
REPORT ON AN INVESTIGATION OF ALLEGED UNFAIR CONDUCT BY THE CITY OF CAPE TOWN IN CONNECTION WITH THE TRANSFER OF A MUNICIPAL HOUSING TENANCY
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Executive Summary

(i) The Public Protector conducted an investigation into the correctness and fairness of a decision of the City of Cape Town (the Municipality) in regard to the transfer of tenancy of a council owned dwelling.

(ii) The Public Protector found that:

(a) The decision of the Municipality to transfer the tenancy to a sister of the Complainant was procedurally unfair in that it did not comply with the provisions of the Policy on Tenancy Matters as it had failed to:

(aa) determine which candidate had the least interrupted stay in the dwelling;

(bb) verify the conflicting factual versions of the candidates in this regard; and/or

(cc) obtain independent evidence from, for instance, the neighbours in order to determine who had the least interrupted stay.

(b) In taking this decision, the Municipality also failed to comply with the Promotion of Administrative Justice Act, 2002 (PAJA) and did not act in a procedurally fair manner.

(c) The Housing Directorate’s decision was accordingly unfair and resulted in prejudice to the Complainant.

(ii) The remedial action to be taken:

(a) The Housing Directorate should finalise the review of its decision regarding the awarding of the tenancy as a matter of urgency, in order to
ensure that the decision complies with the policy. Such review should be lawful, reasonable and fair towards all the affected parties.

(b) The Housing Directorate should notify the Complainant and the other affected parties, in writing, of such review and of the outcome thereof.
REPORT ON AN INVESTIGATION OF ALLEGED UNFAIR CONDUCT BY THE CITY OF CAPE TOWN IN CONNECTION WITH THE TRANSFER OF A MUNICIPAL HOUSING TENANCY

1. INTRODUCTION

1.1 This report is submitted to the Complainant, the Executive Mayor of the City of Cape Town, the City Manager, and the Manager: Existing Housing Settlements of the Municipality, in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

1.2 The report pertains to an investigation undertaken by the Public Protector into the correctness and fairness of a decision of the City of Cape Town (the Municipality) in regard to the transfer a council owned dwelling.

2. THE COMPLAINT

2.1 On 18 September 2008 Mr S Ariefdien (the Complainant), requested that the Public Protector investigate the correctness and fairness of the decision of the Municipality to transfer the council owned dwelling situated at 5 Petrusburg Court, Adriaanse, to his sister, Ms Zaida Diedericks. The Complainant, amongst other things, alleged that:

2.1.1 The lawful tenant of the council dwelling was his mother, the late Fatima Ariefdien who died on 11 August 2003, more than six years ago;

2.1.2 Before his mother’s death, he had lived with her in the dwelling for more than 20 years, and he continued to live there after her death; and

2.1.3 Shortly after his mother’s death his two divorced sisters (Zaida Diedericks and Soraya Precense), Ms Diedericks’ adult son (19) and their sister in law, Naomi Ariefdien, and her three minor children moved into the house with him.
2.2 He approached the Municipality and requested that the tenancy be transferred to him because he is able to pay the rent from his disability grant, while his sisters are unemployed and do not contribute to paying for food, water and electricity, and in addition, there is constant conflict in the house with so many people living there.

2.3 The Municipality decided that he does not qualify in regard to the transfer of the tenancy and decided to allocate and transfer the dwelling to his sister, Ms Diedericks.

2.4 The Complainant lodged a complaint with the Office of the City Ombudsman (the City Ombudsman), and the latter institution referred the complaint to the Municipality's Department of Housing (Existing Housing), which stood by its decision to allocate the dwelling to Ms Diedericks. The Ombudsman did not pursue the matter further.

2.5 Thereafter the Complainant lodged a complaint with the Public Protector.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE MATTER**

3.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution and its additional operational requirements are governed by the Public Protector Act. It was established to strengthen constitutional democracy.

3.2 In terms of Section 182(1) of the Constitution the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. Following an investigation, the Public Protector can report on that conduct and take appropriate remedial action.
3.3 The complaint accordingly falls within the mandate of the Public Protector.

