

## 6.5 Visit to Respondent Municipal Offices - Phuthaditjhaba

6.5.1 On the same day of the investigation, the investigating team paid a courtesy visit to the municipal offices of the Respondent with the intention of informing the Municipal Manager that the Commission had conducted investigations to look at the aftermath of the evictions.

6.5.2 The Municipal Manager and the Mayor were unavailable. The Acting Provincial Manager met with the PA to the Municipal Manager, COGTA officials and an official from the Premiers intervention team.

## 6.6 Respondent's response to allegations

6.6.1 On Tuesday, 10 June 2014, the Commission sent an email to the Municipal Manager of the Respondent requesting the deferment of the eviction that was due to take place the following day.

6.6.2 On Wednesday afternoon, 11 June 2014, the Commission received a response from the Respondent through their attorneys.

6.6.3 They stated the following in their response letter:

- The allegation that residents were only informed to vacate land on the 10<sup>th</sup> was incorrect;
- An order was granted on 12 July 2012 ordering the unlawful occupants to vacate the said property on or before 17 August 2012;
- This order was also duly served on the occupants by the Sheriff of Phuthaditjhaba on 2 August 2012;

- Consequent to the service of the abovementioned order, the occupants appealed against the court order;
- Therefore it was clear that the occupants knew that they needed to vacate the said premises on or before 17 August 2012;
- Notice boards were also erected at the entrances of the said property, clearly indicating that the occupants were illegally occupying the property, that the court ordered that they should vacate the property and that they could apply for sites at the municipality;
- The occupants' application for leave to appeal was dismissed by the Free State High Court in Bloemfontein as well as their petition to the Supreme Court of Appeal;
- On 23 May 2014 the Constitutional Court of South Africa also dismissed with costs the occupants' application for leave to appeal;
- The said order was faxed to the respective attorneys of record, which included the unlawful occupiers' attorney on 26 May 2014. Therefore it was clear that the occupants were aware of the Constitutional Court's order since 26 May 2014;
- Morena Tsolo Mopeli also had a meeting with the occupants on Sunday 8 June 2014 informing the occupants that they would be evicted on Wednesday 11 June 2014;
- The Constitutional Court did not order that any further notice should be given to the occupants before the date of eviction.

However as a courtesy, the sheriff of Phuthaditjhaba was instructed to once again serve the said court order as well as erecting a notice board informing the occupants to vacate the property;

- This notice board clearly indicated that the occupants may apply for alternative sites at the municipality which they failed to do;
- The Municipality made the necessary provisions to assist all persons who would be evicted by having available shelter, bedding as well as food. Persons evicted would not be left in the cold and would be looked after. The Municipality also arranged for the necessary transport to assist any occupant who wished to relocate to another site;
- The Municipality couldn't grant any further extension to stay on the said land as there was no infrastructure and the occupants' further occupation of the said land was a health risk;
- From the onset the occupants' *modus operandi* was to increase the amount of occupants and illegal structures after every postponement or after the applications for leave to appeal, despite the High Court's order interdicting them from erecting further structures and occupying the said premises;
- The occupants had no respect for the court and the court orders and bluntly contravened these orders;

- The Municipality ran the risk that the amount of occupants and structures would increase should they be granted any further extension;
- The Municipality would suffer a great deal of financial loss if it did not proceed with the said eviction;
- The Municipality earmarked certain sites for the relocation of the occupants and same would be made available
- The Commission's availability to mediate the said matter at this late stage would not resolve this matter and any extension of time would only give the occupants further time to increase the amount of occupants and structures, causing greater problems.

6.6.4 On Tuesday, 17 June 2014, the Commission sent an allegation letter providing full details regarding the alleged violation to the Respondent and requested a response thereto within a period of 14 days.

6.6.5 The Commission required a detailed report from the municipality addressing the following:

- Provision of alternative accommodation;
- Relocation plans to an approved municipal site;
- Access to basic municipal services;
- Interim services to be provided to evictees;
- Protection of the rights of vulnerable groups; and
- Security of tenure for evictees.

