CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/09
[2009] ZACC 31

In the matter between:

ABAHLALI BASEMJONDOLO MOVEMENT SA	First Applicant
SIBUSISO ZIKODE	Second Applicant
and	
PREMIER OF THE PROVINCE OF KWAZULU-NATAL	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS, KWAZULU-NATAL	Second Respondent
MINISTER OF HUMAN SETTLEMENTS	Third Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent

Heard on : 14 May 2009

Decided on : 14 October 2009

JUDGMENT

YACOOB J:

Introduction

[1]This application for leave to appeal concerns the validity of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (the Act).[1] The application requires us to consider the relationship between national, provincial and local government in the provision of housing. We must also determine whether it is legitimate for municipalities and owners of property to be compelled to evict certain categories of unlawful occupier. The applicants wish to challenge the correctness of a judgment of the KwaZulu-Natal High Court, Durban[2] (the High Court) dismissing an application to declare certain provisions of the Act to be inconsistent with the Constitution.[3]

[2]The first applicant, the Abahlali baseMjondolo Movement of South Africa, is a voluntary association that represents the interests of many thousands of occupiers of informal dwellings. They are poor people who have no access either to secure tenure or adequate housing. The second applicant, Mr Sibusiso Zikode, is the president of the first applicant. The four respondents are cited in their official capacities. The first respondent is the Premier of KwaZulu-Natal. The second respondent is 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

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[1] 6 of 2007.

[2] Previously known as the Durban and Coast Local Division of the High Court but renamed by the Renaming of High Courts Act 30 of 2008.

[3] The judgment, delivered by Tshabalala JP on 27 January 2009, is reported as *Abahlali baseMjondolo Movement SA and Another v Premier, KwaZulu-Natal, and Others* 2009 (3) SA 245 (D); 2009 (4) BCLR 422 (D&CLD).

Settlements and the national Minister of Rural Development and Land Reform[4] are the third and fourth respondents.

[3]The applicants say, and there is no reason to doubt this, that the members of the first applicant comprise tens of thousands of people occupying about seventeen informal settlements in the surrounds of Durban and Pietermaritzburg in KwaZulu-Natal. They became concerned that the Act would make it significantly easier to evict people living in informal settlements; it would facilitate their eviction without meaningful engagement and in circumstances where they will not be provided with suitable alternative accommodation and would be rendered homeless. They were also afraid that the Act would undermine national legislation aimed at the protection of people with insecure land rights. They accordingly applied to the High Court attacking the constitutional validity of the whole Act as well as some of its provisions.

High Court

[4]The applicants contended in the first place that the whole of the Act was inconsistent with the Constitution and invalid on the basis that the KwaZulu-Natal legislature had no power to enact it. This was so because, according to the applicants, the Act is not about housing, a matter which does fall within the concurrent legislative preserve of both the national and provincial governments; it is in reality concerned

[4] In May 2009, the name of the national portfolio responsible for Housing was changed to Human Settlements and that of Land Affairs to Rural Development and Land Reform.

with land tenure, a matter on which provincial legislatures are incompetent to make law.

[5]The applicants also contested the validity of sections 9, 11, 12, 13 and 16 of the Act on the basis that they are inconsistent with section 26(2) of the Constitution. Section 16 was in particular said to be inconsistent with the provisions of the PIE Act,[5] the national Housing Act[6] as well as the National Housing Code.[7] Section 16 is set out in full in paragraph [44] below.

[6]The High Court held that the Act, properly construed as a whole, is concerned with housing in the context of national and provincial legislation that deals with this functional area.[8] The Court rejected the claims of inconsistency with section 26(2) of the Constitution, finding that, far from being inconsistent with the Constitution, the Act "constitutes a reasonable legislative response to deal with the plight of the vulnerable in our society".[9] Finally, the High Court held that the Act is not in conflict with the PIE Act, the national Housing Act or with chapter 13 of the National Housing Code. The High Court reasoned that the Act authorises evictions subject to the PIE Act, that nothing in the Act precludes reasonable engagement before eviction

[5] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[6] 107 of 1997.

[7] Promulgated in terms of section 4 of the national Housing Act.

[8] Above n 3 at para 32.

[9] Id at para 36.

proceedings are instituted; and that municipalities are bound to comply with national and provincial legislation.[10]

[7]The High Court declined to rule on two other issues before it. The one was a contention by the respondents that it should not entertain argument on the constitutional validity of the Act because the challenge was abstract (on the basis that the Act had not yet been implemented and that implementation is a prerequisite to a court adjudicating upon the challenge). The second issue on which the High Court found it unnecessary to rule is whether a report prepared by the Centre on Housing Rights and Evictions (COHRE Report), which the applicants sought to introduce into evidence, was admissible.

In this Court

[8]The applicants ask that this Court grant them leave to come to this Court directly from the High Court.

[9]It is necessary to determine the issues that fall to be decided before considering the application for leave to appeal itself. The applicants expressly abandoned their attack on sections 9, 11, 12 and 13 of the Act. All the other issues that surfaced in the High Court have been raised by the applicants in this Court. Apart from issues concerned with the interests of justice and the question of the admissibility of the COHRE

[10] Id at paras 37-8.

Report, the matters that will have to be considered by this Court if leave to appeal is granted are whether:

(a) the KwaZulu-Natal Provincial Legislature was competent to pass the law in the light of the division of legislative power between the national and provincial spheres of government stipulated in the Constitution;

(b) section 16 of the Act is consistent with section 26(2) of the Constitution; and

(c) section 16 of the Act is consistent with three national legislative instruments namely, the PIE Act, the national Housing Act and the National Housing Code.

[10] This judgment carries the support of all the members of the Court on its conclusion that the application for leave to appeal should be granted and the finding that the Act is concerned with housing. Concerning the constitutional validity of section 16 of the Act, however, this judgment is a dissent. The majority judgment on that issue, to the effect that section 16 of the Act is inconsistent with the Constitution, has been prepared by my colleague Moseneke DCJ and appears later.

Leave to appeal

[11] This Court will grant leave to appeal if a constitutional matter is raised and if that course is in the interests of justice. Questions of conflict between provincial legislation and the Constitution and between provincial and national legislation inevitably involve the interpretation and enforcement of the Constitution.[11] There is therefore no doubt that constitutional matters have been raised.

[11] Section 167(7) of the Constitution.

[12]It is necessary to enquire into the interests of justice.

[13]An issue fundamental to the interests of justice in this case is that raised in the High Court concerning abstract review. If the challenge to the validity of the Act is indeed an abstract one, in the sense that the rights of the applicants are not threatened[12] or that the applicants have no interest in the adjudication of the dispute, it will in my view not be in the interests of justice to grant leave to appeal.

[14]Everyone is entitled to the full benefit of the rights conferred by section 26 of the Constitution. The PIE Act, the national Housing Act and the National Housing Code represent a legislative effort to give effect to the rights conferred by this constitutional mandate. The nub of the complaint on behalf of the applicants is that the Act erodes significantly the benefits conferred upon them by the PIE Act as well as their right of access to reasonable housing as provided for in the national Housing Act and the National Housing Code. Many of the applicants are themselves unlawful occupiers, urgently in need of permanent housing; they are therefore entitled to, and in dire need of, the essential protection that these laws accord. Indeed, the watering down of this protection would be potentially devastating to the applicants. In the circumstances, they allege, in effect, that their rights enshrined in section 26 of the Constitution have

[12] Section 38 of the Constitution, to the extent relevant, provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. . . ."

been threatened. If the applicants are right that the protection to which they are entitled has been eroded by the Act, then their rights will as a matter of course have been threatened. Their fears are by no means fanciful. The applicants therefore have standing. In the circumstances, they cannot be unsuited on the basis that the challenge to the Act is abstract.

[15]It is in the interests of justice for this Court to consider the appeal for the following reasons. First, the case raises fundamental issues about whether the Act impairs the significant protection that has been afforded by the PIE Act and national housing legislation to people in unlawful occupation of land and people in urgent need of housing. Secondly, we must accept that the applicants feel threatened by the Act and require resolution of their challenge as quickly as possible. Thirdly, the provincial government requires urgent resolution of the dispute concerning the constitutional validity of the Act because the decision of this Court would affect the way in which the provincial government discharges its constitutional obligations concerning housing.

[16]In the fourth place, we are told that the national government and all other provincial governments await the outcome of this application. This is because the Act is really experimental pilot legislation which may be duplicated in other provinces if it is effective. In the circumstances, all the parties were agreed that this Court should consider the case. It is true that in a case of this kind the contribution of the Supreme

Court of Appeal would have been of value. However, the circumstances I have alluded to together with the importance and urgency of effective housing provision render it essential for this Court to hear and determine the matter sooner rather than later.

[17]The application for leave to appeal will accordingly be granted.

The COHRE Report

[18]This report, in summary, speaks to unlawful evictions and demolition of shacks by a municipality, homelessness resulting from unlawful evictions, the failure of a municipality to implement national housing programmes and the provision of housing legislation. It is impossible on the papers before us to tell whether all this is true, but if the allegations are true, they are cause for grave concern. The Report reflects the fears of vulnerable people that the municipal authorities might regard the passing of the Act as licence to effect unlawful evictions and to pay lip service to the consequence of homelessness. These fears cannot be ignored. No organ of state should under any circumstances tolerate or condone any unlawful conduct. All unlawful conduct is inimical to the Constitution and to the development of a society in which dignity, equality and freedom thrive.

