

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

CASE NO:

In the matter between:

AB AHLALI BASEMJONDOLO MOVEMENT SA

First Applicant

SIBUSISO ZIKODE

Second Applicant

and

PREMIER OF THE PROVINCE 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

FOUNDING AFFIDAVIT

I, the undersigned –

SIBUSISO ZIKODE

do hereby make oath and say that –

1 I am an adult male residing at Kennedy Road Informal Settlement, 286
Kennedy Road, Clare Estate, Durban. I am the President of the first
applicant and am duly authorised to launch this application and to
depose to this affidavit on the first applicant's behalf. I am also the
second applicant herein.

2 The facts contained herein are, unless otherwise stated or indicated by
the context, within my own personal knowledge and to the best of my
belief both true and correct.

3 Where I make submissions of law I do so on the basis of advice received
from the applicants' legal representatives.

4 This application concerns the constitutionality of the Kwa-Zulu Natal
Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007
enacted by the Kwa-Zulu Natal Provincial Government on 2 August 2007.
For convenience it shall be referred to as "the Slums Act."

A THE PARTIES

5 The first applicant is Abahlali baseMjondolo Movement South Africa, a
voluntary association with a constitution and with capacity to sue in its
own name with its headquarters at Kennedy Road Informal Settlement,

286 Kennedy Road, Clare Estate, Durban. The first applicant represents the interests of shack dwellers who are all poor people without secure tenure or access to adequate housing.

6 The first applicant's objectives are to improve the lives and living conditions of shack dwellers through *inter alia*: working to democratise the internal governance of all informal settlements; working to develop and sustain co-operative projects aimed at generating income for shack dwellers and working to ensure that shack dwellers are aware of all their rights under South African law and are able to access and defend those rights. The first applicant's objectives are fully set out in its Constitution which is attached hereto as Annexure "A."

7 The first applicant's membership includes occupiers of the Kennedy Road Informal Settlement as well as occupiers of the following informal settlements in Kwa-Zulu Natal, which have either affiliated with the first applicant, or in which the first applicant has established branches in terms of Section 4 of its Constitution –

- The Annet Drive Informal Settlement, Durban;
- The Puntan's Hill Informal Settlement, Durban;
- The Shannon Drive Informal Settlement, Reservoir Hills, Durban;

- The Joe Slovo Informal Settlement, Mobeni Heights, Durban;
- The Mpolweni Informal Settlement, Reservoir Hills, Durban;
- The Burnwood Informal Settlement, Clare Estate, Durban;
- The Motala Heights Informal Settlement, Motala Heights, Durban;
- The New Emaus Informal Settlement, Westmead, Durban;
- The Jadhu Place Informal Settlement, Overport, Durban;
- The Foreman Road Informal Settlement, Clare Estate, Durban;
- The Ash Road Informal Settlement, Pietermaritzburg;
- The Mkhondedni Informal Settlement, Pietermaritzburg;
- The Quarry Road Informal Settlement, Claire Estate, Durban;
- The Emagwaveni Informal Settlement in Tongaat;
- The Thembalihle Informal Settlement in Pietermaritzburg;

- The Thabmville Informal Settlement in Pietermaritzburg .

8 I am the second applicant. I reside at the Kennedy Road Informal Settlement, 286 Kennedy Road, Clare Estate, Durban.

9 The first respondent is the Premier of the Province of Kwa-Zulu Natal. The first respondent is cited in his official capacity as the head of the Kwa-Zulu Natal Provincial legislature which enacted the Slums Act. The Premier's address is care of the State Attorney 6th Floor, Metropolitan Life Building, 391 Smith Street, Durban.

10 The second respondent is the Member of the Executive Council for Local Government, Housing and Traditional Affairs in the Province of Kwa-Zulu Natal. The second respondent is cited in his official capacity as the official responsible for the administration of the Slums Act. The second respondent's address is care of the State Attorney 6th Floor, Metropolitan Life Building, 391 Smith Street, Durban.

11 The third respondent is the Minister of Housing. The third respondent is cited in her official capacity as the Minister responsible for the Housing Act 107 of 1997 ("the Housing Act") and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act"). No

relief is sought against the third respondent and she is cited only for the interest she may have in the first applicant's contentions that the provisions of the Slums Act conflict with the provisions of the Housing Act and the PIE Act. The third respondent's address is care of the State Attorney 6th Floor, Metropolitan Life Building, 391 Smith Street, Durban.