6.6.6 The Commission did not receive the report within the stated period. Subsequent to this, a follow up letter was sent to the Respondent on the 17<sup>th</sup> July 2014. An additional period of 14 days was given to the Respondent to respond to the previous correspondence. The Commission did not receive any response.

## **7. Applicable Legal Framework**

### *7.1 Key International instruments*

#### **7.1.1 International Covenant on Civil and Political Rights<sup>1</sup>**

Article 17 (1) provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

#### **7.1.2 International Covenant on Economic, Social and Cultural Rights<sup>2</sup>**

Article 11(1) provides that "the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

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<sup>1</sup> 1966

<sup>2</sup> 1966

### **7.1.3 Convention on the Elimination of All Forms of Discrimination Against Women<sup>3</sup>**

In relation to obligations towards rural women, article 14(2) (h) of CEDAW compels states parties to ensure that women in rural areas enjoy the right to adequate living conditions, particularly in relation to housing, and sanitation...<sup>1</sup>.

### **7.1.4 Convention on the Rights of the Child<sup>4</sup>**

Article 20 (1) provides that " A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

Article 27 obliges State Parties to take appropriate measures to assist parents and others responsible for the child to implement the child's right to an adequate standard of living, and in case of need, provide material assistance and support programmes, particularly with regard to, among other, housing.

### **7.1.5 United Nations Commission on Human Rights<sup>5</sup> (UNCHR)**

The UNCHR affirmed that the practice of forced evictions is a gross violation of human rights, in particular the right to adequate housing (para 1). The UNCHR urged governments to:

<sup>3</sup> CEDAW 1979

<sup>4</sup> 1989

<sup>5</sup> Commission on Human Rights Resolution 1993/77: Forced Evictions, adopted on 10 March 1993

- Take immediate measures, at all levels, to eliminate the practice of forced evictions;
- Give legal security of tenure to all people currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups; and

Provide immediate restitution, compensation or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted. This has to be based on mutually satisfactory negotiations with those affected and be consistent with their wishes, rights and needs.

The UNCHR reaffirmed<sup>6</sup> that the practice of forced eviction violates several human rights, in particular the right to adequate housing. Government were further urged to ensure that any eviction that is otherwise deemed lawful is carried out in a manner that does not violate any of the human rights of those evicted.

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<sup>6</sup> Commission on Human Rights Resolution 2004/28: Prohibition of forced evictions, adopted on 16 April 2004

### **7.1.6 United Nations Committee on Economic, Social and Cultural Rights (CESCR)**

#### **General Comment 4 The Right to adequate housing<sup>7</sup>**

The General Comment 4 identifies a number of factors to be taken into account in determining whether particular forms of shelter can be considered to be "adequate housing" in terms of the ICESCR. These include: legal security of tenure; availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

### **7.1.7 United Nations Educational, Scientific and Cultural Organization (UNESCO)**

The international ideal for access to housing has been described by UNESCO in these terms:<sup>8</sup>

'The right to adequate housing should not be understood narrowly as the right to have a roof over one's head. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This right has a number of components, including the following:

(i) Legal security of tenure: everyone should enjoy legal protection from forced eviction, harassment and other threats;

(ii) Habitability: housing must provide inhabitants with adequate space and protection from the elements and other threats to health;

<sup>7</sup> General Comment 4 was adopted on 12 December 1991 UN doc. E/1992/23

<sup>8</sup> 'Poverty and Human Rights: UNESCO's Anti-Poverty Projects.'



(iii) Location: housing must be in a safe and healthy location which allows access to opportunities to earn an adequate livelihood, as well as access to schools, health care, transport and other services;

(iv) Economic accessibility: personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not compromised;

(v) Physical accessibility: housing must be accessible to everyone, especially vulnerable groups such as the elderly, persons with physical disabilities and the mentally ill;

(vi) Cultural acceptability: housing must be culturally acceptable to the inhabitants, for example reflective of their cultural preferences in relation to design, site organization and other features;

(vii) Availability of services, materials, facilities and infrastructure that are essential for health, security, comfort and nutrition, such as safe drinking water, sanitation and washing facilities.'

#### **7.1.8 United Nations Special Rapporteur on Adequate Housing**

The UN Special Rapporteur on Adequate Housing presented basic principles and guidelines to the Human Rights Council at its fourth session in 2007.

The Basic Principles and Guidelines list, amongst others, detailed steps to be taken by states before, during and after evictions.

Before an eviction, the guidelines include:

- Giving appropriate notice to all people likely to be affected that an eviction is being considered and that there will be public hearings on the proposed plans and alternatives.
- Giving a reasonable time period for public review of, comment on, or objection to the proposed plan.
- Providing opportunities and facilitating the provision of legal, technical and other advice to affected people about their rights and options.
- Holding public hearings that provide affected people and their advocates with opportunities to challenge the eviction decision or to present alternative proposals and to articulate their demands and development priorities

During an eviction, the guidelines include:

- The mandatory presence of governmental officials or their representatives on site during evictions, who must identify themselves to the people being evicted and formal authorisation for the eviction action.
- Allowing access, upon request, to neutral observers, including regional and international observers.
- The carrying out of evictions in a manner that does not violate the dignity and human rights to life and security of those affected.

- The taking of steps by states to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected.
- Ensuring that any legal use of force is in accordance with the principles of necessity and proportionality, as well as the basic principles on the use of force and firearms by law enforcement officials and any national or local code of conduct consistent with international law enforcement and human rights standards.
- Ensuring that evictions do not take place in bad weather, at night, during festivals or religious holidays, before elections, or during or just before school examinations.
- Ensuring that no one is subject to direct or indiscriminate attacks or other acts of violence, especially against women and children, or arbitrarily deprived of property or possessions as a result of demolition, arson and other forms of deliberate destruction, negligence or any form of collective punishment. This includes protecting property and possessions that are left behind involuntarily against destruction and arbitrary and illegal appropriation, occupation or use.
- Not requiring or forcing those evicted to demolish their own dwellings or other structures. However, the option to do so must be

provided to them so that they can salvage possessions and building materials.

After an eviction, the guidelines include:

- The immediate provision upon eviction, of just compensation and sufficient alternative accommodation, or restitution when feasible by states and other parties responsible for doing so.
- Ensuring, at the very minimum, that the evicted people or groups, especially those who are unable to provide for themselves, have safe and secure access to: essential food, potable water and sanitation; basic shelter and housing; appropriate clothing; essential medical services; livelihood sources; fodder for livestock and access to common property resources previously depended upon; and education for children and childcare facilities.
- Ensuring that members of the same extended family or community are not separated as a result of evictions.
- Making special efforts to ensure the equal participation of women in all planning processes and in the distribution of basic services and supplies.

## 7.2 *Regional Instruments*

### 7.2.1 **African Charter on Human and Peoples' Rights<sup>9</sup>**

The right to housing is not explicitly provided for under this Charter. However, the African Commission on Human and Peoples' Rights has found this right, including a prohibition on unjust evictions, to be implicit in articles 14 (right to property), 16 (right to the best attainable state of physical and mental health) and 18(1) (protection of the family).

### 7.2.2 **African Charter on the Rights and Welfare of the Child<sup>10</sup>**

Article 20 provides that the primary obligation of parents is to secure conditions of living necessary to the child's development and in case of need, State Parties should take all appropriate measures to provide, material assistance and support programmes, particularly with regard to, among other, housing.

