objectives of the Act is: "the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being."

In terms of Art 3, the goal is: “a right of access to basic water supply and basic sanitation.” What exactly these terms and standard services are will depend on what the existing services are and the reasonable expectation of residents in a specific area. Always taking into account the fact that in each Municipality, a specific area must be looked at with the provision of basic services to all residents, including the poor.

My personal observations where I move in South Africa is that poverty in both the previously advantaged as well as the poor is so pathetic that in 75% of cases in Municipal areas, it has made a huge impact that the current authorities are unable to comply with their Constitutional obligations and that residents will therefore have to be very careful about their expectations. Payments for those parts of services that are not properly complied with may be withheld.

Another interesting aspect to consider is the withholding of payments in cases where services are delivered in a ‘shoddy and dilapidated’ state because the net is not held against the pole and the water pipes are full of holes, can payments in such cases be withheld.

When it comes to the POs, the role of the Provincial and National Government and their responsibility towards Local Government must not be forgotten.

So, to come back to the Olga Rademan case, the balance of the judgment in this case is not directly applicable to us, because this case largely deals with the clash between the provisions of the Electricity Regulation Act 4 of 2006 and the Municipal Systems Act as well as the by-laws that are applicable in Kroonstad.

In my opinion, Olga Rademan and some residents of Kroonstad can go back to Court and now prove that the services for which the Municipality is billing them have not been delivered and that they are therefore entitled to withhold payment. It is such a case that I am also litigating with red, but my costs are astronomical, but if people stand together and their finances and strong nerves, it would in my opinion be the ideal if Olga Rademan is given a helping hand and continues with her case against the Municipality on the basis that the services have not been delivered to her and other people in Kroonstad.

Olga Rademan’s case against the Municipality is in my opinion not res indicate because the Court expressly did not base her case on the fact that the services were not delivered, but only on the interpretation of the Electricity Regulation Act.

As a litigant, she can therefore go to court armed with the fact that the services were not delivered; it is a ‘different cause of action’. If someone convinces Olga and her residents to do this and the rest of the country contributes to a ‘fund’ for them, it can possibly succeed and I add the word and emphasize it with my writing why Jaap Kelder, why do you write that you have not lost the same; we must simply win this one; there is no better time than now!

I talk to many people about the Republic and the general feeling I get is one of hopeless optimism that things are not going right. I believe there is enough good human material in our country to make a ‘turnaround’. Unfortunately, racism in this country is a cancer that is busy destroying the lifeblood and potential of its people.

I believe that racism in South Africa is worse than at any other stadium in its history; that is why it is necessary that thinking people now call on their resources and sources of help to make a possible turnaround in our country and can save what can be saved, in a ‘meaningful

and powerful' manner. The Kroonstad case and its next episode is a case of such value that it must not be lost.

I have since the Rademan judgment made some remarks about the outcome and consequences of the judgment to various legal circles; some meaningful and others half-meaningless and of course the natural media as one Johann Hamman of Makhado in Beeld of 4 May 2013 where Jaap Kelder is quoted for the judgment.

With respect, Johann Hammann, **I THINK YOU ARE THE ONE WHO HAS THE POT BY THE WRONG END**, the war is not over yet.

I can further with Agri SA who is concerned about the outcome of the Rademan case because it will have far-reaching consequences.

If I may add a piece of advice through this writing, I would say that it seems to me to be more meaningful to not just run to court and spend money on a prosecutor, but rather to use that money to determine what services should be delivered or properly provided and not just to meet the residents' of a certain town.

Make the sums and replace the lights that are broken and repair the pipes; one or the other will have to be done and probably both higher priority than the maintenance of services that have not been delivered for a long time.

In my opinion, this aspect will have to be considered not just to win the case, but to convince the residents that they are willing to pay, but only for what is delivered. Set up reliable auditors to administer the funds and a 'credit control system' to keep records of residents' payments. When a case then goes to court, publicly disclose this information to the court and show how every donor is.

Greetings from a windless beautiful Gordonsbaai, where the Local Authority thanks to a strong mayor is not corrupt, not yet completely useless and we do not have much to complain about.

Albert Murphy