

The withholding of rates and taxes

IN FIVE LOCAL MUNICIPALITIES

The Community Law Centre, in partnership with the German Agency for Technical Cooperation (GTZ) and SALGA, recently completed a research project on the phenomenon of rates withholding in five South African municipalities. 'Rates withholding' is the practice by ratepayers of withholding their property rates and, in some cases, fees for municipal services because they believe that municipalities are not delivering. We argue that this practice, though less visible than service delivery protests, is equally destructive.

The objectives of the research were to understand the disputes from the perspective of the parties involved; examine the implications for local government and cooperative governance; and recommend ways to help resolve the disputes and strengthen local government. In the process, we interviewed stakeholders including local ratepayers' associations, municipal leaders, councillors, provincial departments responsible for local government, the Department of Cooperative Governance and Traditional Affairs and the National Taxpayers' Union.

Rates withholding is a 'new' form of protest from a possibly unexpected quarter. These ratepayers are mostly white, professional people from traditionally well-off communities. The research shows, however, that rates withholding is motivated by many of the same imperatives that drive service delivery protests, indicating that certain municipal failures affect all citizens, regardless of financial status.

Importance of the research

While rates withholding may not come with the violence and damage associated with other forms of protest, its consequences can be just as bad. Firstly, it can exacerbate the historical racial and class divisions in South African society, to the detriment of nation-building. Secondly, a stand-off between ratepayers and their municipal council can damage public trust and effective government in a municipality. Thirdly, withholding rates without sound legal grounds undermines the rule of law and the constitutional authority of the state. Lastly, it reduces the

municipal revenue base, which in turn can reduce expenditure on services to the community. This article provides a synopsis of the key findings of the research and its recommendations.

'Rates withholding' defined

The majority of ratepayers who withhold their property rates and/or service fees have formed ratepayers' associations to represent their interests. Many of these associations belong to a national umbrella body called the National Taxpayers' Union.

There is no uniformity in rates withholding across municipalities: the reasons for withholding vary, and local conditions determine the nature and form of a particular dispute. However, the research did identify a pattern in the sequence of steps that precipitate a formal declaration of a dispute by a ratepayers' association.

1. A service delivery failure is identified.
2. Ratepayers engage the municipality with a view to resolving the dispute.
3. If engagement fails, a dispute is declared in terms of section 102(2) of the Municipal Systems Act (hereafter the Systems Act).
4. Ratepayers often disaggregate the municipal account and pay for services received such as water and electricity, while withholding the amounts due for property rates.
5. The payments withheld are deposited into a private interest-bearing account until the municipality remedies the service delivery failure.

6. Ratepayers provide the municipality with regular accounts of the money withheld.
7. In worst-case scenarios, ratepayers use the money to deliver services themselves.

Legality of withholding rates and taxes

Ratepayers' associations justify withholding rates on various legal grounds, but municipalities contest this. Several municipalities have used aggressive strategies to coerce defaulting ratepayers to pay outstanding rates and/or service charges. The most common is the disconnection of the electricity supply to individual ratepayers. In turn, ratepayers' associations argue that municipalities do not have the legal right to disconnect electricity for the non-payment of rates, as long as payments for electricity are not withheld.

Contractual relationship between ratepayers and municipalities

The first ground upon which the ratepayers' associations rely is that the relationship between ratepayers and municipalities is contractual. In other words, if ratepayers pay for the services they receive, municipalities must deliver, because, in a contractual relationship, a duty to perform arises where both parties to the contract perform. However, the Constitutional Court, in *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30, 2010, firmly located the relationship between municipalities and citizens within the domain of public law. The Court referred to

the special cluster of relationships that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of persons living in its jurisdiction.

The Court thus confirmed that the relationship between ratepayers and municipalities is not a *quid pro quo* one, so failure to perform by either the municipality or ratepayers can never result in the *automatic* termination of the public duties owed by each to the other.

Dispute clause in section 102(2) of the Systems Act

The second ground on which ratepayers rely is the 'dispute clause' in section 102(2) of the Systems Act. The declaration of a dispute in terms of this subsection has the effect of suspending the municipality's credit control and debt collection processes until the dispute is resolved. The Act states clearly, however, that any dispute must relate to a 'specific amount claimed by the municipality'. A dispute on the basis of general dissatisfaction with municipal services, such as failure by the municipality to maintain roads or public places, does not qualify.

Disaggregation of property rates and trading services

Thirdly, the ratepayers' associations' actions rest on the perception that income from property rates is used to fund communal services such as road building and maintenance or storm-water drainage.

Income from trading services such as water and electricity, on the other hand, is generally thought to fund the delivery of these specific services. The key difference between property rates and service charges, however, is that the right to levy property rates is derived from the Constitution itself, which makes rates a municipal tax. As such, it can be used to finance various activities, from the running of the council and municipal administration to the delivery of trading services to the public. The courts have therefore made it clear that property rates and service charges are not mutually exclusive. Service charges are defined narrowly, but property rates are defined broadly and may include service charges. There is thus no watertight distinction between property rates and service charges.

Section 102(1)(a) of the Systems Act also allows municipalities to consolidate municipal accounts and suspend any municipal service to enforce the payment of an unsettled account. For example, the fact that the 'electricity portion' of a municipal account has been paid does not preclude the municipality from allocating that payment to any other outstanding portion of the municipal account, such as property rates or water.

The Constitutional Court, in *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC), furthermore made it clear that it is the courts' function to make a declaration of rights and grant appropriate relief. Local government, it pointed out, cannot function properly

if every person who has a grievance about the conduct of a public official or a governmental structure were to take the law into his or her own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. ... It is pre-eminently for the courts to grant appropriate relief against any public official, institution or government when there are grievances. It is not for the disgruntled individual to decide what the appropriate relief should be and to combine with others to take it upon himself or herself to punish the government structure by withholding payment which is due (para 93).

Legality of disconnections in response to rates withholding

The duty to collect debts

Section 96(a) of the Systems Act provides that a municipality 'must collect all money that is due and payable to it'. Case law has confirmed the peremptory nature of this duty. In *Mkontwana v Nelson Mandela Metropolitan Municipality* (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004) the Constitutional Court held that municipalities must

send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances and take appropriate steps for the collection of amounts due.

The municipality's credit control and debt collection processes must, however, be pursued within the stringent framework outlined in section 97 of the Systems Act. By specifying the details to be included in the credit control and debt collection policy, the Act strives to ensure legal certainty, so that citizens are fully aware of what is expected of them and of the recourse available to them in the context of the termination of services. Importantly, section 97 directs municipalities to make specific provision for indigent and vulnerable debtors.

Legal clarity is important, but a legal declaration of rights in itself will not help the parties get along in future as partners rather than adversaries, nor will it solve the underlying administrative and service delivery problems behind these disputes. It is the parties themselves – namely, the municipalities and the ratepayers' associations – that must do so, with the assistance of others.

Key findings

The financial impact of the disputes is limited, but the political impact is substantial

The interviewees generally agreed that the financial impact of withholding was negligible, but the political impact was much more pronounced, through the loss of trust between the municipality and its citizens. Accommodation and cooperation, not adversity and protest, are necessary for peaceful coexistence and development. As one municipal official put it, a loss of confidence in the municipality benefits no one.

The disputes relate to a variety of problems with municipal service delivery

In all cases, the grievances giving rise to disputes were linked to concrete service delivery problems. In most cases, municipal and provincial officials confirmed that there were genuine service delivery problems, indicating a high degree of convergence among parties on the facts of the dispute. As one provincial official put it, 'There may be politics at play, but at the end of the day they [ratepayers] wouldn't have a space if the municipality had done what it was supposed to do.' So agreement on the factual problems provides a strong basis for resolving the dispute, irrespective of how the parties may perceive each other's motives.

Ratepayers see a connection between their grievances and municipal incapacity, maladministration and corruption

In all cases, ratepayers saw the service delivery problems as nested within systemic failures of governance and administration. Many municipal and provincial officials also mentioned broader institutional problems. The Auditor-General's reports make clear that problems of this kind do exist in all five municipalities. The high probability that actual problems of governance are involved again provides a factual basis for resolving the disputes, and

suggests the need to reform certain aspects of governance and administration.

Municipalities respond to the declaration of disputes in many ways

Municipalities' responses to the declaration of disputes ranged from disengaging entirely, while employing aggressive legal strategies (such as cutting off electricity) to compel payment, to engaging the ratepayers' associations with a view to finding a solution. In trying to engage the municipality, ratepayers were most often in contact with the office of the mayor or municipal manager, through correspondence and meetings. Encouragingly, there was evidence of these kinds of contact in all five municipalities, even where the relationship between the parties was extremely strained. Evidence of engagement, even where the parties were locked in legal battle, is a further indication that there are firm grounds for resolving these disputes.

Disputes often involve a breakdown in communication between municipalities and ratepayers

Poor communication emerged as a major contributor to the disputes. In all five municipalities, communication breakdowns precipitated the disputes and hampered efforts to find a solution. Interviewees in all groups agreed that open and frank engagement between the parties was essential, and that poor communication bred discontent and misunderstanding. A strong message was that communication did not mean simply talking about the problem, but instead taking practical action to resolve the problem and following through on that action in a responsible and reliable manner. Had communication and engagement been effective to begin with, some of these disputes could have been avoided. Most ratepayers and officials were explicit on this point: the absence of dialogue, engagement and follow-through had frustrated and alienated the ratepayers and undermined trust between the parties.

Representative organs of councils do not appear to play a significant role in disputes

A fundamental question of the research was what part, if any, the democratic structures of the council played in addressing or resolving the grievances. Where were the grievances registered and discussed with a view to resolving them?

When asked whether they participated in ward committee, integrated development planning or budgeting processes, most ratepayers indicated that they did. However, most seemed discontented over the way these processes were organised and run. Several ratepayers expressed concern that budget and planning meetings 'were not properly advertised' and that they had to find out about meetings 'from each other via SMS'. Ratepayers generally expressed discontent about the accessibility and efficacy of these participatory mechanisms.

This is crucial, given that the participatory structures in municipalities are designed to be the main avenues through which community needs and concerns are discussed and addressed. We inferred that these structures were not addressing the ratepayers' concerns and, thanks to poor administration, may even have added to their discontent.

How did the dispute play out in the council itself? No convincing examples were provided of these disputes being discussed in the council. Some councillors appeared unsure about whether they had been discussed there at all. It was not clear, in any of the five municipal councils, how the dispute had been registered or discussed within its executive and legislative organs. A clear message from the councillors was that part of the problem was that council structures were generally organised along party-political lines, which elevated the party caucus and offered few incentives for deliberative politics across party lines.

One of our main conclusions is that the executive mayoral committee system is neither suited to South African conditions nor an effective instrument for local nation-building. It leads to executive-centeredness and carries the risk of the party caucus replacing the council. Nation-building in our context requires that we actively build local political communities for the long term. That goal will only be achieved when leading sectors of a local community have incentives to deliberate and find common ground on the matters that separate and unite them.

Recommendations

- *Resolving the stand-off is necessary and possible.* There are opportunities to resolve disputes before they escalate to the point of breakdown, but they require substantive engagement by both parties. The municipality, as the elected authority, must take the lead.
- *Practical leadership and open communication are essential.* Open and frank dialogue is the only basis for a sustainable solution to rates withholding. However, effective communication must translate into tangible action. This requires personal and institutional reliability, which entails following through on decisions and practical actions like returning phone calls, honouring commitments and scheduling and showing up for meetings.
- *Improvements to strengthen governance and administration can*

prevent a recurrence of the problem. Officials, councillors and ratepayers suggested several possible areas of improvement:

- The Auditor-General should have statutory powers to take action against persistent non-compliance by municipalities.
- Ordinary residents must become more involved in the formal participatory structures of council, in respect of both formal participation and substantive outcomes. This relates to budget preparation, IDP processes, ward committee meetings and ward-specific processes and projects.
- Engagement outside formal structures must be robust.
- Petitions, complaints mechanisms and report-backs to communities need to be regularised and better managed.
- Council executive structures should be made more transparent and inclusive.
- *The possibility of creating an ombudsman for service delivery to investigate citizens' complaints should be considered.*

Conclusion

Our recommendations may give some ideas towards resolving these disputes, but it is the people who are directly involved, and have to live together, who must ultimately resolve their own problems. This is part of what the White Paper on Local Government had in mind when it defined 'developmental local government' as 'local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives'.

Rates withholding highlights the real challenges that affect citizen engagement in the public participatory processes designed to achieve this vision. While rates withholding may be a 'new' form of protest action from an unexpected quarter, there is clear evidence of problems and vulnerability in common with communities that undertake service delivery protests.

Our research highlights the need for new forms of collaboration and consensus-seeking in communities against the historical background of divided communities. It shows how community life could benefit from an active citizenry that crosses traditional divides to address the institutional failures of municipalities and the failure of political representatives to exercise oversight over municipal affairs or represent their communities' interests.



This article is a summary of a larger research paper, 'The withholding of rates and taxes in five local municipalities', by Derek Powell, Annette May and Phindile Ntliziywana. The full report can be downloaded at <http://www.ldphs.org.za/news-and-events/roundtable-discussion-rates-withholding>.