4. **THE INVESTIGATION**

The investigation was conducted in terms of section 6 and 7 of the Public Protector Act and comprised the following:

4.1 **Written correspondence**

4.1 Written correspondence was exchanged between the Public Protector, the City Ombudsman, the Municipality’s Head: Rental Stock and the Complainant, which revealed the following:

4.1.1 The Municipality’s Existing Housing section maintained that:

4.1.1.1 The family members were consulted and a decision was made by the Council on the merits of the matter.

4.1.1.2 All the children of the deceased had the same claim to the tenancy.

4.1.1.3 Despite numerous consultations with the Complainant and his two sisters regarding the transfer of the tenancy no substantive agreement could be reached.

4.1.1.4 One of the sisters (Ms Precense) did submit an affidavit in favour of the transfer of the tenancy to her sister (Ms Diedericks).

4.1.1.5 Although Ms Diedericks did not have a registered application for accommodation on the Municipality’s housing waiting list, she was registered as a dependent on the household family card, and she was not previously allocated a state subsidized house.
4.1.1.6 The onus rests on the Municipality as the lessor and owner of the property to make a fair decision in regard to the transfer of the tenancy.

4.1.1.7 They decided to transfer the tenancy to Ms Diedericks because she is a daughter of the deceased tenant and has dependents.

4.1.2 In response to the aforesaid the Complainant maintained that-

4.1.2.1 He lived with his mother for an uninterrupted period of 20 years and remained in the house after her death.

4.1.2.2 His sisters, on the other hand, only moved into the house after her death.

4.1.2.3 Their minor children do not live with them, but with their fathers.

4.1.2.4 His sister-in-law and her three minor children also live in the house and he fears that his sister will evict them if the tenancy is transferred to her.

4.1.3 In response to the Public Protector’s additional queries arising from the Complainant’s comments, Mr Ashraf Slamdien (Head: Rental Stock) in the Housing Directorate of the Municipality advised that:

4.1.3.1 The Complainant did advise them that his sisters’ minor children do not live with them, but consideration was given to transfer the dwelling onto the name of one of the children of the deceased tenant in terms of the policy; and

4.1.3.2 The sister-in-law was not consulted because preference is given to the children of the deceased in terms of the policy.

4.1.4 On 21 September 2009 the Public Protector faxed the Municipality a provisional report on the investigation and afforded them an opportunity to make final comments thereon. Ms Blaauw (Manager: Existing Housing) informed the Public Protector on 11 September 2009 that she was “trying to
obtain clarity on certain issues” regarding the complaint and would respond shortly.

4.1.5 On 17 November 2009 the Public Protector received a letter from Ms Blaauw, which indicated that she re-visited the files relating to the relevant tenancy and that it was decided to review the decision to transfer the tenancy to Ms Diedericks.

4.1.6 On 3 December 2009 the Municipality commenced the review of the aforesaid process by holding a meeting with the affected siblings and municipal officials involved. The Public Protector observed the proceedings, which were inconclusive due to conflicting information furnished by the siblings on, for instance, the inception and duration of stay in the dwelling. As a result of this, the proceedings were adjourned to a date to be decided to enable the siblings to provide proof of when and how long they have stayed in the dwelling. The relevant housing officials were also tasked to investigate certain information which surfaced during the proceedings concerning an aunt with whom the Complainant had allegedly resided in Bishop Lavis before 2003, and they also undertook to interview the neighbours of the relevant dwelling.

4.1.7 Ms Blaauw assured the siblings that the person to whom the tenancy is ultimately transferred, may not arbitrarily evict the other occupants.

4.2 Legal framework relevant to the complaint

4.2.1 Legal prescripts considered

4.2.1.1 In terms of section 33 of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

4.2.1.2 Furthermore, in terms of section 26(1) and (3) of the Constitution everyone has the right to have access to adequate housing and no one may be evicted
from their home, without a court order made after all the relevant circumstances were considered.

4.2.1.3 In terms of section 3 of the Promotion of Administrative Justice Act, 2002 (PAJA), in regard to procedurally fair administrative action affecting any person, the following are stipulated:

"3(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

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

(b) a reasonable opportunity to make representations;

(c) a clear statement of the administrative action;

(d) adequate notice of any right of review or internal appeal, where applicable; and

(e) adequate notice of the right to request reasons in terms of section 5.

(3)... 

(4)... 

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

4.2.1.4 Additionally, the Batho Pele White Paper which sets out eight national service delivery principles, amongst other things, includes the setting of service standards in so far as it relates to the level and quality of services that
customers can expect, as well as increased openness and transparency about how services are delivered.