[19]But as will be seen from the analysis that follows, these allegations and the information in the Report, valuable as it is, does not in fact assist in the determination

of the issues in this case. The Act is to be interpreted on the basis that it by no means directly or indirectly encourages or authorises any unlawful conduct on the part of any person. The Report contains general information, which is not strictly relevant to this interpretive exercise and it is accordingly not necessary to have regard to it.

The competency of the KwaZulu-Natal Provincial Legislature

[20]A provincial legislature can legislate only on any matter within a functional area listed in Schedule 4[13] or Schedule 5.[14] As I have already pointed out, the applicants contend that the Act is, on a proper construction, not concerned with housing, a Schedule 4 matter within the concurrent provincial and national competence. It is instead, they say, concerned with land tenure and access to land in terms of section 25(5) of the Constitution[15] and is therefore outside the provincial competence. The respondents contend that the legislation is concerned with housing.

[21]The parties agree as to the approach to be adopted by a court in determining the functional area within which particular legislation falls. It is necessary for this Court to discover the "substance of the legislation, which depends not only on its form but also on its purpose and effect"[16] or "its essence, or true purpose and effect, that is,

[13] Section 104(b)(i).

[14] Section 104(b)(ii).

[15] Section 25(5) provides:

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

[16] *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* [1996] ZACC 15; 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) at para 19.

what the [law] is about".[17] It is also trite that no national or provincial legislative competence can be entirely water-tight and that it may become necessary to find the "main substance of legislation" to ascertain whether there is provincial competence.[18]

[22]In developing their submissions, the applicants contended that sections 5, 7, 8, 9 and 17 of the Act must not be brought into the equation because each of them is no more than a repetition of material in other legislation.

[23]Section 7 of the Act[19] is indeed materially the same[20] as section 7 of the national Housing Act and section 2B(1) of the KwaZulu-Natal Housing Act.[21] But that is no reason for ignoring section 7 of the Act. It is trite that the meaning of legislation is to be assessed in its context. The duties of the MEC in relation to the elimination of slums, as envisaged in section 8 of the Act, must be evaluated and interpreted in the context of the provincial obligation to facilitate housing set out in section 7. Section 7 is of considerable importance in the construction of the Act as a whole. The fact that it is repeated is neither here nor there.

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[17] *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 36. See also *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) at paras 63-4 and 68.

[18] *Liquor Bill* above n 17 at para 62.

[19] The section provides:

> "Subject to the provisions of the Housing Act, 1997 (Act No. 107 of 1997), the responsible Member of the Executive Council must promote and facilitate the provision of adequate housing throughout the Province within the framework of the national policy on housing development."

[20] It is however not a reproduction as contended for by the applicants.

[21] 12 of 1998.

[24]A cursory examination of the relevant legislation[22] shows that—

(a) section 5 of the Act is not the same as any of the provisions of the National Building Regulations and Building Standards Act;[23]

(b) section 8 of the Act is not a reproduction of any provision of the national Housing Act or the KwaZulu-Natal Housing Act;

(c) section 9 of the Act does not reproduce any part of the national Housing Act or the KwaZulu-Natal Housing Act; and

(d) section 17 of the Act is concerned with matters very different from those envisaged in section 15A(7) of the KwaZulu-Natal Housing Act.

Arguments to the contrary must therefore be rejected. Indeed, sections 8, 9 and 17 of the Act deal in detail with aspects of slum elimination, a matter not even touched upon in any of the national or provincial housing legislation. These sections represent an innovation into the statutory scheme and must be considered when investigating whether the Act deals with housing.

[25]It follows that the contention that sections 5, 8, 9 and 17 of the Act are similar to other legislative provisions must be rejected. Accordingly, all the provisions of the legislation must be considered together to arrive at its true substance.

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[22] I consider it unnecessary to set out the provisions of the legislation for purposes of this judgment.

[23] 103 of 1997.

[26]The applicants point to certain specific provisions of the Act to demonstrate that it is not concerned with housing but is in reality concerned with—

(a) mandatory institution of eviction proceedings of people; and

(b) prohibition on the occupation of certain land and buildings; bolstered by

(c) the creation of offences for non-compliance.

[27]It is true that three sections of the Act[24] are concerned with eviction, that the Act does prohibit the letting for gain of any substandard accommodation[25] and that the owner or person in charge of property commits an offence if he or she does not take reasonable steps to prevent the unlawful occupation of the land or building concerned.[26] That is not however the end of the enquiry. It is our duty to examine the Act as a whole in order to determine its true ambit.

[28]The long title of the Act makes plain that it has three purposes, all of which are concerned with slums: the progressive elimination of slums, measures for the prevention of the re-emergence of slums and the upgrading and control of existing slums.[27]

[29]In the Act, the definition of "slum" refers to "overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons". The word

[24] Sections 6, 10 and 16.

[25] Section 5.

[26] Section 15(3).

[27] Some may consider the repeated use of the word "slum" in the Act unfortunate. I do not however think it has a pejorative meaning.

"occupied" in this definition cannot in its context be said to refer to occupation for business or industrial purposes. This is understandably not what is contended for. The definition refers to people who live in slum conditions, not to people who conduct commercial or industrial activity in these areas. It refers to people who have their homes there. Accordingly, the long title indicates strongly that the Act has to do with peoples' homes: housing.

[30]Moreover the Preamble of the Act refers to the need "to encourage interaction and support between provincial and local governments in the provision of affordable housing". The Preamble goes on to say that "it is desirable to introduce measures which seek to enable the control and elimination of slums, and the prevention of their re-emergence, in a manner that promotes and protects the housing construction programmes of both provincial and local governments". The Act conceives of an inevitable relationship between the provision of housing and the elimination of slums. I cannot accept the applicants' contention that the Preamble merely refers to housing. It does more.

[31]The whole of the Act seeks to define a strategy for achieving the object of the elimination of slums and the prevention of their re-emergence. Chapter 2 is concerned with the achievement of this object by a prohibition of unlawful occupation and use of substandard accommodation. Chapter 3 defines the role of the MEC of Housing in this strategy. Chapter 4 sets out the ways in which municipalities might

contribute to the achievement of the objectives of the Act, while Chapter 5 imposes certain duties on owners and municipalities. I describe the strategy briefly in order to demonstrate that the Act concerns housing.

[32]The strategy must be evaluated on the basis that the slums in which people live are their homes. But these homes are not fit for human habitation. The elimination of slums and the prevention of their re-emergence is a worthy objective provided that the process prescribed for their elimination and the prevention of their re-emergence is lawful, reasonable and part of the achievement of a housing objective. If the process prescribed by the Act had been limited to compulsory eviction and the creation of offences and penalties without more, regardless of whether people were unjustifiably rendered homeless by the process, a contention that the Act is not concerned with housing may well have been tenable. It is important therefore to determine how the Act proposes to eliminate slums and prevent their re-emergence.

The role of municipalities in the slum elimination process

[33]The Chapter concerned with the role of municipalities begins by defining, in broad terms, the ways in which a municipality would achieve the elimination of slums and the prevention of their re-emergence.[28] The municipality is empowered, in the process of integrated development planning,[29] and within its available resources, to achieve the elimination of slums in the following ways—

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[28] Section 9.

[29] Section 9(1).

(a) take reasonable measures for the progressive realisation of the right to adequate housing;[30]

(b) promote socially and economically viable communities and safe and healthy living conditions;[31]

(c) encourage and promote housing and economic development in rural areas;[32]

(d) facilitate co-operation between municipalities to achieve inter-municipality co-ordination for the creation of a safe and healthy environment;[33] and

(e) work with traditional councils where necessary.[34]

In addition, the MEC is empowered to direct one municipality to provide sanitary or other services to people living in slum conditions, informal settlements or a transit area in another municipality as a matter of priority.[35] All the provisions discussed in this paragraph are concerned with the improvement of the conditions in which people are housed.

[34]The Act also confers specific responsibilities on municipalities in the slum elimination process.[36] Each municipality is required to prepare a detailed slum elimination programme with "key performance indicators" to measure progress in its implementation.[37] A municipality must initially submit a status report to the MEC

[30] Section 9(1)(a).

[31] Section 9(1)(b).

[32] Section 9(1)(c).

[33] Section 9(1)(d).

[34] Section 9(1)(e).

[35] Sections 9(2) and 9(3).

[36] Section 11.

[37] Section 11(1).

containing the slum elimination programme. The report must also show the number of slums within its area together with details in respect of each slum.[38] More importantly, the report must indicate the feasibility of alternative accommodation being made available for the occupants of slums[39] and make recommendations as to whether a particular slum is capable of upgrading and improvement.[40] A municipality is required to submit detailed annual reports to the MEC describing the progress that has been made in slum elimination.

