## Prosecution by a local authority

Durban Central Transitional Metropolitan Council (DCTMC) prosecuted Mr. Winchester for failing to obtain licences for his dogs. The DCTMC had acquired this power to prosecute by delegation from the Attorney-General through section 8 of the Criminal Procedure Act 51 of 1977. Mr. Winchester admitted that the dogs were his, and that he had not obtained licences for them. However, he asserted that the prosecution unfairly discriminated against him because the laws under which he was being prosecuted were not being enforced in the informal settlements. The Magistrate hearing the case upheld his plea. On appeal, the Natal Supreme Court disagreed, and held in *Central Transitional Metropolitan Council v Winchester* 1997 (3) BCLR 312 (N) that DCTMC had the same discretion to exercise its prosecuting power as the Attorney-General. The decision to prosecute could only be reviewed by the Supreme Court (now the High Court). The introduction of the interim Constitution did not extend the jurisdiction of the magistrate's court to the extent that a magistrate was empowered to give effect to the guarantee of equality before the law by reviewing a decision to prosecute.

## Rendering of primary health care in terms of agency agreement

Hantam District Council (HDC) rendered primary health care services in terms of an agency agreement with the Northern Cape provincial administration, in which the original public authority was vested. Towards the end of 1997, the provincial administration gave the HDC one year's notice of its intention to terminate the agreement, and in November 1998 the agreement was cancelled. *In IMATU v MEC: Environmental Affairs, Developmental Social Welfare and Health* 1999 (6) BCLR 664 (NC) the HDC challenged the validity of the termination of the agreement on the ground that no proper consultation had taken place prior to the final cancellation. The Northern Cape High Court agreed with the HDC when it asserted that the conclusion and termination of the agency agreement were done in terms of a statutory power. The power of the Northern Cape administration to render primary health care services existed in terms of the Abolition of Development Bodies Act 75 of 1986, which transferred the powers of the abolished Divisional Council of Calvinia to the Cape Province, which was later succeeded by the Northern Cape province. The termination of the agency agreement by the province was therefore subject to the principles of administrative law, which include the right to be heard, and not to ordinary contractual principles only. However, the MEC had complied with the principles of administrative law by inviting the HDC to come forward with alternatives.

The second leg of the HDC's argument for invalidating the termination of the agency agreement was based on inconsistency of this action with the Constitution and the Municipal Structures Bill (now enacted as Local Government: Municipal Structures Act 117 of 1998). In terms of section 156, read with Schedule 4, Part B, of the Constitution, municipalities must render municipal health services. In terms of the Structures Act, the HDC was to be replaced by a superceding municipal council which would take over all HDC's functions and powers. The HDC's argument was that the Northern Cape province failed to take this into account when terminating the agency agreement. The High Court dismissed the argument. The Court made clear that section 156 of the Constitution cannot be relied upon, because the new competency framework for local government would only take effect after 30 April 1999 (now after 30 April 2000, see 1999 (1) *LGL Bulletin* 7). Item 26(1) of Schedule 6 to the Constitution provides that the provisions of the LGTA apply until then. As regards the Structures Act, the High Court found that reliance on its provisions by the HDC was premature, because the key provisions have yet to be activated for each newly established municipality in the 'section 12 notice' (see 1999 (1) *LGL Bulletin* 8). This will only take place after the process of demarcation has been finalised. The Northern Cape province was not obliged to consider the provisions of the Structures Act. The Court therefore concluded that the HDC had no statutory function to render health services, and that their functions stemmed from the agency agreement. The termination of the agency agreement did not infringe any statutory or constitutional rights of the HDC.

