

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT 22/08

In the matter between:

VARIOUS OCCUPANTS

Applicants

and

THUBELISHA HOMES

First Respondent

NATIONAL MINISTER OF HOUSING

Second Respondent

**MINISTER OF LOCAL GOVERNMENT AND
HOUSING, WESTERN CAPE**

Third Respondent

**SUBMISSIONS OF THE AMICI CURIAE:
COMMUNITY LAW CENTRE (UWC) AND
CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE)**

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Introduction¹

1. This case raises two issues of fundamental importance in relation to the realisation of the socio-economic rights guaranteed in our Constitution.
2. The first issue raised is the fact that socio-economic rights concern more than simply the delivery of material goods. They also have an intangible dimension which is critical to enable them to fulfil their purpose as human rights guarantees. The second issue raised is the intersection between socio-economic rights and the rights of poor people to be consulted and have a say in decisions which fundamentally impact on their rights. The right to have a say in decisions affecting one's constitutional rights is fundamental to the affirmation of one's dignity as a human being.
3. The respondents have adopted the N2 Gateway Project through which they seek to progressively realise the right of access to adequate housing for the residents of informal settlements situated along Cape -Town's N2 highway. As part of this process the respondents seek the mass eviction of the applicants and their relocation to temporary residential accommodation ("TRAs") in Delft. Delft is 15 kilometres away from the Joe Slovo Informal Settlement in which the applicants have been living for many years.
4. The respondents contend that the Delft TRAs constitute a marked improvement on the shacks in which the applicants are currently living. Indeed, the respondents contend that the Delft

¹ We acknowledge the considerable contribution made to these heads of argument by Professor Sandy Liebenberg and Dr Geo Quinot of the Faculty of Law, University of Stellenbosch.

TRAs constitute 'adequate housing' in terms of section 26 of the Constitution while the applicants' informal homes do not.

5. The respondents contend further that after their temporary stay in the TRAs the applicants will be allocated permanent housing. Some of this will be the new developments being constructed at Joe Slovo. The majority of it will be in Delft.
6. The applicants are opposed to a relocation to Delft. The basis for their opposition is two-fold. They contend that a relocation to Delft will leave them worse off in socio-economic terms than they are currently. They contend further that there is no real prospect that any significant number of them will ever be permanently rehoused in the 'new Joe Slovo.' Regrettably, the respondents have failed to engage meaningfully with these concerns. Instead they have tended to dismiss the applicants' opposition to the Project as obstructionist and opportunistic. The respondents maintain that they are acting to realise the applicants' constitutional rights of access to adequate housing. They maintain further that it is in the applicants' best interests that they be evicted from their current homes and moved to Delft.
7. It is evident from the record that the applicants have come to regard the statements and actions of the respondents with deep mistrust. This is regrettable and, in our view, could have been avoided. While the respondents' goal² is a legitimate one, there are, in our view, two fundamental flaws in the respondents' approach which have contributed significantly to the current climate of conflict and mistrust.

² To achieve the progressive realisation of the right of access to adequate housing for the residents of informal settlements.

8. Firstly, the respondents have failed to take into account that housing as a human right constitutes more than simply providing bricks and mortar.³ It includes what we shall refer to as the intangible dimensions of housing rights, which we describe further below. Secondly, the respondents have failed to treat the applicants as human beings in the process of taking decisions about their housing. In particular, the respondents have failed to engage meaningfully with them. Both these issues are interrelated and raise important questions relating to the realisation of the right of access to adequate housing entrenched in section 26 of the Constitution.

9. The first issue raised is the extent to which adequate housing in section 26 goes beyond bricks and mortar and takes account of the environment in which housing is situated. As this Court stated in *Port-Elizabeth Municipality v Various Occupiers*:

Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world.⁴

10. The applicants, like others who live in informal settlements, are the poorest of the poor. They live on the margins of society and are dependent for their survival on fragile social and economic networks – which they have established on their own without any assistance from the state. These survival networks depend on the applicants' living within reasonable proximity to economically active areas. They also depend on support and co-operation within the community. The essence of the applicants' objection

³ See *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 35.

⁴ At para 17.

to moving to Delft is not the quality of the TRAs⁵ but the limited employment opportunities in Delft coupled with the severely curtailed access to public transport there. The applicants also state that relocating to Delft will destroy their established community networks and the support and security they provide.

11. We submit that the applicants' concerns in this regard are reasonable and well-founded. This is clear from a study by the Development Action Group ("DAG") entitled "Living on the Edge: A Study of the Delft Temporary Relocation Area."⁶ After a detailed survey of the households currently living in the Delft TRAs the Report concludes that –

It is clear for most households living the Delft TRAs that although they have better shelter and access to services than they previously did, in social and economic terms they are worse off than they were when they were residing in Langa.⁷

12. The DAG Report also finds that there is evidence of significant social instability in Delft which is likely to give rise to an increase in the occurrence and variety of social problems, including crime. The Report notes that although government carries the cost for this, in its expenditure on crime prevention for example, the social cost is borne by the households who live in Delft.⁸

13. The applicants' concern that despite the physical attributes of the TRAs (which do appear to be superior in certain respects to the applicants' informal homes), relocating to Delft will leave them worse off in overall terms, is accordingly borne out by the

⁵ Subject to the debate about whether or not the TRAs are constructed of asbestos. We do not enter into this debate. We note however that the applicants have not pursued this point on appeal.

⁶ Record volume 8, p 763.

⁷ Record volume 8, p 791.

⁸ Record volume 8, p 787.

results of the DAG study. We submit that failing to take this concern seriously in determining the adequacy of proposed housing is antithetical to the values of the Constitution.⁹

14. We submit that in order to be adequate within the meaning of section 26, housing must be located so as to provide reasonable access to employment opportunities and social services. It must also provide security of tenure. This interpretation gives effect to the interdependency of fundamental rights¹⁰ and the primary importance of the rights to life and dignity in the Bill of Rights.¹¹ It also gives effect to the fundamental principle that constitutional rights should be interpreted in a manner which improves and, at the very least, does not intensify the marginalisation of the poor and vulnerable in our society.¹²

15. The interpretation we contend for is supported by international law. Moreover it is the basis for South African Housing policy as set out in “Breaking New Ground: a comprehensive plan for the

⁹ The Preamble of the Constitution reads:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to ... [i]mprove the quality of life of all citizens and free the potential of each person

Section 1 of the Constitution provides:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms....

Section 7(1) of the Constitution reads:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

¹⁰ On ‘interdependence’, see *Grootboom* above n 3, paras 23 – 24; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC), paras 40 – 42. On the importance of interdependence as a principle in the interpretation of socio-economic rights, see further S Liebenberg and B Goldblatt ‘The interrelationship between equality and socio-economic rights under South Africa’s transformative Constitution’ (2007) 23 *SAJHR* 335 – 361 at 338 – 341.

¹¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 41; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 35.

¹² *Port Elizabeth* above n 4 at para 18.

development of sustainable human settlements, 2 September 2004” (“the BNG”) and Chapter 13 of the National Housing Code entitled “Upgrading Informal Settlements” (“Chapter 13”).¹³

16. The respondents quote extensively from the BNG in their heads of argument and seek to justify their actions with reference to that policy. We submit that the respondents’ actions cannot be so justified. On the contrary, the manner in which the respondents have sought to implement the N2 Gateway Project in relation to the Joe Slovo residents is fundamentally at odds with the principles on which the BNG is based. As we shall show below the respondents’ approach is also fundamentally inconsistent with the principles and provisions of Chapter 13.

17. We submit that the respondents’ contention that the Delft TRAs constitute ‘adequate housing’ reveals an approach to the interpretation of housing rights which is divorced from social and economic context and the intangible goods provided thereby. This, we submit, is antithetical to the BNG, to Chapter 13 and to a proper interpretation of section 26.

18. The respondents contend that evicting the applicants from their current homes and relocating them to Delft will improve their security of tenure. We submit that the opposite is in fact true. The TRAs constitute temporary accommodation only. The record provides no clear indication of where, when or how the applicants will be allocated permanent housing after their temporary stay in the Delft TRAs. The state has only acquired 60% of the land required for the N2 Gateway Project. There is insufficient planned accommodation to permanently house all the Joe Slovo households – which are approximately 8000 in total. Moreover single persons and persons who are not South

¹³ October 2004.

African citizens or permanent residents are not entitled to housing subsidies in terms of the state's policies. They will therefore not receive permanent housing. There is no indication of where these people are to live after they are removed from the Delft TRAs.

19. In the result the respondents seek an order evicting the applicants from housing in which they are reasonably secure to a temporary stay in a 'halfway house' and an entirely insecure future. The only virtual certainty is that many of the applicants will not receive permanent housing. We submit that the Delft TRAs do not provide secure tenure in these circumstances and cannot therefore qualify as adequate housing.

20. The second fundamental flaw in the respondents' approach is their failure to meaningfully engage with the applicants. The record reveals that the respondents failed to engage with the applicants either in the development and implementation of the N2 Gateway Project or in the decision to seek the applicants' eviction and relocation to Delft. To the extent that the respondents held meetings with the applicants, this was merely to inform them of the housing scheme that had already been decided on for their area. It did not afford the applicants any meaningful opportunity to influence basic decisions about the nature of the scheme as it applied to their particular situation. The applicants were presented with a *fait accompli* with regard not only to the decision to seek their eviction and relocation to Delft but also with regard to –

20.1. the nature of the process in terms of which the Joe Slovo Informal Settlement was to be upgraded, in particular whether this was to be by way of roll-over or *in situ* upgrading;

20.2. the location and character of the TRAs;

20.3. the nature of the formal housing to replace the current informal housing; and

20.4. the procedure and entitlements in respect of accessing the new formal housing.

21. We submit that, in this case, the respondents' duty to meaningfully engage with the applicants arose primarily from section 26 and section 33 of the Constitution. We submit that, in a case such as the present, the duty to meaningfully engage in terms of section 26 of the Constitution, is fleshed out, in the context of administrative action, by the duty to observe procedural fairness as entrenched in section 33 of the Constitution, and given effect to in sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

22. We submit that, in this case, the respondents were required to engage with the applicants in terms of the procedures set out in section 4 of PAJA. Such engagement ought to have been conducted not only in relation to the applicants' proposed eviction but also in relation to the critical decisions (listed in paragraph 20 above) in respect of the N2 Gateway Project as they applied to the applicants' particular situation. The engagement process ought to have covered the socio-economic and security of tenure impacts of a relocation to Delft since these are, we submit, crucial components of the right of access to adequate housing. Such an engagement process would accord with international law and indeed the principles on which the BNG and Chapter 13 are based.