[35]A municipality is also empowered to require the owner to upgrade and refurbish land and buildings.[41] The improvement of the conditions in slums and the provision of suitable alternative accommodation,[42] the establishment of transit areas,[43] and the power to compel a landowner to upgrade or refurbish substandard accommodation[44] are all concerned pre-eminently with housing. Indeed every municipality is the engine of slum elimination.

[36]It is true that the Act also empowers the municipality to evict. But the responsibilities imposed on municipalities are not limited to the three mechanisms contended for by the applicants: compulsory eviction of people so that they are

[38] Sections 11(1)(a) and (b).

[39] Section 11(1)(c).

[40] Section 11(1)(d).

[41] Section 14.

[42] Dealt with in more detail in section 12 of the Act.

[43] Section 13.

[44] Section 14.

rendered homeless, preventing people from occupying empty land or buildings unlawfully, and criminal sanction. Indeed, these responsibilities transcend the duty to evict. The role of a municipality has been carefully crafted. The flexible strategy includes the development of housing, the creation of socially and economically viable communities and safe and healthy living conditions, development in rural areas, co-operation between municipalities, co-operation between municipalities and traditional councils and the provision by one municipality of essential services for the benefit of the occupants of slums in another.

[37]The Act also envisages the preparation and implementation by the municipality of a detailed slum elimination programme which includes the acquisition of land or buildings for their relocation near employment opportunities, as well as the upgrading and improvement of existing slum areas. In addition, transit areas may be established to temporarily accommodate people who are evicted from slum areas. This Chapter demonstrates that the Act is principally about the improvement of the conditions of life of those unfortunate people who are housed in slums in the province of KwaZulu-Natal.

The role of the MEC

[38]I need say no more about the role of the MEC[45] than that the MEC has the power and duty to evaluate and monitor the implementation of the municipalities' slum

[45] See Chapter 3.

elimination programmes. The province also funds slum elimination through upgrading and relocation.[46]

The role of owners of property

[39]The Act also places certain duties on owners of properties in the slum elimination process. It prohibits the letting of substandard accommodation for financial benefit[47] and empowers the municipality to require the owner to eject unlawful occupants of substandard accommodation.[48] In addition the Act places obligations on owners to prevent the unlawful occupation of land or buildings on pain of criminal sanction.[49] It also obliges owners and municipalities to evict unlawful occupiers in certain circumstances.[50] Taken in their context, these provisions are part of the strategy to eliminate slums and are concerned with housing.

Conclusion on functional area

[40]To conclude, the Act designs and puts into place a complex, co-ordinated and coherent scheme for the elimination of slums and the prevention of their re-emergence. The scheme aims at the improvement of the housing conditions of people living in slums and involves municipalities, the provincial government as well as the provincial legislature. The subject matter of the Act is housing.

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[46] Section 8.

[47] Section 5.

[48] Section 6.

[49] Section 15.

[50] Section 16.

Section 16

[41]This section makes it obligatory for proceedings to be instituted for unlawful occupiers to be evicted. The challenge to the provision in the written argument differed somewhat from the submissions that were orally advanced before us at the hearing. I deal first with the written argument.

[42]In their written argument, the applicants contest the validity of section 16 on the basis that it is inconsistent with section 26(2) of our Constitution, the PIE Act, the national Housing Act as well as the National Housing Code on various overlapping grounds. It will be more convenient to discuss each ground in turn and indicate the inconsistency contended for. The contentions are that:

(a) owners and municipalities would be forced to institute eviction proceedings even if, in their evaluation, the PIE Act has not been complied with;

(b) the section takes away the discretion conferred on the owner or municipality;

(c) it permits eviction other than as a matter of last resort; and

(d) the section permits eviction proceedings to be instituted without allowing for reasonable engagement.

Before dealing with each of these contentions, it is necessary to say something about section 16.

The scope of section 16

[43]I have already pointed out that the applicants fear that the Act authorises the MEC or the municipality to act in a manner which is inconsistent with the Constitution as well as national and provincial legislation. However, their approach leaves out of account a fundamental tenet of constitutional interpretation, which is that all legislation must be interpreted subject to and in accordance with the Constitution. Nothing in the Act precludes an interpretation that accords wholly with the constitutional and statutory duties of the MEC, or the municipality. The Act must therefore be interpreted consistently with these duties. The Act itself signifies that it is to be interpreted subject to the Constitution[51] and other statutes[52] that embody constitutional safeguards.

[44]Section 16 provides:

> "(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.
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> (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."

[51] Sections 9(1), 10 and 19.

[52] Sections 2(2), 4(2), 6(2), 10 and 16.

[45]We must first delineate the meaning of the concept of slums as envisaged by the Act. The Act makes a distinction between informal settlements on the one hand and slums on the other. This important distinction shows that the Act has nothing to do with the elimination of informal settlements. It is concerned only with slums. An informal settlement is defined as—

> "an area of unplanned and unapproved informal settlement of predominantly indigent or poor persons with poor or non-existent infrastructure or sanitation".[53]

A slum is defined 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".[54]

[46]Common to "informal settlements" and "slums" as defined in the Act is that they both comprise predominantly indigent or poor people who exist under the burden of poor or non-existent infrastructure or sanitation. There are however three significant differences between the definition of a "slum" and that of an "informal settlement". Firstly, the people in a slum live in overcrowded or squalid conditions. By definition the conditions under which people in slums live are worse than those who live in informal settlements. The absence of services must be so severe as to render the areas occupied as squalid or overcrowded. Squalid is defined in the Concise Oxford English Dictionary as "extremely dirty and unpleasant". The long title accordingly

[53] Section 1 of the Act.

[54] Id.

evinces a purpose to eliminate and prevent the re-emergence of situations in which people are housed and live in dire circumstances, in conditions so extremely unpleasant or dirty that they are not fit for human habitation.

[47]The second difference between slums and informal settlements as defined reflects another respect in which desperate people who live in dire circumstances are burdened. They have no security of tenure. The third and most fundamental difference, in my view, between a slum and an informal settlement as conceived in the Act is that a slum consists of occupants of land or buildings while an informal settlement, as the name suggests, is a settlement of people. We must therefore accept that the Act is not concerned with the elimination of settlements of people who are poor and indigent and who live without appropriate structure or sanitation. The Act has the decided purpose of eliminating and preventing the re-emergence of phenomena represented by land and buildings in which poor or indigent people live in the direst of circumstances unfit for human habitation and without land security.

[48]Those involved in the progressive elimination of slums must not be too ready to jump to the conclusion that an area in which people live is a slum. The difference between informal settlements and slums depends to an extent on degree. Most people in informal settlements live without security of tenure and many informal settlements are to a degree overcrowded and not consistent with the most hygienic of living conditions. Informal settlements too are most often also occupied by poor people. It

must be emphasised that the word slum must be given a narrow meaning. Before land or a building may be regarded as a slum, the area must be so overcrowded or so extremely dirty as to be unfit for human habitation bearing in mind the extent of poverty in our society. The New Shorter Oxford English Dictionary defines a slum as "an overcrowded district of a town or city having squalid housing conditions and inhabited by very poor people".

[49]The section provides one more way in which slums may be eliminated and must be interpreted in the context of other obligations placed on municipalities to eliminate slums by providing alternative housing and the upgrading of existing slums. It places an obligation to evict on the owner or person in charge of property as well as municipality in certain circumstances. I will refer to the owner or person in charge simply as the owner. We must remember that section 16 becomes operational in practice not on the date of coming into operation of the Act but some time after that date. The obligation to evict[55] arises only after notice by the MEC in the provincial Gazette; it cannot be given before the Act comes into force. The Act came into force more than two years ago on 2 August 2007. The MEC has not yet given notice that is required to operationalise the section.

[50]Section 16 is of limited application. The duty to commence eviction proceedings arises only in respect of land or any building that was already occupied by unlawful occupiers at the date of commencement of the Act. The Act does not apply to land or

[55] Section 10.

buildings occupied after the commencement of the Act, presumably on the basis that the regime created in section 15 would adequately cater for the prevention of the re-emergence of slums.[56] It follows that the unlawful occupiers concerned would all by now have been in occupation, albeit unlawfully, for a period of more than two years. It is significant that no notice has yet been issued by the MEC to oblige the owner or the municipality to evict these occupiers.

[51]This is consistent with the tenor of the Act. The Act does not evince a purpose that eviction of unlawful occupiers should become obligatory immediately upon its commencement. If this had been the purpose of the Act, it would not have been left to the MEC to determine the date on which and the circumstances in which notice by the MEC may be given. The Act would itself have obliged the owners and municipalities to evict as from the date of its commencement. It was left to the MEC to decide this because the objectives and mechanisms of the Act contemplate that the slum elimination processes that do not involve obligatory eviction would begin as soon as possible after the Act commenced. Municipalities would begin to collate information

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[56] Section 15 provides:

> "(1) An owner or person in charge of vacant land or building must, within twelve months of the commencement of this Act, take reasonable steps to prevent the unlawful occupation of such vacant land or building.
>
> (2) In the event that the owner or person in charge of vacant land or building fails to comply with subsection (1), a municipality within whose area of jurisdiction the vacant land or building falls must give written notice to the owner or person in charge thereof to, within 30 days of receipt of such notice—
>
> > (*a*) comply with the provisions of subsection (1); or
> >
> > (*b*) give reasons for failure to comply.
>
> (3) The failure by the owner or person in charge of vacant land or building to comply with the notice issued in terms of subsection (2) constitutes an offence."

for submission to the MEC in the status report and for the preparation of its slum elimination programme. The programme would thereafter be implemented by a process of upgrading, where possible, the provision of alternative housing as well as the provision of alternative accommodation in transit areas. In my view, the Act contemplates that the MEC would give notice at some time during the implementation of the slum elimination programme; at a time when the MEC considered it necessary to do so in order to eliminate slums. I come back to this later. I must emphasise at this stage though that any notice issued by the MEC before the implementation of a municipality's slum elimination programme would in all probability be ultra vires.