- 12 The fourth respondent is the Minister of Land Affairs, who is cited in her official capacity as the Minister responsible for land reform and land tenure issues in the national government. No relief is sought against the fourth respondent and she is cited only for the interest she may have in these proceedings. The fourth respondent's address is care of the State Attorney 6th Floor, Metropolitan Life Building, 391 Smith Street, Durban.

B INTRODUCTION

The First Applicant and its Members

- 13 All of the informal settlements occupied by persons whose interests are represented by the first applicant were established because of a lack of adequate housing for poor people in Durban and Pietermaritzburg. They were established on vacant land in locations which afforded their residents viable access to jobs, livelihood strategies and social services within a reasonable distance. Many of the residents of the Shannon Drive

Informal Settlement, for example, benefit from low-paid domestic work and gardening “piece jobs” in the suburb of Reservoir Hills, Durban.

- 14 Almost all of the first applicant’s members live in fear of eviction. Almost all of them are either unaware of who owns the land they live on, or are aware that they have no formal permission from the owner or person in charge to live on the land. Accordingly, I am advised that the vast majority of the first applicant’s members are “unlawful occupiers” within the meaning of section 1 of the PIE Act.
- 15 All of the informal settlements affiliated to and represented by the first applicant lack basic infrastructure and sanitation. For example, the 7000 residents of the Kennedy Road Informal Settlement depend on just 5 communal standpipes for their water supply, and 106 pit latrines and 3 chemical toilets for sanitation. In six of the informal settlements inhabited by members of the first applicant, a minority of households have access to some electricity. The rest of the settlements have no access to electricity at all.
- 16 We do not want to have to live in these conditions, but are unable to find formal accommodation which is both lawful and affordable to us while allowing us to sustain our jobs, livelihoods and access to social services. Government (whether in the national, provincial or local sphere) has

failed to provide us with access to proper housing which is lawful, affordable and accessible. We have had no realistic alternative available to us and have had to use our own resources to create or find accommodation in these settlements and to live under these ordinarily unacceptable conditions.

17 The informal settlements inhabited by the first applicant's members have been in existence for several years. A socio-economic profiling exercise currently being conducted under my supervision in the Durban settlements occupied by the first applicant's members has found that:

- The Kennedy Road Informal Settlement, where I live with my family, was established in 1984 and is currently home to over 7000 people, living in approximately 2600 shacks;
- The Puntan's Hill Informal Settlement was established in 1990 and is home to 700 people living in 300 shacks;
- The Joe Slovo Informal Settlement was established in 1986 and is home to 70 people living in 39 shacks ;

- The Mpolweni Informal Settlement was established in 1992 and is home to 451 people living in 143 shacks;
- The Burnwood Informal Settlement was established in 1987 and is home to 720 people living in 301 shacks;
- The New Emaus Informal Settlement was established in 1990 and is home to 1564 people living in 391 shacks;
- The Jadhu Place Informal Settlement was established in 1984 and is home to approximately 3500 people living in 800 shacks;
- The Foreman Road Informal Settlement was established in 1990 and is home to 6965 people living in 1110 shacks;
- The Motala Heights Informal Settlement was established in 1964 (to the best of my knowledge, originally with the permission of the government of the

time) and is home to 109 people living in 53 dwellings, most of which are shacks;

- The Shannon Drive Informal Settlement was established in 1992 and is home to 489 people living in 239 shacks;
- The Annet Drive Informal Settlement was established in 1975 and is home to 491 people living in 124 shacks.

18 All of the shacks in the above settlements are made out of mud-brick, wood, corrugated iron or plastic.

19 The first applicant's profiling exercise is ongoing and a similar socio-economic profiling exercise is planned in its Pietermaritzburg settlements. The results set out above are those available at the time of deposing to this affidavit.

The Slums Bill

20 The Kwa-Zulu Natal Elimination and Prevention of Re-Emergence of Slums Bill was published on 16 November 2006. The applicants however only became aware of the Bill during March 2007 – not through any

official government or media channel, but by chance when Richard Pithouse, one of the first applicant's members, was informed of its existence by Marie Huchzermeyer, an Associate Professor at the University of the Witwatersrand.

