Housing rights of "slum" dwellers at stake

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Abahlali baseMjondolo Movement SA and Another v Premier of KwaZulu-Natal and Others Case No 1874/08 (Durban High Court) (*Slums Act* case)

On 27 January 2009, the High Court (Durban and Coast Local Division) handed down judgment in the *Slums Act* case. The case concerned a controversial piece of legislation, the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (Slums Act), which aims to eliminate slums in KwaZulu-Natal.

The Slums Act

The Slums Act came into force in October 2007. "Slum" is defined in the Act as "overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons, without security of tenure and with poor or non-existent infrastructure or sanitation" (section 1). The Act aims to:

- eliminate slums;
- prevent the re-emergence of slums;
- promote co-operation between the department in the Provincial Government of KwaZulu-Natal responsible for housing (the department) and municipalities in the elimination of slums;
- promote co-operation between the department and municipalities in the prevention of the re-emergence of slums;
- monitor the performance of the department and municipalities in the elimination and prevention of the re-emergence of slums; and
- improve the living conditions of the communities in the province (section 3).

It prohibits unlawful occupation (section 4) and the use of substandard accommodation for financial benefit (section 5). According to the Act, a building is not fit for human habitation if it does not have access to natural light, running water and ablution facilities, if it is a health nuisance as defined in the National Health Act 61 of 2003, or if it is in a serious state of neglect or disrepair (section 5). Where there is unlawful occupation, the occupier may be evicted after the procedure set out in section 4, 5 or 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) has been followed (section 4(2). In the case of substandard accommodation, a municipality is required to give notice to the owner or person in charge to institute eviction proceedings, failing which the municipality may institute such proceedings itself (section 6).

In addition, a municipality may institute proceedings for the eviction of an unlawful occupier from land or buildings falling within its jurisdiction if this is in the public interest (section 10). Should a municipality decide to make alternative land or buildings available to persons relocated from slums, it "must take reasonable measures, within its available resources, to ensure that such alternative land or building is in reasonable proximity to one or more economic centres" (section 12). Furthermore, the Slums Act enables municipalities to set up transit areas for people evicted from their homes, which must have suitable accommodation and be equipped with the necessary basic infrastructure and sanitation (section 13).

Owners or persons in charge of land or buildings are required to take reasonable steps to prevent unlawful occupation. Failure to do so constitutes an offence (section 15). They are also required to institute proceedings for the eviction of unlawful occupiers. If they do not, a municipality "must" institute such proceedings (section 16).

One of the problematic features of the Slums Act is that it makes it an offence to unlawfully interfere with measures aimed at preventing unlawful occupation (section 20). Thus, it criminalises (non-legal) attempts to stop evictions. An offender can be fined up to R20 000 or imprisoned for up to five years or both (section 21).

The passing of the Slums Act was not welcomed by informal settlement dwellers and some civil society organisations and academics, especially as it encourages evictions, makes it mandatory for landowners to institute eviction proceedings and makes opposing evictions a criminal offence.

The Slums Act case

Following the enactment of the Slums Act, Abahlali baseMjondolo, an association working towards improving the lives and living conditions of shack dwellers in South Africa, instituted legal action before the High Court, asking it to declare the Act unconstitutional. The president of Abahlali baseMjondolo joined as the second applicant.

The respondents in the case were the Premier of the Province of KwaZulu-Natal, the MEC for Local Government, Housing and Traditional Affairs in KwaZulu-Natal, the Minister of Housing, and the Minister of Land Affairs.

Arguments of the applicants

The applicants challenged the constitutionality of the Slums Act on several grounds. First, they argued that the provincial government did not have the competency to pass it as the regulation of evictions, land tenure and access to land fell outside its legislative competence (para 4). Only the national government, they argued, was competent to legislate on these matters, so the provincial government had exceeded its constitutional powers by passing the Slums Act (para 6).