[52]It is also necessary to observe that section 16 applies to unlawful occupiers alone. This follows from the circumstance that owners and municipalities are required to evict in terms of the provisions of the PIE Act, and eviction under the PIE Act is competent only in respect of unlawful occupiers. The owner is decidedly not obliged to bring eviction proceedings against lawful occupiers: people who occupy with the consent of the owner.

[53]This means that the owners of land or buildings are required to make a decision whether they consent to the occupation of their property or not. If they consent to occupation, they are not obliged to evict. It is only if they do not consent to occupation, in other words, only if the occupation is unlawful, that they become obliged to evict. If owners consent to occupation, they must face the consequences of

having consented; they must comply with their obligations arising from their ownership of the property. In the context of the Act, a consenting owner who exacts rental can be obliged by a municipality to refurbish substandard accommodation.[57] An owner in this position cannot blow hot and cold. He cannot refuse to upgrade property on the basis that he has not consented to occupation and, in the same breath, allow the unlawful occupier to continue to live on the property in inhumane conditions. The owner's contribution to the elimination of slum conditions on her property means that she must either improve the conditions in which people live or evict the occupier.

[54]The fact that owners and municipalities must proceed in terms of the PIE Act has another important consequence. Courts can issue orders of evictions only if the requirements set by the PIE Act are complied with. It is not necessary to venture into a detailed account of the PIE Act. I need do no more than set out the substantive circumstances that must exist before eviction orders can be made. Unlawful occupiers may be evicted by an owner only if it is just and equitable to do so.[58] If the occupier has been in occupation for more than six months, the court is obliged to consider, in the process of the justice and equity enquiry, ". . . whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier".[59] The point

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[57] Section 5 of the Act.

[58] Sections 4(6) and 4(7) of the PIE Act.

[59] Id at section 4(7).

to be made is that courts may not grant eviction orders unless it is just and equitable to do so, and there is nothing in the Act that even remotely suggests that eviction orders may be granted by a court when it is not just and equitable to do so.

[55]An organ of state on the other hand cannot secure an eviction order against an unlawful occupier merely on the basis that it is just and equitable to do so. It must in addition establish to the satisfaction of a court that it is in the public interest to grant an order of eviction[60] at the instance of the municipality. And the municipality, too, cannot evict an occupier who is there with the consent of the owner. All it can do is to require the owner to upgrade the property so that it is rendered fit for human habitation.[61] If the owner of property consents to the occupation and upgrades the property in accordance with the reasonable requirements of the municipality, the municipality can do nothing. It must be emphasised in this context that, far from authorising municipalities to evict outside the terms of the PIE Act, section 16 of the Act itself obliges municipalities to proceed in terms of the PIE legislation.

[56]The last observation that must be made is that section 16 will be inconsistent with the Constitution if any of the grounds advanced by the applicants withstand scrutiny. If owners or municipalities were obliged to institute eviction proceedings even if the requirements of the PIE Act are not complied with and without reasonable engagement, the provision would be invalid.

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[60] Id at section 6(1).

[61] Section 14.

In what circumstances can eviction proceedings be brought?

[57]It was contended that the section 16 MEC notice would oblige owners and municipalities to institute eviction proceedings even if, in their evaluation, the PIE Act cannot be complied with. In other words, owners are obliged to institute eviction proceedings even if they are convinced that they cannot establish that it is just and equitable for an eviction order to be granted. And municipalities would be compelled to bring eviction proceedings in a court even if they have no evidence to establish that it is just and equitable and that it is in the public interest to grant the eviction order. Section 16, so it is submitted, is inconsistent with section 26(2) of the Constitution and the PIE Act because it does not say in so many words that the owner or municipality are required to institute eviction proceedings only if they have the evidence to establish the requirements of the PIE Act. The concerns of the applicants are in all the circumstances understandable.

[58]In my view, though the Act may be reasonably capable of the interpretation contended for by the applicants, that construction is not appropriate. Section 16 of the Act requires both owners and municipalities to proceed in terms of the PIE Act. It is, in my view, a necessary implication of this requirement that they should approach a court for eviction of any unlawful occupier only if they are able to establish the requirements for eviction in terms of the PIE Act. If the municipality and the owner were obliged by the Act in express terms to proceed with eviction of unlawful

occupiers even where the requirements of the PIE Act could not be established, the provision would be irrational, in conflict with the Constitution and the PIE Act and invalid. But the Act does not say this in so many words. On the contrary, it requires the owner or municipality to proceed in terms of the PIE Act. A construction of the section that obliges owners and occupiers to approach a court for eviction in terms of the PIE Act, even if it is impossible for the requirements of the PIE Act to be established, cannot hold water.

[59]In addition section 10 of the Act allows a municipality to institute ejectment proceedings:

> "subject to section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, the Constitution, and any other national legislation protecting the housing or occupational rights of persons . . . ."

[60]It is moreover, trite that the legislature cannot be taken to have intended absurd consequences. As was said by Ngcobo J in *CUSA*[62] "[a] legislative intention cannot be construed to bring about an absurdity."[63] It would be an absurd result if legislation that expressly requires a party to proceed in terms of the PIE Act is interpreted to mean that the legislature intended the parties concerned to proceed with eviction proceedings even if the PIE Act cannot be complied with. Having specifically obliged the municipality or owner to proceed in terms of the PIE Act, the provincial

[62] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC).

[63] Id at para 95.

legislature could not have intended these parties to proceed with eviction proceedings irrespective of whether the PIE Act had been complied with.

[61]The majority judgment errs in two respects. First, it does not give full weight to (in fact it virtually ignores) the words "in a manner provided for in section 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act" contained in section 16(1) as well as the obligation on the municipality to "invoke the provisions of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act" prescribed by section 16(2) of the Act. This Court has made it plain that "if the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[64] It does not matter whether the words of a law are simply ignored or whether they are ignored in favour of a general resort to values. Words should not be ignored.

[62]The second reason is that the majority judgment resorts to an interpretation that gives rise to absurd results. Ordinarily, courts are required, if possible, to avoid absurdity if the ordinary words give rise to it. Contrary to this approach, the majority judgment indeed creates an absurd result by ignoring words.

[63]And it is not so that a requirement that the municipality must proceed only if it has evidence to comply with the PIE Act means that the municipality is given a discretion. The municipality's obligation to institute eviction proceedings is simply

[64] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18.

qualified by the obligation to proceed in terms of the PIE Act. The obligation comes into play only if there is evidence that the PIE Act has been complied with. There is in that event no discretion.

The discretion of the owner or municipality?

[64]There is no doubt that the Act, upon the expiry of the period stipulated in the section 16 notice, obliges owners and municipalities to evict unlawful occupiers who are liable to eviction in terms of the PIE Act. On the other hand the PIE Act does not oblige owners or municipalities to institute eviction proceedings. It simply empowers them to do so and, according to the applicants' submission, leaves it to them to decide whether to evict. The Act takes away this choice once the period stipulated in the section 16 notice expires. The applicants contend that section 16, by taking away this choice, is in conflict with the PIE Act. I do not agree.

[65]Owners of property have always had the right to decide whether they should evict unlawful occupiers. That right was not conferred by the PIE Act but existed before the PIE Act became part of our constitutional legislative order. The purpose of the PIE Act was not to confer the right to decide whether to evict but to limit that right by providing that evictions would not follow as a matter of course merely because the occupation was unlawful. The PIE Act did not confer a right of eviction on organs of state and owners. All it did was to limit the right of owners and municipalities to evict at the time when they had the right to do so.

[66]There can be a conflict, in my view, only if the PIE Act, on a proper construction, either expressly or by necessary implication demands that no provincial legislation can compel an owner or municipality to evict regardless of the circumstances. The PIE Act does not provide this expressly nor can I find any basis to conclude that there is a necessary implication to this effect. The position may have been different if the PIE Act had provided that no owner or municipality may be obliged by any law to evict any unlawful occupier, or even if the section provided expressly that owners or municipalities should not be obliged to institute ejectment proceedings. In other words, for there to be a conflict between the Act and the PIE Act, the PIE Act ought in some way to have conferred on the owner of property or the municipality the inalienable right to decide on eviction regardless of the circumstances and even if the owner does not consent to the occupation. The PIE Act does not achieve this. Nor does the law or the Constitution confer on municipalities the right to allow continued unlawful occupation of property even if their eviction is in the public interest and is just and equitable.