21 Upon becoming aware of its existence, the first applicant and its members, including myself, obtained copies of the Bill and studied it. We were extremely concerned at the tone and content of the Bill and at the approach it adopted to informal settlements occupied by persons such as ourselves. We felt that the Bill's use of the term "slums" to describe our homes and communities was disrespectful and uncaring. The use of the term "elimination" to describe how informal settlements would be dealt was repressive and threatening. Generally we felt that the Bill regarded us not as human beings but as offensive nuisances to be cleared away, by force if necessary.

22 Section 16 of the Bill sought to do precisely this. Section 16(1) provided that an owner or person in charge of land or a building, which at the commencement of the Act is occupied by unlawful occupiers, must within a fixed period to be gazetted by the second respondent, apply for the eviction of such unlawful occupiers in terms of the PIE Act. Section 16(2) provided that if the owner or person in charge failed to do so within the prescribed period, the relevant municipality must apply for the eviction of

such unlawful occupiers in terms of the PIE Act. No discretion was permitted.

- 23 It was not clear from the Bill what was to happen to unlawful occupiers such as ourselves in the event of eviction under section 16. The Bill provided only that the relevant municipality may make available alternative land or buildings or may establish a “transit area” for the “relocation of people evicted from slums.” The Bill thus left it to the relevant municipality’s discretion as to whether to provide alternative land or accommodation at all.
- 24 The first applicant and its members raised all these concerns at a public hearing on the Bill convened by the office of the second respondent on 4 May 2007. The first applicant further submitted a detailed written submission on the Bill on 21 June 2007. Notwithstanding the first applicant’s submissions in this regard, the first respondent assented to the Bill on 18 July 2007 in substantially the same terms in which it had originally been published.
- 25 The Slums Act was published on 2 August 2007. Since no date was specified for its commencement, the Slums Act came into force on 2 August 2007. A copy of the Slums Act is attached hereto as Annexure “B.”

Developments since the Promulgation of the Slums Act

26 In November 2007 officials from the eThekweni Municipality arrived at the Annet Drive Informal Settlement in Durban (one of the first applicant's members) and used spray paint to mark certain of the shacks with an X. On 17 January 2008 the officials returned and demolished three of the marked shacks. The officials had no court order entitling them to act as they did. The occupiers of the Annet Drive Informal Settlement immediately launched an urgent court application interdicting the Municipality from demolishing further shacks or attempting to evict the occupiers without a court order obtained in terms of the PIE Act. The Municipality opposed the application on the basis that the Slums Act entitled it to demolish shacks erected after October 2007. Louisa Motha, a member of the first applicant's Secretariat, has personal knowledge of the above facts. Ms Motha's confirmatory affidavit is attached hereto as Annexure "C." The above facts were also reported in an article in the Natal Mercury on Friday 25 January 2008. A copy of the article is attached hereto as Annexure "D."

27 The above incident - and the Municipality's stance in Court - has caused the first applicant to fear that government officials will seek to rely on the Slums Act to justify action which violates the provisions of the PIE Act and indeed the Constitution itself.

Summary of the Applicants' Submissions

- 28 The applicants are advised and submit in the first instance that the Provincial Government of Kwa-Zulu Natal lacked the legislative competence to enact the Slums Act. This is because, as shall be shown below, in its substance, purpose and effect the Slums Act deals with land use, land tenure and eviction, matters which fall outside the functional areas of provincial competence in terms of section 104 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") read with Schedules 4 and 5 thereof. The applicants submit that the Slums Act accordingly falls to be declared *ultra vires* the legislative authority of the Kwa-Zulu Natal Provincial Government and unconstitutional.
- 29 In the alternative to the above the applicants submit that section 16 of the Slums Act is inconsistent with section 26(2) of the Constitution. This is because it does not constitute a reasonable legislative measure to achieve the progressive realisation of the right of access to adequate housing of the residents of informal settlements in Kwa-Zulu Natal. The applicants submit that section 16 of the Slums Act accordingly falls to be declared invalid.

30 In the further alternative to the above, the applicants submit that section 16 and section 9(1)(a) of the Slums Act conflict with the provisions of the Housing Act and the PIE Act, both of which constitute national legislation applying uniformly across the country as a whole. The applicants submit that the Housing Act and the PIE Act must prevail in terms of section 146(2) of the Constitution and that section 16 and section 9(1)(a) of the Slums Act accordingly fall to be declared inoperative.