23. We submit that the administrative justice rights, and in particular procedural fairness requirements, have a vital function to fulfil in

relation to the realisation of socio-economic rights. Procedural fairness facilitates accurate and rational decision-making and is a crucial element of participatory democracy. Through affording people the opportunity to participate actively in the provision of state assistance, procedural fairness can achieve much in terms of giving beneficiaries a sense of ownership and participation and accordingly, significance and self worth.

24. The consequences of the respondents' failure to take seriously their duty to engage with affected communities are already being felt in Delft. The DAG Report finds that:

The lack of involvement by residents in decision-making resulted in inappropriate choices about the location of the settlement and the types of housing to be provided. This has created immense dissatisfaction and a sense of dependency in which affected households are just waiting for their 'brick houses' to be provided (even though they have no idea when or where they will be provided).¹⁴

25. We submit that granting the respondents the order they seek in the present circumstances will have the effect of violating the applicants' rights of access to adequate housing and to just administrative action. We submit that the appeal ought accordingly to be upheld.

26. In what follows below we shall make reference to relevant international law on adequate housing and meaningful engagement. Next we shall consider South African housing law and policy on these aspects. Thereafter, and in the context of the above legal principles, we shall consider firstly whether the Delft TRAs can be said to constitute adequate housing within the meaning of section 26, and secondly the issue of meaningful engagement in this case. Finally we shall make some comments

¹⁴ Record volume 8, p 788.

on the respondents' failure to attempt mediation in terms of section 7 of the PIE Act.¹⁵

“More than Bricks and Mortar” International Law and Housing as a Human Right

27. In the context of using international law to interpret the rights in the Bill of Rights, this Court has held that reference may be had to both binding as well as non-binding international law.¹⁶ The latter may include treaties to which South Africa is not a party,¹⁷ those which it is precluded from ratifying,¹⁸ and, where appropriate, ‘soft’ international law.¹⁹ This includes reports and guidelines issued by special rapporteurs, working groups and other non-treaty based international mechanisms. A recent example of this is the *Basic Principles and Guidelines on Development-Based Evictions and Displacement* developed under the auspices of the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard

¹⁵ Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. In the event that the PIE Act applies, an issue on which we express no view.

¹⁶ *S v Makwanyane* above n 11 para [35].

¹⁷ Such as, for example, the International Covenant on Economic, Social and Cultural Rights (1966) which is the only major international human rights treaty which South Africa has not yet ratified, although it signed the treaty in 1994. According to article 18 of the Vienna Convention on the Law of Treaties (1969), although a state is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts ‘which would defeat the objects and purpose’ of such a treaty.

¹⁸ Such as, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and the American Convention on Human Rights (1969).

¹⁹ Soft International law involves standards which have not yet crystallised into treaty provisions or norms of customary international law. They include resolutions adopted at international conferences organised under the auspices of the United Nations or regional bodies such as the African Union, guidelines adopted by international organisations. For example, the *Voluntary guidelines to support the progressive realisation of the right to adequate food in the context of national food security*, adopted by the 127th session of the Food and Agricultural Organisation (FAO) Council, 2004. An indication that ‘soft’ international law is included among the ‘tools of interpretation’ which the Court may consider is Chaskalson P’s (as he then was) reference in *S v Makwanyane* above n 11 at para [35] to ‘reports of specialised agencies such as the International Labour Organisation.’

of Living.²⁰ We submit that these Guidelines are of particular significance in this case as they deal with development-based evictions planned in order to serve the public good, such as those linked to measures associated with urban renewal, slum upgrades, housing renovation and city beautification.²¹ Moreover, the Guidelines deal with the quality of housing to be provided in the aftermath of development-based evictions, thereby giving important content to the right to adequate housing in these circumstances.²²

28. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is of particular relevance in the interpretation of section 26 of the Constitution because the Covenant was a major source of reference for the drafting of this provision.²³

29. Article 11(1) of the ICESCR recognises the right to housing of everyone:

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.

²⁰ UN doc A/HRC/4/18, 5 February 2007 (Annex 1).

²¹ Ibid. p 15, para 8.

²² See Ibid. p 22, Part V – After an Eviction: Immediate Relief and Relocation

²³ See: S Liebenberg ‘Socio-Economic Rights’ in Chaskalson et al (eds) *Constitutional Law of SA* (Revision Service 3, 1998), Ch. 41, 3 – 4; J Fitzpatrick and R C Slye ‘Economic and social rights – South Africa – Role of international standards in interpreting and implementing constitutionally guaranteed rights’ (2003) 97 *American Journal of International Law* 669 – 680. South Africa has not yet ratified the ICESCR. However, according to article 18 of the Vienna Convention on the Law of Treaties (1969), although a state is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts which would defeat the objects and purpose of such a treaty.

30. While there are differences in the formulation of the right of access to adequate housing in section 26 of the Constitution and the right to housing in article 11 of the Covenant,²⁴ it is submitted that the purposes and values underpinning this right in the Covenant (and related international instruments) and the Constitution are essentially similar. The Covenant and related international law on the right to housing thus constitute an important guide to interpreting section 26 so as to promote ‘the values that underlie an open and democratic society based on human dignity, equality and freedom.’²⁵

31. The Committee on Economic Cultural and Social Rights has interpreted article 11 of the Covenant as follows –

In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head, or views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This ‘the inherent dignity of the human person’ from which the rights in the Covenant are said to derive requires that the term housing be interpreted so as to take account of a variety of other considerations. Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing.²⁶ (emphasis added)

32. In accordance with the above the Committee has stated that in order to qualify as adequate, housing must be provided in a

²⁴ See *Grootboom* above n 3 para [28].

²⁵ *Ibid.* para [45].

²⁶ CESCR, General Comment 4 at para 7 See also the factors which the Committee has identified must be taken into account in determining the adequacy of housing ‘in any particular context. These include: legal security of tenure; the availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, appropriate location; and cultural adequacy (at para 8 (a) – (g). Many of these factors relate to the non-tangible aspects of housing rights which we seek to emphasise in these submissions.

location which allows reasonable access to employment options and social services:

Adequate housing must be in a location which allows access to employment options, health care services, schools, child care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households.”²⁷

33. International law makes it clear that security of tenure is a fundamental component of the right to adequate housing.²⁸

34. In a recent landmark decision of the European Committee of Social Rights, *European Federation of National Organisations Working with the Homeless (FEANTSA) v France* Complaint No. 39/2006 (4 February 2008), the European Committee of Social Rights found that various aspects of French housing legislation and policy were inconsistent with article 31 of the Revised European Social Charter. Article 31 provides as follows:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- (1) to promote access to housing of an adequate standards;
- (2) to prevent and reduce homelessness with a view to its gradual elimination; and
- (3) to make the price of housing accessible to those without adequate resources.

35. The Committee found that the failure of the French authorities to ensure “stable and accessible re-housing options” before eviction took place amounted to a breach of article 31(2) of the Charter.²⁹

²⁷ Ibid. at para 8(f).

²⁸ Ibid. at para 8(a).

²⁹ Ibid. at para 18. See also the decisions of the European Committee on Social Rights in *European Roma Rights Centre v Greece*, Complaint No 15/2003 of 8 December

36. The Committee found further that the measures in place to reduce homelessness in France were inadequate and constituted a violation of article 31(2) of the Charter. These measures were found to be inadequate in both a quantitative and a qualitative sense. In relation to the latter, the Committee held, *inter alia*, that the temporary sheltering facilities which existed in France did not contribute to the fulfilment of human dignity or provide adequate security of tenure:

As regards living conditions in sheltering facilities, the Committee believes these should be such as to enable living in keeping with human dignity, and that support should be routinely offered to help persons within the facilities attain the greatest possible degree of independence.³⁰ (emphasis added)

37. Furthermore:

The Committee recalls that the temporary provision of accommodation, even decent accommodation, cannot be considered a satisfactory solution and that people living under these conditions must be offered housing of an adequate standard within a reasonable time. ...the Committee [found] that ... the reception facilities for persons in very insecure circumstances could be improved in France. There is too much of a fallback on makeshift or transitional forms of accommodation which are inadequate both in a quantitative and a qualitative sense and which offer no definite prospect of access to normal housing.³¹ (emphasis added)

38. In *European Roma Rights Centre v Italy*, Complaint No 27/2004, (7 December 2005), the European Committee of Social Rights stated that one of the purposes of the right to housing in article 31 of the Revised European Social Charter is to:

2004; *European Roma Rights Centre v Bulgaria* Complaint No. 31/2005 (30 November 2006) at para 90.

³⁰ *Italy* *ibid.* at para 108.

³¹ *Italy* *ibid.* at para 108-9.

secure social inclusion and integration of individuals into society and contribute to the abolishment of socio-economic inequalities.³²

39. The deleterious effects of removing people from their homes against their will are well recognised in international law. They go way beyond the loss of shelter and impact, often drastically, on peoples' social, economic, physical and psychological well-being. This was highlighted by the African Commission on Human and Peoples' Rights in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*.³³

Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of the means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness.

40. Evictions tend to cause social conflict and further marginalise the poorest and most vulnerable members of society. The *UN Basic Principles and Guidelines on Development-Based Evictions and Displacement* state as follows in this regard -

Forced evictions intensify inequality, social conflict, segregation and 'ghettoization', and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society, especially women, children, minorities and indigenous peoples.³⁴

41. In a similar vein, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has stated as follows:

³² At para 34.

³³ African Commission on Human and Peoples' Rights, Communication No. 155/96; (2001) AHRLR 60 (ACHPR 2001) at para 63. In this communication, the Commission derived a right to adequate housing, including a prohibition on unjustified evictions, from a combined reading of articles 14, 16 and 18(1) of the African Charter on Human and Peoples' Rights (1981).

³⁴ Above n 20, para 7.