A last resort

[67]The applicants rely on the fact that the national Housing Act and the National Housing Code stipulate that unlawful occupiers must be evicted from their homes only as a matter of last resort. They submit that section 16 obliges evictions even if other options are available and even if evictions are not necessary as a last resort. The

National Housing Code makes it plain that occupiers must not be evicted from their homes if it is possible to upgrade the areas in which they live as well as their homes. It is in this sense that people in occupation of their homes are to be evicted only as a matter of last resort. I have already pointed out that the Act provides for upgrading[65] and for the MEC to monitor this process, to approve upgrading projects and their financing.[66]

[68]And section 10 of the Act empowers the municipality to institute eviction proceedings subject to all national legislation that affords protection to unlawful occupiers. It follows that eviction can be ordered by a court only if the granting of that order is consistent with the national Housing Act and the National Housing Code. Any applicant for eviction must make that allegation and establish it. If they cannot establish the allegation, they cannot be obliged to apply for eviction. This means that the applicants for eviction must establish that the eviction sought is consistent with the national Housing Act and the National Housing Code.

Is reasonable engagement precluded?

[69]The applicants contend that section 16 is in conflict with section 26(2) of the Constitution and the PIE Act because it obliges eviction without reasonable engagement. Now neither section 26(2) of the Constitution nor the PIE Act expressly requires reasonable engagement. The requirement has been made applicable by

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[65] See [34] above.

[66] See [37] above.

judgments of this Court. It is this Court which has held that reasonable engagement is not only required by section 26(2) of the Constitution[67] but is also mandated in all evictions under the PIE Act;[68] evictions sought in the context of housing development. As I have already pointed out, owners and municipalities can evict only in terms of the PIE Act. This means that all applicants for eviction must comply with the requirements expressly stipulated in the PIE Act and the Constitution as well as with all other requirements that have been judicially stipulated. In the circumstances, all applicants for eviction must engage reasonably before instituting eviction proceedings. If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process. I therefore disagree with the submission that reasonable engagement is excluded by the Act.

The notice by the MEC

[70]In oral argument before us, counsel for the applicants, against the background of the submissions made in the written argument, contended that the provision enabling the MEC to issue a notice compelling owners and municipalities to institute eviction

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[67] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) at paras 15-7; *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 84 and 87.

[68] *Port Elizabeth Municipality* above n 67 at paras 39-45. See also the judgment of Yacoob J concerning the requirement of reasonable engagement on which there was no demur in the case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; Case No CCT 22/08, 10 June 2009, as yet unreported, at paras 115-7.

proceedings is irrational and therefore inconsistent with the Constitution. The submission was that all the MEC is empowered to do by section 16 is to stipulate, in the notice, a date from which all municipalities and all owners are obliged to evict all unlawful occupiers. This, regardless of whether the properties can be upgraded and appropriate relocation is possible. A literal construction of section 16 could indeed lead to this conclusion. In this sense, the interpretation postulated is one that may be said to be reasonable. However, it will result in unconstitutionality because a notice of this kind will in my view be irrational. It conjures up the spectre of the notice of the MEC compelling all owners and municipalities in all areas of the province of KwaZulu-Natal to evict all unlawful occupiers regardless of the circumstances.

[71]If however, the provisions are capable of a reasonable interpretation which renders the provision constitutionally compliant, we must resort to that construction.[69] Against this background, I proceed to construe the section to determine whether:

(a) the section 16 notice can refer to all unlawful occupiers in the province of KwaZulu-Natal regardless of the circumstances of their unlawful occupation; and

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[69] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22 and 26. See also *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; Case No CCT 77/08, 7 May 2009, as yet unreported, at para 20; *Du Toit v Minister of Transport* [2005] ZACC 9; 2006 (1) SA 297 (CC); 2005 (11) BCLR 1053 (CC) at para 29; *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at para 20; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72; *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 40; and *S v Dzukuda and Others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37.

(b) the MEC's notice can be generally applicable to all property in the province of KwaZulu-Natal.

[72]Section 16 does not limit the compulsory eviction to unlawful occupiers of land or buildings that perpetuate slum conditions. This creates the possibility, at least in theory, that the MEC's notice would have an impact on every unlawful occupier. In my view, the MEC cannot competently issue a notice that applies to all unlawful occupiers, regardless of whether they live in slum conditions or whether their eviction is necessary to eliminate and/or to prevent the re-emergence of slums. This is because, at the very least, the MEC has the power to issue a notice in terms of the Act if, and only if, the notice is consistent with and is aimed at achieving the purpose and objective of the Act. In other words, the notice will be competent if it is a step in slum elimination, slum control or the prevention of their re-emergence. A notice that is not carefully tailored to achieve these results would not be authorised by the statute. A notice that specifies the vacation of property that is not necessary for slum elimination will probably be invalid. The notice would therefore ordinarily apply to land or a building that is a slum or which must be vacated for the elimination of slums or the prevention of their re-emergence.

[73]The next question is whether the notice can simultaneously apply to all slums in the province of KwaZulu-Natal or whether the Act envisages that the notice would apply to land or a building which is a slum as defined in the Act and which is

individually particularised in the notice. In my view, for the reasons that follow, the Act contemplates that the notice can be issued only in respect of specified property that constitutes a slum. In the first place, section 16 does not refer to owners, municipalities and land or buildings in what may be called a collective sense. In terms of section 16(1) an owner or person (not owners or persons) in charge of land or a building (not buildings) is obliged to institute eviction proceedings. In similar vein, section 16(2) provides that a municipality (not municipalities) within whose area of jurisdiction the land or building (not buildings) falls must institute eviction proceedings, if the owner or person in charge (not owners or persons in charge) fails to comply with the notice. This suggests a process by which the MEC must identify each property and each owner separately.

[74]The second reason for this construction is contextual. The MEC will issue the section 16 notice in the slum elimination process which that office closely monitors. The office of the MEC will, in the process of performing this monitoring function, in relation to each slum within the area of jurisdiction of each municipality receive details of its location, the identity of its owner, the description of the property as well as the estimated number of people in occupation of that slum.[70] The annual progress reports must contain information at the same level. The MEC will therefore have details of the progress of achieving the objects of the Act in relation to each slum. The notice of the MEC can only refer to those slums in relation to which he

[70] Section 11(1)(a) and (b).

concludes, in the process of the performance of the monitoring function, that eviction is necessary to achieve the objects of the Act.

[75]The notice must be seen as part of the process of the upgrading and relocation of people that municipalities must engage in so as to eliminate slums. If municipalities co-operate and issue ejectment proceedings in every case in which eviction is necessary, in order to implement the objectives of the Act, it will not be necessary for the MEC to give the section 16 notice in the slum elimination process. The MEC will need to give that notice only if the eviction is necessary in the process of slum elimination.

[76]It is an accepted principle that an apparently wide discretion conferred on any authority by legislation must be narrowed down in the light of the purpose of the legislation. As Ngcobo J said:[71]

> "The answer to the attack on s 22C(1)*(a)* is that counsel for the applicants is giving too wide an interpretation on the subsection. The power of the Director-General to prescribe conditions under subsection is limited by the context in which these powers are to be exercised. Thus the power to prescribe conditions must be exercised in the light of, amongst other considerations, the government purpose of increasing access to medicines that are safe for consumption, the purpose for which the discretionary powers are given and the obligations of medical practitioners who have been issued with dispensing licences. All this provides sufficient constraint on the exercise of the discretionary powers conferred by the subsection.

[71] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

> Thus, in determining what conditions to prescribe, the Director-General will be guided by the provisions of the Medicines Act read in the light of its objectives and policies. In particular, the Director-General will be guided by the government purpose behind the licensing scheme, namely the need to increase the access to medicines that are safe for consumption. In addition, the Director-General will be guided by the relevant provisions of the regulations, such as those that set out the obligations of the persons who have been issued with licences."[72]

[77]Apparently wide powers given to the MEC by the Slums Act to issue the section 16 notice must likewise be constrained by the purpose of the legislation, the way in which it seeks to achieve that purpose as well as the overall context in which that purpose is to be achieved. A notice issued by the MEC that requires the wholesale eviction of all unlawful occupiers inconsistently with the purpose of the Act would undoubtedly be invalid. One cannot construe the constitutionality of a provision on the basis that the MEC will, in issuing the section 16 notice, do so in a manner that is inconsistent with the Act and the Constitution.

[78]This brings me to the question of why the section was necessary in the context of existing legislation. It has been suggested that the fact that the provision is wholly unnecessary in the context of the existing legislative framework renders the incorporation of the section into the legislation suspect. The argument is that municipalities and owners can evict if they so wish. How can it ever become necessary for them to be compelled to institute eviction proceedings? Common sense tells us that there may be times when municipalities would, for one reason or another,

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[72] Id at paras 38-9.

fail or refuse to evict certain unlawful occupiers even if their eviction would be necessary in the reasonable implementation of the slum elimination programme, be just and equitable and in the public interest. If this were to happen, the inaction of the municipality could jeopardise a slum elimination programme and result in considerable suffering and pain. Section 16 is on the statute books precisely in order to prevent municipalities from holding the process of slum elimination to ransom for one or other reason. The section can be said to be unnecessary only if one concludes that municipalities would always make appropriate decisions in the slum elimination process, even if those decisions are hard ones that necessitate the eviction of poor people. I am not so sanguine.