It was argued in the alternative that sections 9, 11, 12, 13 and 16 of the Slums Act were unreasonable and therefore inconsistent with section 26(2) of the Constitution, which requires the state to take reasonable measures to progressively realise the right of access to adequate housing (paras 4 and 7). These sections of the Slums Act give municipalities an open-ended discretion whether to upgrade informal settlements and whether to provide alternative accommodation, notwithstanding the constitutional obligation on the state to provide alternative accommodation where an eviction would result in homelessness (para 10). The applicants put it that the failure of the Slums Act to provide guidance to municipalities on how to exercise this discretion rendered the Act unconstitutional and invalid (para 10).

The applicants argued also that section 16 (allowing for the eviction of unlawful occupiers) was unconstitutional on the following grounds: it undermined security of tenure; it mandated the institution of eviction proceedings without consideration of the particular circumstances of prospective evictees; it did not require the state to provide alternative accommodation where the eviction would result in homelessness; and it did not promote the constitutional requirement of meaningful engagement, because the Act provided for such engagement after the decision to evict had already been made (para 9). The applicants argued that Chapter 13 of the National Housing Code provided for the upgrading of informal settlements, which had not been implemented in Durban (para 8). They also contended the Slums Act was "irreconcilable" with the National Housing Code (para 12).

The applicants further asserted that section 16 of the Slums Act was in conflict with the provisions of the Housing Act 107 of 1997 because the latter required that informal settlements be upgraded and that evictions should be sought as a last resort, while the former laid emphasis on evictions. Secondly, the Housing Act and decisions of the Constitutional Court required that there be meaningful engagement with the affected persons before an eviction order could be granted (see, for example, *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC)). It was also argued that section 16 of the Slums Act was inconsistent with the provisions of PIE in that it required the institution of eviction proceedings while PIE did not (para 11).

The applicants submitted that the National Housing Act and PIE provisions had to prevail over the provisions of the Slums Act, since they had been enacted to give effect to section 26 of the Constitution and provide uniformity in the areas of housing and evictions (para 12).

Arguments of the respondents

The respondents answered that the Slums Act was a measure to improve the living conditions in slums (para 14). They argued that the Act was in fact consistent with the government's international and constitutional obligations, and national and provincial housing laws and policies. They submitted that should the Court find the Act was inconsistent with section 26(2) of the Constitution, the Act should be held to be a justifiable limitation in terms of section 36(2) of the Constitution (para 14)

With regard to the applicants' argument that the Slums Act was beyond the legislative mandate of the province, the respondents argued that the Act related to housing, which was a concurrent competence of national and provincial government (para 16).

Concerning the argument on the wide discretion given to municipalities, the respondents maintained that municipalities were bound by national and provincial housing legislation and policies (para 18). They added that the Act was not a provincial plan to eradicate slums and that its reasonableness must be assessed against the principles laid down in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*) (paras 19-20)

The respondents submitted further that meaningful engagement was a constitutional imperative, implying that the Slums Act did require consultation (para 21). They argued that there was no conflict between the Slums Act and such national legislation as PIE and the National Housing Code (para 22).

The Court held that it could not strike down the Slums Act without first giving the opportunity to implement it.

The decision

Judge Tshabalala handed down the High Court judgment, beginning by acknowledging the plight of those who were without adequate housing and the fact that the living conditions in slums were a universal problem (para 27).

The Court held that it could not strike down the Slums Act without first giving the opportunity to implement it. In the words of the Court:

> The province of KwaZulu-Natal must be applauded for attempting to deal with the problem of slums and slum conditions. This is the first province to have adopted legislation such as the Slums Act. The Slums Act makes things more orderly in this province and the Act must be given a chance to show off its potential to help deal with [the] problem of slums and slum conditions. This Court cannot strike the Act down before it has even [been] properly implemented (para 39)

With regard to whether the province had the competence to pass the Act, the Court observed that the main objective of the Act was housing and that land could not be dissociated from housing. Based on this, it did not find the argument that the Act was *ultra vires* to be valid (para 32).