31 Each of the above aspects will be dealt with in turn below.

C THE SLUMS ACT IS ULTRA VIRES THE LEGISLATIVE AUTHORITY OF THE KWA-ZULU NATAL PROVINCIAL GOVERNMENT

32 Section 3 of the Slums Act describes its objects as follows –

“Objects of the Act

3. The objects of this Act are –
- (a) to eliminate slums;
 - (b) to prevent the re-emergence of slums;
 - (c) to promote co-operation between the department and municipalities in the elimination of slums;

- (d) to promote co-operation between the department and municipalities in the prevention of the re-emergence of slums;
- (e) to monitor the performance of the department and municipalities in the elimination and prevention of the re-emergence of slums; and
- (f) to improve the living conditions of the communities.”

33 The Slums Act accordingly has two objectives: to eliminate slums and to prevent the re-emergence of slums. This is clear from the Act’s stated objects quoted above. It is also clear from the substantive provisions of the Slums Act.

34 A consideration of the substantive provisions of the Slums Act reveals that it seeks to achieve its two objectives through the following means –

34.1 Prohibiting the use of substandard accommodation for financial benefit (section 5);

34.2 Mandating the institution of eviction proceedings against occupiers of substandard buildings (section 6);

34.3 Imposing duties on owners and persons in charge to upgrade land or buildings which are in “an unhygienic condition,” in “a

state of disrepair” or “likely to become a slum” and creating an offence for failure to do so (section 14);

34.4 Imposing duties on owners and persons in charge to take steps to prevent the unlawful occupation of vacant land or buildings and creating an offence for failure to do so (section 15);

34.5 Mandating and compelling the institution of eviction proceedings against unlawful occupiers of land and buildings by owners and persons in charge (section 16(1));

34.6 Mandating and compelling the institution of eviction proceedings against unlawful occupiers of land and buildings by municipalities (section 16(2)).

35 We are advised and respectfully submit that the above constitute matters of land use, land tenure and eviction which fall outside the functional areas of provincial legislative competence in terms of section 104 of the Constitution read with Schedules 4 and 5 thereof.

36 We are advised and respectfully submit further that while the Preamble and certain provisions of the Slums Act make reference (inaccurately) to the constitutional right of access to housing and to certain provisions of the Housing Act, the Slums Act does not in its overall substance, purpose or effect fall within the functional area of housing. Indeed it is submitted

that the mere repetition of the provisions of section 26 of the Constitution and of certain provisions of the Housing Act are not sufficient to bring the Slums Act within the functional area of housing listed in Schedule 4 of the Constitution.

37 The Slums Act purports to deal with a matter listed in Schedule 4 of the Constitution - viz housing. It is respectfully submitted that its true purpose and effect is to achieve a different goal - that of regulating land use and land tenure - which falls outside the functional areas listed in Schedule 4. It is accordingly respectfully submitted that the Slums Act falls to be declared *ultra vires* the legislative authority of the Kwa-Zulu Natal Provincial government and unconstitutional.

38 In the alternative to the above - in the event that it is found that the Slums Act does fall within the functional area of housing and was validly enacted by the Kwa-Zulu Natal Provincial legislature - it is submitted that section 16 of the Slums Act is inconsistent with section 26(2) of the Constitution and invalid.

D THE UNCONSTITUTIONALITY OF SECTION 16 OF THE SLUMS ACT

39 Section 16 of the Slums Act provides as follows –

“Eviction of unlawful occupiers

16(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.” (emphasis added)

40 Section 26(1) and (2) of the Constitution provide as follows –

“Housing

26 (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

41 We are advised and respectfully submit that in order to be reasonable within the meaning of section 26(2) legislative measures are required to meet, *inter alia*, the following standards –

41.1 be comprehensive, coherent and effective;

41.2 have sufficient regard for the social, economic and historical context of widespread deprivation;

41.3 make short, medium and long term provision for housing needs;

41.4 give special attention to the needs of the poor and the most vulnerable;

41.5 be implemented reasonably;

41.6 respond with care and concern to the needs of the most desperate; and

41.7 achieve more than a mere statistical advance in the numbers of people accessing housing by demonstrating that the needs of the most vulnerable are being catered for.