[79]It is the owner or the municipality, in the final analysis, that must make the decision whether to evict unlawful occupiers pursuant to the MEC's section 16 notice. Both are required to engage reasonably before evicting and, as I have pointed out earlier, the engagement could have a material impact on the question whether the eviction is just and equitable and on the issue of whether the eviction is in the public interest. It is the municipality or the owner who must be satisfied about the existence of these requirements. It is therefore not necessary for the MEC to be satisfied that an eviction by some other entity would be just and equitable and in the public interest. That is the determination to be made where necessary by the municipality or owner concerned. It must be borne in mind that the notice would compel eviction proceedings only on the assumption that the municipality is of the view that the

requirements of the PIE Act have been met and that a court will grant an eviction order only if this is so.

[80]I summarise the scope, consequences and requirements of section 16 as follows—

(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.

[81]The majority judgment takes the opportunity (which might be said to be provided by the summary above) to make the point that the interpretation contended for in this judgment is not a reasonable one because six matters are added to the legislation. Indeed, the point is made that the summary demonstrates that this judgment takes over the legislative function. This approach is, in my view, simplistically quantitative. I make two observations to demonstrate this.

(a) The first four items in the summary contained in the previous paragraph arise from our obligation to take into account the purpose of the legislation as well as the context in the process of limiting the apparently wide discretion of the MEC to issue the section 16 notice.

(b) The last two items in the summary are a direct result of our obligation to take into account and give full effect to the fact that the municipality and the owner are expressly required to proceed in terms of the PIE Act.

[82]I would therefore hold that section 16 is consistent with the Constitution, the PIE Act, the national Housing Act as well as the National Housing Code.

[83]It follows that my difficulties with the majority judgment relate crucially to three aspects. The majority judgment:

(a) does not give due or any weight to the fact that section 16 of the Act obliges the municipality and the owner to proceed in terms of the PIE Act;

(b) interprets section 16 so as to give rise to absurd consequences; and

(c) determines the ambit of the discretion of the MEC to issue the notice without regard to the purpose of the Act.

Costs

[84]In my view, the lack of specificity and clarity in the Act gave rise to serious fears and concerns on the part of the applicants who were justified in starting these

proceedings. This judgment has resolved ambiguities and averted consequences that might have followed from an over-literal interpretation of the Act. The adjudication of this case was in the interests not only of the KwaZulu-Natal provincial government but in the public interest. The applicants have assisted in this process and should be burdened neither with their own costs nor with the costs of the respondents either in this Court or in the High Court. The respondents should be ordered to pay the applicants' costs both in the High Court and in this Court.

Other provincial legislation

[85]This judgment has left no doubt that the Act is not a model of clarity. To the extent that other provinces await the guidance of this Court before they decide on the nature of similar legislation, it is fair to say that this judgment signifies that the Act, though constitutionally compliant, is not exemplary legislation. Provinces will no doubt take this judgment into account if they choose to prepare similar legislation.

[86]I would therefore have granted the application for leave to appeal, dismissed the appeal but would nevertheless have ordered the respondents to pay the costs of the applicants including those of two counsel.

MOSENEKE DCJ

Introduction

[87]The first applicant is Abahlali baseMjondolo Movement of South Africa, a voluntary association which acts in the interests of several thousands of people who live in informal dwellings. They are represented by its president, Mr Sibusiso Zikode, the second applicant. In the isiZulu language, Abahlali baseMjondolo literally means "occupiers of informal homes". These occupiers are sometimes referred to as "shack dwellers".

[88]The papers show that the residents of the informal settlements affiliated to the applicants occupy no less than 15 informal settlements located in Durban, Tongaat and Pietermaritzburg within the province of KwaZulu-Natal. The settlements have been there for several years now. The residents describe their homes as "shacks" which are said to be made of mud-brick, wood, corrugated iron or plastic. The residents are poor. Many of them benefit from low paid domestic work and gardening "piece" jobs in neighbouring affluent suburbs. The residents live in fear of eviction. Virtually all of them are either unaware of who owns the land they live on or know that they have no formal permission from the owner or person in charge of the land they live on. They readily admit that they are unlawful occupiers within the meaning of section 1 of the PIE Act.

[89]For that reason, they are in desperate need of adequate housing and have no security of tenure. They fear that certain provisions of the KwaZulu-Natal

Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (the Slums Act) will render them significantly more vulnerable to eviction than would otherwise be the case. They see the provincial legislation as capable of undermining the cluster of national laws that have been passed with the express purpose of shielding homeless people with insecure land tenure.

[90]They approached the High Court for an order invalidating the Slums Act on the grounds that the provincial legislature had no power to enact it because, they argued, its subject-matter is land tenure,[73] which does not fall within the competence of the province and the national legislature. They also sought to persuade the High Court that sections 9, 11, 12, 13 and 16 of the Slums Act are constitutionally bad. The High Court dismissed their claim.

[91]Before this Court, they seek leave to appeal the decision of the High Court. However, what is different is that the applicants have abandoned their constitutional attack against sections 9, 11, 12 and 13. There are thus two crisp questions to be resolved. The first is whether the provincial legislature had the requisite competence to legislate on the subject matter of the Slums Act. The second is whether section 16 of the Slums Act withstands constitutional scrutiny.

[73] A similar argument found favour in this court in *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at paras 3 and 107-8.

[92]I have had the benefit of reading the well-worked and comprehensive judgment of my esteemed colleague Yacoob J. I, however, arrive at a different outcome. In my view, section 16 of the Slums Act is inconsistent with section 26(2) of the Constitution and for that reason is invalid.

[93]I would accordingly grant leave to appeal, uphold the appeal and order that the respondents pay the applicants' costs in the High Court and in this Court, including costs of two counsel.

[94]Before I furnish reasons for the conclusions I reach, I briefly identify areas of agreement between us. Firstly, I agree that this matter raises constitutional issues and that leave to appeal should be granted, as it is in the interests of justice to do so.[74]

[95]Secondly, I agree that we should not admit into evidence the report submitted by the Centre on Housing Rights and Evictions (COHRE Report) but on grounds somewhat different from those advanced by my colleague, Yacoob J.[75] The COHRE Report documents incidences of evictions and demolitions of shacks by municipalities, which resulted in homelessness. It gives an account of the omission by certain local authorities in KwaZulu-Natal to implement national housing programmes as required by housing legislation. In many ways, the

[74] See [11]-[17] above.

[75] See [18]-[19] above.

COHRE Report highlights the anxieties of vulnerable people that they may become victims of arbitrary evictions by local authorities. Their fear stems from their precarious land tenure and lack of adequate housing. I think that the more compelling reason why the Report should not be admitted is that the narrow exercise confronting us is mainly interpretive. We are called upon to determine whether the provisions of section 16 of the Slums Act accords with the Constitution and national housing legislation. To that end, the COHRE Report is not relevant in this case.

[96]It is so that in an appropriate case, background material of the kind found in the COHRE Report may provide valuable context within which the interpretive exercise may occur. The lived experiences of claimants that speak to the impact of the impugned legislation may be relevant to its proper interpretation. This Court has on numerous occasions recognised the value of contextual analysis as an aid to a proper understanding of legal provisions.[76] In this case, the task can be well accomplished without relying on the perceived threat of widespread evictions.[77] In any event, the live impact of the impugned provisions is not known because this

[76] On contextual analysis, see *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at paras 24 and 71-81; *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 66. On constitutional or legislative interpretation, see *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 101-3.

[77] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; Case No CCT 22/08, 10 June 2009, as yet unreported, at paras 115-7; *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

challenge was mounted even before the Member of the Executive Council (MEC) had taken any measures in terms of section 16 of the Slums Act.

[97]Thirdly, I agree with Yacoob J that the subject matter of the Slums Act relates primarily to housing.[78] Schedule 4 of the Constitution provides for functional areas of concurrent national and provincial legislative competence. It lists housing as a concurrent competence. That means that a provincial legislature enjoys the power to make laws on housing concurrently with national legislation. I agree that the Slums Act falls well within the province's legislative competence. This disposes of one of the two remaining attacks which the applicants mounted against the constitutional validity of the Slums Act.

[98]This conclusion may be readily reached by ascertaining the core purpose of the Slums Act. This is done best by reading the Slums Act as a whole. Its Preamble echoes the constitutional right of access to affordable housing for all citizens. It acknowledges that national housing legislation encourages provincial governments to enact legislation which will facilitate the achievement of adequate and affordable housing. It records that the legislation introduces measures to eliminate slums and to prevent their re-emergence in order to protect the housing and construction programmes of provincial and local governments.[79]

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[78] See [40] above.

