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# Slums Act unconstitutional

Lilian Chenwi

*Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others* CCT 12/09 [2009] ZACC 31 (*Slums Act*)

The Constitution Court handed down judgment in the *Slums Act* case on 14 October 2009. The case was a direct appeal against a judgment of the KwaZulu-Natal High Court, Durban, in which the latter refused to strike down the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (the Slums Act) (see *Abahlali baseMjondolo Movement SA and Another v Premier, KwaZulu-Natal and Others* 2009 (3) SA 245(D)).

The Slums Act aims to progressively eliminate slums, prevent the re-emergence of slums and upgrade and control existing slums. It also aims to improve the living conditions of communities (section 3).

The High Court case has been discussed in a previous issue of the *ESR Review* (Chenwi, 2009). This article provides an overview of the Constitutional Court's judgment.

The applicants in the case at the Constitutional Court level were Abahlali baseMjondolo, comprising tens of thousands of people occupying about 17 informal settlements in Durban and Pietermaritzburg in KwaZulu-Natal (first applicant) and the president of the Abahlali baseMjondolo (second applicant). The respondents were the Premier of KwaZulu-Natal, the Member of the Executive Council for Local Government, Housing and Traditional Affairs (the MEC) of the province of KwaZulu-Natal, the national Minister of Human Settlements and the national Minister of Rural Development and Land Reform (paras 2 and 3).

## Issues before the Constitutional Court

The Constitutional Court dealt with two issues. The first was whether the provincial legislature had the competence to pass the Act. The applicants argued that the Act was not concerned with housing (which falls within the concurrent jurisdiction of both provincial and national legislatures) but with land tenure and access to land, which does not fall within provincial legislative competence (para 20).

The second issue was whether section 16 of the Act was consistent with section 26(2) of the South African Constitution (the Constitution) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), the national Housing Act 107 of

1997 (Housing Act) and the National Housing Code (paras 9 and 91). Section 26(1) of the Constitution guarantees the right to have access to adequate housing and subsection (2) imposes positive duties on the state to take *reasonable* measures to achieve the progressive realisation of this right. Section 16 of the Slums Act provides as follows:

> (1) An owner or person in charge of land or a building, which at the commencement of this Act is already occupied by unlawful occupiers must, within the period determined by the responsible Member of the Executive Council by notice in the *Gazette*, in a manner provided for in section 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, institute proceedings for the eviction of the unlawful occupiers concerned.
> (2) In the event that the owner or person in charge of land or a building fails to comply with the notice issued by the responsible Member of the Executive Council in terms of subsection (1), a municipality within whose area of jurisdiction the land or building falls, must invoke the provisions of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

**At the core of the judgment is the finding that section 16 of the Act offends against section 26(2) of the Constitution and the rule of law**

The applicants argued that the second provision above violated section 26(2) of the Constitution because it precluded meaningful engagement between municipalities and unlawful occupiers, violated the principle that evictions should be a measure of last resort and encouraged eviction proceedings (paras 42 and 102).

## The decision

The Constitutional Court found that the province had the competence to pass the Act. It also found the Act to be unconstitutional and inconsistent with the Housing Code and the Housing Act, which were passed to give effect to section 26(2) of the Constitution.

The majority decision was written by Moseneke J with Yacoob J dissenting. Yacoob J, however, wrote the unanimous decision of the Court in relation to the finding that the Act is concerned with housing.

## Provincial competence

The Court agreed that the Act related primarily to housing, as it was aimed at improving the housing conditions of the people living in slums (paras 40 and 97). It observed that the title of the Act and its preamble echoed the constitutional right to have access to adequate housing because the Act was concerned mainly with improving the circumstances under which people live (paras 29 and 98). The Act also placed responsibilities on municipalities and the MEC to progressively realise this right and provided for measures related to slums and informal settlements, which are places where people live and have their homes (paras 98, 100 and 101; see also paras 20-40). Accordingly, the Court held that the provincial government had the competence to pass the Act.

## Unconstitutionality of the Act

At the core of the judgment is the finding that section 16 of the Act offends against section 26(2) of the Constitution and the rule of law (para 127). This section makes it obligatory for an owner or person in charge of land or a building to institute eviction proceedings against unlawful occupiers once the MEC in a notice requires so; failing which, the obligation shifts to the municipality. Though such proceedings have to be instituted in terms of the relevant provisions of PIE, the Slums Act is silent on whether the owners or municipality have the discretion not to institute eviction proceedings if, based on their evaluation, the eviction will not be justified under PIE. The Court found that it was not in the exclusive discretion of the owners or municipality to do so because 'owners and municipalities must evict when told to do so by the MEC in a notice' (paras 110-111). Moreover, as observed by the Court, PIE does not compel an owner or municipality to evict unlawful occupiers (para 112). The Court therefore found that section 16 was 'at odds with section 26(2) of the Constitution because it requires an owner or municipality to proceed with eviction of unlawful occupiers even if the PIE Act cannot be complied with' (para 111). Furthermore, it held that the compulsion

> erodes and considerably undermines the protections against arbitrary institution of eviction proceedings. It renders those who are unlawful occupiers and who are invariably found in slums and informal settlements liable to face eviction proceedings which, but for the provisions of section 16, would not have occurred (para 112).

The Court also found the power given to the MEC to issue a notice to be 'overbroad and irrational', and thus 'seriously invasive of the protections against arbitrary evictions' in section 26(2) of the Constitution read with PIE and national housing legislation (para 118).

This was so because the power applied to any unlawful occupier on any land or in any building, including those who did not live in slum conditions, and was thus not properly related to the purpose of the Act of eliminating and preventing the re-emergence of slums (para 116).

The Court further found that section 16 was not capable of an interpretation that promoted the elimination and prevention of slums and the provision of adequate and affordable housing (para 121). The section, especially due to its compulsory nature, was also inconsistent with the constitutional and legislative framework for the eviction of unlawful occupiers, which establishes that housing rights should not be violated without proper notice and the consideration of all alternatives (para 122).

**The Constitutional Court's decision has prevented the eviction of many poor people who were targetted by the Slums Act**

The Court therefore concluded that section 16 was inconsistent with the Constitution (para 128 and 129).

In a dissenting opinion, Yacoob J suggested that the invalidity of section 16 could be overcome by reading in the following six qualifications:

(a) the notice is issued in the process of slum elimination;

(b) it can only be issued in respect of property that perpetuates slum conditions and is a slum;

(c) the MEC must identify the property or properties to which the notice relates;

(d) it must be necessary to evict the unlawful occupiers from the property or properties concerned to achieve the objects of the Act;

(e) the owner is obliged to evict only if she has not consented to the occupation and only if, on the evidence available, the eviction is just and equitable;

(f) a municipality is obliged to evict consequent upon the notice only if it can establish that it is just and equitable and that it is in the public interest that the unlawful occupiers concerned be evicted (para 80).

However, the majority of the Court found such an interpretation to be 'intrusive' and offensive of the requirements of the rule of law and separation of powers (para 123). The rule of law requires that a law must be clear and ascertainable and the separation of powers doctrine requires that courts should not embark on an interpretative exercise that rewrites the law (para 125).

## Slums and informal settlements: Are they the same?

An interesting issue, though not raised by the parties, was raised by Yacoob J in relation to the distinction between 'slums' and 'informal settlements'. Section 1 of the Act defines an informal settlement as 'an area of unplanned and unapproved settlement of predominantly indigent or poor persons with poor or non-existent infrastructure or sanitation'. A slum on the other hand is defined as 'overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons, without security of tenure with poor or non-existent infrastructure or sanitation'.

Yacoob J points out three significant differences between slums and informal settlements as defined in the Act. He notes that 'the conditions under which people in slums live is worse than those who live in informal settlements' (para 46); slums dwellers 'have no security of tenure' (para 47); and 'slums consist of occupants of land or buildings while an informal settlement, as the name suggests, is a settlement of people' (para 47). He therefore held that 'slum' must be given a narrow meaning (para 48).

The majority of the Court, however, found the distinction to be untenable. It held that it would not be appropriate to give 'slum' a narrow meaning which places informal settlements beyond the scope of the Act, as the latter are also squalid and overcrowded, are not permanent until they are upgraded, and the residents live under constant threat of eviction and have little or no security of tenure (paras 104 and 105).

The Court observed that the distinction in the Act does not mean that section 16 is not applicable to informal settlements (para 104), especially as the section does not distinguish between unlawful occupiers in a slum or those in an informal settlement (para 106).

## Conclusion

The Constitutional Court's decision has in fact prevented the eviction of many poor people who were targeted by the Slums Act. The implication of the ruling is that other provinces that were hoping to pass similar legislation will not be able to do so. The decision is another 'wake-up call' for the government to ensure that its approach to the challenge of informal settlements or slum conditions is pro-poor and acknowledges peoples' existing circumstances. The government must direct its efforts at improving the lives of those who live in slums and informal settlements rather than at 'eradicating' slums without providing alternative appropriate housing.

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**The full judgment of the Constitutional Court is available at http://www.saflii.org/za/cases/ZACC/2009/31.pdf.**

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# The right of access to sufficient water and the Constitutional Court's judgment in *Mazibuko*

Siyambonga Heleba

*Lindiwe Mazibuko and Others v City of Johannesburg and Others Case* CCT 39/09 [2009] ZACC 28 (*Mazibuko*)

On 8 October 2009, the Constitutional Court handed down its judgment in the *Mazibuko* case. This case dealt with an appeal against the judgment of the Supreme Court of Appeal of 25 March 2009, regarding the constitutionality of the City of Johannesburg's free basic water policy and the lawfulness of the pre-paid water meters. The facts and decisions of the High Court and Supreme Court of Appeal have been discussed in previous issues of the *ESR Review* (Khalfan and Conteh, 2008; and Dugard and Liebenberg, 2009).

## Issues before the Constitutional Court

The Constitutional Court considered two major issues. The first issue was whether the City's policy in relation to free basic water (FBW) and, particularly, its decision to supply six kilolitres of free water per month to every account-holder in the city (the FBW policy) was in conflict with section 27 of the Constitution or section 11 of the Water Services Act 108 of 1997 (WSA) (para 6). The second issue was whether the installation of pre-paid water meters by the first and second respondents (the City of Johannesburg and Johannesburg Water (Pty) Ltd, respectively) in Phiri was lawful (para 6).

## The decision

The Constitutional Court held that the City's FBW policy was reasonable, as the City acted consistently with its constitutional obligation in terms of section 27(1)(b) read with section 27(2) of the Constitution. It also held that the use of pre-paid water meters in Phiri, Soweto was lawful. It thus set aside the orders of the High Court and Supreme Court of Appeal requiring the City to provide Phiri residents with 50 and 42 litres of free water per person per day, respectively.