### 7.2.3 **African Commission on Human and Peoples' Rights (ACHPR)**

In its 2012 resolution, the ACHPR urged State Parties to use eviction only as a last resort for purposes of development projects, to provide adequate eviction notices, and to supply housing in accordance with international and regional standards.<sup>11</sup>

<sup>9</sup>1981

<sup>10</sup>1990

<sup>11</sup> Resolution 231 Adopted at the 52<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held in Yamoussoukro, Côte d'Ivoire, from 9 to 22 October 2012

### *7.3 Domestic Legislation*

#### **7.3.1 Constitutional Rights**

The preliminary assessment of the Free State Provincial Office indicated that the rights alleged to have been violated according to the report are sections 10, 25, 26, 28 and 32 of the Constitution of the Republic of South Africa. Each of these rights are discussed hereunder, in turn:

##### **7.3.1.1 The Right to Human Dignity**

Section 10 is the right to have the inherent dignity of everyone respected and protected.

##### **7.3.1.2 The Right to Property**

Section 25 (5) provides that the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

This right is an integral component of the right to have access to adequate housing.

The state has an obligation to ensure access to land for the homeless on a progressive basis.

### 7.3.1.3 The Right to Housing

Section 26(3) of the Constitution provides that "no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." This section is aimed at ensuring that every person has access to adequate housing and the state may not interfere with such access unless justifiable.

Section 26(1) imposes a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.

### 7.3.1.4 Children

Section 28 (1) (c) provides an unqualified right for every child to basic shelter. Where parents are unable to shelter their children, the Court in the *Grootboom* case<sup>12</sup> stated that the obligation falls to the state.

Children therefore have both an unqualified right to shelter; and a weaker (because qualified) but larger right of access to adequate housing.

### 7.3.1.5 The Right to Access Information

Section 32 provides that everyone has the right of access to –

"a) any information held by the state; and

b) any information that is held by another person and that is required for the exercise or protection of any rights."

<sup>12</sup> *Government of the Republic of South Africa and Other v Grootboom and Others* 2001 (1) SA 46 (CC)

## 7.4 Other Domestic Legislation

### 7.4.1 The Prevention of Illegal Eviction and Unlawful Occupation of Land Act<sup>13</sup> (PIE Act)

Section 4(7) of the PIE Act provides for the eviction of unlawful occupiers who had occupied property for a period longer than six months, expressly requires a court to, in considering all the relevant circumstances, consider "whether land has been made available or can reasonably be made available by a municipality or other organ of state...for the relocation of the unlawful occupiers."

This Act reinforces the court order requirement under section 26(3) of the Constitution.

The PIE Act defines an unlawful occupier as a person living on land without the express or tacit (unspoken or implicit) consent of the owner or person in charge, or without any other legal right to occupy the land.<sup>14</sup>

The PIE Act sets out the procedures for evictions carried out by two groups of people: (1) an owner or person in charge; and (2) an organ of state.

An organ of state may institute proceedings, under section 6 of PIE, for the eviction of an unlawful occupier from land which falls within its area of

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<sup>13</sup>Act 19 of 1998

<sup>14</sup>Section 1 of PIE Act



jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in sale of execution pursuant to a mortgage.

The organ of state is required to give notice to the owner or person in charge of the land before instituting eviction proceedings.

In deciding whether it is fair to grant an order for eviction, a court is required to consider the following:

- The circumstances under which the unlawful occupier occupied the land and erected the building structure;
- The period the unlawful occupier and his or her family have resided on the land in question; and
- The availability to the unlawful occupier of suitable alternative accommodation or land.

#### **7.4.2 The Housing Act<sup>15</sup>**

The Housing Act defines housing development as:

*The establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis have access to-*

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<sup>15</sup>107 of 1997

(a) *A permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and*

(b) *Potable water, adequate sanitary facilities and domestic energy supply.*<sup>16</sup>

Section 9 of the Housing Act requires that every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:

- Ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- Ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;
- Ensure that services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner that is economically efficient;
- Set housing delivery goals in respect of its area of jurisdiction;
- Initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

Section 2 of the Housing Act sets out the general principles applicable to housing development. They provide that national, provincial and local spheres of government must *inter alia*:

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<sup>16</sup>Section 1 (vi) of the Housing Act 107 of 1997