[79] The Preamble of the Slums Act states as follows:

> "WHEREAS the provision of affordable housing for all citizens in South Africa, and especially those sectors of the community who, prior to the advent of democracy in South Africa, were disadvantaged politically and economically, is a cornerstone in the building of a

[99]In the objects of the Slums Act, the purpose to eliminate slums and to prevent their re-emergence is restated.[80] But the objects also make clear a commitment to improving the living conditions of communities. The MEC bears the duty to promote and facilitate the provision of adequate housing.[81] He or she is responsible for approving any project recommended by a municipality to upgrade or improve a slum or informal settlement and for providing funds for the financing

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stable and healthy national community;

AND WHEREAS everyone has a constitutional right to have access to affordable housing;

AND WHEREAS section 7 of the Housing Act, 1997 (Act No. 107 of 1997), encourages provincial governments to, amongst other things, enact legislation which will facilitate the achievement of the objective of providing adequate and affordable housing;

AND WHEREAS the KwaZulu-Natal Housing Act, 1998 (Act No. 12 of 1998), was duly enacted by the KwaZulu-Natal provincial government to afford everyone in the Province access to affordable housing;

AND WHEREAS one of the objectives of both the Housing Act, 1997 (Act No. 107 of 1997), and the KwaZulu-Natal Housing Act, 1998 (Act No. 12 of 1998), is to encourage interaction and support between provincial and local governments in the provision of affordable housing;

AND WHEREAS it is desirable to introduce measures which seek to enable the control and elimination of slums, and the prevention of their re-emergence, in a manner that promotes and protects the housing construction programmes of both provincial and local governments

BE IT THEREFORE ENACTED . . .”

[80] Section 3 of the Slums Act provides:

“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, in the Province.”

[81] Section 7 of the Slums Act provides:

“Subject to the provisions of the Housing Act, 1997 (Act No. 107 of 1997), the responsible Member of the Executive Council must promote and facilitate the provision of adequate housing throughout the Province within the framework of the national policy on housing development.”

of such projects. The MEC is enjoined to do everything necessary to achieve these housing objectives.

[100]On the other hand, Chapter 4 is replete with provisions that are directed at the role of municipalities in the progressive realisation of the right to adequate housing.[82] Municipalities may decide to make available alternative land or buildings for the relocation of people living in slums.[83] In certain instances, the municipality may acquire land or buildings for the purpose of setting up a transit area for temporary accommodation of persons who are evicted from a slum pending their permanent accommodation.[84]

[101]There is another self-evident reason, which is not purely textual and which tells us why the primary preoccupation of the Slums Act is housing. The Slums Act provides for measures related to slums and informal settlements. Both of these are places where people live and have their homes, and their homes are houses. Their homes may not amount to adequate housing, but they are homes for as long as the residents have no other or adequate housing.

Section 16 of the Slums Act

[102]The applicants contend that section 16 makes it compulsory for municipalities to institute proceedings for eviction of unlawful occupiers where the owner or person

[82] Section 9(1) of the Slums Act.

[83] Section 12 of the Slums Act.

[84] Section 13 of the Slums Act.

in charge of the land fails to do so within the time period prescribed by the MEC. They argue that the provision violates section 26(2) of the Constitution in three respects: (a) it precludes meaningful engagement between municipalities and unlawful occupiers;[85] (b) it violates the principle that evictions should be a measure of last resort; and (c) it undermines the precarious tenure of unlawful occupiers, by mandating the institution of eviction proceedings and obliterating the established procedures under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[86] (the PIE Act) and the protection it affords to unlawful occupiers.

[103]Section 16 provides:

> "(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

[85] As to the requirement of meaningful engagement, see *Residents of Joe Slovo Community* above n 5 at paras 167, 237 and 239-44; *Occupiers of 51 Olivia Road* above n 5 at paras 16-8. The duty on the state to engage in consultation with affected persons in the context of housing, and particularly where threatened with eviction, was established in *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 87 and reaffirmed in *Port Elizabeth Municipality* above n 5 at paras 39 and 42 (which discusses the vital role of mediation between parties seeking eviction and those sought to be evicted).

[86] 19 of 1998.

> of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act."

[104]At the outset of his analysis of section 16 of the Slums Act, Yacoob J found it necessary to draw a definitional difference between "informal settlements" and "slums" in the Slums Act.[87] This he does presumably in order to limit the application of the provisions of section 16 to slums and to the exclusion of informal settlements. This, in my view, may be a distinction without a difference. The absence of "infrastructure or sanitation"[88] in an informal settlement often means that it is squalid and overcrowded. An informal settlement is not permanent and, until the government upgrades it, the residents live under constant threat of eviction. Invariably, its residents have little or no security of tenure. Their position cannot be differentiated from that of residents of a slum. It is, therefore, doubtful whether it would be appropriate to give "slum" a narrow meaning which in effect places informal settlements beyond the scope of the Slums Act. The Slums Act carries several provisions which expressly regulate informal settlements alongside slums.[89] The legislature thus sought to draw a distinction between them. But this does not mean that section 16 of the Slums Act does not apply to informal settlements.

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[87] See [45]-[48] above.

[88] Section 1 of the Slums Act.

[89] Sections 8(1)(e)(i) and (ii); 9(2); 22(1)(a), (c) and (e).

[105]I am also wary of drawing lines between people who are forced to live in slums and those who have no option but to live in informal settlements. As we gather from the two definitions in the Slums Act, in both instances they are people who live on the margins of our society in squalid conditions. They are similarly situated: both are poor, without adequate infrastructure or secure tenure, and therefore equally vulnerable. Nothing suggests that the differentiation between slums and informal settlements is necessary for the pursuit of the prime objects of the legislation to eliminate slums: to prevent their emergence and to improve the living conditions of the communities by providing alternative accommodation or adequate housing.[90]

[106]There is another important reason why the distinction between informal settlements and slums is untenable for purposes of understanding the meaning of section 16 of the Slums Act. On its face, section 16 simply requires eviction proceedings to be initiated against unlawful occupiers. It does not make any reference whatsoever to any distinction between unlawful occupiers to be found in a slum or in an informal settlement. And therefore any limitation of its scope of application to slums is one which must be justifiable in the context of the purpose of the Act.

[107]Happily, we need not decide this definitional wrangle because it is not necessary for purposes of ascertaining whether the provisions of section 16 of the Slums Act

[90] Section 3 of the Slums Act.

are consistent with the Constitution. Even if the provisions of section 16 were to apply only to unlawful occupiers within slums, the provision would not pass constitutional muster. Therefore, it seems to matter not for the purpose of understanding section 16 whether it deals only with slums or with slums as well as informal settlements.

[108]It is so that the scope of section 16 is limited. It applies to unlawful occupiers who were in occupation of land or a building before the Slums Act commenced. What is beyond doubt is that when the MEC in a notice requires so, the provision makes it obligatory for an owner or person in charge of land or a building to approach a court in order to evict unlawful occupiers. If the owner fails to do so, the obligation falls upon the municipality. The owner or municipality must do so in terms of the relevant provisions of the PIE Act. This means that courts may grant an eviction order only when it is just and equitable to do so after weighing

carefully all relevant factors applicable to an eviction sought by a private owner[91] or by a municipality or an organ of state.[92]

Discretion of owners and municipalities

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[91] Section 4(6) and (7) of the PIE Act provides as follows:

> "(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

Section 5 of the PIE Act provides as follows:

> "(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—
>
> (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
>
> (b) the likely hardship to the owner or any 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
>
> (c) there is no other effective remedy available.
>
> . . ."

[92] Section 6 of the PIE Act provides as follows:

> "(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
>
> (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

[109]However, crucially, section 16 is silent on whether the owners or municipalities are free not to institute eviction proceedings if, in their evaluation, the eviction will not be justified under the PIE Act. The applicant contends that the section obliges owners and municipalities to ask a court to eject unlawful occupiers even if they are certain that it may not be just and equitable or in the public interest to do so. Yacoob J accepts that the provision is reasonably capable of the construction contended for by the applicants. But holds that the more appropriate interpretation is that municipalities and owners are not obliged to follow the notice of the MEC if, in their view, the requirements of the PIE Act cannot be proven.[93]

[110]Does section 16 mean that it is in the exclusive discretion of an owner or municipality to decide whether to start eviction proceedings in the light of the evidentiary material it may have to satisfy the requirements of the PIE Act? I respectfully think not. The applicants are correct that section 16 is not reasonably capable of a meaning that permits owners and municipalities to heed the MEC's notice only if they know that they can satisfy a court that the eviction is fair or in

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section, 'public interest' includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

. . ."

[93] See [58] above.

the public interest. This interpretation makes the owner or municipality the only judge of whether PIE is likely to be satisfied. It pulls the coercive teeth of section 16. It renders the provision nugatory.

[111]That in my view is not a plausible interpretation of section 16. An appropriate construction is one that recognises the coercive import of section 16. This means that owners and municipalities must evict when told to do so by the MEC in a notice. On that interpretation, section 16 is 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.

[112]Related to the coercive nature of section 16 is the fact that the PIE Act does not compel any owner or municipality to evict unlawful occupiers. Section 16 does. I am unable to support the reasoning that says that whilst the PIE Act does not compel eviction proceedings it does not prohibit legislation providing for the kind of compulsion required by section 16. In my view, to the extent that section 16 eliminates discretion on the part of the owner or municipality, it erodes and considerably undermines the protections against the 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.