42 We are advised and respectfully submit that section 16 of the Slums Act which, without more, mandates and compels the institution of eviction proceedings against all unlawful occupiers in the Province of Kwa-Zulu Natal within a fixed period, does not conceivably meet these standards. Indeed we respectfully submit that section 16 of the Slums Act does not promote but retards the progressive realisation of the right of access to adequate housing in the Province of Kwa-Zulu Natal. It is accordingly submitted that the section is unconstitutional.

E THE SLUMS ACT CONFLICTS WITH NATIONAL LEGISLATION

43 In the further alternative to the above, it is submitted that section 16 and section 9(1)(a) of the Slums Act conflict with the provisions of the Housing Act and the PIE Act and accordingly fall to be declared inoperative. Before demonstrating this conflict it is necessary to set out the relevant provisions of the Housing Act and the PIE Act.

The Housing Act

- 44 The Housing Act was enacted in order to give effect to section 26(1) and (2) of the Constitution. Thus its Preamble records that “everyone has the right to have access to adequate housing, and the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”
- 45 The purpose of the Housing Act is “to provide for the facilitation of a sustainable housing development process; for this purpose to lay down general principles applicable to housing development in all spheres of government and to define the functions of national, provincial and local governments in respect of housing development.”¹
- 46 Section 3 of the Housing Act requires national government, acting through the third respondent, and after consultation with provincial and local government, to establish and facilitate a sustainable housing development process. In particular the Housing Act requires the third respondent to –

¹ The long title of the Housing Act

- determine national housing policy, including national norms and standards, in respect of housing development;²
- set broad national housing delivery goals and facilitate the setting of provincial and local government housing delivery goals in support thereof;³
- monitor the performance of the national government and, in co-operation with every provincial MEC for housing, the performance of provincial and local governments against housing delivery goals and budgetary goals.⁴

47 Section 4 of the Housing Act requires the third respondent to publish a code called the National Housing Code which must contain national housing policy.⁵

48 In terms of section 4(6) of the Housing Act the National Housing Code is binding on the provincial and local spheres of government.

² Section 3(2)(a)

³ Section 3(2)(b)

⁴ Section 3(2)(c)

⁵ Section 4(1) and 4(2)(a).

49 The National Housing Code was published by the third respondent in October 2004. Its provisions, particularly in relation to informal settlements, shall be dealt with in detail below.

50 Section 7 of the Housing Act deals with the functions and duties of provincial government in relation to housing. The following subsections are particularly important for present purposes –

- Every provincial government, through its MEC, must, after consultation with local government, do everything within its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.⁶
- Every provincial government must, through its MEC, administer every national housing programme and every provincial housing programme, which is consistent with national housing policy.⁷

51 Section 9 of the Housing Act deals with the functions and duties of local government in relation to housing. It provides that every municipality must, as part of the municipality's process of integrated development

⁶ Section 7(1).

⁷ Section 7(3)(a).

planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to –

- ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;⁸ and
- initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.⁹

52 Section 2 of the Housing Act sets out the general principles applicable to housing development. These principles are binding on national, provincial and local spheres of government. The following principles are important for present purposes –

“2 General principles applicable to housing development

(1) National, provincial and local spheres of government must –

- (a) Give priority to the needs of the poor in respect of housing development;

⁸ Section 9(1)(a)

⁹ Section 9(1)(f).

- (b) Consult meaningfully with individuals and communities affected by housing development;

- (c) Ensure that housing development –
 - (i) Provides as wide a choice of housing and tenure options as is reasonably possible;

 - (ii) is economically, fiscally, socially and financially affordable and sustainable;

 - (iii) is based on integrated development planning;
and

 - (iv) is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance;

- (d) Encourage and support individuals and communities, including, but not limited to, co-operatives, associations and other bodies which are community based, in their efforts to fulfil their own housing needs by assisting them in accessing land, services and

technical assistance in a way that leads to the transfer of skills to, and empowerment of, the community

....

- (h) In the administration of any matter relating to housing development –
 - (i) respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution;
 - (ii) observe and adhere to the principles of co-operative government and intergovernmental relations referred to in section 41(1) of the Constitution; and
 - (iii) comply with all other applicable provisions of the Constitution.
- (i) Strive to achieve consensus in regard to the policies of the respective spheres of government in respect of housing development.

.....”