The third issue to be decided dealt with the transfer of staff. In the termination of the agreement, the relevant employees of HDC were offered employment by the province on condition that they resign from the HDC and apply for appointment with the province. Neither the employees nor IMATU were afforded a hearing prior to the decision to make the employment offer subject to resignation. The agency agreement did not compel the province to consult directly with the employees of the HDC. However, the Court was of the opinion that the employees of HDC were entitled to a fair hearing by the province before their employment was terminated by the HDC as a result of the cancellation of the agency agreement. This was the case because the province had created the impression that all parties would be consulted in that process. However, this duty on the province did not exist at the stage of the termination of the agency agreement. It would only come into play should a decision be made to compel the HDC to terminate the employment of its employees. No final decision in connection with the termination of employment had been made yet. Hence no breach of principles of administrative law had occurred.

## 'Owner' of property must pay rates

Section 168 of the Local Authorities Ordinance 25 of 1974 (Natal) imposes liability for payment of property rates to local authorities on the "owner" of the property. "Owner" in the case of land is normally understood to be the registered owner of the land. But it is sometimes given a wider meaning so as to include within its ambit persons who have rights in the property, which for practical purposes make them the owner. This issue arose in the case of *Member of the Executive Council responsible for Local Government and Finance KwaZulu-Natal v North Central & South Central Local Councils Durban* 1999 JOL 4909* (N), Case No: 1776/98, (18/03/1999). The Natal High Court had to decide whether certain land tenure rights, conferred in respect of immovable property situated in the former self governing territory of KwaZulu (in terms of Proclamation R293 of 1962, as amended, made by the State President by virtue of his powers under the Development Administration Act 38 of 1927), qualified as rights of 'ownership' and imposed liability for property rates on the holders of these tenure rights. The two problematic forms of tenure were acquisition by means of deed of grant and acquisition by means of right of leasehold.

The Court was convinced that both fell within the ambit of the definition of "ownership" in the Ordinance. The intention of

the former was clearly that the grantee under the deed of grant would be the owner of the land. The holder of the leasehold rights had rights to possess, encumber and dispose of the property, and that made him or her fall within the meaning of the term "owner"in the Ordinance. The severe and sometimes draconian limitations imposed by the regulations on both tenure rights did not preclude the holders of such rights to be owners.

The KwaZulu Land Affairs Act 11 of 1992 introduced a form of land tenure called "deed of grant rights". In terms of section 8(3) of the Act, the two forms mentioned above were deemed to be "deed of grant rights". In dealing with this form of tenure, the Court held that the holder of such rights is the "owner" of the erf to which the rights relate, despite the fact that the grantor of the rights is still reflected in the records of the Deed Registry as the owner. Accordingly, all the forms of tenure mentioned above imposed liability for property rates on the holders of those rights.

## Is disconnection of water supply unlawful deprivation of possession?

*In Zolani v Cathcart Transitional Local Council* 1999 JOL 4999 (EC), Case No. 71/98, (06/02/1998), the Eastern Cape High Court dealt with an application for the restoration of water supply to a resident. Mr. Zolani had not paid for water since 1995 and in January 1998, after numerous accounts and notices had been issued, the water supply to his house was disconnected by the Cathcart TLC. He approached the Court for restoration of water supply on the ground that he had the right to be supplied with water by the municipality, because that right is incidental to his possessionary right to occupy his property. The disconnection without a court order was an unlawful deprivation of his possession of the house. The Court disagreed. In order for a remedy based on unlawful deprivation of possession to succeed, the applicant would have to prove that he was in possession of the water and that the deprivation was unlawful. On both counts, he failed. Mr. Zolani claimed restoration of the supply of water but he was never in possession of the supply of water. He did not claim the return of the meter or the pipes. And the termination of water supply was lawful by virtue of the provisions of the Municipal Ordinance 20 of 1974 (Cape) and by virtue of the contractual obligation on Mr. Zolani to pay for the water supplied to him. The Court did not accept Mr. Zolani's argument that a court order is necessary for the termination of water. It held that this is an unrealistic approach, which makes neither business nor practical sense.

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*** 'JOL' refers to 'Judgments Online', an internet database at http://www.lawreports.co.za**