Last resort and reasonable engagement

[113] Are obligatory evictions under section 16 required to be made as a last resort and do they permit reasonable engagement? This question is prompted by the applicants who contend that compulsory evictions made in compliance with section 16 are not a step of last resort. This contention is premised on the provisions of the national Housing Act[94] and of the National Housing Code[95] which stipulate that unlawful occupiers must be ejected from their homes only as a last resort. Section 16 is silent on this matter. On its face, it is clearly in conflict with the national Housing Act and the National Housing Code because the requirement for instituting eviction proceedings against unlawful occupiers is no more than that the MEC must so direct. The fact that section 16 of the Slums Act may be in conflict with national legislation does not in itself mean that it is invalid, since provinces are entitled to regulate differently in areas of concurrent competence,

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[94] 107 of 1997. Section 2(1)(b) of the Housing Act provides:

> "National, provincial and local spheres of government must—
>
> . . .
>
> (b) consult meaningfully with individuals and communities affected by housing development".

[95] Chapter 13 of the National Housing Code provides that municipalities "must demonstrate that effective interactive community participation has taken place in the planning, implementation and evaluation of the project" at 9. It also provides that "[w]here 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 authority of a court order" at 20.

subject to section 146 of the Constitution.[96] However, provincial legislation must always conform with the Constitution.

[114] Yacoob J resolves this matter through interpretation. He takes the view that the obligatory evictions under section 16 must be read subject to the national Housing

[96] Section 146 of the Constitution provides:

"(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for—

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

Act and the National Housing Code.[97] This would again mean that the owner or municipality may only evict as a matter of last resort and after having taken all possible steps to upgrade areas in which homeless people live. On this interpretation it also means that eviction can take place only after a reasonable engagement as required by section 26(2) of the Constitution has occurred. This of course means that no evictions should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.[98]

[115] In my view, that interpretation is not reasonably plausible. It has the effect of re-writing section 16 in a manner that is not apparent on its face and that is in conflict with the coercive design of section 16 to eliminate slums and informal settlements. Put otherwise, if in fact institution of eviction proceedings under section 16 may be resorted to only as a measure of last resort and only after reasonable engagement, then its obligatory provisions serve no useful purpose in advancing

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

. . ."

In *Mashavha v President of the Republic of South Africa and Others* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) at paras 37 and 50, this Court considered the application of section 126 of the interim Constitution, which dealt with concurrent competence of provincial and national legislatures, now governed by section 146 of the Constitution.

[97] See [43] above.

[98] Above n 13.

the object of the Slums Act. The proper view is that section 16 cannot be reconciled with the national Housing Act and the National Housing Code, both of which have been passed to give effect to section 26(2) of the Constitution. However, as already pointed out, this on its own does not mean that section 16 is invalid.

The MEC's notice

[116]Does a plain reading of section 16 authorise the MEC to specify in a notice a date by which all owners and municipalities are obliged to evict all unlawful occupiers without regard to distinguishing circumstances? This question was posed by the applicants as part of the contention that the notice mechanism through which the compulsory institution of proceedings is achieved is irrational because the power of the MEC is overbroad and not appropriately calibrated in relation to the purpose sought to be advanced by the provision. That power may be exercised in relation to all unlawful occupiers, including those who do not live in slum conditions. In other words, the power is not rationally related to the purpose of eradicating slums and informal settlements.[99]

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[99] In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85; Chaskalson P held that "[i]t is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement." See further *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 75.

[117] Yacoob J suggests again that this potential irrationality of section 16 may be cured by reading down its provisions to mean that the notice would be valid only if it is consistent with, and is aimed at, achieving the purpose and objective of the Slums Act.[100] This means that the notice must be appropriately tailored to apply to slums only or to prevent their re-emergence. He further holds that section 16 must be read to be limited to a land or building that is a slum and that is individually particularised in the MEC's notice.[101]

[118] Again, in my view, the notice mechanism set up by section 16 is clearly irrational and overbroad and for that reason, seriously invasive of the protections against arbitrary evictions to be found in section 26(2) of the Constitution, read together with the PIE Act and the national housing legislation.

[119] It is now appropriate to remind oneself that our Constitution requires courts, when interpreting any legislation, to promote the spirit, purport, and object of the Bill of Rights.[102] It is so that "where a statutory provision is reasonably capable of a construction that would bring it in line with the Constitution it is that construction which must be preferred provided that it is not strained".[103] Courts

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[100] See [72] above.

[101] Id.

[102] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[103] Yacoob J, writing for the minority in *Centre for Child Law v Minister for Justice and Constitutional Development and Others* [2009] ZACC 18, Case No CCT 98/08, 15 July 2009, as yet unreported, at para 108. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC

must give legislation a purposive and contextual interpretation in order to achieve this end.

[120]Yet, whilst it is important to prefer an interpretation that avoids any constitutional inconsistency, we must be careful not to choose an interpretation which cannot be readily inferred from the text of the provision. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[104] Ackermann J warns that "a construction is not a reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered."[105]

[121]In my view, section 16 may be rendered consistent with section 26(2) of the Constitution and the applicable national legislation only by distorting its meaning or by reading into it numerous qualifications which cannot be readily inferred from the text under consideration. Whilst the goal of the Slums Act may be a salutary one aimed at eliminating and preventing slums and at providing adequate and affordable housing, I cannot find that section 16 is capable of an interpretation that promotes these objects.

15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72; *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35; 2001 (8) BCLR 779 (SCA) at para 20; *S v Dzukuda and Others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-6; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4; *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; and *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 59.

[104] Above n 31.

[105] Id at para 23.

[122]There is indeed a dignified framework that has been developed for the eviction of unlawful occupiers and I cannot find that section 16 is capable of an interpretation that does not violate this framework. Section 26(2) of the Constitution, the national Housing Act and the PIE Act all contain protections for unlawful occupiers. They ensure that their housing rights are not violated without proper notice and consideration of other alternatives. The compulsory nature of section 16 disturbs this carefully established legal framework by introducing the coercive institution of eviction proceedings in disregard of these protections.

Rule of law and section 16

[123]Yacoob J suggests that we could overcome the facial invalidity of section 16 by reading in at least six qualifications which he specifies in the judgment.[106] I think not. An intrusive interpretation of this magnitude offends requirements of the rule of law and of the separation of powers.

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[106] See [80] above where Yacoob J finds:

"I summarise the scope, consequences and requirements of section 16 as follows—

(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; and

(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."

[124]The rule of law is a founding value of our constitutional democracy.[107] Its content has been expanded in a long line of cases. It requires that the law must, on its face, be clear and ascertainable.[108] To read in one qualification to achieve constitutional conformity is very different from reading in six. Indeed, reading in so many qualifications inevitably strains the text.[109] This is all the more so when the legislation in issue affects vulnerable people in relation to so vital an aspect of their lives as their security of tenure. It will be impossible for people in the position of the applicants, even if advised by their lawyers, to be clear on how this provision will operate. The same will indeed apply to others affected by the law, such as owners, and to the bureaucrats charged with applying it.

[125]There can be no doubt that the over-expansive interpretation of section 16 is not only strained but also offends the rule of law requirement that the law must be clear and ascertainable. In any event, separation of power considerations require that courts should not embark on an interpretative exercise which would in effect

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[107] Section 1(c) of the Constitution.

[108] *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11, Case No CCT 77/08, 7 May 2009, as yet unreported, at paras 22 and 100. See further *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at paras 27-8; *Affordable Medicines* above n 27 at para 108; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 47.

[109] *National Director of Public Prosecutions and Another v Mohamed NO and Others* above n 31 at para 35.

re-write the text under consideration.[110] Such an exercise amounts to usurping the legislative function through interpretation.

[126] The papers inform us that the Slums Act is seen as pilot legislation which may be duplicated in other provinces if it is effective. We were told that other provinces are awaiting guidance from this Court before deciding on similar legislation. This underscores the need for clarity.

[127] We find section 16 to be unconstitutional in offending against section 26(2) of the Constitution and the rule of law. To the extent that justification is in issue at all, the province sought to tender none, relying solely on interpretation. We can find none.

[128] In the light of the above, I conclude that section 16 of the Slums Act is inconsistent with the Constitution and invalid. This means that the order of the

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[110] In *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 37, Ngcobo J, writing for the majority, held that:

> "[t]he constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised.' Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution." (Footnote omitted.)

See further *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 35.

High Court should be set aside, the appeal succeeds and the respondents are ordered to pay costs.

The order

[129]The following order is made:

(1) The application for leave to appeal is granted.

(2) The appeal is upheld to the extent set out herebelow.

(3) The order of the High Court is set aside.

(4) It is declared that section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 is inconsistent with the Constitution and invalid.

(5) The first and second respondents are ordered to pay the costs of the first and second applicants in the High Court and in this Court, which costs shall include costs consequent upon the use of two counsel.

Langa CJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Moseneke DCJ.

For the Applicant:	Advocate W Trengove SC, Advocate H Barnes and Advocate K McLean instructed by the Wits Law Clinic.
For the Second and Third Respondents:	Advocate JJ Gauntlett SC, Advocate AA Gabriel instructed by Shepstone and Wylie.
For the Fourth Respondent:	Advocate R Seegobin SC instructed by the State Attorney, Durban.