53 It is respectfully submitted that it is clear from the above that the Housing Act –

53.1 establishes a comprehensive and coherent country-wide framework in order to give effect to section 26(1) and (2) of the Constitution;

53.2 defines the roles of national, provincial and local spheres of government within that framework;

53.3 establishes principles, or norms and standards, with which housing development at all three levels of government must comply; and

53.4 establishes national housing policy by which provincial and local spheres of government are bound.

54 As stated above the National Housing Code was published in terms of the Housing Act in October 2004. Chapter 13 of the National Housing Code deals with the upgrading of informal settlements. This Chapter will be considered below.

Chapter 13 of the National Housing Code: Upgrading of Informal Settlements

55 Chapter 13 provides that informal settlements are to be upgraded *in situ*, in partnership with the affected community, in order to establish sustainable human settlements. Its introduction provides as follows –

“This Chapter deals with the rules for the upgrading of informal settlements. These rules relate to the provision of grants to a municipality to enable it to upgrade informal settlements in its jurisdiction in a structured way on the basis of a phased development approach. The grant funding so provided will enable the municipality to fast track the provision of security of tenure, the provision of basic engineering services, the provision of social amenities and the empowerment of informal settlement inhabitants to take charge of their own housing development.”¹⁰

56 Chapter 13 provides that relocation may occur only where absolutely necessary such as by virtue of geological conditions and then with the agreement of the community. Chapter 13 strongly discourages evictions and provides no funding for them. Chapter 13 provides as follows in this regard –

¹⁰

“Residents living in informal settlements are often dependent on fragile networks to ensure their livelihoods and survival. A guiding principle in the upgrading of these communities is the minimisation of disruption and the preservation of community cohesion. The Programme accordingly discourages the displacement of households, as this not only creates a relocation burden, but is often a source of conflict, further dividing and fragmenting already vulnerable communities.

In certain limited circumstances, it may however be necessary to permanently relocate households living in hazardous circumstances or in the way of essential engineering or municipal infrastructure. In all such cases and where feasible and practicable, the relocation must take place at a location as close as possible to the existing settlement and within the context of a community approved relocation strategy that must be submitted with the final business plan for approval by the MEC.

Where possible, relocations should be undertaken in a voluntary and negotiated manner. Mechanisms to ensure that the land is not re-occupied must be identified during this process. Legal processes should only be initiated as a last resort and all eviction-based relocations must be undertaken under the authority of a court order.

As a result, no funding is available for legal proceedings linked to the relocation of households. Funding for relocation will only be available on the basis of a detailed motivation to be provided by the municipality which must demonstrate the existence of a viable long-term land-release and upgrading strategy.” (emphasis added)

57 Chapter 13 is premised not just on consultation with affected communities, but on community partnership. It provides as follows in this regard –

“Community Partnership: The Programme is premised upon substantial and active community participation and funding is accordingly made available to underpin social processes. The following parameters are applicable:

- Community participation is to be undertaken through the vehicle of Ward Committees or a similar structure where Ward Committees don't exist, in line with the provisions of the Municipal Systems Act.
- Ongoing effort must be made to promote and ensure the inclusion of key stakeholders within the participatory process.

- The municipality must demonstrate that effective interactive community participation has taken place in the planning, implementation and evaluation of the project.
- Special steps may be required to ensure the ongoing involvement of vulnerable groups.”¹¹ (emphasis added)

58 One of the fundamental goals of Chapter 13 is to establish secure tenure for the residents of informal settlements. A variety of tenure arrangements are possible in this regard. These too are required to be determined in consultation with the community. Chapter 13 provides as follows in this regard –

“Tenure: The Programme promotes security of tenure as the foundation for future individual and public investment. The broad goal of secure tenure may be achieved through a variety of tenure arrangements and these are to be defined through a process of engagement between local authorities and residents. The following factors should be taken into consideration during this process:

¹¹ p 9

- The selected tenure arrangement must protect residents against arbitrary eviction.
- Where substantial public funding is invested in the acquisition and rehabilitation of well-located land, public interest factors may support tenure forms which encourage the retention of land and housing assets for long-term occupation by lower-income groups.
- The costs of administering different tenure arrangements and the capacity requirements of such administration must be taken into consideration.
- Residents must be involved in the development of appropriate dispute resolution mechanisms.¹² (emphasis added)

59 Chapter 13 makes provision for a comprehensive, fully costed four-phase process for the upgrading of informal settlements. This is the following –

Phase 1: The Application

¹² p 8.

