Legal options in dealing with incorrect municipal bills

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There are varying options for dealing with incorrect billing from the City of Johannesburg to a tenant, who does not have his/her own municipal account but is billed in the name of the landlord.

Impossible triangle

Let us consider an example where the municipality estimates electricity charges and bills a medium-sized residential household R10,000 for one month (when the normal charge based on actual readings is about R2,500).

The landlord gets the bill and sends it to the tenant to pay. The tenant tells the landlord that he cannot afford to pay the whole amount claimed and that the amount claimed is in any event wrong.

The landlord reacts in one of two ways: he either demands payment nonetheless, on the basis that he is entitled to do so in terms of the lease or he allows the tenant to pay less, and assists or allows the tenant to dispute the charges with the municipality.

If the landlord demands payment of the impugned charges in full, the tenant either coughs up (in which case the tenant would want to have the municipality fix the bill and seek a refund from either the municipality or the landlord) or the tenant defaults (because he cannot or will not pay the impugned amount). In the latter case, the tenant now faces the prospect of being sued for damages and evicted.

If the landlord sympathises and allows the tenant to make payment of only the undisputed charges, the landlord now faces the prospect of being held liable by the municipality at a later stage for the impugned amounts not paid by the tenant. In addition, the landlord and tenant will have to work together to get the municipality to fix the bill because the municipality may terminate or threaten to terminate the service for non-payment if the billing error is not corrected.

The authors propose that the answer to the problem lies in either rectification of the lease to include a common understanding of how these kinds of disputes should and can be dealt with or, if this is not possible, then in terms of a series of duties imposed by the South African law of delict.

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1. **Strict compliance with the lease**

   Unsympathetic landlords will demand payment of the whole amount billed, even though the tenant may be able to demonstrate that the amount claimed is incorrect. Undoubtedly the landlord will base his claim on the wording of the lease, which probably obliges the tenant to pay all amounts billed for municipal charges within a number of days of being invoiced, without providing for any mechanism for the tenant to dispute and not pay the impugned charges. In most cases, on a literal interpretation of the wording of the lease, the landlord would be justified in doing this.

   A landlord would insist on payment in full because it protects the landlord from being held liable at a later stage for any portion of the impugned amount that (if the landlord allowed the tenant not to pay) might at a later stage still be claimed from the landlord. In addition, payment in full means that there is no risk to the landlord that the premises will be disconnected for non-payment, and (at first glance it appears that) there is no need for the landlord to fuss about disputing the bill with the municipality. [Read more on the latter obligation below.]

   However, logic dictates that this simply cannot be lawful (unless the parties clearly contemplated this problem when entering into the lease, and the tenant agreed to this upfront and in writing with a proper understanding of what he or she was letting himself in for) because it would be prejudicial to a tenant in a situation where the tenant can (on his own) do nothing to rectify the problem.

   Could there be room for any other principles of law to apply to the situation, which alter the ‘strict liability’ paradigm?

2. **Intention of the parties and rectification of the lease**

   The first proposed solution to the ‘strict liability’ paradigm as explained above, is for the lease to be rectified (amended) to expressly include the common understanding of the parties as to how such a problem ought to be solved.

   Depending on the wording of the lease, it might be possible to argue that when entering into the lease agreement the parties never contemplated strict liability for municipal charges where they were blatantly or potentially incorrect. Consider a situation where a municipality accidentally bills R1 million in one month. Surely the parties never intended that in such an instance the tenant’s refusal or inability to make payment would constitute a breach of the lease?

   It could be argued that when entering into the lease the parties always contemplated (but did not expressly put down in

writing) that where an incorrect municipal bill is furnished by the landlord to the tenant for payment, the tenant is excused from making payment of the charges that are incorrect (or suspected as being incorrect).

In cases like these, there needs to be some safeguard for the landlord. It would not be fair or lawful for the landlord to be saddled ultimately with the incorrect charges because the tenant did not pay them, nor would this (presumably) have been within the contemplation of the parties when entering into the lease.

Luckily, there are legally prescribed dispute resolution mechanisms that a landlord and/or tenant can avail themselves of, in order to raise a dispute with the municipality in respect of the impugned charges.

Fortunately, further, whilst such a dispute is pending, the municipality is not lawfully permitted to disconnect the supply to the property in question.

This seems logical enough. It is widely known that such dispute mechanisms exist in relation to municipal charges (which charges are often wrong or based on estimated readings). To the extent that it could be said that this was intended by the parties, but accidentally omitted from the lease at the time it was concluded, the lease needs to be rectified (amended to include what was omitted). It is submitted that most landlords and tenants would have understood the situation to be as set out in this section, unless the contrary is expressly alleged and proven.

The question now arises as to whose responsibility it is to dispute the impugned charges with the municipality. The authors are of the view that this question is answered with reference to certain duties that the law imposes on the parties, which are implied by the law of delict and thus form govern the relationship between the parties (whether this is put into writing or not) where the lease does not expressly provide otherwise. (See section 3 below for more in this regard.)

Assuming that the landlord and tenant are under the duties referred to below, when a lease is rectified as suggested above, everyone wins. The tenant does not have to pay the impugned charges, but is under a duty to dispute the charges with the municipality and to pursue the dispute to its conclusion, and to have the incorrect charges reversed from the municipal account, so that the landlord is not held liable for same. The landlord is not held liable for the impugned charges by the municipality because the tenant raises and pursues the dispute until the incorrect charges are reversed. Neither party suffers inconvenience or damage because of termination of services for the non-payment of the impugned amount. To the extent that either the landlord or tenant fail in their duties to raise or pursue the dispute with the municipality, there is adequate recourse for them by suing each other for damages in terms of the lease.

To the authors this seems like the most common sense understanding of how the ‘impossible triangle’ ought to be remedied, and it is submitted that in most cases both the landlord and tenant would agree that this was what was contemplated at the time of concluding the lease.

Of course, there will be instances in which the parties have a different understanding or have never contemplated the matter at all.

3. **Duty to raise and pursue dispute**

What is the legal situation where a lease does not provide for strict liability for impugned charges, and where it cannot be said that the parties contemplated and agreed that the arrangement described in section 2 above would apply?

We then look to our common law of landlord and tenant and any applicable legislation, to see if there is any other law governing the situation that would apply. Unfortunately, as far as the authors can tell, there is no such legislation or case law dealing with the issue. Our last resort is the law of delict, which governs the duties that persons owe each other so as not to cause each other harm or loss.

It is submitted that (ignoring the contractual duties between the parties in terms of the lease for the moment), the landlord and the tenant owe each other certain basic legal duties in terms of our law of delict. These duties arise because if certain acts are not carried out or refrained from, the other party will suffer some sort of loss or harm.

Plainly speaking, the parties 'owe it to each other' in terms of the law of delict to act in a certain way in relation to impugned municipal charges, to ensure that they do not cause the other to suffer harm, because a reasonable person would have foreseen the risk of harm to the other party and acted to prevent it

As with all duties that arise from delict law, these duties could be altered by contract, so if the parties have agreed to the contrary in the lease, these duties would not apply.

Where the lease does not preclude the existence of these duties, their content and extent revolve around the responsibility for reporting the dispute and pursing it to ensure that the incorrect charges are reversed. Remember that we are dealing with an 'impossible triangle' here, where the account is in the landlord's name, but it is the tenant who is consuming the services and would have all of the knowledge pertaining to the dispute. Consider further that the landlord will be held liable for the impugned amounts if they are not reversed from the bill, and that if the tenant is still in the property, both the tenant and landlord will suffer as a result of a termination for non-payment of the impugned amounts. Lastly, it is important to understand that the consequences of the non-payment of the impugned charges may only be visited upon the landlord long after the tenant has vacated. The landlord may have other tenants in the property and be called upon to make payment of the impugned charges to avoid disconnection of supply to those tenants or the landlord may only be held liable for payment of the impugned charges at the time that the property is being sold.

If the landlord is happy to assist the tenant by raising and pursuing the dispute on the tenant's behalf, then there is no problem. Nevertheless, this means that the landlord may need to continue fighting the municipality to correct the bill on his own after the tenant has left.

