

IN THE HIGH COURT OF SOUTH AFRICA  
(DURBAN AND COAST LOCAL DIVISION)

CASE NO: 1874/08

In the matter between:

**AB AHLALI BASEMJONDOLO MOVEMENT SA**

First Applicant

**SIBUSISO ZIKODE**

Second Applicant

and



**PREMIER OF KWA-ZULU NATAL**

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
LOCAL GOVERNMENT,  
HOUSING AND TRADITIONAL AFFAIRS,  
KWA-ZULU NATAL**

Second Respondent

**MINISTER OF HOUSING**

Third Respondent

**MINISTER OF LAND AFFAIRS**

Fourth Respondent

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**APPLICANTS' APPLICATION FOR LEAVE TO APPEAL**

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KINDLY TAKE NOTICE THAT on a date to be determined by the Registrar of this Honourable Court, the applicants intend to apply for leave to appeal to the

Supreme Court of Appeal, alternatively to a full bench of the above Honourable Court, against the whole of the judgment and order of the Honourable Judge President Tshabalala, handed down in the Durban and Coast Local Division of the High Court on 27 January 2009.

**TAKE NOTICE FURTHER** that this application for leave to appeal is brought in terms of section 20(4)(b) read with section 20(1) of the Supreme Court Act 59 of 1959 and rule 49(1) of the Uniform Rules of Court.

**TAKE NOTICE FURTHER** that this application for leave to appeal is conditional upon the applicants' application for leave to appeal directly to the Constitutional Court, filed in terms of Rule 19 of the Constitutional Court Rules, being refused by the Constitutional Court.

**TAKE NOTICE FURTHER** that the applicants' grounds of appeal are the following –

The Legislative Competence of the KwaZulu-Natal Provincial Legislature

1. The Court erred in finding that the applicants' argument that the Slums Act is *ultra vires* the legislative competence of the KwaZulu-Natal Legislature, entailed a "piecemeal" analysis of the Slums Act.

2. The Court ought to have held that the Slums Act, analysed as a whole, confers new powers and obligations only in relation to land tenure, land use, access to land and eviction. Accordingly, the Court ought to have held that the Slums Act falls to be characterised as legislation dealing with land.
3. The Court ought to have held that – to the extent that it purports to deal with housing – the Slums Act simply refers to or substantially reproduces selected provisions in other national and provincial legislation. The Court ought to have held that the Slums Act does not, in itself, create any new powers or obligations relating to the provision of housing.
4. The Court erred in finding that because "*you cannot have housing without land*" the Slums Act falls to be characterised as dealing with housing.
5. The Court erred in finding that the Slums Act's "*main objective*" relates to "*issues of housing*".
6. The Court failed, with respect, to evaluate the Slums Act in light of the decision of the Constitutional Court in *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC). On a proper application of that decision to the facts of the case, the Court ought to have held that the

true purpose and effect of the Slums Act is to regulate land tenure, access to land and eviction.

7. The Court ought to have held that the passage of the Slums Act was *ultra vires* the legislative competence of the KwaZulu-Natal Provincial Legislature and consequently invalid.

#### The Slums Act as a Violation of Section 26(2) of the Constitution

8. The Court erred in finding that the Slums Act "*provides a legislative framework for the implementation of housing policies in KwaZulu-Natal.*"
9. The Court erred in finding that the Slums Act seeks to "*facilitate housing policies.*"
10. The Court erred in finding that "*the Slums Act is not a duplication of PIE at provincial level.*" The Court ought to have found that section 2 of the Slums Act clearly demonstrates that the Slums Act seeks primarily to regulate the eviction of unlawful occupiers and accordingly duplicates the scope of application of the PIE Act at provincial level.
11. The Court erred in finding that the intention of the Slums Act is to assist provincial and local governments in the provision of housing.

12. The Court erred in finding that the Slums Act "*constitutes a reasonable legislative response to deal with the plight of the vulnerable in our society.*"
13. The Court ought to have held that section 16 of the Slums Act (which mandates the institution of eviction proceedings) is inconsistent with section 26(2) of the Constitution because it precludes meaningful engagement between unlawful occupiers and municipalities prior to a decision to institute eviction proceedings being taken.
14. The Court ought to have held that section 16 of the Slums Act, read in the context of the Slums Act as a whole, is inconsistent with section 26(2) of the Constitution, because:
- 14.1. it undermines security of tenure;
  - 14.2. it mandates the institution of eviction proceedings without a consideration of the particular circumstances of those whose eviction is sought; and
  - 14.3. it does not require the state to provide alternative accommodation in the event that those whose eviction is sought will be left homeless as a result.

15. The Court ought to have held that:

- 15.1. the effect of sections 9, 11, 12 and 13 of the Slums Act, read together, is to give municipalities an open-ended discretion as to how to deal with informal settlements;
- 15.2. such a discretion will likely lead to a violation of fundamental rights, having regard to the historical, social and policy context in which the Slums Act was adopted; and
- 15.3. the failure of the Slums Act to provide guidance to municipalities to ensure that they exercise their discretion consistently with their constitutional and statutory obligations in relation to housing, renders sections 9, 11, 12 and 13 of the Slums Act inconsistent with section 26(2) of the Constitution and invalid.

