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Paper prepared by Jay Kruuse, Head of PSAM for the Consultative Workshop organized by the Eastern Cape Department of Housing - 22 January 2010, Osner Hotel, East London.

Informal Settlements and the law – lessons learned from the KZN and court jurisprudence

Hon. MEC Mabandla, staff of the Housing Department, and participants at this workshop, thank you for the opportunity to reflect on the *Prevention of the Mushrooming of Informal Settlements Green Paper 2009* [1] at this workshop.

Background

During June 2008 the Eastern Cape Housing Department (the Department) requested input and commentary on draft legislation entitled the *Eastern Cape Act on the Eradication of Informal Settlements.* The PSAM made a submission on 27 June 2008 which was considered by the Department alongside submissions received from the likes of Afesis-Corplan, Nelson Mandela Bay Metro Municipality and the Legal Office of the EC Legislature.[2]

The Department has since produced a document entitled *Prevention of the Mushrooming of Informal Settlements - Green Paper 2009* which was released to the PSAM on 7 January 2010 and made accessible on the Department's website on 12 January 2010.[3] The PSAM has had an opportunity to briefly consider the Green Paper and will in due course provide detailed written comment on its content. The Department is to be commended for its consultation efforts to date, in seeking to enhance and provide sustainable human settlements.

In 2008, when the Department asked for comment on the draft *Eastern Cape Act on the Eradication of Informal Settlements* it was explained that:

> *Eastern Cape, like other Provinces is faced with a challenge of sprawling informal settlements. As part of government's broader agenda and presidential priority on eradication of informal settlements the department is tasked to ensure that this priority is achieved through legislation. The MINMEC of the Department of Housing then resolved that all provinces should formulate provincial legislation on the eradication of informal settlements. Clear terms of reference were drawn that by November 2008, all Provinces must have the legislation in place, using KwaZulu-Natal as a base or reference as they already have the legislation on the eradication of informal settlements.*[4]

[1] Accessible at http://echousing.ecprov.gov.za/index.php?module=documents&category=4#Publications

[2] Prevention of the Mushrooming of Informal Settlements Green Paper 2009, p. 13.

[3] http://echousing.ecprov.gov.za/index.php?module=documents&category=4#Publications

[4] Memorandum from the General Manager: Housing Policy Planning and Research dated 17 June 2008

This explanation has been similarly included in the Green Paper at page 11, with the Department further explaining at page 12 that:

> *Within this context the main goal is to, finally, develop Legislation on Prevention of Mushrooming of Informal settlements in the Province of the Eastern Cape.*

The KZN Legislature has indeed introduced provincial legislation, called the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 ("the Slums Act"). This occurred in July 2007 in order to try and address through legislation, the proliferation of informal settlements in that province.[5]

The current Eastern Cape Green Paper has included draft legislation which has been drawn from the KZN Act. In this regard I would like to refer you to pages 58 to 62 of the Green Paper which contains sections numbered from 7.1. to 7.7. These sections are virtually identical to sections 9 to 16 of the KZN Act which has since been successfully challenged in court.

<u>What lessons must we learn from the KZN exercise so that it is not repeated in the EC?</u>

The KZN Act was challenged in the Durban High Court during November 2008 by Abahlali Basemjondolo Movement SA (Abahlali) who argued that the legislation was unconstitutional.[6] The High Court found against Abahlali on 27 January 2009[7], so they approached the Constitutional Court for relief.

On 14 May 2009 the Constitutional Court heard argument on behalf of Abahlali and also heard argument by counsel representing the KZN Premier, the KZN MEC for Housing, the Minister of Human Settlements and the Minister of Rural Development and Land Reform. Part of the argument put forward by Abahlali can be summarised as follows:

> Shack dwellers feared that certain provisions of the KZN 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."*[8]

On 14 October 2009 the Constitutional Court delivered its judgment, declaring section 16 of the KZN Act (which relates to the eviction of unlawful occupiers) inconsistent with the Constitution and therefore invalid.[9]

As explained earlier, section 16 of the KZN Act is contained in the Eastern Cape Green Paper at page 62, section 7.7(1) and (2), which if introduced as legislation will be regarded as unconstitutional.[10]

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[5] http://www.kznlegislature.gov.za/Portals/0/KZN%20elimination%20and%20Prevention%20of%20Re-emergence%20of%20Slums%20Act-English,2007.pdf

[6] http://www.constitutionalcourt.org.za/Archimages/13405.PDF

[7] http://www.constitutionalcourt.org.za/Archimages/13405.PDF

[8] Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwa-Zulu Natal and Others CCT12/09 at paragraph 89. Accessible at: http://www.constitutionalcourt.org.za/Archimages/13897.PDF

[9] Nine Judges concurred with the judgment of Moseneke DCJ, whereas Yacoob J gave a dissenting judgment.

The Abahlali shack dwellers argued that section 16 of the KZN Act violated the Constitution in three respects:

1) it precluded meaningful engagement between municipalities and unlawful occupiers;

2) it violated the principle that evictions should be a measure of last resort; and

3) it undermined 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 (PIE) and the protection it affords to unlawful occupiers.[11]

Section 16 of the KZN Act reads as follows:

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

The majority decision of the Constitutional Court interpreted this section to be coercive in nature – that is to say that an owner or municipality *must* evict unlawful occupiers when told to do so by the MEC in a notice.[12] The Constitutional Court found that while the PIE Act does not compel any owner or municipality to evict unlawful occupiers, section 16 of the KZN Act does.[13]

The Court found that the section "eliminates discretion on the part of the owner or municipality, it erodes and considerably undermines the protections against arbitrary institution of eviction proceedings. It renders those who are unlawful occupiers and who are invariably found in slums and informal settlements liable to face eviction proceedings which, but for the provisions of section 16, would not have occurred."[14]

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[10] This section also appears similarly phrased at paragraph 5(1) and (2) of the 2008 draft *Eastern Cape Act on the Eradication of Informal Settlements.*

[11] Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwa-Zulu Natal and Others CCT12/09, at paragraph 102.

[12] Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwa-Zulu Natal and Others CCT12/09, at paragraph 111.

[13] Ibid, at paragraph 112.

[14] Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwa-Zulu Natal and Others CCT12/09, at paragraph 112.

The Court determined that while the goal of the KZN 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]

The Court then noted as follows:

> *[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.*

This Court concluded that section 16 was inconsistent with the Constitution and the rule of law and was therefore invalid.[16]

Timeframes and the way forward.

The lessons learned from the KZN province should help the Eastern Cape improve upon the current Green Paper. In the PSAM's view, our greatest challenges relate to the effective implementation of existing legislation and policy, such as the Housing Act and Code, the BNG and PIE.

Should it still be necessary to introduce provincial legislation so as to better streamline collaboration between tiers of government, and amongst stakeholders and communities, then this legislation must complement existing laws.

We have to find solutions which will be implemented. This will require meaningful consultation, informed decision-making and improved service delivery. If government can continue to improve upon its budgeting, expenditure, performance management and accountability this will significantly enhance efforts to achieve widespread and progressive access to adequate human settlements and thereby the reduction in informal settlements. It is hoped that the ongoing development of this Green Paper represents a further step forward.

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[15] Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwa-Zulu Natal and Others CCT12/09, at paragraph 121.

[16] Ibid, at paragraphs 127 to 128.