4.2.1.5 The Policy on Tenancy Matters (the Policy), which was adopted by the Municipality's Housing Portfolio Committee on 1 August 2006, sets out the applicable procedure and requirements relating to the transfer of a municipal rental housing tenancy. The following provisions are relevant:

(i) Paragraph 2 of the Policy, which stipulates as follows:

"2. PRINCIPLES:

2.1...

2.2 There should be fair allocation of rental stock according to set and agreed procedures.

2.3 All existing public housing will be regarded as such with no third party having influence on any allocation.

2.4 The lease automatically terminates on the death of the tenant. The matter is then dealt with in terms of the policy in respect of transfer of tenancies or unlawful occupation, whichever is applicable.

2.5 Transfer of tenancy will be dealt with in the following order of succession to a qualifying:

2.5.1 spouse
2.5.2 child
2.5.3 grandchild
2.5.4 sibling
2.5.5 relative
2.5.6 other household member.
2.6...
2.7 Prospective tenants and tenants transferring to alternative accommodation must qualify in terms of the eligibility criteria."

(ii) Paragraph 4 of the Policy specifies what the eligibility criteria are, namely:
“4.1 Must be an adult South African, with a valid identity document.
4.3 (sic) Must have capacity to contract.
4.4 Must have a registered application for accommodation.
4.5 Must not be registered property owners.
4.6 Gross household income must be less than R7000.00 pm.
4.7 Where household income is between R0-R3500 p.m, tenants pay the Economic Cost Recovery rental.
4.8 Where the household income is between R3501-R7000 p.m, tenants pay the Economic Cost Recovery Rental plus 8% on the amount exceeding R3500.
4.9 Should it at any stage during the tenancy be found that the household income is in excess of R3500, the rental will be adjusted to include the 8% surcharge.
4.10 Tenants earning more than R7000 p.m qualify for a bond on the open market and must therefore vacate the unit.
4.11 These income categories are applicable to tenancy transfers, as well as to transfers to alternative accommodation, and are subject to periodic revision by Council decision.”

(iii) Paragraph 5 of the Policy further stipulates under what conditions and to whom the transfer of tenancy may take place. In terms of this provision the tenancy may be transferred where the tenant has died, divorced or vacated or relinquished the tenancy and people have remained in occupation of the property.

(iv) Paragraph 5 provides further that in the case of the death of the tenant the tenancy may be transferred to

(a) “a surviving spouse or
(b) a sole occupant (child or household member) or
(c) the children (including grandchildren)”
(v) Additionally, paragraph 5.3 lays down the general criteria for the transfer of tenancy to children, namely:

(a) "The applicable section is the section on the succession for transfer of tenancy (paragraph 2.5 of the Policy).

(b) Duration of stay – interrupted or uninterrupted. The decision maker has to determine who had the least interrupted stay.

(c) Section 3.5.1 of the approved Unlawful Occupancy Policy, if applicable.

(d) If all the above criteria are exhausted and the persons still have the same claim, the matter must be referred to the Manager: Existing Human Settlements.

(e) The request and wishes of the tenant may be considered."

(vi) In terms of paragraph 5.3.2 of the Policy, transfer of tenancy to children (including grandchildren) or household members may be considered if, amongst others,

(a) "The person is of legal age and had been in occupation with the tenant for an unbroken period of two years prior to the termination of the tenancy subject to substantive proof being provided.

(b) Persons who are not in occupation at the time of termination of the tenancy may be considered on the merits of the matter."

5. EVALUATION OF EVIDENCE

5.1 Eligibility criteria

5.1.1 With reference to the Policy's eligibility criteria as contained in paragraph 4 of the Policy (cited on p 12 and p 13 above), at no time did the Municipality indicate that the Complainant does not qualify to be considered in terms of the transfer of the tenancy. He is, therefore, deemed to be eligible for consideration as a prospective tenant.
5.2 Criteria for the transfer of tenancy to children (including grandchildren) or household member (section 5.3. of the Policy)

5.2.1 The section on succession for transfer of tenancy is applicable and indicates that, as there is no surviving spouse the deceased's three (3) children are the next candidates to be considered for the transfer of tenancy.

5.2.2 The tenant was survived by three (3) adult children, and the criteria for the transfer of the tenancy should, therefore, be applied to each of her children in order to determine to which child the tenancy should be awarded.