Alternatively, the landlord could give the tenant power of attorney to dispute the charges and pursue the dispute on the landlord's behalf. But if the tenant fails to raise the dispute and/or fails to pursue it to its conclusion, the landlord may be saddled with the impugned debt, and may then need to take up the fight himself or pay the impugned debt himself.

In light of the above, it is submitted that the landlord is under a duty to assist the tenant by giving the tenant a power of attorney to deal with the municipality to resolve the dispute. It is submitted further that the tenant is under a duty to dispute the charges and pursue the dispute through to its conclusion. If both of these duties are fulfilled, both parties benefit from the arrangement and neither is prejudiced in any event.

What happens, however, if the landlord refuses to give the tenant power of attorney? It is submitted that in such cases the landlord will be under a duty to raise the dispute and pursue it to its conclusion on his own. If the landlord refuses to assist the tenant in any way at all, any harm that the tenant suffers (such as damages for rotting food when electricity is disconnected for non-payment of the impugned charges) is recoverable from the landlord.

Further, if after having given the landlord proper notice to remedy such a breach, (if the landlord refuses to assist) the tenant could cancel the lease and vacate the property if necessary. In addition, the tenant could approach a court or the Rental Housing Tribunal for an order that the landlord assist the tenant is raising and pursuing the dispute (either by giving the tenant power of attorney or by doing it on the tenant's behalf).

Alternatively, what happens if the tenant fails in his duty to raise or pursue the dispute to its conclusion and the landlord is held liable for the impugned charges? In this case, the landlord would have a delictual claim against the tenant for damages suffered because of the tenant's failure to comply with his delictual duties to the landlord, but this would entail the landlord having to pursue the tenant legally (which could be difficult, time consuming and costly, especially if the tenant had already moved out).

It may also be possible for the landlord to deduct the amount owing from the deposit (if there is one) or from any amount held by the landlord in trust after the lease has terminated by agreement between the parties.

4. **The deposit**

If the tenant has not yet moved out, could the landlord deduct the amounts owing from the tenant's deposit? The answer to this question depends on whether the duties set out in section 3 above in terms of our law of delict apply, or whether they have been altered by the lease.

If the lease expressly provides for strict liability for municipal charges and the lease is not subject to rectification because the parties both intended on applying strict liability at the time that the lease was concluded, then the landlord can deduct any amount owing by the tenant in respect of the impugned charges from the deposit.

To the extent that the delictual duties described above apply, it is submitted that the tenant is excused from having to make payment of the impugned charges to the municipality. The corollary of which is that the landlord cannot sue the tenant for the impugned charges, or put the tenant in breach for same, or deduct the impugned charges from the deposit until such time as the dispute raised with the municipality has been concluded.

If the conclusion is that the impugned charges are owed, the municipality can hold the owner liable for same and the owner can hold the tenant liable for same. If the owner has a deposit, the owner can deduct the impugned charges from the deposit (if the tenant does not pay them when invoiced in the ordinary course).

5. **Conclusion**

In summary, landlords are under a duty (arising from our law of delict) to assist a tenant in raising and pursuing a dispute with a municipality in relation to impugned municipal charges. Whilst this dispute persists, the landlord cannot hold the tenant liable for those impugned charges (as similarly the municipality cannot hold the landlord liable for same).

The tenant is likewise under a legal duty to raise and pursue the dispute to its conclusion. On conclusion, if it is determined that any portion of the impugned charges are payable, then the municipality can hold the landlord liable for same, and the landlord in turn can hold the tenant liable for same.

The above can be expressly set out in a lease.

Where the lease is silent on the issue, it could be said in most instances that the intention of the parties was that the legal duties arising from common law would apply, and the lease accordingly rectified to provide for same.

Where the lease is silent on the issue and the parties did not contemplate that the above duties should apply (such that the lease cannot be rectified to include same), the legal duties set out in section 3 above apply in any event (as they arise from our law of delict and have not been altered by the lease).

Where the lease provides otherwise (namely for strict liability for the impugned charges) the provisions of the lease will negate these common law delictual duties.

It is submitted that the above framework is a common sense approach to a particularly difficult problem, but which can easily be accommodated in terms our existing legal framework, without the courts needing to do much circumvention.

ABOUT THE AUTHOR

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