#### The Conflict between the Slums Act and National Legislation

16. The Court erred in finding that the incorporation of certain provisions of the PIE Act and the National Housing Act into the Slums Act precludes the possibility of conflict between the Slums Act and the aforesaid national legislation.

17. The Court erred in finding that *"the Slums Act is actually endorsing the PIE Act and other national legislation."* The Court ought to have held that the Slums Act conflicts with the PIE Act and the National Housing Act in critical respects.
18. The Court ought to have found that section 16 of the Slums Act conflicts with:
- 18.1. the provisions of the National Housing Act and the National Housing Code which require informal settlements to be upgraded *in situ* and disallow evictions other than in exceptional circumstances;
  - 18.2. the provisions of the National Housing Act which require meaningful engagement with individuals and communities prior to taking a decision to institute eviction proceedings; and
  - 18.3. sections 4, 5 and 6 of the PIE Act which make the institution of eviction proceedings discretionary.
19. The Court ought to have held that sections 9, 11, 12 and 13 of the Slums Act are fundamentally irreconcilable with the provisions of the National Housing Code.

20. The Court ought to have declared the aforesaid sections of the Slums Act inoperative by virtue of the above conflicts.

The Report by the Centre on Housing Rights and Evictions ("COHRE") and the Context within which the Slums Act fell to be Evaluated

21. The Court erred in making the following finding: *"There was an application to strike out the COHRE report brought by the respondents but I do not think that it is an important matter since this Court's findings will be made according to the merits of the matter."*

22. The Court ought to have dismissed the respondents' application to strike out with costs.

23. The Court ought to have taken the passages of the COHRE report specifically identified and relied upon in the applicants' replying affidavit into account in evaluating the historical, social and policy context within which the Slums Act was adopted.

24. The Court erred in finding that the judgment of the Durban High Court in *Jaca and Others v eThekweni Municipality* (Case No. 1020/2008) *"does not demonstrate that evictions are carried out unlawfully in Durban"*.



25. The Court ought to have held that the *Jaca* decision tends to establish the fact of unlawful evictions in the Durban municipal area. This is a fact which the Court ought have taken into account in evaluating the historical, social and policy context within which the Slums Act was adopted.
26. The Court erred in finding that "*the Slums Act makes things more orderly*" in the KwaZulu-Natal Province.
27. The Court erred in holding that "*this Court can not strike the Act down before it is even being properly implemented.*"
28. The Court erred in holding that since the applicants chose not to join the eThekweni Municipality as a party to the proceedings, the Court could not deal with the conduct of the Municipality in that –
- 28.1. The applicants sought no relief against the eThekweni Municipality;  
and
- 28.2. The evidence contained in the COHRE Report, some of which related to the eThekweni Municipality, ought properly to have been taken into account by the Court in evaluating the historical, social and policy context within which the Slums Act was adopted.
29. The Court erred in dismissing the application.

30. The Court ought to have upheld the application and awarded the applicants their costs.

**TAKE NOTICE** that the applicants submit, with respect, that there is a reasonable prospect that another Court might come to a different conclusion in respect of all the above-mentioned issues.

**DATED AT DURBAN ON THIS THE 16TH DAY OF FEBRUARY 2009.**



**WITS LAW CLINIC**  
Applicants' Attorneys  
University of the Witwatersrand  
1 Jan Smuts Avenue  
Braamfontein  
Johannesburg  
DX 197 Johannesburg  
Tel: (011) 717-8562  
Fax: (011) 717-8519  
Ref: Wits Law Clinic/CALS/S Wilson/Abahlali  
**c/o NICHOLS ATTORNEYS**  
Suite 115 Musgrave Park  
18 Musgrave Road  
Berea  
Durban  
4001  
Tel: 031 201 3440  
Fax: 031 202 3645  
**Ref: T Nichols/cn/CAL 043**

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT,  
DURBAN

AND TO: SHEPSTONE AND WYLIE ATTORNEYS

First, Second and Third Respondents  
35 Aliwal Street  
DURBAN  
Ref: V Nkosi/ed/PROV3228.13

RECEIVED COPY HEREOF WITHOUT PREJUDICE

THIS 16 DAY OF Feb 2009  
AT 11:46 AM / PM

*[Signature]*  
for SHEPSTONE & WYLIE ATTORNEYS

AND TO: THE STATE ATTORNEY

Fourth Respondent's Attorneys  
6<sup>th</sup> Floor, Metropolitan Life Building  
391 Smith Street  
DURBAN  
Ref: C DORKIN / 80/134/08/A/P7

I ACKNOWLEDGE RECEIPT OF THIS DOCUMENT, ON BEHALF OF THE STATE ATTORNEY, WITHOUT PREJUDICE TO THE MERITS OF THE MATTER.  
11h50 2009/02/16  
TIME RECEIVED DATE  
*[Signature]*  
SIGNATURE