5.2.3 The next criterion is the duration of stay and whether it was interrupted or uninterrupted. This is a mandatory requirement and the policy unequivocally instructs the decision maker to determine who had the least interrupted stay (as cited in para (v) (b) on p 13 above). In this regard the Complainant alleges that he lived with his mother for an uninterrupted period of 20 years and stayed on in the dwelling after her death, whereas his sisters, on the other hand, according to him only moved into the house after their mother passed away. This was not disputed by the Municipality. However, none of the siblings provided evidence to corroborate their allegations and neither did the Municipality try to obtain independent evidence to satisfy this criterion. Due to this dispute of fact, it is not possible to decide who has the least interrupted stay.

5.2.4 Despite the aforesaid, the Housing section of the Municipality decided to transfer the tenancy to Ms Diedericks because she is a daughter of the tenant and has dependents. The Municipality maintained that they made this decision on the merits of the matter.

5.2.5 The Municipality ignored the Complainant's assertion that Ms Diedericks' minor children (that is, her dependents) do not live with her but with their father. When the Public Protector queried this, Mr Slamdien of the Housing
section confirmed that the Complainant informed them of the aforesaid, but he did not indicate whether the matter was investigated further, and he merely responded that "consideration was given to transfer the dwelling onto the name of one of the children of the deceased tenant in terms of the said Policy".

5.2.6 Furthermore, arising from the Public Protector’s enquiries to the Office of the City Ombudsman, the latter notified the Public Protector, in writing, that in the response that the Department: Existing Housing formulated to them to convey to the Public Protector, the latter Department responded that "[a]ll the heirs (children) of the deceased had the same claim to the tenancy". If that was the case, the matter should have been decided with reference to the criterion in terms of the duration of stay. Only if all the other criteria were exhausted and the persons still had the same claim, should the matter be referred to the Manager: Existing Human Settlement for decision.

5.3 Non compliance with PAJA

5.3.1 By failing to determine which candidate had the least interrupted stay the Municipality failed to act in a procedurally fair manner when it decided to award the tenancy to the Complainant’s sister.

5.3.2 The Municipality’s decision to award the tenancy to the Complainant’s sister adversely affected his rights. In terms of PAJA, before the Municipality took the decision, it had to send the Complainant a notice of the nature and purpose of the administrative action (decision to transfer the tenancy to his sister), as well as giving him a reasonable opportunity to make representations. According to the Municipality it held numerous consultation sessions with the siblings, but no substantive agreement could be obtained from them. According to the information furnished by the Complainant there was, at least, one meeting between the Municipality and the siblings regarding the matter, and arising from which the Complainant submitted
additional representations to Mr Slamdien by way of a letter dated 24 June 2008. The Municipality, therefore, complied with this provision of PAJA.

5.3.3 However, there is no indication that the Municipality afterwards furnished the Complainant with a notice of his right to appeal or review and his right to request written reasons as required in terms of PAJA.

6. FINDINGS

6.1 The decision of the Municipality to transfer the tenancy to Ms Diedericks was procedurally unfair in that it did not comply with the provisions of the Policy on Tenancy Matters as it had failed to:

6.1.1 determine which candidate had the least interrupted stay in the dwelling;

6.1.2 verify the aforesaid conflicting factual versions of the candidates in this regard; and/or

6.1.3 obtain independent evidence from, for instance, the neighbours in order to determine who had the least interrupted stay.

6.2 In taking this decision, the Municipality also failed to comply with PAJA and did not in act in a procedurally fair manner.

6.3 The Housing Directorate's decision was accordingly unfair and resulted in prejudice to the Complainant.

7. REMEDIAL ACTION TO BE TAKEN

The following remedial action in terms of section 182(1)(c) of the Constitution is to be taken by the Municipality:
7.1 The Housing Directorate should finalise the review of their decision regarding the awarding of the tenancy as a matter of urgency, in order to ensure that the decision complies with the policy. Such review should be lawful, reasonable and fair towards all the affected parties.

7.2 The Housing Directorate should notify the Complainant and the other affected parties, in writing of such review and of the outcome of thereof.

8. CONCLUSION

8.1 The Public Protector will monitor the progress in the implementation of the aforesaid remedial action on a monthly basis.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 23/02/2010

Assisted by Mrs S Lengeveldt, Investigator: Western Cape
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