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HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

REFERENCE: AL Housing (2000-9)
SWZ 1/2013

29 July 2013

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context pursuant to Human Rights Council resolution 15/8.

In this connection, I would like to bring to your Excellency's Government's attention information I have received concerning a recent decision.

According to the information received:

A recent decision by the Supreme Court of Swaziland in the case of Umbane Limited v Sofi Dlamini and Three Others [2013] SZSC 25, dated 31 May 2013, ordered families living on the land to vacate it within twenty one days or face eviction and demolition of their houses. The court offered no alternative accommodation or compensation for the affected community. Allegedly the decision would affect 150 people living in Malkerns who have occupied the land for as long as fifty six years, since 1957, and, as they occupied this land, based their claim in the common law notion of acquisitive prescription. The decision overruled an earlier ruling by the High Court which granted the residents valid tenure to the land they occupied in an uninterrupted manner for decades.

According to the decision, Umbane Ltd. was the registered owner of the land since 1999, having purchased it from Usuthu Pulp Company Ltd. The residents claimed that the previous owner (Usuthu Pulp) had allowed them to inhabit in the land for decades and that they had acquired the land under the common law notion of acquisitive prescription, which was recognized by the High Court in its ruling. The Supreme Court found that the respondents failed to prove acquisitive prescription was applicable, as they failed to rebut the evidence of the appellant that they and their predecessors are in occupation of the property with the

permission of its previous owner Usuthu Pulp, but not with established acquisition by prescription.

According to the information received, the Supreme Court disregarded the evidence presented by the community which referred to its extended period of residence in these lands. Accordingly, the Court found no application *in casu* of section 19(2) of the Constitution which states that a “person shall not be compulsorily deprived of property or any interest in or right over the property of any description” as it envisages a situation where the state or an organ of it expropriates land and the compensation anticipated by Section 19(2)(b)(1) of the Constitution could only be validly granted if specifically claimed. The Court ruled that this had not been specifically claimed. The Court also found that the Farm Dwellers Act was liable to be set aside as the respondents did not plead any rights under the Act.

According to the information, the Court did not take into account the rights recognized in the Constitution of the Kingdom of Swaziland which recognizes in article 211(3) that "a person shall not be deprived of land without due process of law and where a person is deprived, that person shall be entitled to prompt and adequate compensation for any improvement on that land or loss consequent upon that deprivation unless otherwise provided by law", nor ruling on any compensation of alternative accommodations either.

While I do not wish to prejudge the accuracy of these allegations, I would like to remind your Excellency's Government of its obligations under various international human rights instruments, in particular the International Covenant on Economic, Social and the International Covenant on Civil and Political Rights, both of which have been ratified by the Kingdom of Swaziland.

In relation to the right to adequate housing, Article 11.1 of the International Covenant on Economic, Social and Cultural Rights states that “the States Parties to present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including housing, and to the continuous improvement of living conditions”. This article must be read in conjunction with Article 2.2 of the Covenant which provides for the exercise of any right under the Covenant without discrimination of any kind. The Committee on Economic, Social and Cultural Rights in its General Comment No. 4 has stressed that the right to adequate housing should not be interpreted in a narrow or restrictive sense such as merely having a roof over one's head; rather, it should be seen as the right to live somewhere in security, peace and dignity. With “due priority to those social groups living in unfavorable conditions,” the right to housing includes guaranteeing: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) location; and (g) cultural adequacy. The Committee also added that “the right to housing should be ensured to all persons irrespective of income or access to economic resources”.

According to the General Comment No. 7 of the International Covenant on Economic, Social and Cultural Rights:

“15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (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; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions should not take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

“16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. 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.”

Furthermore, in accordance with article 2(3) of the International Covenant on Civil and Political Rights, State parties are required to ensure an “effective remedy” for persons whose rights have been violated and the obligation upon the competent authorities is to “enforce such remedies when granted”.

Also relevant to the situation of this community are the regional instruments in relation to the right to adequate housing, as the Kingdom of Swaziland is also party to the African Charter on Human and Peoples' Rights. In this context, the African Commission on Human and Peoples' Rights adopted resolution 231 on the right to adequate housing and protection from forced evictions, which urged all State Parties to the African Charter to take appropriate steps to ensure respect, protection and realization of the right to adequate housing by: (i) putting an end to all forms of forced evictions, in particular evictions carried out for development purposes; (ii) ensuring that evictions are only carried out as a last resort after all alternatives to eviction have been provided and that all evictions comply with international and regional standards; (iii) adopting legislative and other measures to ensure that legal procedures are complied with prior to any eviction and making available remedies that are likely to result in the right to reparation either in the form of *restitutio in integrum* or monetary compensation; (iv) taking concrete measures to confer security of tenure to all people lacking such protection, with prior and informed consent of the affected people; and (v) ensuring that any alternative housing

provided to people complies with international and regional standards on the right to adequate housing.

As it is my responsibility, according to the mandate entrusted to me by the Human Rights Council, I wish to clarify all allegations brought to my attention. I would therefore greatly appreciate detailed information from your Government concerning the above situation and the measures taken by the competent authorities. I would in particular appreciate to receive information on the following points:

1. Are the facts alleged in the above summary of the situation accurate?
2. What other alternatives to eviction were considered and analyzed before the decision was taken by the Supreme Court? What were the considerations in relation to the obligation to provide protection for the individuals, as well as alternative accommodation and adequate compensation?
3. What measures were foreseen and/or already put in place in terms of relocation? If locations have been designated for relocation, please provide details on the exact location, including details on the area and quality of land, access to public services, including water and sanitation, and livelihood sources
4. What is the current situation of the community? Has the decision to evict the community already been implemented, and if so, could you provide details of how it was carried out, when and in what way. Please provide details of the actions by the government (executive and judicial branches) in general as well as specifically in relation to persons in situation of vulnerability, such as children, older persons and women?. What measures were foreseen to ensure that the evicted persons will not become homeless?
5. Were the alleged victims informed of their right to seek compensation, adequate alternative accommodation, and the required administrative procedures? Did the government take measures to provide legal aid for individuals and communities to protect and exercise their human rights?
6. Please give details of way in which compensation will be provided, if any, for all concerned individuals, with a due assessment of the imminent loss of their housing, land and livelihood. Please give information about the administrative procedures people will need to follow in order to access compensation and about time frames.

I undertake to ensure that your Government's response to each of these questions is accurately reflected in the report I will submit to the Human Rights Council for its consideration.

While waiting for your response, within 60 days, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of

the above mentioned persons are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency's Government adopt effective measures to prevent the recurrence of these acts, including in the future consideration of similar situation by the judicial system.

Please accept, Excellency, the assurances of my highest consideration.

Raquel Rolnik

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context