60 At this stage the municipality applies for funding for the upgrading of an informal settlement through the submission of an interim business plan. The application is made to the provincial MEC for housing who considers the application based on criteria contained in implementation guidelines.¹³

Phase 2: Project Initiation

61 At this stage the municipality will receive funding for and undertake the following –

- the acquisition of land, if necessary;
- the establishment of capacity for the surveying and registration of households;
- the establishment of capacity for community participation facilitation, information communication, community training and assistance, conflict resolution and housing support facilitation;

¹³ p 12 – 13.

- the installation of interim services to provide basic water and sanitation to households within the settlement on an interim basis pending the formalisation of the settlement;
- pre-planning studies to determine detailed geological conditions; and
- an environmental impact assessment.¹⁴

62 The municipality is required to submit a detailed business plan at the completion of this stage which must contain certain specified information. Once this has been approved by the provincial MEC for housing, phase 3 may be embarked upon.¹⁵

Phase 3: Project Implementation

63 At this stage the municipality will receive funding for and undertake the following -

- the establishment of project management capacity;

¹⁴ p 13 – 14.

¹⁵ p 14 – 15.

- the establishment of housing support centres to support households at an early stage regarding their rights, housing options, and the construction of various housing typologies in accordance with their needs, means and aspirations;
- the initiation of planning processes including detailed town planning and the surveying of sites;
- the formalisation of land occupational rights whether individually or on a collective basis and the resolution of disputes;
- land rehabilitation where necessary in order to facilitate the development of certain areas, including drainage and storm water interventions and the engineering of steep slopes;
- the installation of permanent municipal engineering infrastructure including water, sanitation and toilet structures, roads, storm water and street lighting where applicable; and

- the construction of social amenities, economic and community facilities such as early-childhood development facilities, primary health clinics, recreational and community facilities, public open space improvements, public markets, public transport hubs and workplace facilities. The selection of social/economic facilities is to be determined in accordance with community needs and aspirations.¹⁶

Phase 4: Housing Consolidation

- 64 This phase deals with township establishment finalisation, ownership registration (where appropriate) and house construction. Any outstanding social amenities will also be constructed during this phase.¹⁷
- 65 Occupier benefits available under the final phase are linked to the status of the relevant person regarding competency to contract, previous residential property ownership status, the fact that the person may have accessed a state financed housing subsidy previously and the citizenship status of the person. These benefits are set out in detail in Chapter 13.¹⁸

¹⁶ p 15- 16.

¹⁷ p 17.

¹⁸ p 17-18.

- 66 A copy of Chapter 13 of the National Housing Code is attached hereto as Annexure “E.”

The PIE Act

- 67 The PIE Act applies in respect of all land throughout South Africa.¹⁹ It was enacted in order to give effect to section 26(3) of the Constitution. Thus its Preamble states that “no-one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances.”
- 68 While landowners and organs of state, including municipalities, may institute proceedings for the eviction of unlawful occupiers in terms of PIE, PIE provides that a court may grant an eviction order only if it is just and equitable to do so after considering all the relevant circumstances.
- 69 The courts are enjoined - in all cases - to give specific consideration to the rights and needs of the elderly, children, disabled persons and households headed by women. Where the unlawful occupier sought to

¹⁹ Section 2 of the PIE Act.

be evicted has occupied the land or building in question for more than six months, the courts are further enjoined to consider the availability to the unlawful occupier of suitable alternative accommodation or land.²⁰ Where the eviction of such unlawful occupier is sought by an organ of state the courts are in addition enjoined to have regard to the circumstances under which the unlawful occupier occupied the land and the period the unlawful occupier and his or her family have resided on the land in question.²¹

70 Section 5 of the PIE Act severely curtails the circumstances in which it is possible to obtain an order for the eviction of unlawful occupiers on an urgent basis. A court may grant such an order only if it is satisfied that –

- there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not evicted forthwith from the land;
- the likely hardship to the owner or other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

²⁰ Section 4(7) and 6(3)(c) of PIE.

²¹ Section 6(3)(a) – (b) of PIE.