[T]he practice of forced eviction constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to food, the right to freedom of movement, the right to privacy, the right to security of the home, the right to security of the person, the right to security of tenure, the right to equality of treatment and a variety of additional rights.³⁵

42. Basic to international human rights law is that evictions need to be fully justified, may be undertaken only as a last resort, and “should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.” The UN Committee on Economic, Social and Cultural Rights has stated that:

Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that *adequate* alternative housing, resettlement or access to productive land, as the case may be, is available.³⁶

43. The *UN Basic Principles and Guidelines on Development-Based Evictions and Displacement* set out the standards with which re-housing in the aftermath of development-based evictions must comply. The Guidelines state at the outset that ‘all persons, groups and communities have the right to resettlement which includes the right of alternative land of better or equal quality.’³⁷

44. The Guidelines provide that –

Identified relocation sites must fulfil the criteria for adequate housing according to international human rights law. These include: (a) security of tenure; (b) services, materials, facilities and infrastructure such as potable water, energy for cooking, heating and lighting, sanitation

³⁵ See Resolution 1996/27 on forced evictions, para 1; See also the Sub-Commission’s resolution 1998/9 on forced evictions, para 1.

³⁶ General Comment No. 7, para 17.

³⁷ Above n 20 at p 17, para 16.

and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and to natural and common resources, where appropriate; (c) affordable housing; (d) habitable housing providing inhabitants with adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors, and ensuring the physical safety of occupants; (e) accessibility for disadvantaged groups; (f) access to employment options, health-care services, schools, childcare centres and other social facilities, whether in urban or rural areas; and (g) culturally appropriate housing. In order to ensure security of the home, adequate housing should also include the following essential elements: privacy and security; participation in decision-making; freedom from violence; and access to remedies for any violations suffered.³⁸ (emphasis added)

45. The UN Guidelines elaborate on the above criteria in the context of development-based evictions as follows –

No affected persons, groups or communities shall suffer detriment as far as their human rights are concerned, nor shall their right to the continuous improvement of living conditions be subject to infringement.³⁹ (emphasis added)

Alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted.⁴⁰

The time and financial cost required to travel to and from the place of work or to access essential services shall not place excessive demands on the budgets of poor households.⁴¹

The state shall provide all necessary amenities, services and economic opportunities at the proposed site.⁴²(emphasis added)

46. The Guidelines provide further that –

³⁸ Guidelines above n 20 para 55; See also UN Committee on Economic, Social and Cultural Rights, General Comment 4, above n 26 at para 8.

³⁹ Guidelines above n 20 para 56.

⁴⁰ Guidelines above n 20 p 21, para 43.

⁴¹ Guidelines above n 20 para 56.

⁴² Guidelines above n 20 para 56.

Persons, groups or communities affected by an eviction should not suffer detriment to their human rights, including their right to the progressive realisation of the right to adequate housing⁴³

47. The UN Special Rapporteur on adequate housing, Miloon Kothari, during a visit to South Africa in April 2007, issued a statement⁴⁴ observing “a failure at all levels of government to provide adequate post-settlement support” in new settlements created as a result of development-based evictions. He noted that “[in] many such cases, communities [did] not receive even the most basic support services, including ... access to schools and access to livelihood options.”

48. The Supreme Court of India, in its judgment in *Olga Tellis v Bombay Municipal Corporation*,⁴⁵ held that the “means by which alone life can be lived”⁴⁶ was deserving of protection. In that case, the petitioners alleged that their right to life would be violated if they were evicted from their pavements and slum dwellings. The Court stated:

The petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Evidently, they choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding to their slender means. To lose the pavement or the slum is to lose the job.⁴⁷

49. The Court held that the evidence of the nexus between life and means of livelihood was ‘unimpeachable’⁴⁸ and ordered that the petitioners be relocated to areas not much further away from

⁴³ Guidelines above n 20 paras 57-8.

⁴⁴ United Nations Expert on Adequate Housing Concludes Visit to South Africa, Press Release, Geneva, 7 May 2007.

⁴⁵ (1985) 3 SCC 545.

⁴⁶ *Ibid* at para 2.

⁴⁷ *Ibid.* at para 36.

⁴⁸ *Ibid.* at para 32.

their current dwellings. We submit that this principle has particular resonance in South Africa where the levels of poverty are such that the loss of a job may threaten life itself.⁴⁹

International Law and Meaningful Engagement

50. International law requires that where, in exceptional circumstances evictions may be justified, they must be carried out in strict compliance with procedural safeguards.⁵⁰ What is required is genuine consultation in which representations from affected persons and communities are invited and considered.

51. In General Comment No 7 on forced evictions, the UN Committee on Economic, Social and Cultural Rights stated that:

States parties must ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding or at least minimizing, the need to use force.⁵¹ (emphasis added)

52. The Committee has highlighted the crucial importance of procedural protection and due process safeguards in the context of evictions, given their adverse impact on a wide range of internationally recognised human rights.⁵² The procedural protections which should be applied in relation to evictions include:

(a) an opportunity for genuine consultation with those affected (emphasis added);

⁴⁹ See also *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others* 2004 (4) SA 444 (C) at 448E-F.

⁵⁰ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution, 1997/6 on forced evictions above n 35, *preamble*; UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 above n 36, para 15.

⁵¹ General Comment No. 7 *ibid.* at para 14.

⁵² *Ibid.*, para 16.

- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected.⁵³

53. The *UN Basic Principles and Guidelines on Development-Based Evictions and Displacement* state that:

All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider (emphasis added).⁵⁴

54. The Guidelines provide that development processes which may result in the displacement of people from their homes, must have built into them the following elements:

- (a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives;
- (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups;
- (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (emphasis added)
- (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and
- (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.⁵⁵ (emphasis added)

⁵³ Ibid.

⁵⁴ Guidelines above n 20 para 38.

⁵⁵ Ibid. para 37.

55. Of importance is the fact that genuine consultation is required in respect of both the proposed eviction and the proposed resettlement. Thus the Guidelines provide that:

The entire resettlement process should be carried out with full participation by and with affected persons, groups and communities. States should, in particular, take into account all alternative plans proposed by the affected persons, groups and communities.⁵⁶ (emphasis added)

56. Also important is the Guidelines' statement that special measures may need to be taken to ensure that all affected persons, including women and vulnerable and marginalised groups, are included in the consultation process. The Guidelines provide as follows in this regard:

During the planning process, opportunities for dialogue and consultation must be extended effectively to the full spectrum of persons, including women and vulnerable and marginalised groups, and where necessary, through the adoption of special measures or procedures.⁵⁷ (emphasis added)

57. The European Court of Human Rights has held the existence of procedural safeguards to be a crucial consideration in the Court's assessment of the justifiability of an interference with the right to respect for a person's home in terms of article 8 of the European Convention on Human Rights.⁵⁸ *Connors v UK*⁵⁹

⁵⁶ Ibid. at para 56(i).

⁵⁷ Ibid. para 39.

⁵⁸ Article 8 reads:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence;
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

concerned the eviction of a gypsy family from a halting site by a local authority on the grounds of alleged anti-social behaviour. The eviction was challenged, *inter alia*, as a violation of article 8 of the European Convention on Human Rights. The Court noted that article 8 “concerns rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.”⁶⁰

58. The effect of the eviction was to render the applicant family homeless, “with the adverse consequences on security and well-being which that entails.”⁶¹ The Court held that the seriousness of the impact of the eviction required “particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed.”⁶²

59. The Court held that although the applicants had been entitled to apply for judicial review of the decision to evict them, this did not provide an opportunity for an examination of the facts in dispute between the parties. The fact that UK law did not provide for an inquiry by a court into the substantive justification for the evictions of gypsy families on halting sites led the Court to find a violation of article 8 of the European Convention on Human Rights. In its judgment the Court stated:

The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation [in relation to social and economic policies]. In particular, the

⁵⁹ (2005) 40 EHRR 9.

⁶⁰ Ibid para 82.

⁶¹ Ibid para 85.

⁶² Ibid para 86.

Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by article 8...⁶³ (emphasis added)

60. In *McCann v The United Kingdom*⁶⁴ the European Court of Human Rights held, in the context of a challenge by a joint tenant to the summary dispossession of his home without the possibility of having the proportionality of that measure determined by an independent tribunal:

The loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.⁶⁵

61. The Court concluded that the summary procedure applied by the public authority resulted in the applicant being dispossessed of his home "without any possibility to have the proportionality of the measure determined by an independent tribunal." It followed that, "because of the lack of adequate procedural safeguards, there has been a violation of article 8 of the Convention in the instant case."⁶⁶

62. In the decision of the European Committee of Social Rights in *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*,⁶⁷ the Committee found that various aspects of French housing legislation and policy were inconsistent with article 31 of the Revised European Social

⁶³ Ibid. para 83.

⁶⁴ Application no 19009/04 handed down on 13 May 2008.

⁶⁵ Ibid at para 50.

⁶⁶ Ibid. at para 55.

⁶⁷ Above at para 34.

Charter in that they failed to provide adequate procedural safeguards. The Committee held as follows in this regard:

Legal protection for persons threatened by eviction must include, in particular, an obligation to consult the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction...Procedural guarantees are important. Even when an eviction is justified, authorities must adopt measures to re-house or financially assist the persons concerned.⁶⁸

63. In *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*⁶⁹ the African Commission on Human and Peoples' Rights held that articles 16 and 24 of the African Charter on Human and Peoples' Rights obliged State Parties to provide "meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."⁷⁰

South African Housing Law and Policy

64. South African housing law and policy encompasses a vision of housing which goes beyond mere shelter and places importance on the environment in which the housing is located. It also attaches central importance to the need to consult meaningfully with affected individuals and communities. In these respects it is compatible with international law.

The Housing Act

⁶⁸ Ibid. at para 88.

⁶⁹ African Commission on Human Rights, Decision 155/96 (27 May 2002). Fifteenth Annual Activity Report on the African Commission on Human and Peoples' Rights, 2001 – 2002. Done at the 31st Ordinary Session of the African Commission held from 2nd to 16th May 2002 in Pretoria, South Africa.

⁷⁰ 31st Ordinary Session, para 53.

65. The Housing Act,⁷¹ enacted to give effect to the state's obligations under section 26(2) of the Constitution, sets out the functions of all three spheres of government in respect of housing development and the principles in terms of which such functions are to be performed.

66. Notably, the Housing Act recognises that adequate housing is more than just shelter and requires an environment in which individuals and communities have *inter alia* "convenient access to economic opportunities and social amenities" The Act's definition of "housing development" provides as follows –

'housing development' means 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 –

- (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. (emphasis added)

67. We submit that it is evident from the above that the statutory test of what constitutes adequate housing includes "convenient access to economic opportunities and social amenities." The respondents concede that a relocation to Delft will cause the applicants considerable inconvenience in this regard. The respondents have accordingly, on their own version, failed to meet this statutory test. We shall deal with this aspect further below.

⁷¹ 107 of 1997.

68. Section 2(1)(a) of the Housing Act requires all three spheres of government to “give priority to the needs of the poor in housing development.”

69. Section 2(1)(d) requires the state to “encourage and support individuals and communities, including but not limited to co-operatives, associations and other bodies which are community based, in their efforts to improve their own housing needs...in a way that leads to the transfer of skills to, and the empowerment of, the community.”

70. Crucially, section 2(b) of the Housing Act requires the state to “consult meaningfully with individuals and communities affected by housing development.”

Breaking New Ground

71. The respondents quote extensively from the BNG in their heads of argument. What they do not address are the reasons – identified in the BNG – for the need for fundamental change in South African housing policy. Chief among these was the recognition that housing units delivered post 1994 ‘have tended to be located on the urban periphery and have achieved limited integration.’⁷² Post 1994 settlements have accordingly ‘lacked the qualities necessary to enable a decent quality of life’⁷³ and “the 1.6 million subsidy houses that have been built have not become valuable assets in the hands of the poor.”⁷⁴

72. The BNG notes that:

⁷² Record volume 4, p 274, para 3.

⁷³ Ibid.

⁷⁴ Ibid.

The dominant production of single houses on single plots in distant locations with initially weak socio-economic infrastructure is inflexible to local dynamics and changes in demand. The new human settlements plan moves away from the current commoditised focus of housing delivery towards more responsive mechanisms which address the multi dimensional needs of sustainable human settlements.⁷⁵

73. The BNG defines ‘sustainable human settlements’ as:

well-managed entities in which economic growth and social development are in balance with the carrying capacity of the natural systems on which they depend for their existence and result in sustainable development, wealth creation, poverty alleviation and equity.⁷⁶(emphasis added)

74. The footnote to this definition goes on to describe such settlements as places where inhabitants have ‘adequate access to economic opportunities’, ‘reliable and affordable basic services, educational, entertainment and cultural activities and health, welfare and police services’ and ‘efficient public transport’. The footnote emphasises that ‘specific attention is paid to ensuring that low-income housing is provided in close proximity to areas of opportunity.’⁷⁷

75. The BNG recognised that government’s then housing policy with its overemphasis on housing as “mere shelter” would not secure the upgrading of informal settlements. It recognised further that there was a need for a fundamental shift in the official policy response to informal settlements:

There is a need to acknowledge the existence of informal settlements and recognise that the existing housing programme will not secure the upgrading of informal settlements. There is also a need to shift the official policy

⁷⁵ Record volume 4, p 278, para 2.2.

⁷⁶ Record volume 4, p 281, para 3.

⁷⁷ Record volume 4, p 281.

response to informal settlements from one of conflict and neglect, to one of integration and co-operation, leading to the stabilisation and integration of these areas into the broader urban fabric.⁷⁸

76. In line with this approach the BNG adopted a phased *in situ* upgrading approach to informal settlements, in line with international best practice.⁷⁹ It stated that “this approach will maintain community networks, minimise disruption and enhance community participation in all aspects of the development solution.”⁸⁰

77. Paragraph 8 of the BNG⁸¹ deals with “Information, Communication and Awareness Building,” placing emphasis on community mobilisation. The goal is to ensure that beneficiaries of government housing programmes become “partners” with the Department of Housing. This is to be achieved through a mobilisation and communications strategy to “clarify the intentions of the policy and to raise awareness” of its content. Communities, it is said, must be “mobilised to engage effectively with the housing programme.”

Chapter 13 of the National Housing Code

78. Significantly, the respondents make no reference in their papers or in their heads of argument to Chapter 13 of the National Housing Code. While, as the respondents correctly state, the National Housing Code was adopted in terms of section 4 of the Housing Act in March 2000, Chapter 13 was only adopted in October 2004. It was adopted in response to the BNG. Chapter

⁷⁸ Record volume 4, p 287, para 4.1.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Record volume 4, pp296-7.

13 is the mechanism which seeks to give effect to the principles set out in the BNG pertaining to informal settlements.

79. In terms of section 4(6) of the Housing Act the provisions of the National Housing Code, including Chapter 13, are binding on all spheres of government.

80. The objective of Chapter 13 is 'to facilitate the structured upgrading of informal settlements' in order to give effect to the principles set out in the BNG. The principles of respect for the members of the community and active community participation throughout the process infuse every element of the Chapter.

81. At the outset, the Chapter provides that '[t]he programme is premised upon substantial and active community participation', the parameters of which include the use of ward committees and ongoing efforts to include stakeholders in the 'participatory process.' Municipalities, which will usually be responsible for the implementation of upgrading programmes, 'must demonstrate that effective interactive community participation has taken place in the planning, implementation and evaluation of the project'.(emphasis added)

82. Fundamental to Chapter 13 is the principle that informal settlements are to be upgraded in accordance with a 'holistic approach with minimum disruption or distortion of existing fragile community networks and support structures.' The Chapter therefore advocates the *in situ* upgrading of informal settlements – in accordance with the BNG. Chapter 13 provides that any relocation should be the exception rather than the rule and to a location 'as close as possible' to the existing settlement in accordance with a 'community approved relocation strategy.' Chapter 13 strongly discourages evictions and provides no

funding for them. The Chapter provides as follows in this regard.⁸²

Residents living in informal settlements are often dependent on fragile networks to ensure their livelihoods and survival. A guiding principle in the upgrading of these communities is the minimisation of disruption and the preservation of community cohesion. The Programme accordingly discourages the displacement of households, as this not only creates a relocation burden, but is often a source of conflict, further dividing and fragmenting already vulnerable communities.

In certain limited circumstances, it may however be necessary to permanently relocate households living in hazardous circumstances or in the way of essential engineering or municipal infrastructure. In all such cases and where feasible and practicable, the relocation must take place at a location as close as possible to the existing settlement and within the context of a community approved relocation strategy that must be submitted with the final business plan for approval by the MEC.

...

Where possible, relocations should be undertaken in a voluntary and negotiated manner... Legal processes should only be initiated as a last resort and all eviction-based relocations must be undertaken under the authority of a court order. As a result, no funding is available for legal proceedings linked to the relocation of households. Funding for relocation will only be available on the basis of a detailed motivation to be provided by the municipality which must demonstrate the existence of a viable long-term land-release and upgrading strategy." (emphasis added)

83. One of the related policy objectives set out in paragraph 13.2.1 of the Chapter is the focus on community empowerment and the promotion of social and economic integration. This includes 'active participation of communities in the design, implementation and evaluation of projects' in order that communities are able to 'assume ownership of their own development and the improvement of their lives.'

⁸² At para 13.4

84. Importantly, the Chapter provides for the upgrading of informal settlements through area based as opposed to individual, housing subsidies. This ensures that all the residents of an informal settlement are catered for.

85. The principles of the programme include the following:

85.1. Communities are to play 'an active role in the early planning stages to ensure that all needs are identified and that project designs comply with the community needs and profiles.' (emphasis added)

85.2. The selection of pilot projects is to be undertaken through consultation with affected communities.⁸³

85.3. Stand sizes should be determined through 'dialogue between local authorities and residents' taking into consideration the need for the ultimate density of the settlement to allow for municipal structures and emergency service vehicles.

85.4. In respect of the provision of services, community needs and preferences must be balanced with affordability indicators.

85.5. The type of infrastructure to be developed for social and economic amenities must be 'undertaken through a process of engagement between the local authority and residents', community preference being determined after an assessment of community needs.

⁸³ At para 13.9.

85.6. Layout and design of the final township must be made on the basis of community needs and the principle that relocation is to be avoided.⁸⁴

85.7. Indicators used to measure project performance include poverty rates, economic activity, social capital and crime.⁸⁵

85.8. Pilot projects are to be 'closely monitored and documented to inform the finalisation of the programme.'⁸⁶ Conditions of pilot projects include the fundamental principle that communities be empowered 'to enable them to assume ownership of their own development and the improvement of their lives. Thus 'the involvement of the target community from the outset must in all cases be pursued.'⁸⁷

86. There is a dispute between the parties as to whether an *in situ* upgrade of the Joe Slovo Informal Settlement is possible. While we do not enter this debate, we note with concern the generic nature of many of the reasons given by the respondents for their decision not to upgrade Joe Slovo *in situ*.

87. The first and third respondents state that the process of an *in situ* development is "highly participative"⁸⁸ and "it is entirely probable that no consensus [with the residents] could be reached and that the project would flounder."⁸⁹ They state further that "the logistics are overwhelming" and that *in situ* upgrades

⁸⁴ At para 13.11.7.b.

⁸⁵ At para 13.10.

⁸⁶ At para 13.11.1.

⁸⁷ At para 13.11.6.

⁸⁸ First and Third Respondents' Heads of Argument, p 129, para 162.

⁸⁹ *Ibid*, p 130, para 162.3.2

require “a commitment of skills and human resources which are not available to the respondents.”⁹⁰

88. Similarly, the second respondent states that “engineers, builders and surveyors are generally averse to *in situ* developments from a safety and practical point of view”⁹¹ and “there are no institutional mechanics available to the Housing Department to undertake an *in situ* upgrade.”⁹² The second respondent also baulks at the prospect of a participative process stating that “an *in situ* upgrade would require the community to reach consensus on who would go and who would stay”⁹³ – thereby assuming that there is no prospect that such consensus could be achieved.

89. The above statements reveal that the respondents consider *in situ* upgrades – in general terms – to be prohibitively complex and time-consuming. This attitude flies in the face of Chapter 13 and the BNG – which, ironically, the respondents place so much reliance on in seeking to justify their actions. The above statements also reveal much about the respondents’ attitude to consultation with the applicants, a matter that we deal with in detail below.

90. It must be emphasised that the active and substantial community participation on which the BNG and Chapter 13 are premised does not fall away simply because the respondents have decided to upgrade Joe Slovo by means of a roll over (as opposed to *in situ*) development. The meaningful community engagement mandated by those policies – and by the Housing Act itself - remains applicable and indeed binding.

⁹⁰ Ibid, p 129, para 162.

⁹¹ Second Respondent’s Heads of Argument, p 122, para 226.6.

⁹² Ibid, p 122, para 226.8.

⁹³ Ibid, p 122, para 226.4.

Do the Delft TRAs constitute Adequate Housing?

91. International law and South African housing law and policy recognise that housing, poverty, economic, social and psychological sustenance are interrelated. They also recognise that state action in relation to housing ought to improve and, at the very least, not worsen the position of the poor and vulnerable in our society. Indeed we submit that this is fundamental to the foundational values of our Constitution. As this Court held in *Port Elizabeth Municipality v Various Occupiers*:⁹⁴

Our society as a whole is demeaned when State action intensifies, rather than mitigates, [the] marginalisation [of the poor]. The integrity of the rights-based vision of the Constitution is punctured when government action augments, rather than reduces, denial of the claims of the desperately poor to the basic elements of a decent existence.

92. It is against these standards that the adequacy of the TRAs must be assessed.

The Socio-Economic Consequences of Relocating to the Delft TRAs

93. The record establishes that, overwhelmingly, the residents of Joe Slovo live on the margins of society and are dependent on fragile economic and social networks for their survival.

94. Chief among the applicants' objections to relocating to Delft is the limited employment opportunities there coupled with prohibitive transport costs of commuting to economically active centres each day.

⁹⁴ Above n 4 at para 18.

95. Many of the applicants have calculated the financial and time costs of commuting from Delft to their current jobs each day.

96. Mandilakhe Mahlangeni:

For an impression of the cost difference take this as an example: my current monthly transport expenditure from Langa to Greenpoint is R170 a month. This figure is composed of R80-00 for the train from Langa to Cape Town and R90-00 for the taxis from Cape Town to Greenpoint. Now if I was in Delft one would have to add R220-00 (this is the monthly bus fee from Delft to Langa) to this composite figure to get a new monthly expenditure figure that would total R390-00 – more than double the previous figure. The cost difference will have a tremendous effect on my already burdened budget.⁹⁵

97. Sibusiso Mkholiswa:

Of my monthly income R70 00 is allocated to transport. This is the cost of the monthly ticket of the train service from Langa station to Wynberg station. Though the journeys are long, an average of just over an hour in each direction, it is much cheaper and simpler than transportation from Delft.

From Delft I would have to use a combination of modes – bus, taxi, train – which consequently results in increased travelling costs. Further it would take much longer. I already have to leave home at 4:30 in the morning and have to wake up much earlier in order to prepare myself. This sacrifice is not bad though, compared to the other ruinous consequences of increased transport fees.⁹⁶

98. Many of the applicants are unemployed or are dependent on casual and piece work for their survival. They point out that Joe Slovo's location facilitates job-seeking and the securing of piece work in a way that Delft would not.

99. Mandilakhe Mahlangeni:

⁹⁵ Record volume 11 p 1007.

⁹⁶ Record volume 13 p 1219.

Residence in Joe Slovo gives better chances than Delft of re-employment. It increases the chances by being proximate to business, industry, and other employment opportunities. The proximity is such that one can solicit work here without having to cough up for transport. And if the place of work is far, at least the transportation would be cheaper than from Delft.⁹⁷

100. Vuyelelo George:

The location of Joe Slovo is perfect for job seeking. There are businesses in Langa and Rylands which are within walking distance. There is Industry in Epping which is also walking distance. Not only are permanent or semi-permanent jobs possible from this area, but also once-off day jobs are obtainable. In a situation like mine, a casual job or a once-off day job can make a difference.⁹⁸

101. The residents of Joe Slovo are a well established and settled community. They point out that a relocation to Delft would destroy the community networks they have established and the security and support they provide.

102. Vuyelo George:

Joe Slovo is safe, there is illumination at night and everybody here knows each other. I have been here since 2003/2004 and my girlfriend since 1998. There is a support network between neighbours and other residents that protects us all.

The support network extends to the protection of employment as well. If and when I'm unemployed or in need of additional income, I can simply ask for piece job at a friends place, or assist a friend with a task from which I would earn part of the income, payable then or at a future date.⁹⁹

103. Mawethu Hodini:

⁹⁷ Record volume 11 p 1007.

⁹⁸ Record volume 10 p 946.

⁹⁹ Ibid.

Where we live, I know people in the community. The community is safe because we know each other. We leave for work at 6am each day; no one breaks into our house while we are at work because our neighbours are watching and know everyone.

It is fine for rich people to live in a place without a community because they can afford expensive security. We cannot. We need our community to be safe.¹⁰⁰

104. Thetiwe Macibela:

I have a strong support system here in Joe Slovo to help me raise my child. My sister also stays in Langa and I have friends here who support me and can help me if I need it.¹⁰¹

105. Patricia Mnyama:

I like living in Joe Slovo as my neighbours and friends are nearby and I feel I can ask the community for help or for when I need food and they will be able to assist.¹⁰²

106. The respondents contend that it is evident from the DAG report that it is not all “doom and gloom”¹⁰³ in Delft and that “there is by no means consistent and universal unhappiness with the TRAs.”¹⁰⁴ They point to the fact that 54% of those surveyed by DAG expressed happiness with their houses and submit that this is “indicative of the suitability of the alternative accommodation.”¹⁰⁵

107. The respondents fail, with respect, to come to grips with either the key findings of the DAG Report or its conclusions and recommendations.

¹⁰⁰ Record volume 10, p 954.

¹⁰¹ Record volume 10, p 984.

¹⁰² Record volume 11, p 1063.

¹⁰³ Second Respondent’s Heads of Argument p102, para 194.

¹⁰⁴ Second Respondent’s Heads of Argument p104, para 195.

¹⁰⁵ Second Respondent’s Heads of Argument p105, para 195.

108. The Report's key findings are the following –

108.1. 68% of the households surveyed were unhappy with the move to Delft. The main reason for their unhappiness was the transport problem.¹⁰⁶ DAG found that a further reason for unhappiness in Delft was “that people had lived in Langa for a long time and had social networks there.”¹⁰⁷

108.2. In 34% of the households surveyed, someone had either lost their job or was no longer able to find employment as a result of the move to Delft. The report graphically describes how jobs were lost due to prohibitive transport costs, repeatedly being late for work (due to the significantly increased travelling time) or a combination of both.¹⁰⁸ The Report also records that the relocation to Delft resulted in a number of people no longer being able to find informal work.¹⁰⁹

108.3. 95% of households surveyed stated that their income and expenditure had changed significantly as a result of the move to Delft. Without exception, household expenditure had increased.¹¹⁰

109. The DAG Report's conclusions and recommendations include the following:

¹⁰⁶ Record volume 8, p 778.

¹⁰⁷ Ibid.

¹⁰⁸ Record volume 8, p 780 – 781.

¹⁰⁹ Record volume 8, p 781.

¹¹⁰ Record volume 8, p 779.

For those relocated to Delft, about 15 km away by road from where they had been living in Langa, the impacts were severe. Social and economic networks were severely disrupted, and many people lost their jobs due to the poor transport links from Delft to the rest of Cape Town. For those who managed to keep their jobs, they now find themselves spending five times as much on transport as they previously did.¹¹¹

This study highlights the impact of location on people's livelihoods...the impact of relocation needs to be analysed more carefully before decisions on relocation are made, as relocation to an inappropriate location can leave people worse off (even if some of their living conditions are improved as a result of the relocation).¹¹²(emphasis added)

Large numbers of people living in relative isolation in areas such as Delft can give rise to an increase in the occurrence and variety of social problems, which in turn can create high levels of crime. This instability is already evident in greater Delft, and although government carries the cost in its expenditure on, for example, crime prevention, the social cost is borne by the households who live in Delft.¹¹³(emphasis added)

110. Finally, on security of tenure, the DAG Report concludes as follows:

TRAs force people to live in unsuitable and unsettled conditions for protracted periods. They waste resources and delay addressing people's real needs (as one respondent in this survey aptly noted 'We cannot be happy while thousands of temporary houses are built instead of brick houses). Moving to a permanent location as soon as possible, where people can have some form of long term security of tenure, is therefore always better than moving to a temporary resettlement area.¹¹⁴

111. The negative impact that relocations to far-flung and isolated locations have had on the quality of life of poor and vulnerable people are well documented. As Stuart Wilson found in a survey which informed an article entitled *Judicial*

¹¹¹ Record volume 8, p 766.

¹¹² Record volume 8, p 787.

¹¹³ Record volume 8, p 788

¹¹⁴ Record volume 8, p 790.

*Enforcement of the Right to Protection from Arbitrary Eviction:
Lessons from Mandelaville.*¹¹⁵

In the Mandelaville/Sol Plaatjie case, a long range relocation from a deep urban area, rich in micro-economic opportunity to a peri-urban area comparatively poor in such opportunity, further impoverished an already vulnerable economic group...For many in Mandelaville [the relocation from Diepkloof to Sol Plaatjie] was an economic disaster.¹¹⁶

112. The BNG itself recognises that housing constructed post 1994 has tended to be located on the urban periphery and has accordingly “lacked the qualities necessary to enable a decent quality of life.” Indeed, the BNG identified this as a primary reason for the need for fundamental change in government housing policy.

113. Having regard to all of the above we submit that the applicants’ concerns about the socio-economic impact of relocating to Delft are both extremely serious and eminently reasonable.

114. We submit, with respect, that the respondents have failed to come to grips with these concerns in any meaningful way. The second respondent’s heads of argument state that “whilst it is unavoidable that a community which is relocated suffers the inconvenience arising from the need to adjust, steps have been taken in order to assist with the integration of the community into their new environment and accordingly, to alleviate their hardship.”¹¹⁷

¹¹⁵ 2006 SAJHR 535.

¹¹⁶ Ibid at p 547. See also M. Neocosmos & K. Naidoo in *A socio-economic profile of Soshanguve and a comparison with Sunnyside inner city area*. Department of Sociology, University of Pretoria: March 2004

¹¹⁷ Second Respondent’s Heads of Argument, p 109, para 206.1.

115. The respondents concede that a relocation to Delft will deprive the applicants of convenient access to employment opportunities and social services. We submit that the respondents have accordingly, on their own version, failed to meet the statutory test for adequate housing set out in the Housing Act.

116. Furthermore, the respondents fail to appreciate that this inconvenience will not be temporary. The statement in the second respondent's heads of argument, quoted above, assumes that there is viable environment into which "integration" is possible. There is, with respect, not. Delft is far from economically active centres, has no adequate transport system, has no schools, has one clinic and has no cultural, recreational or sporting facilities. It is by all accounts a barren wasteland. The reality is that this situation will not change for the foreseeable future and the applicants will have to endure Delft's hardships for as long as they have to live in the TRAs - which on the respondents' own version is indeterminate.

117. The steps which the respondents have taken to ameliorate Delft's hardships are the provision of school buses¹¹⁸ and - stated for the first time in reply¹¹⁹ - free transport for adults from Delft to Langa. The second respondent's heads of argument state that the latter is "now laid on from 5:30 in the morning and will continue to be there until there is a greater resolution of the functioning of the community."¹²⁰

118. Again, this assumes that there will come a point at which the applicants will be able to afford the increased transport costs

¹¹⁸ Record volume 2, pp75-6.

¹¹⁹ Record volume 14, p 1259, para 18.

¹²⁰ Second Respondent's Heads of Argument, p 110, para 206.2.

from Delft. This is unrealistic. In any event, even while these measures are in place they are unlikely to be sufficient to significantly mitigate the hardship of living in Delft. They will certainly not help Sibusiso Mkholiswa who has to leave his home in Joe Slovo at 4:30 in order to get to work on time.¹²¹ Doubtless many others do too. This underlines the importance of engaging with the community to establish what their actual needs are. Significantly, the DAG Report reveals that notwithstanding the provision of free transport for adults for several months, a job had been lost in 34% of the Delft households surveyed.¹²²

119. The respondents state that while Delft is distant from the city and the work opportunities there, it is “closer to the Belville corridor.”¹²³ We note that Belville is 10.84 km away from Delft, hardly walking distance.

120. The first and third respondents’ heads of argument state that the “complaints advanced by the residents do not take into account the fact that the TRAs are temporary settlement areas, a half-way house to permanent housing in the re-developed areas.”¹²⁴ This is, with respect, disingenuous. The fact of the matter is that the overwhelming majority of planned permanent housing is to be located in Delft itself.

121. Moreover, it is evident from the record that there is no clear indication of where, when or how the applicants will be accommodated in permanent housing after their temporary stay in the TRAs. There is simply no certainty or security for the applicants in these circumstances. It is to the issue of security of tenure that we now turn.

¹²¹ Record volume 13 p 1219.

¹²² Record volume 8, p 773 and p 780.

¹²³ Record volume 14, p 1279, para 46.4.4.3.

¹²⁴ First and Third Respondents’ Heads of Argument, p 125, para 156.

Security of Tenure in the Delft TRAs

122. The applicants' sense of insecurity in relation to their future in the N2 Gateway Project is reflected in their affidavits.

123. Bongiwe Notshokovu:

We are happy in Joe Slovo. Although we do want a house, we are not ready to risk our lives and safe community because we don't know if we will ever receive a better house.¹²⁵

124. Apart from the fact that the applicants have not been told when, where or how they will be allocated permanent housing, there is, on the record, insufficient permanent housing to go around.

124.1. Approximately 8000 Joe Slovo households need to be catered for (3 432 are currently accommodated in the Delft TRAs and approximately 4 500 are still living in Joe Slovo).

124.2. The housing potential of the two Delft Projects is 9 500.

124.3. Of these 9 500 houses:

124.3.1. 30% or 2 850 must be allocated to people who currently live in the existing suburbs of Delft.

124.3.2. 1000 must be allocated to people from the Nyanga Upgrade Project.

¹²⁵ Record volume 11, p 1101.

124.3.3. 840 must be allocated to people from Freedom Farm and Malawi.¹²⁶

124.4. This leaves 4 802 for the residents of informal settlements in the N2 Gateway project of which Joe Slovo is but one.

124.5. This is plainly insufficient to meet the needs of the 8000 Joe Slovo households.

124.6. Even assuming that all remaining 4 802 sites in Delft are allocated to Joe Slovo households and a further 1000 Joe Slovo households are accommodated in the new developments in Joe Slovo itself, which seems unlikely, there will still be a shortfall of over 2000 permanent houses.

125. The respondents have simply failed to explain how and where the 8000 Joe Slovo households will be permanently housed.

126. Moreover, those applicants who do not qualify for housing subsidies will not receive permanent housing.¹²⁷ These include single persons and persons who are not South African citizens or permanent residents. The respondents provide no indication of where they are to live when their time in the TRAs is up.

127. It is therefore not correct to state, as the respondents do, that what is not contemplated is that the applicants will be “vulnerably housed” or rendered homeless at any stage.¹²⁸ On

¹²⁶ Record volume 7, p 651.

¹²⁷ As stated in the Second Respondent’s Heads of Argument [applicants] will be moved from the TRAs into houses in accordance with their preference on housing waiting lists and housing subsidy approvals p 109, para 202.

¹²⁸ First and Third Respondents’ Heads of Argument, p 24, para 39.

the contrary it is clear from the record that what is sought is an order evicting the applicants from housing in which they are reasonably secure to a temporary stay in a 'halfway house' and an entirely insecure future. As the applicants state "the only virtual certainty is that a very large number of [the applicants] will not be provided with permanent accommodation."¹²⁹

128. In *Baartman and Others v Port Elizabeth Municipality*¹³⁰ the Supreme Court of Appeal refused to grant an eviction order in circumstances in which the appellants could not be assured of security of tenure at an alternative location. The Court stated that:

The appellants do not object to being moved from the property but merely wish to settle where they will be assured of security of tenure, something which the respondent seems reluctant to commit itself to. The Court *a quo* found that Walmer Township is alternative land to which the appellants can move. But it is certainly not in the public interest, in my view, to evict the appellants from the property only for them to be evicted again from Walmer Township on grounds of being unlawful occupiers...in the absence of an assurance that the appellants will have some measure of security of tenure at Walmer Township I consider that the Court a quo should not have granted the order sought.¹³¹ (emphasis added)

129. We submit that it is clear from the above that relocating the applicants to the Delft TRAs will leave them worse off in socio-economic terms and will offer them no real security of tenure. For these reasons, we submit that the Delft TRAs cannot be regarded as adequate housing within the meaning of section 26 of the Constitution. We submit, for the same reasons, that relocating the applicants to Delft TRAs would not constitute a reasonable measure within the meaning of section 26 of the

¹²⁹ Heads of Argument for the Task Team, p 74, para 187.

¹³⁰ 2004 (1) SA 560 (SCA).

¹³¹ *Ibid* at para 19.

Constitution.¹³² Nor would it constitute the progressive realisation of the right of access to adequate housing.

Meaningful Engagement in this Case

The Source of the Duty to Engage

130. The duty on the state to engage in consultation with persons threatened with eviction was established by this Court in the *Grootboom*¹³³ and *PE Municipality*¹³⁴ judgments.

131. This Court recently elaborated on the source of this duty in *Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others*.¹³⁵ This Court based the duty principally on section 26 and to a lesser extent on the preamble, the right to dignity,¹³⁶ the right to life¹³⁷ and the objects of local government listed in section 152(1) of the Constitution. This Court stated that “in the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of [the above] constitutional obligations taken together.”¹³⁸

132. We submit that the above principle is clearly of application in the present case.

¹³² *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC).

¹³³ Above n 3 at para 87.

¹³⁴ Above n 4 at paras 39 and 42.

¹³⁵ [2008] ZACC 1, 2008 (5) BCLR 475 (CC).

¹³⁶ Section 10 of the Constitution.

¹³⁷ Section 11 of the Constitution.

¹³⁸ At para 16.

133. There is however a further dimension to this case. The respondents' decision to evict the applicants and relocate them to Delft was an administrative decision taken in relation to the applicants' housing rights. So too were the decisions to upgrade the Joe Slovo Informal Settlement by way of 'roll-over upgrading'; to select Delft as the relocation site and to select the type of formal housing that was to replace the current informal housing in Joe Slovo. These decisions plainly amounted to the exercise of public power which affected the applicants' socio-economic rights and therefore constituted administrative action in terms of section 33 of the Constitution and PAJA. The first and third respondents concede in their heads of argument that the applicants were entitled to have decisions which affected their socio-economic rights taken in a manner which was consistent with their right to just administrative action.¹³⁹ In order to ensure that their administrative action was procedurally fair the respondents were required to comply with the requirements of PAJA.

134. The respondents' duty to consult in this case accordingly arises out of a number of interrelated fundamental rights – primarily section 26 and section 33. We submit that, in cases such as the present, the duty to meaningfully engage in terms of section 26, is fleshed out, in the context of administrative action, by the duty to observe procedural fairness as entrenched in section 33 of the Constitution and given effect to in sections 3 and 4 of PAJA. Put differently, the duty to meaningfully engage in the context of section 26 of the Constitution is not one parallel to the general administrative justice duties flowing from section 33.

¹³⁹ First and Third Respondent's Heads p 18, para 26.2.

135. Such recognition prevents the development of parallel tracks of procedural duties and the fragmentation of procedural duties across different contexts. We submit that this is supported by this Court's implicit endorsement in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*¹⁴⁰ of the need for a coherent and integrated approach to the control of public power. Such recognition also assists administrators by confirming that the particular steps to be taken to achieve "meaningful engagement" when making specific decisions are those outlined in PAJA.

136. As the primary source of administrative law under the Constitution, PAJA demands close attention in all exercises of administrative power. This holds true both for administrators exercising such power and for courts assessing the (constitutional) validity of such power. We submit that it is incumbent on administrators to structure and courts to assess exercises of administrative power primarily and directly in terms of the provisions of PAJA.

137. There is an important symbiosis between section 26 and section 33 in a case such as the present. They stand in a reciprocal relationship to each other, each gaining from the other. The specific constitutional protections provided in the context of housing by section 26 of the Constitution obtain an operational dimension from section 33 which sets out the manner in which public authorities should go about implementing public programmes. At the same time, the administrative justice guarantees in section 33 draw substantive content in the context of housing from section 26. Thus while section 33 (as fleshed out by PAJA) dictates the procedure to be followed by organs of

¹⁴⁰ 2000 (2) SA 674 (CC).

state when engaging with communities affected by a housing development programme, section 26 dictates the issues that are to form the subject matter of the engagement. This Court implicitly recognised this symbiotic relationship between section 26 and section 33 in *Occupiers of 51 Olivia Road* when it linked the substantive entitlement to housing to a procedural duty to engage.

The Nature of the Duty to Engage and the Respondents' Failure to do so

138. The respondents, with respect, appear to misunderstand the nature of the duty to engage that was required in this case. They contend that consultation does not mean that their policy decisions required the applicants' "approval"¹⁴¹ and that "public involvement" is in any event "an inexact concept."¹⁴² For the latter proposition they rely on the decision in *King v Attorneys Fidelity Fund Board of Control*.¹⁴³

139. Plainly the respondents do not require the applicants' "approval" in order to take administrative action. Furthermore, the respondents' reliance on the concept of "public involvement" in *King* is wholly inapposite. *King* concerned a challenge to the validity of a statute based on section 59 of the Constitution which provides *inter alia* that "the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees." That case accordingly dealt with public involvement in the process of law-making and gave effect to the constitutionally sanctioned right of Parliament to regulate

¹⁴¹ First and Third Respondent's Heads of Argument, p 108, para 139.

¹⁴² *Ibid*, p 110, para 141.

¹⁴³ 2006 (1) SA 474 (SCA).

its own affairs in determining the manner in which such public involvement was to take place.

140. In between the poles of “approval” and “the facilitation of public involvement” lies the concept of meaningful engagement which – in our submission - is what was required in this case. Its nature arises out of the provisions of section 26 and section 33 of the Constitution from which it derives.

141. This Court made some important statements on the nature of meaningful engagement in *Occupiers of 51 Olivia Road*:

Engagement is a two way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.¹⁴⁴

It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.¹⁴⁵

Indeed the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement.¹⁴⁶

142. The administrative action taken in this case affected “a section of the public” and the respondents were therefore required to comply with the consultative procedures stipulated in section 4 of PAJA. Section 4 of PAJA itself gives important guidance on the nature of the duty to engage.

143. The primary choices available to an administrator in terms of section 4 of PAJA are the holding of a public inquiry and the following of a notice and comment procedure.¹⁴⁷

¹⁴⁴ Above n 135 at para 14.

¹⁴⁵ Ibid at para 15.

¹⁴⁶ Ibid at para 19.

¹⁴⁷ Sections 4(1)(a), (b), 4(2) and 4(3) of PAJA.

144. After the holding of a public inquiry, and a proper consideration of the input received,¹⁴⁸ section 4(2)(b)(iii) of PAJA requires the administrator to “compile a written report on the inquiry and give reasons for any administrative action taken or recommended.”

145. If an administrator opts to follow a notice and comment procedure, section 4(3) of PAJA provides that the administrator must:

- (a) Take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
- (b) Consider any comments received;
- (c) Decide whether or not to take the administrative action, with or without changes; and
- (d) Comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.¹⁴⁹

146. In terms of section 4 of PAJA, an administrator may hold a public inquiry and follow a notice and comment procedure.¹⁵⁰ An administrator may also follow another appropriate procedure which gives effect to the requirements of section 3. Section 3(2)(b) of PAJA provides that an administrator must give a person affected by administrative action:

- (i) adequate notice of the nature and purpose of the proposed administrative action;

¹⁴⁸ As prescribed in detail in chapter 1 of the Regulations on Fair Administrative Procedures, 2002.

¹⁴⁹ These requirements are worked out in further detail in chapter 2 of the Regulations on Fair Administrative Procedures, 2002.

¹⁵⁰ Section 4(1)(c) of PAJA.

- (ii) a reasonable opportunity to make representations;
and
- (iii) a clear statement of the administrative action.

147. It is clear from the above provisions of PAJA read together with this Courts statements' in *Occupiers of 51 Olivia Road* that the respondents were required to:

147.1. inform the applicants of the administrative action they proposed taking prior to taking it;

147.2. invite the applicants to make comments and representations on the proposed administrative action;

147.3. consider such comments and representations with an open mind; and

147.4. inform the applicants of the administrative action taken and the reasons therefor.

148. We submit that the requirements of the BNG and Chapter 13 required the respondents to go further and attempt to seek consensus with the applicants on the critical decisions in relation to the N2 Gateway Project as they applied to the applicants' particular situation. At the very least however the respondents were required to properly comply with the steps set out above.

149. The respondents give the following as examples of consultation that took place with the applicants:

[The applicants] were advised that they would receive houses in Joe Slovo in terms of the N2 Gateway Project.¹⁵¹

There was a 'vigorous' campaign by Councillor Gophe and members of SANCO to get the Joe Slovo residents to agree to move to Delft.¹⁵²

After Thubelisha became involved in the N2 Gateway Project in February 2006 it also actively encouraged residents to move.¹⁵³

Mayor Mfeketo often visited the fire victims and made promises as to how government would assist them. This was followed by the announcement of the Gateway Project.¹⁵⁴

150. What the above examples indicate is that the respondents met with the applicants for the purpose of announcing decisions which they had already taken. This is reflected throughout the record. The record also reflects that the respondents met with the applicants in order to attempt to persuade them to accept their decisions which were stated to be in the applicants' best interests. This approach, we submit, is the antithesis of meaningful engagement.

151. The fact that Joe Slovo is a large community comprising approximately 20 000 ought not to have deterred the respondents from engaging meaningfully with its residents. Indeed, as this Court stated in *Occupiers of 51 Olivia Road* "the larger the number of people potentially to be affected by an eviction, the greater the need for structured, consistent and careful engagement."¹⁵⁵ PAJA recognises the difference between administrative action impacting on single individuals and administrative action impacting on large groups as far as

¹⁵¹ First and Third Respondents' Heads of Argument, p112, para 143.1

¹⁵² Ibid, p 112, para 143.3

¹⁵³ First and Third Respondents' Heads of Argument, p 112, para 143.3.

¹⁵⁴ Ibid, p 113, para 143.8

¹⁵⁵ Above n 135 at para 19.

procedural fairness is concerned by prescribing differentiated procedural requirements in sections 3 and 4 respectively. The mechanisms created in section 4 of PAJA and the Regulations on Fair Administrative Procedures, 2002, made under PAJA, are clearly focused on facilitating meaningful engagement with large groups of people affected by public decisions.

152. Nor ought the respondents to have been deterred by the divisions within the community – of which much is made in their heads of argument. The reality is that there will be divisions in large communities. We note that international law requires particular care to be taken to ensure that consultation takes place effectively in relation to the full spectrum of affected persons, including vulnerable and marginalised groups, and that special measures may have to be taken in this regard.

153. We submit that in this case the respondents were required to engage with the applicants in terms of the procedures set out in section 4 of PAJA. Such engagement ought to have been conducted not only in relation to the applicants' proposed eviction but also in relation to the critical decisions in respect of the N2 Gateway Project as they applied to the applicants' particular situation. These decisions included:

153.1. the nature of the process by which the Joe Slovo Informal Settlement would be upgraded, in particular whether this would be done by way of roll-over or *in situ* upgrading;

153.2. the location and character of the TRAs;

153.3. the nature of the formal housing to replace the current informal housing; and

153.4. the procedure and entitlements in respect of accessing the new formal housing.

154. The engagement process ought to have covered the socio-economic and security of tenure impacts of a relocation to the Delft TRAs since these are - in our submission - crucial components of the right of access to adequate housing.

155. Such an engagement process would have accorded with international law and indeed the principles on which the BNG and Chapter 13 are based.

The Importance of the Duty to Engage and The Consequences of the Respondents' Failure to do so

156. The realisation of the socio-economic rights in the Constitution is largely to be effected through government programmes involving the exercise of administrative power. In fact, it may be argued that all action, with the exclusion of purely legislative, executive and judicial action, aimed at the realisation of the socio-economic rights entrenched in the Constitution, amounts to administrative action in terms of section 33 of the Constitution and PAJA. As such, the administrative justice rights, and in particular procedural fairness, have an important function to fulfil in relation to the realisation of socio-economic rights.

Accurate and Rational Decision-Making

157. The first important function of procedural fairness in this context is in ensuring “accurate, rational and legitimate decision-making that can further the public interest.”¹⁵⁶ Procedural

¹⁵⁶ See *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E) at para 76.

fairness requirements are critical in bringing all the relevant considerations to the attention of the administrator before decisions are taken.¹⁵⁷ This facilitates a balanced approach which is likely to lead to greater rationality in administrative programmes. This was effectively stated by Ngcobo J in *Masetlha v President of the Republic of South Africa and Another*,¹⁵⁸ which statement was endorsed by the majority of this Court in *Walele v City of Cape Town and Others*¹⁵⁹ with reference to section 33 of the Constitution:

“The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* (the *audi* principle). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision maker to act fairly. It provides an insurance against arbitrariness. Indeed, consultation prior to taking a decision ensures that the decision-maker has all the facts prior to making a decision. This is essential to rationality, the sworn enemy of arbitrariness.” (emphasis added)

158. The Supreme Court of Appeal held in *Director: Mineral Development, Gauteng Region, & Another v Save the Vaal Environment & Others*¹⁶⁰ that:

“... a mere preliminary decision can have serious consequences in particular cases, *inter alia* where it lays ‘... the necessary foundation for a possible decision ...’ which may have grave results. In such a case the *audi* rule applies to the consideration of the preliminary decision.

¹⁵⁷ See *Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC) at para 24.

¹⁵⁸ [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 187.

¹⁵⁹ [2008] ZACC 11 at para 27.

¹⁶⁰ 1999 (2) SA 709 (SCA) at para 17.

159. The present matter effectively illustrates the importance of this function of procedural fairness. As we have seen above, to the extent that the respondents held meetings with the applicants, it was merely to inform them of the housing scheme that had already been decided on for their area. It did not afford the applicants any meaningful opportunity to influence basic decisions about the nature of the scheme as it applied to their particular situation. The applicants were presented with a *fait accompli* with regard to all the critical decisions in relation to the housing to be developed for them, including where it was to be located, what its nature would be, and how the applicants would be permitted to access it.

160. In the absence of any meaningful consultation prior to taking the above decisions, there was no way for the respondents to accurately consider the impact of their decisions to build specific types of housing in place of the Joe Slovo informal housing, or to relocate the applicants, either on the applicants' lives or more generally. The tension that has resulted from the relocation of some of the Joe Slovo residents to the TRAs in Delft between these new residents and existing Delft residents underscores this point.¹⁶¹

161. The point is also underscored in the DAG Report's conclusions:

The lack of involvement by residents in decision-making resulted in inappropriate choices about the location of the settlement and the types of housing to be provided. This has created immense dissatisfaction.

This study highlights the importance of people being involved in decisions that affect their everyday lives. A body representative of households displaced by the Joe Slovo fire should have been elected to enable the participation of affected households in decision-making

¹⁶¹ See record volume 8 p 773.

about relocation and the proposed re-development of Joe Slovo. This would have resulted in greater consideration being given to the needs of households and would make it possible to consider how to mitigate the negative impact of any decisions taken (such as unavoidable relocation).¹⁶² (emphasis added)

162. We submit that the above illustrates the importance of close attention to procedurally fair administrative action as a constitutional guarantee in order to fashion not only an integrated and coherent approach to administrative justice (e.g. in the way that procedural fairness facilitates reasonable decision-making), but more generally an integrated and coherent approach to the body of fundamental rights entrenched in the Constitution. This view highlights the interconnectedness of the entrenched rights, in this case particularly administrative justice and socio-economic rights such as housing. Compliance with procedural fairness in terms of section 33(1) of the Constitution hence facilitates the reasonable realisation of other substantive rights. In this context, we submit that procedural fairness must be a central element of both *a priori* design, when administrators set up and implement state programmes aimed at the realisation of substantive rights, and of *ex post facto* scrutiny, when courts constitutionally assess such state action.

163. The following observations of the Supreme Court of Appeal in relation to the interdependence between the right of access to social assistance¹⁶³ and administrative justice rights is equally applicable in the context of housing rights in section 26 of the Constitution:

The realisation of substantive rights is usually dependant upon an administrative process...Where, as in this case, the realisation of the substantive right to social assistance is dependant upon lawful and procedurally fair

¹⁶² Record volume 8, p 26 – 27.

¹⁶³ Section 27.

administrative action, and the diligent and prompt performance by the state of its constitutional obligations, the failure to meet those process obligations denies to the beneficiary his or her substantive right to social assistance. What has been denied to Kate is not merely the enjoyment of a process in the abstract, but through denial of that process she has been denied her right to social assistance, which is dependant for its realisation upon an effective process.¹⁶⁴

Participatory Democracy

164. The second important function of procedural fairness relates to the notion of participatory democracy as an essential characteristic of the Constitution's vision of South African society. In *Doctors for Life International v The Speakers of the National Assembly and Others*, this Court said:

“Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated.”¹⁶⁵

165. In his judgment, Sachs J said:

Public involvement will ... be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections.¹⁶⁶

166. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*,¹⁶⁷ Sachs J highlighted the important

¹⁶⁴ *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) at para 22.

¹⁶⁵ 2006 (6) SA 416 (CC) at para 111.

¹⁶⁶ *Ibid.* at para 234.

¹⁶⁷ 2006 (2) SA 311 (CC).

link between a person's dignity and her participation in public decisions that affect her:

“The right to speak and to be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity. Indeed, in a society like ours, where the majority were for centuries denied the right to influence those who ruled over them, the ‘to be present’ when laws are being made has deep significance.”¹⁶⁸

167. Procedural fairness as an element of administrative justice is a key driver of participatory democracy in South Africa. It guarantees individuals an active role in that aspect of state functioning that impacts them most directly and most often, viz. state administration.

168. In this role, procedural fairness reinforces the dignity of beneficiaries of state socio-economic programmes. Comprehensive socio-economic assistance from the state creates the risk of perpetuating stereotypes of those receiving state benefits as passive dependants on state largesse.

169. The problem is not so much dependence on the provision of the actual assistance (e.g. food, housing or social assistance), but the perception it may create of the recipients as dependent, passive, weak, subjugated ‘external objects of judgment’.¹⁶⁹ It is the latter perception which principally undermines such beneficiaries’ dignity. By affording them the opportunity to actively participate in the provision of state assistance, procedural fairness can achieve much in giving such beneficiaries a sense of control, participation and, accordingly,

¹⁶⁸ 2006 (2) SA 311 (CC) at para 627.

¹⁶⁹ Nedelsky “Reconceiving Autonomy: Sources, Thoughts and Possibilities”(1989) *Yale Journal of Law and Feminism* 7 at 27.

significance and worth. Nedelsky¹⁷⁰ puts this function of procedural fairness eloquently:

The opportunity to be heard by those deciding one's fate, to participate in the decision at least to the point of telling one's side of the story, presumably means not only that the administrators will have a better basis for determining what the law provides in a given case, but that the recipients will experience their relations to the agency in a different way. The right to a hearing declares their views to be significant, their contribution to be relevant. In principle, a hearing designates recipients as part of the process of collective decision-making rather than as passive, external objects of judgment. Inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power. A hearing could of course be a sham, or be perceived to be so even if it were not. But the possibility of failure or perversion of the process leaves its potential contribution to autonomy unchanged.

170. We submit that even where a hearing allegedly cannot achieve much by way of substantive outcome, because of objective restrictions on available options such as an objective impossibility of developing a particular area while people are in residence or the limited availability of relocation options, this important function of procedural fairness remains unaffected.

171. Regrettably, the DAG Report reveals that the respondents' failure to engage meaningfully with affected communities has indeed resulted in a sense of passivity and dependency:

[Many residents] did not know what was going on. As one resident said 'we just came here because we are instructed to do so.' The lack of involvement by residents in decision-making.... has created immense dissatisfaction and a sense of dependency in which affected households are just waiting for their 'brick houses' to be provided (even though they have no idea when or where they will be provided).¹⁷¹

¹⁷⁰ Ibid.

¹⁷¹ Record volume 8, p 788.

Mediation in terms of PIE

172. There is a dispute between the parties as to whether or not the PIE Act applies. While we do not enter that debate, we submit that in the event that it does apply, the right to consultation and meaningful engagement is also protected through the provision for mediation in section 7 of the PIE Act.

173. In the *PE Municipality* judgment this Court stated that:

It would ordinarily not be just and equitable to order eviction if proper discussions, and where appropriate mediation, have not been attempted.¹⁷²

174. In their heads of argument, the first and third respondents summarise the reasons given by this Court for the importance it placed on engaging in a process of mediation before resorting to eviction.¹⁷³ Conspicuously absent from that summary is a reference to the value of human dignity. In the *PE Municipality* judgment this Court stated that “mediation is a dignified way of achieving sustainable reconciliations of the different interests involved”¹⁷⁴ and that mediation “promotes respect for human dignity and underlines the fact that we all live in a shared society.”¹⁷⁵

175. We submit that like procedural fairness, mediation can do much to reconcile individual claims such as dignity, freedom and autonomy and collective responsibility, such as state responsibility to realise socio-economic rights. Moreover, mediation in this case would have provided an opportunity for the respondents to get to grips, in a meaningful way, with the

¹⁷² Above n 4 at para 43.

¹⁷³ First and Third Respondent’s Heads of Argument, p 132 – 133, para 164.

¹⁷⁴ Above n 4 at para 39.

¹⁷⁵ Ibid at para 42.

legitimate concerns raised by the applicants. This would likely have facilitated the design and implementation of a housing project that responded rationally to the applicants' concerns, thereby giving them a sense of ownership and pride in the Project.

176. It is clear from what has been set out above that the respondents failed to engage in any meaningful consultation with the applicants at any stage. We submit that the respondents' contention that mediation ought not now to be ordered because "too much water has flowed under the bridge"¹⁷⁶ cannot be accepted in these circumstances.

177. In the event that the PIE Act is found to be applicable in these proceedings, then we submit that the respondents' failure to attempt mediation before resorting to an application for the applicants' eviction ought to weigh heavily against them.

Conclusion

178. This Court held in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*¹⁷⁷ that:

[w]here State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and *implementing* such policy, the State has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. (emphasis added)

179. It is submitted that in this case the respondents have, in implementing the N2 Gateway Project with reference to the applicants, failed to act in accordance with their constitutional

¹⁷⁶ First and Third Respondent's Heads of Argument, p 133, para 165.

¹⁷⁷ 2002 (5) SA 721 (CC) at para 99.

obligations in terms of section 26 and section 33 of the Constitution.

180. In holding that, as a pilot project, the N2 Gateway Project would “not have all the attributes of perfection,” would have “to be adjusted as the circumstances permit and refined as it goes along”,¹⁷⁸ and that “mistakes [were] expected” from which the persons responsible for the project’s implementation would learn,¹⁷⁹ Hlophe J failed to have regard to the very real impact of the manner in which the project is being implemented on the rights of the applicants, an impact that will likely be irreversible by the time the suggested ‘adjustments’ take place. The fact that the pilot project is intended to be rolled-out nationally in due course¹⁸⁰ only heightens the need to ensure that the pilot is implemented with full appreciation and respect for the constitutional rights of the intended beneficiaries.

181. We submit that, in this case, the respondents have impermissibly narrowed the range of interests to be protected by section 26 to those concerned with the physical attributes of the TRAs to be provided – in other words bricks and mortar. Concomitantly, the respondents have failed to pay proper regard to the non-tangible aspects of the right of access to adequate housing, in this case, convenient access to economic opportunities and social services and security of tenure. The effect of this failure is that far from improving the lives of the applicants - the fundamental purpose of section 26 - the proposed relocation to the Delft TRAs will leave the applicants worse off.

¹⁷⁸ High Court Judgment, Record volume 17 p 1683 at para 44.

¹⁷⁹ Record volume 17 p 1704 at para 81.

¹⁸⁰ Sigcawu Founding affidavit at para 21.2, Record volume 2 p 64.

182. We submit further that the respondents have failed to give the applicants any say on decisions which impact fundamentally on their constitutional rights. This has precluded the respondents from making accurate and rational decisions in relation to the N2 Gateway Project and has engendered a sense of passivity and dependency in the intended beneficiaries of the project. Fundamentally, it has meant that the respondents have failed to treat the applicants as human beings.

183. The *amici* submit that under the circumstances and in light of the above the eviction order granted in the Court *a quo* cannot stand and that the appeal ought accordingly to succeed.

DATED at Johannesburg this the 4th day of August 2008.

Heidi Barnes

Nokukhanya J. Jele

Counsel for the *Amici Curiae*

Sandton Chambers

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