The Court proceeded to consider whether the Slums Act violated section 26(2) of the Constitution. With reference to the *Grootboom* judgment, it stated that the question was whether the measures taken by the state to realise the right were reasonable. It noted that the Housing Act had been passed to give effect to the right of access to adequate housing. It required provincial governments to promote and facilitate the provision of adequate housing in their provinces within the framework of the national policy.

The Slums Act, the Court observed, provided a legislative framework for the implementation of housing policies in KwaZulu-Natal. It pointed out that the Act tried to facilitate the implementation of housing policies pursuant to national and provincial legislation (para 34). The Court added that the Slums Act did not duplicate PIE as the applicants contended, since it aimed to assist provincial and local governments in the provision of housing (para 34). It then found that the Slums Act constituted "a reasonable legislative response to deal with the plight of the vulnerable in our society" (para 36).

The Court also found no merit in the argument that the Slums Act was in conflict with national legislation, since the Act endorsed PIE and other national legislation (para 37). According to the Court, "the Slums Act does not envisage a random eviction of people", and "evictions will be carried out with a due consideration of whether it is just and equitable to do so" (para 37). Incorporating PIE in the Act implied that the relevant circumstances set out in PIE would be considered (para 38).

Some observations

The High Court's decision could result in the removal of poor people from areas within reach of their sources of livelihood, putting their housing rights at stake. UN-Habitat has argued that

> *in-situ* slum upgrading is more effective than resettlement of slum dwellers and should be the norm in most slum-upgrading projects and programmes. Forced eviction and demolition of slums, as well as resettlement of slum dwellers create more problems than they solve. Eradication and relocation destroys, unnecessarily, a large stock of housing affordable to the urban poor and the new housing provided has frequently turned out to be unaffordable, with the result that relocated households move back into slum accommodation. Resettlement also frequently destroys the proximity of slum dwellers to their

> employment sources. Relocation or involuntary resettlement of slum dwellers should, as far as possible, be avoided ... (UN-Habitat, 2003).

The problems highlighted by UN-Habitat are not alien to South Africa.

The Slums Act envisages a one dimensional solution to slums in KwaZulu-Natal – namely, relocation. It does not give room for the consideration of *in situ* upgrading, which would maintain community networks, minimise disruption and enhance community participation in finding durable solutions. Chapter 13 of the National Housing Code provides that relocation should be the exception rather than the rule, and discourages evictions. The High Court notes in this regard that while *in situ* upgrading is required, relocation is sometimes necessary to make way for essential engineering or in hazardous conditions (para 38). However, Chapter 13 does not envisage a "blanket" application of relocation. There would surely be instances in the province where *in situ* upgrading would be possible. The Slums Act, as well as the High Court, fails to acknowledge this reality.

One of the positive aspects of the judgment is that it underscores the importance of meaningful consultation and engagement with communities. However, the Court fails to see the importance of explicitly including this requirement in the Act.

Furthermore, it is a basic principle of international human rights law that evictions should be fully justified and undertaken only as a last resort. By contrast, the Slums Act mandates the eviction of unlawful occupiers as the first option. The Court failed to see this disparity. Hence, some have argued that the Slums Act is reminiscent of the apartheid policy of control and the Prevention of Illegal Squatting Act 52 of 1951, which empowered landowners to eliminate informal settlements (Huchzermeyer, 2008: 4; see also Huchzermeyer, 2007).

Of crucial concern is the fact that the Slums Act clearly makes the provision of alternative accommodation discretionary, even for those who will not be able to provide for themselves once evicted. This goes against the established principle requiring the provision of alternative accommodation, particularly in situations where people would be rendered homeless and are not able to provide for themselves (see generally Chenwi, 2008).

Conclusion

The applicants have applied for leave to appeal directly to the Constitutional Court. This case is crucial as it will influence the way in which provinces deal with informal settlement dwellers. The decision of the High Court in endorsing the Slums Act failed to protect the rights of those in desperate need of housing and state assistance in eviction situations.

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