- there is no other effective remedy available.²²

71 The PIE Act strongly encourages mediation. Section 7 of the PIE Act entitles municipalities to appoint mediators to attempt to mediate and settle disputes in terms of the Act. Municipalities are entitled to do so even if they do not own the land in question, provided only that it falls within their area of jurisdiction.²³

72 Overall, it is submitted that the purpose and effect of the PIE Act is to discourage the institution of eviction proceedings against unlawful occupiers where their eviction would not be just and equitable, and in particular, where there would be no suitable alternative accommodation or land available to them.

Conflict between the Slums Act and the Housing Act and the PIE Act

73 Section 16 of the Slums Act has been quoted in paragraph 39 above. It requires eviction proceedings in terms of the PIE Act to be instituted against all unlawful occupiers in the Province of Kwa-Zulu Natal within a fixed period to be gazetted by the second respondent.

²² Section 5 of PIE.

²³ Section 7(1) of the PIE Act.

- 74 The Slums Act gives no clear indication of where the residents of informal settlements are to live after their eviction in terms of section 16. Section 12 of the Slums Act provides that a municipality may make alternative land or accommodation available and if it decides to do so such land or accommodation must comply with certain conditions. Section 13 of the Slums Act provides that a municipality may establish “transit areas” for the “relocation of persons evicted from slums” and that, if established, such “transit areas” must comply with certain conditions. Whether evictees will be provided with alternative land or accommodation, even on a temporary basis, is accordingly left entirely to the relevant municipality’s discretion.
- 75 The Slums Act also describes the duty of municipalities to take reasonable measures to achieve the progressive realisation of the right of access to adequate housing contained in section 26 of the Constitution as a discretionary one. Thus section 9(1)(a) of the Slums Act provides that “a municipality may, as part of its process of integrated development planning, and within its available resources, take reasonable measures to achieve for its inhabitants the progressive realisation of the right of access to adequate housing contained in section 26 of the Constitution.”
- 76 Having regard to the above it is submitted that the following conflicts arise –

76.1 Section 16 of the Slums Act conflicts with the following provisions of the Housing Act –

76.1.1 section 2, which binds provincial and local government to certain norms and standards in respect of housing development;

76.1.2 section 7(1), which requires every provincial government to do everything within its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.

76.1.3 section 9(1)(a), which requires every municipality to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

- 76.1.4 section 4(6), which provides that the National Housing Code is binding on provincial and local spheres of government; and
- 76.1.5 the provisions of the National Housing Code itself which require local and provincial government to upgrade informal settlements *in situ* in terms of a comprehensive fully funded programme and disallow evictions except as a last resort.
- 76.2 Section 9(1)(a), of the Slums Act conflicts with the following provisions of the Housing Act –
- 76.2.1 section 9(1)(a), which requires every municipality to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- 76.2.2 section 9(1)(f), which requires every municipality to take all reasonable and necessary steps within the framework of national and provincial housing

legislation and policy to initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

76.3 Section 16 of the Slums Act conflicts with the following provisions of the PIE Act –

76.3.1 sections 4, 5 and 6, in terms of which owners, persons in charge or municipalities, as the case may be, may institute proceedings for the eviction of unlawful occupiers.

77 We are advised and respectfully submit that the provisions of the Housing Act and the PIE Act must prevail over the provisions of the Slums Act for, *inter alia*, the following reasons –

77.1 The Housing Act and the PIE Act are constitutional legislation enacted in order to give effect to the fundamental rights of access to adequate housing and protection against arbitrary eviction enshrined in section 26 of the Constitution.

77.2 Legislation which gives effect to fundamental rights ought to be uniform across the country, *inter alia*, in order to be consistent with the right to equality in section 9 of the Constitution.

77.3 The Housing Act, through the National Housing Code, provides government services, to which there ought to be equal access across the country.

77.4 The Housing Act and the PIE Act provide the uniformity needed across the country in the areas of housing and evictions by *inter alia* establishing norms and standards, frameworks and national policies.

78 It is accordingly submitted that sections 16 and 9(1)(a) of the Elimination of Slums Act fall to be declared inoperative.

WHEREFORE the applicants pray that it may please the above honourable Court to grant the order as prayed for in the Notice of Motion.

SIBUSISO ZIKODE

The Deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to before me at _____ on this the _____ day of FEBRUARY 2008 the regulations contained in Government

Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS