IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no. 12/09

In the matter between:

ABAHLALIBASEMJONDOLO MOVEMENT SA **First Applicant**

SUBUSISO ZIKODE **Second Applicant**

and

PREMIER OF KWAZULU-NATAL **First Respondent**

MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS, KWAZULU-NATAL **Second Respondent**

MINISTER OF HOUSING **Third Respondent**

MINISTER OF LAND AFFAIRS **Fourth Respondent**

SECOND AND THIRD RESPONDENTS' HEADS OF ARGUMENT

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A. INTRODUCTION

1. The KwaZulu-Natal Province ("the Province") enacted the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 ("KZN Slums Act") which commenced on 2 August 2007. This is the first legislative endeavour by a province to address the acute social problem of the rehabilitation or removal of degraded living circumstances. It has however been attacked by the applicants, in respects which have repeatedly shifted, as being in conflict with the Constitution. The question for determination now is whether they should be allowed to appeal direct to this court against the judgment of Tshabalala JP rejecting their challenge, and if so, whether any such appeal should succeed.

2. "Slum" is defined in the KZN Slums Act 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" and "slum conditions" has a corresponding meaning. That vulnerable group of persons is the subject matter of the KZN Slums Act.

3. The KZN Slums Act specifies its objectives in section 3, which are:

> **"(a) to eliminate slums;**
>
> **(b) prevent the re-emergence of slums;**
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> **(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"**(emphasis added).

4. As noted, the long title and preamble to the KZN Slums Act expressly link the Act to the constitutional right to have access to affordable housing and to national and provincial commitments to providing adequate housing within the Province.

5. The applicants brought and lost a challenge to the constitutional validity of the KZN Slums Act before his Lordship Mr Justice Tshabalala JP in the court *a quo*. That judgment forms the subject of this appeal.

6. The applicants now seek leave to bypass the Supreme Court of Appeal and to appeal directly to this Court. The second and third respondents ("respondents") abide the decision of this Court on this issue but oppose the appeal.

7. Regrettably, the record fails to include a bundle of documents relied on by the respondents in the court *a quo*. These documents relate to international and national policy documents; the record has been duly supplemented to include these documents as Volumes 12-15 (filed with an index volume).

8. The constitutional challenge to the KZN Slums Act went through several incarnations in the court *a quo*.

9. First, the applicants argued that the KZN Slums Act is a repressive legislative measure which will result in wholesale and massive evictions, which will lead to increased homelessness. The respondents contended that, when interpreted in its proper context, the KZN Slums Act is a measure designed to improve the lives of those living in slum conditions and to ensure that slums and slum conditions do not continue to proliferate.

10. Then the applicants significantly amended and expanded their constitutional attack on the KZN Slums Act in their replying affidavits. The reformulated grounds of attack may be summarised as follows:

(a) First, it is alleged that the KZN Slums Act falls outside the legislative competence of the KwaZulu-Natal Province ("the Province").[1] This argument was not amended in reply.

(b) The initial second attack – an alternative to the first - was that section 16 of the KZN Slums Act was inconsistent with section 26(2) of the Constitution.[2] The initial complaint was that section 16, which permits the second respondent by notice in the *Provincial Gazette* to determine time periods within which owners of land or buildings must institute proceedings for the eviction of unlawful occupiers, "without more" was inconsistent with section 26(2) of the Constitution.

(c) In reply, the applicants expanded this ground of complaint to allege that sections 16, 9, 11 12, and 13 of the KZN Slums

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1 Volume 1: Applicants' founding affidavit, paragraphs 32-38, pages 20-23.

2 Volume 1: Applicants' founding affidavit, paragraphs 39-42, pages 23-26.

Act are inconsistent with section 26 of the Constitution. The reformulated complaint is that sections 16, 9, 11, 12 and 13 of the KZN Slums Act conflict with the National Housing Act 107 of 1997 and Chapter 13 of the National Housing Code and are inconsistent with section 26 of the Constitution.[3]

(d) The original third contention (also in the alternative) was that sections 16 and 9(1)(a) of the KZN Slums Act are in conflict with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act") and the Housing Act.[4]

(e) The reformulated argument in reply asserted that the cumulative effect of these sections contravenes the National Housing Act, and the PIE Act, because municipalities are not given appropriate guidance on how to institute evictions to prevent violations of fundamental rights.[5] Further complaints are that the KZN Slums Act does not require municipalities

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3 Volume 4: Applicants' replying affidavit, paragraphs 35-39, pages 359-360.

4 Volume 1: Applicants' founding affidavit, paragraphs 73 - 78, pages 45 – 50.

5 Volume 4: Applicants' replying affidavit, paragraphs 35-39, pages 359-360.

to provide alternative accommodation, even temporary accommodation, provides for mandatory evictions and does not require municipalities to engage with affected communities.[6]

11. In summary, the respondents contend that these challenges are without merit because the KZN Slums Act is consistent with and gives effect to:

(a) government's international law obligations;

(b) government's constitutional obligations, and more particularly, the obligations placed on government in section 26(2) of the Constitution;

(c) the Province's obligations in national housing policies and laws;

(d) the Province's obligations in terms of duly adopted housing laws and policies;

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[6] Volume 4: Applicants' replying affidavit, paragraphs 43.2-43.9, pages 362-365.

(e) the KZN Slums Act is a reasonable and rational policy and legislative response to ensure that the living conditions of those who live in informal settlements are improved; and

(f) the KZN Slums Act is a reasonable and rational legislative and policy response to ensure that the overall provincial housing project, through the delivery of housing units in sustainable human settlements, is not continuously undermined by the proliferation and expansion of informal settlements.

12. In the alternative, the respondents contend that if it is found that the KZN Slums violates section 26 of the Constitution, as alleged, then it is a reasonable and justifiable limitation of such rights as is contemplated in section 36 of the Constitution, given the scale of the challenge presented by the proliferation of informal settlements, at provincial, national and international levels.

13. The court *a quo* dismissed the constitutional challenge to the KZN Slums Act and upheld each of the respondents' arguments.[7] It was

[7] The judgment of the court a quo appears in the Record at Volume 11, pages 930-946.

accordingly not necessary for the court below to deal with the limitations analysis.

14. We propose to deal with each of these arguments in turn. At the outset however we address a preliminary evidential issue, which relates to the applicants' reliance on a Draft Report dated 30 May 2008 emanating from the Centre on Housing Rights and Evictions ("draft COHRE Report").

15. The structure of these submissions is as follows:

(a) In **SECTION B** we deal with the draft COHRE Report and submit that it ought to be struck out, or disregarded in its entirety, as was done in the court *a quo*. The applicants continue to rely on this report as is evident from their heads of argument.

(b) In **SECTION C** we draw attention to the manner in which the constitutional challenge is presented and to applicable legal and constitutional principles.

(c) In **SECTION D** we deal with the applicable international, national and provincial policy and legislative frameworks,

which we submit is the context within which the KZN Slums Act must be interpreted.

(d) In **SECTION E** we provide an analysis of the KZN Slums Act.

(f) In **SECTION F** we deal with the first ground of complaint. We submit that the KZN Slums Act falls squarely within provincial legislative competence and is not *ultra vires* the Province's legislative authority.

(g) In **SECTION G** we deal with the second ground of complaint. We demonstrate that the applicants have misinterpreted the KZN Slums Act and section 16. We submit that the impugned sections are constitutionally sound.

(h) In **SECTION H** we deal with the third ground of complaint and submit that there is no merit in this complaint. We demonstrate that the KZN Slums Act is consistent with the Housing Act and the PIE Act.

(i) In **SECTION I** we submit that if it is found that the KZN Slums Act infringes section 26 of the Constitution, then such

limitations on rights constitute reasonable and necessary limitations on rights in accordance with section 36 of the Constitution.

(j) In **SECTION J** we make concluding submissions.

B. RELIANCE ON 20 MAY 2008 DRAFT COHRE REPORT

16. The applicants seek to rely on a draft report dated 30 May 2008, compiled by COHRE. It was first alleged to have been compiled under the auspices of Jean du Plessis who did not claim to be the author of the work.[8]

17. The respondents brought an application to strike out the draft COHRE Report which the court below did not grant as it was of the view that this was not an important issue as the court could reach a decision "according to the merits of the case at hand".[9] Earlier the court referred to the respondents' argument that the challenge had been brought as an abstract constitutional challenge (which we deal with in

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8 Volume 4: Applicants' replying affidavit, paragraphs 6-8, pages 341-342 read with affidavit of Jean du Plessis, Record, Volume 7, pages 650-651.

9 Volume 11: Judgment, paragraphs 28, page 940.

the next section) and that the applicants had not attacked the implementation of the KZN Slums Act, the implementation of housing policies and programmes in the Province, nor had they challenged the constitutionality of the National Housing Act 107 of 1997 ("Housing Act") or the KwaZulu-Natal Housing Act 12 of 1998 ("KZN Housing Act"). This was described as an "important submission".[10]

18. The applicants contend in their grounds of appeal that the court a quo ought to have dismissed the application to strike out with costs and ought to have relied on the passages of the draft COHRE report identified in the replying affidavits and that the evidence contained in the draft COHRE report relating to the eThekwini Municipality ought to have been taken into account.[11]

19. The applicants' heads of argument contain little on these grounds of appeal save for the reliance on findings and conclusions in the draft COHRE Report in the section entitled "The Reality in Durban".

20. We submit that the court *a quo* correctly disregarded the draft COHRE report and in the light of its finding that it was not necessary

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[10] Volume 11: Judgment, paragraph 15, page 937.

[11] Volume 11, paragraphs 38-45, pages 963-965.

to deal with the draft COHRE report no cross-appeal on this issue was necessary.[12]

21. We demonstrate below why the draft COHRE report is inherently unreliable and ought not be considered as admissible evidence or evidence to which any weight can be given in these proceedings.

22. Although Jean du Plessis deposed to a confirmatory affidavit in reply, it is clear that the deponent is not the author of the work, could not verify the truth or the contents of the draft report, nor confirm the accuracy or correctness of the conclusions drawn in the draft report or speak to the factual bases or correctness of the methodology on which such conclusions were drawn.

23. It is trite law that:

> **In motion proceedings, a document can be evidence and attached to an affidavit for two purposes. Firstly, the document can be used in the litigation simply to prove that the deponent has in his or her possession such a document … Secondly, however, a document can be annexed to an affidavit for the purpose of relying upon the truth of the content of such document. This is the second prong of applicants' attack on these documents.**
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> **If a deponent intends to rely on the truth of the contents of a document annexed as aforesaid, the facts contained**

[12] S v Boesak 2000 (3) SA 381 (SCA) at 373A-C (and further authorities there collected).

> **therein must be proved by direct evidence. This requires an affidavit by the author of the document or someone else who can testify to the truth of such facts contained in the document. The latter person is required generally to state how he or she knows that the contents are true (*Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C) at 551G-552D; *Da Mata v Otto NO* 1971 (1) SA 763 (T) at 769D).[13]**

24. To the extent that it may be said that the draft report is relied on for its value as a specialist research report or "expert" report, our law is equally clear that such evidence must be supported by facts proved through admissible evidence, with a clear exposition of the applicable research or analytic tools employed:

> **"Fourth, the facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others. If the expert has observed them, then the expert must testify as to their existence:**
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> > **'The duty of the expert is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the expert's conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.' (See *Davey v Edinburgh Magistrates* 1953 SC 34 at 40.)**
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> **Obviously the expert must furnish criteria for testing the accuracy and objectivity of his or her conclusion. The Court must be told of the premises upon which the opinion is based. Since the testimony of an expert is likely to carry more weight, it is thus understandable that**

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13 *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1993 (2) SA 12 (NamSC), at page 30 D-F.

higher standards of accuracy and objectivity should be required."[14]

25. The draft COHRE report is not a final report, was clearly not prepared for the purpose of this litigation and comprises a mélange of media reports, analyses, opinions (some attributed others not) and conclusions based on facts were not been introduced as evidence in these proceedings. It is submitted that the draft report is inadmissible evidence in these circumstances. This is especially so when, we submit, the constitutional attack is based on facial inconsistency with the Constitution. There is, we now submit, no adequate reason why in such circumstances a record should be swelled and costs inflated by the attachment of discursive documentation of this nature. In the absence of any evidence on oath from the author, the draft report is manifestly hearsay evidence.

26. The applicants belatedly sought to deliver replying affidavits from those who are said to be the "authors" of the work.[15] However, each of those deponents confirm the affidavit of Jean du Plessis and did not confirm the truth of the contents of the draft COHRE report. At the 11th hour, the applicants delivered an application to deliver further

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14 *Holthauzen v Roodt* 1997 (4) SA 766 (W), at 772I-773B.

15 Volume 10: Applicants' supplementary replying affidavits, Pithouse 890-891, Robbins 914-916 and Tsalong 911-913.

affidavits from the authors who purported to confirm the truth and correctness of the contents of the draft COHRE report.[16] The judgment makes no reference to this application for condonation for the late receipt of these further affidavits and it must accordingly be taken to have been refused. There was no proper basis for the introduction of yet further affidavits at the last moment, when the respondents could not reasonably be expected to deal with them (except at the cost of seeking to postpone the hearing). It is submitted, however, that even these further affidavits had been received that would not cure the deficiencies in the draft COHRE report, set out below.

27. To the extent that the applicants place reliance on "findings" made through research for the draft report, it is in any event clear that such research methodologies cannot be said to be without inherent problems. For example, reliance is placed in paragraph 70.4 (Volume 4, page 393) on an assertion that the eThekwini Municipality is unlawfully demolishing shacks without recourse to the PIE Act. This conclusion apparently emerges from interviews conducted with people but no indication is given of the people interviewed or the extent, range, type or manner of such interview sample. Another example emerges from paragraph 30 of the replying affidavit (Volume 4, pages

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16 Volume 10A: Affidavits Wilson 929A-929B.

353-355) where reliance is placed on "numerous research projects" which are simply not identified and which the respondents could simply not respond to. The inclusion of a copious bibliography in reply did not remedy but worsened the position.[17]

28. There is a further problem. The report as originally presented in the court *a quo* was 150 pages long. The version on the Record is 245 pages and footnote references in large parts of the document do not bear the same superscript numbering in the main body of the text.

29. Although the draft COHRE report is referred to generally in paragraph 6 of the replying affidavit (Volume 4, page 341), the applicants later stated that they intended to rely on Chapters 4 and 5 of the draft report (Volume 4, paragraph 7, pages 341-342). If that is so, then it is unclear why the entire report was attached to the papers, if not to assert it as "evidence" in the case. This modus was particularly prejudicial to the respondents given that the draft report is emotive and replete with hearsay statements, in sections of the draft report not directly referred to in the replying affidavit, which emanate from

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[17] Volume 10: Applicants' supplementary replying affidavit, du Plessis, pages 880-885.

anonymous sources to which it is impossible for the respondents to respond.[18]

30. In these circumstances, it is submitted that the draft report constituted vexatious and irrelevant material, to the obvious prejudice of the respondents, and was correctly disregarded by the court *a quo*.

31. However, the applicants did not confine themselves to references to Chapters 4 and 5 of the draft report and relied in the court *a quo* on:

(a) opinions expressed in Chapter 1 of the draft report;[19]

(b) references to Chapter 2 of the draft report: an extract reproduced at paragraph 71 of the applicants' heads of argument;[20] and

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18 Examples of these are to be found at Volume 7 page 607, sentence ending with reference to footnote 556 (which is now footnote 304) to an "anonymous interview with housing professional"; page 616, second paragraph ("a number of housing professionals told COHRE…off the record"; and page 614, last paragraph read with footnote 572, which is now footnote 320, which refers to a housing professional who asked to remain anonymous.

19 Volume 4: Applicants' replying affidavit, paragraph 29, page 353; paragraph 66.5, pages 389-390.

20 Volume 4: Applicants' replying affidavit, paragraph 70.19, pages 398-400.

(c) conclusions and opinions expressed in Chapter 3 of the draft report;[21]

32. More importantly, the draft COHRE report is replete with hearsay and double hearsay references which are presented in the replying affidavits as facts in support of conclusions drawn and opinions expressed therein, to which it is impossible for the respondents to respond. Examples are:

(a) Volume 4, paragraph 19, page 347, which refers to statistics obtained from anonymous sources[22] which are later used in support of conclusions of fact;[23]

(b) Volume 4, paragraph 20, pages 347-348 which refers to statistics obtained from unidentified officials;[24] and

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21 Volume 4: Applicants' replying affidavit: paragraph 30, pages 353-355; paragraph 34, pages 358-359; paragraph 40, page 361.

22 Volume 6, page 573, first sentence read with footnote 482 ("Anonymous interview, transcript with COHRE").

23 Volume 4: Applicant's replying affidavit, third sentence of paragraph 20, page 348.

24 The penultimate sentence preceding the table in Volume 6, page 571 and the reference to an "anonymous interview" in the sentence after the table on page 572.

(c) references to interviews with anonymous or unidentified people.[25]

33. It is submitted that the admission of such hearsay evidence, including the conclusions of fact drawn in the draft COHRE report based on such evidence, cannot be in the interests of justice given the manifest prejudice to the respondents and the applicants' failure, without explanation, to introduce the facts and conclusions sought to be relied on the draft report, as evidence in these proceedings.[26]

34. Importantly, the respondents established that the final COHRE report was released during July 2008 and expressly records the primary author as Richard Pithouse whom the applicants describe "as one of first applicant's members".[27] Pithouse does not deny this allegation in reply.[28] The fact that Pithouse was the primary author is confirmed by

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25 Applicants' replying affidavit, paragraph 70.4, page 393; paragraph 70.9, page 395; paragraph 70.11, page 396; paragraph 70.13, pages 396-397; and paragraph 70.18, page 398.

26 The dangers of the admission of such evidence, *albeit* in the criminal context, are demonstrated in the decision in *S v Molimi* 2008 (3) SA 608 (CC).

27 Volume 8: Second respondent's supplementary answering affidavit, paragraph 11, pages 721-722.

28 Volume 10: Applicants' supplementary replying affidavit, Pithouse, pages 890-891.

Du Plessis in reply.[29] The draft COHRE report cannot in these circumstances be said to emanate from a neutral non-partisan source. The failure to disclose such authorship at the outset is unfortunate. The applicants do not explain their failure to do so.

35. Rule 34 of the Constitutional Court Rules provides for the admission of evidence not appearing in a record by any party to the proceedings, or by a duly admitted *amicus curiae*, only where such facts "are common cause or otherwise incontrovertible" or "are of an official, scientific, technical or statistical nature, capable of easy verification." This Court has held that "[f]actual material in the affidavits which falls within these parameters is admissible under Rule 34; but disputed facts which are not capable of easy verification are not."[30]

36. It is submitted that the draft COHRE report does not meet even these extended reception standards to qualify as admissible evidence in these proceedings.

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29 Volume 10: Applicants' supplementary replying affidavit, du Plessis, paragraph 17, page 875, paragraph 20, page 876, paragraph 22, page 877.

30 *S v Lawrence; S v Negal; S v Solberg* 1997(4) SA 1176 (CC), at paragraphs 22-23. *See also*, *Minister of Heath v Treatment Action Campaign* 2002 (5) SA 713 (CC), at paragraphs 6 and 8-10; *Volks NO v Robinson and Others* 2005(5) BCLR 446 (CC), at paragraphs 31-34.

37. Our courts have in any event decried the practice of attaching lengthy reports to affidavits as proof of facts not clearly alleged in the affidavits and which are not tested in evidence in such proceedings. It is not for an adversary to sift through annexures to sort out as best it may what are the pertinent facts comprising the case against it which it must answer. The Supreme Court of Appeal rejected this practice in strong terms in *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) as follows:

> **"[43] The allegations relied on by counsel for the respondents appear from the extract from the report prepared by Ernst & Young; the valuations of the applicants' farms performed by Griffiths; and the affidavit of Daniels and letters written by his attorney to the Land Claims Commissioner, Mpumalanga, and the Registrar of the SA Council for Property Valuators Profession. Counsel also criticised Roux, the valuer appointed by the applicants, in certain respects. I shall deal with each in turn. Before doing so, it is necessary to emphasise two aspects. The first is that the only issue for the court a quo to decide on the merits was whether the respondents were entitled to cancel the sale agreements because of fraud. The second is that the case argued before this court was not properly made out in the answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein* [2006 (1) SA**

> **591 (SCA)], and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted"** [emphasis added].[31]

38. It is submitted that the prejudice to the respondents is manifest. It is difficult if not impossible to respond to anecdotal 'evidence,' hearsay and double hearsay statements and to generalities and conclusions drawn from these statements when these have not been introduced in evidence in these proceedings. The respondents are, by design or by result, blindsided: precisely what will be relied on in argument is not pleaded in the papers as it should be, and the potpourri of opinion and hearsay cannot be addressed in evidence.

39. Matters are not assisted by the fact that the applicants deliberately elected not to join the eThekwini Municipality as party to these proceedings. As is evident from the affidavit of the Head of the Housing Unit of the eThekwini Municipality, much of the material contained in the draft COHRE report, as it pertains to that

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[31] *See also*: *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA), paragraph 44, footnote 46.

municipality, appears to be based on outdated information and policies preceding the adoption of new national policies on these issues.[32]

40. It does not assist the applicant to state in reply that the reports were extensively "peer-reviewed".[33] If the fundamental facts underlying the conclusions drawn in the draft COHRE report cannot be independently verified, then no amount of review by "peers" – particularly if they are not shown not to be as independent as true peer-review requires - can remedy the defects in the report nor can it ameliorate the prejudice to the respondents.

41. For all of these reasons, it is submitted that the court *a quo* correctly ignored the "evidence" in the draft COHRE report. It is submitted further that little or no reliance or weight can be given to the draft COHRE report in these proceedings in the light of the multiple deficiencies described above.

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32 Volume 8: Respondents' supplementary answering affidavit: Pather, paragraphs 4-6, pages 765-766.

33 Volume 10: Applicants' supplementary replying affidavit, du Plessis, paragraphs 18-25, pages 875-877.

C. THE NATURE OF THE CHALLENGE AND APPLICABLE LEGAL AND CONSTITUTIONAL PRINCIPLES

42. We believe it is important to draw attention at the outset to certain fundamental principles applicable to the assessment of the applicants' claims.

(1) This is an 'abstract' challenge

43. The applicants seek to declare provisions in the KZN Slums Act unconstitutional. However, they do not do so on the basis of the actual implementation of the provisions sought to be impugned. The complaint is one raised in the abstract (thus 'abstract constitutional challenge', as it is often termed) about the possible consequences which it is alleged could arise from the implementation of the KZN Slums Act.

44. The applicants have not sought to impugn the implementation of the housing programmes and policies in the Province or in municipalities in the Province. As noted, they have deliberately chosen not to join the major delivery-body in the areas to which they constantly refer, the eThekwini Municipality. They seek no relief in this regard and

have not brought a challenge aimed at the process through which the KZN Slums Act or related policies were promulgated and enacted.

45. For present purposes the challenge is thus one of abstract review. Much of the factual material relied on by the applicants in support of their complaints is accordingly irrelevant to the determination of whether the interpretation of the impugned provisions of the KZN Slums Act are consistent with the Constitution. These factual allegations are raised to bolster positions of conjecture, as to what "might happen". The applicants cannot have it both ways. They cannot predicate their challenge on worst-case speculative scenarios involving unreasonable and arbitrary action. If that is the case, the challenge is premature: it must await implementation of the Act, and they must then challenge unlawful administrative action.[34] If however (consistent with abstract review) the attack is on the Act itself, the logic must be that the terms of the Act, read sensibly in the required way, are themselves (irrespective of reasonableness of implementation) unconstitutional.

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[34] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), at paragraph 58, in which a similar distinction was drawn, albeit in a different context, between the taking of a decision and the implementation of such decision.

(2) Disputes of fact to be resolved in respondents' favour

46. To the extent that the applicants have sought to place factual material before this court which is disputed by the respondents, and to the extent that this is determined to be relevant to the interpretation of the challenged provisions, it is submitted that such disputes ought to be resolved in favour of the respondents in accordance with the well-established test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[35]

(3) Legislation must be interpreted consistently with the Constitution

47. There is a further principle of constitutional interpretation which we submit must be borne in mind. When it is possible to interpret legislation in a manner that is consistent with the Constitution, so as to avoid a finding of constitutional inconsistency, this is the route that ought to be followed.[36] Stated simply, this principle means that if it is

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[35] 1984 (3) SA 623 (A) at 634E-635B. Most recently affirmed in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), at paragraphs 12-13 and in *National Director of Public Prosecutions v Zuma*, *supra*, at paragraph 26.

[36] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at para [31] (139H-140A), and further decisions there cited in footnote 21. *Zondi v MEC For Traditional and Local Government Affairs*

reasonably possible to d so, legislation must be construed consistently with the Constitution.

48. This principle also finds expression in the related principle of interpretation encapsulated in section 39(2) of the Constitution, which requires all legislation to be interpreted consistently with the Bill of Rights.[37] In other words, this principle of interpretation requires all legislation to be interpreted through the "prism of the Bill of Rights", which is said to be a "mandatory constitutional canon of statutory interpretation".[38]

49. We submit further that the enquiry into the constitutionality of the KZN Slums Act must be approached in the context of constitutional obligations placed on government in relation to housing and related

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and Others 2005 (3) SA 589 (CC), at paragraph 102, read with the authorities cited in footnote 105 of the judgement.

37 *Zondi, supra,* at paragraph 102.

38 *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* 2001 (1) SA 545 (CC), at paragraph 21; F*raser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC), at paragraph 43; and *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2007 (6) SA 350 (CC), at paragraph 27.

international, national and provincial laws and policies on this issue. It is this context to which we turn next.

D. APPLICABLE INTERNATIONAL, NATIONAL AND PROVINCIAL POLICY AND LEGISLATIVE FRAMEWORK

50. Much of what is said in this section is common cause or undisputed on the papers. The applicants do not dispute the essential legal and policy framework but seek to raise arguments regarding the contended failure of the KZN Slums Act to refer to these policies and laws and to give effect to them. We demonstrate later that this is where the applicants fall into critical error. What follows is extracted largely from the second respondent's answering affidavit, read with the relevant documents in the respondents' bundle of documentation.

(1) The International Legal and Socio-Economic Framework

51. It is common cause on the papers that the plight and living conditions of those who occupy slum or informal housing settlements constitute an endemic, universal and exponentially increasing problem.[39]

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[39] Volume 2: Second respondent's answering affidavit, paragraphs 7-12, pages 139-141. The scale of the problem is not disputed in the applicants' replying affidavit: Volume 4, paragraph 44, pages 365-366.

52. The applicants point pertinently to this socio-economic reality at a domestic level amongst their members in Pietermaritzburg and Durban,[40]

53. This concern prompted the adoption, at the turn of the century, by the member states of the United Nations of eight UN Millennium Development Goals. Clause 19 of General Assembly Resolution 55/2 records a resolution to:

> "**By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers as proposed in the "Cities Without Slums Initiative".**[41]

54. Goal Seven records this intention and South Africa is party to this United Nations Millennium Declaration.

55. Reports commissioned by the United Nations in 2005 and 2007 demonstrated an abysmal lack of progress on the crisis of slum housing conditions worldwide. In 2005, it was reported that approximately 900 million people are estimated to live in slum-like conditions, with the majority (more than 70%) being in Sub-Saharan

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40 Volume 1: Applicant's founding affidavit, paragraphs 16-18, pages 12-15.

41 The United Nation's Resolution appears at Volume 12, pages 3-11.

Africa. In 2007, a further report indicated that the number of people living in slums and slum-like conditions was growing, with the majority continuing to be found in Sub-Saharan Africa.[42]

56. That is the international framework within which South Africa's policies and laws on slum settlements must be assessed.

(2) National Housing Act, 1997

57. These issues are dealt with in the second respondent's answering affidavit and are undisputed by the applicants save for the arguments advanced in respect of the KZN Slums Act, issues which we deal with later in these submissions.[43]

58. The inception of democracy in South Africa brought with it complex, historically-accumulated socio-economic challenges with one of the key issues being the provision of adequate housing to a previously excluded majority of citizens.

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42 Volume 2: Second respondent's answering affidavit, paragraphs 10-11, pages 140-141, read with 2005 report in Volume 12 commencing respectively at page 12, and specifically at page 42 and the 2007 report commencing at Volume 13 page 107 and specifically at page 148.

43 Volume 2: Second respondent's answering affidavit, paragraphs 13-14, pages 141-142; Volume 4: Applicants' replying affidavit, paragraph 45, page 366.

59. In addition, the Constitution enshrined a right of access to adequate housing in section 26 in the following terms:

> **"(1) Everyone has the right to have access to adequate housing.**
>
> **(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.**
>
> **(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."**

60. The scale and urgency of the housing crisis in the country has been repeatedly described by our courts.[44] Eleven years into our

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[44] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), at paragraphs 1-6; *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another*, *supra*, at paragraphs 37-38; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), at paragraphs 8-10; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (AGRISA and Others, Amici Curiae)* 2005 (5) SA 3 (CC), at paragraph 36; and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg, v City of Johannesburg and Others* 2008 (3) SA 208 (CC), at paragraph 19.

democracy, this Court noted that massive housing challenges remained:

> **"[36] The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us 11 years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."**[45]

61. Government's approach to solving these challenges commenced, *inter alia*, with the adoption of the National Housing Act No. 107 of 1997. The Housing Act gives effect to government's primary housing objective which is to undertake housing development in the country to ensure integrated, stable and sustainable public and private residential environments, where communities have access to economic and other social forms of assistance and opportunities.

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[45] *Modderklip Boerdery*, *supra*, at paragraph 36.

62. The National Housing Act places emphasis on the need for integrated planning and development of housing strategies and policies amongst all three spheres of government and defines the inter-related legislative obligations on each of the three spheres of government. For example, section 9(1) of the Housing Act obliges municipalities, as part of their integrated development plans to take all reasonable and necessary steps, within the framework of national and provincial legislation to ensure that, *inter alia*, conditions that are not conducive to the health and safety of the inhabitants of their areas of jurisdiction are prevented and removed (section 9)(1)(a)(ii)).

63. Provinces are similarly obliged to give effect to the National Housing Act and national housing policies in accordance with section 2 generally, which lists "general principles applicable to housing development" throughout the country[46], and specifically in accordance with section 7, which sets out the functions of provincial governments in regard to housing.

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[46] As examples, these principles reflect wide-ranging obligations on all three spheres of government to "consult meaningfully with individuals and communities affected by housing development" (section 2(1)(b)) and to ensure that housing development "is based on integrated development planning" (section 2(1)(c)(iii)).

64. This is confirmed by the Director-General in the National Department of Housing.[47]

(3) National Housing Code and Breaking New Ground

65. These issues are dealt with in the second respondent's answering affidavit and, once more, are largely undisputed by the applicants, save for certain arguments in relation to the KZN Slums Act to which we return later.[48]

66. The National Housing Code was approved by national government in April 2004, in accordance with section 4 of the National Housing Act. It is binding on provincial and municipal spheres of government by virtue of the provisions of section 4(6).[49] The National Housing Code sets out government's policy on housing and the achievement of the constitutional obligations in section 26 of the Constitution.

67. Chapter 12 of the National Housing Code[50] deals with a key policy

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47 Volume 8: Third respondent's answering affidavit, paragraph 8, page 761.

48 Volume 2: Second respondent's answering affidavit, paragraphs 15-26, pages 142-147; Volume 4: Applicants' replying affidavit, paragraphs 46-50, pages 367-370.

49 Section 4(6) provides: "The Code shall be binding on the provincial and local spheres of Government."

50 Which is included in Volume 13, commencing at page 157.

objective, which is the need to provide housing assistance in emergency circumstances.

68. Chapter 12 of the National Housing Code responds to the plight of persons in emergency situations with exceptional housing needs. This includes assistance to communities where living conditions have deteriorated to such an extent that they are intolerable and pose major threats to the health and safety of people resident therein and to surrounding areas.

69. Chapter 12 deals with the obligations placed on municipalities in section 9(1)(a)(ii) of the Housing Act to prevent and remove housing conditions which affect negatively the health and safety of the residents.

70. Section 12.4.1.b of Chapter 12[51] requires municipalities to engage in pro-active planning to identify possible emergency housing situations and to plan adequately for, *inter alia*, for alternative land to settle residents in existing and potential emergency housing situations and to developing and implement procedures to monitor land use, including illegal land invasion.

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[51] Volume 13, page 183.

71. Chapter 13 of the National Housing Code deals with the upgrading of informal settlements and provides for *in-situ* upgrading of informal settlements and where this is not possible, for example, where densities are too high to support a sustainable and safe human settlement, for the relocation of residents to alternative areas of accommodation.[52]

72. Chapter 13 of the National Housing Code emphasises the need to engage in partnership with affected communities, and the need for consensus in the event that relocation of the residents of informal settlements are necessary.[53]

73. Where relocations are necessary, this is against the policy obligations that:

> **"In certain limited circumstances, it may however be necessary to permanently relocate households living in hazardous circumstances or in the way of essential engineering or municipal infrastructure. In all such cases**

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[52] Volume 1: Applicant's founding affidavit, paragraphs 55-66, pages 34-43; Volume 2: Second respondent's answering affidavit, paragraphs 67-68, pages 170-171. Chapter 13 is attached to the Applicant's founding affidavit, in Volume 1, as annexure "E", commencing at page 76.

[53] Volume 2: annexure "E": of relevance are clauses 13.11.6 which deals with "community participation" at page 108 and clause 13.11.7.(a) at page 110 which requires relocation strategies to be developed "in collaboration with and on the approval of the community."

> **and where feasible and practicable, the relocation must take place at a location as close as possible to the existing settlement and within the context of an community approved relocation strategy that must be submitted with the final business plan for approval by the MEC."**[54]

74. Further national policy developments included the adoption in September 2004 of a housing policy entitled *Breaking New Ground in Housing Delivery*. This policy sets out a comprehensive plan for the development of sustainable human settlements in the country.[55]

75. Section 3.1[56] of the *Breaking New Ground* policy analyses the reasons for the urgent need to eradicate informal settlements and to integrate residents of those settlements into sustainable human settlements. It provides:

> **"Informal settlements must urgently be integrated into the broader urban fabric to overcome spatial, social and economic exclusion. The Department will accordingly introduce a new informal settlement upgrading instrument to support the focused eradication of informal settlements. The new human settlements plan adopts a phased in-situ upgrading approach to informal settlements, in line with international best practice. Thus, the plan supports the eradication of informal settlements through in-situ upgrading in desired locations, coupled to the relocation of households where development is not**

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54 Volume 1: clause 13.4, page 94.

55 The *Breaking New Ground Policy* appears in Volume 14 at pages 219-299 and continues in Volume 15 at pages 300-325.

56 Volume 14, pages 233-234.

> **possible or desirable. The upgrading process is not prescriptive, but rather supports a range of tenure options and housing typologies.**
>
> **Where informal settlements are upgraded on well-located land, mechanisms will be introduced to optimize the locational value and preference will generally be given to social housing (medium density) solutions. Upgrading projects will be implemented by municipalities and will commence with nine pilot projects, one in each province building up to full programme implementation status by 2007/8 ..."**(emphasis added).

76. Section 4.1[57] of the *Breaking New Ground* policy deals further with the policy response to informal settlements as follows:

> **"There is a need to respond positively and procactively to processes of informal housing development which are taking place across the country. A more responsive state-assisted housing policy, coupled to delivery at scale is expected to decrease the formation of informal settlements over time. There is however a need [to] acknowledge the existence of informal settlements and recognize that the existing housing programme will not secure the upgrading of informal settlements. There is also a need to shift the official policy response to informal settlements from one of conflict or neglect, to one of integration and co-operation, leading to the stablization and integration of these areas into the broader urban fabric" (**emphasis added).

77. The policy adopted in respect of informal settlements includes an innovative funding mechanism for the upgrading of informal

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[57] Volume 14, pages 238-239.

settlements to be implemented through a phased approach. This funding mechanism is introduced on an area-wide basis, rather than on an individual occupant basis, to:

(a) ensure that community networks are maintained;

(b) minimise social disruption within informal settlements; and

(c) enhance community participation in all aspects of the sustainable human settlement development solution.

78. The phased funding mechanism for the upgrading of informal settlements will proceed as follows:

(a) Phase 1 requires a survey of the informal settlement community to determine the housing and infrastructural needs of the community through a process of consultation and which will determine whether the land is suitable for in-situ upgrading;

(b) Phase 2 will focus on the provision of basic services, social amenities and security of tenure for the entire community; and

(c) Phase 3, the final phase, will focus on the development of housing in response to the needs of the community which may take a variety of forms.

79. A critical policy obligation in *Breaking New Ground* is that national, provincial and municipal spheres of government are required to work in partnership to upgrade informal settlements. *Breaking New Ground* also provides a business plan (Business Plan 3) to facilitate the upgrading of informal settlements, through the phased approach described above, and with the ultimate objective of delivering security of tenure, the provision of socio-economic services and sustainable housing opportunities.

(4) KwaZulu-Natal Housing Act and Housing Policies

80. It is undisputed on the papers that the foregoing legislative and policy framework formed the basis of the Province's housing laws and policies.[58]

81. It is also undisputed that:

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[58] Volume 2: First respondent's answering affidavit, paragraph 27, page 147, with which the applicants do not deal in reply.

(a) The Province passed the KwaZulu-Natal Housing Act 12 of 1998 ("KZN Housing Act") in accordance with its obligations in terms of the National Housing Act, to provide for sustainable housing development in the Province, as is recorded in section 2 thereof which provides for "sustainable housing development in the Province within the framework of national and provincial policy"; and

(b) Section 2B of the KZN Housing Act obliges the second respondent to determine provincial housing policy in the Province in accordance with the principles identified in section 2 of the Housing Act and the Housing Code.[59]

82. This is the legislative and policy backdrop against which the second respondent developed the provincial policy described as *KwaZulu-Natal Department of Housing: Eradication of Slums Strategy "Vision 2014"* on 20 April 2007.[60]

83. That policy was formulated in accordance with the UN Millennium Development Goals, the KZN Housing Act and applicable national

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[59] Volume 2: Second respondent's answering affidavit, paragraphs 28-29, pages 147-148; read with Volume 4: Applicants' replying affidavit, paragraph 51, page 371.

[60] A copy of this policy appears at Volume 2: pages 174-190 of the papers.

housing laws and policies. The policy was formulated to address and guide the approach towards the eradication of informal settlements in the Province, which emerges from section 2 where the policy objective is to "outline the mode and the platform for the provincial department of housing to eradicate informal settlements and measures to control continuation of informal settlements in KwaZulu-Natal."[61]

84. As is evident from the second respondent's answering affidavit, the policy was formulated on the basis of available statistics on numbers of informal settlements in the Province, available at that time (December 2006), which indicated that approximately 210 721 households in the Province lived in slums and informal settlements in approximately 609 informal settlements. The policy itself acknowledged that a key challenge was the lack of accurate statistics on slums and informal settlements in the Province.[62]

85. More recent statistics available after the adoption of the provincial policy indicate that there are approximately 192 252 households in informal dwellings or settlements in the Province. Nationally, there

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61 Second respondent's answering affidavit, paragraphs 30-32, pages 148-149 read with page 179.

62 Second respondent's answering affidavit, paragraphs 33-35, pages 149-151.

are an estimated 1 804 428 households living in informal dwellings and settlements.[63]

86. Accordingly, on any assessment of the statistics, the numbers of people living in slum or informal settlements are sizeable and represent a critical challenge in the implementation of housing policies and programmes in the Province.

87. Further features of the provincial policy include a commitment to working in partnership with municipalities to prioritise informal settlements in the provincial housing programme and to "ensure and secure the integration of informal settlements through establishing inter-departmental strategies".[64]

88. A further policy objective is the need to prevent the re-emergence of slum settlements.[65]

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63 Volume 8: Second respondent's supplementary answering affidavit, paragraphs 33(c)-(d) at pages 735-736. The applicants do not deal with this in reply.

64 Volume 2: Second respondent's answering affidavit, paragraph 36, at page 152, read with section 8.3 of the policy at pages 183-184, section 8.5 at page 184, section 12 at page 187.

65 Volume 2: Second respondent's answering affidavit, paragraph 37, page 152 read with section 15 of the policy at page 188.

89. Although the applicants criticise this provincial policy, they do so only on the bases that:

(a) the policy will retard the UN Millennium Development Goals;

(b) the 2014 target is said to be unrealistic;

(c) the statistics are disputed;

(d) a complaint that they were not consulted in the formulation of the policy; and

(e) an allegation that the KZN Slums Act will achieve the policy objective of preventing the re-emergence of slums through "mandating the institution of eviction proceedings on a massive scale."[66]

90. We deal with these arguments later when dealing with the substance of the constitutional complaints.

91. The policy, its purpose and its objectives remain otherwise undisputed, as is the fact that this policy formed the basis for the KZN Slums Act.

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[66] Volume 4: Applicants' replying affidavit, paragraphs 52-57, pages 371-375.

92. In addition, the third respondent confirms that the KZN Slums Act was debated at Minmec, which is a forum comprising MECs for housing in the provinces and the national Minister of housing.[67]

93. A further regional policy forum also informed the provisions of the KZN Slums Act and this arose as a result of the inaugural meeting of the African Ministers' Conference on Housing and Urban Development held in early 2005 in Durban.[68]

94. The Report emerging from that conference demonstrated a commitment to addressing, *inter alia*, the upgrading of slum settlements and recognising and respecting the rights of residents of slum settlements, within the context of the UN Millennium Development Goals.

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67 Volume 8: Third respondent's answering affidavit, paragraphs 11-12, page 762 read with second respondent's supplementary answering affidavit, paragraphs 57-62, pages 747-748.

68 These matters are dealt with in Volume 2, second respondent's answering affidavit, paragraphs 39-43, pages 153-155 the Report on that Conference commences at Volume 2, page 191.

E. THE KZN SLUMS ACT

95. The long title to the KZN Slums Act reflects one of the key objectives in section 3(1)(f) of the Act, that is to upgrade and improve the living conditions of residents of slums.

96. As noted previously the definition of slum in section 1 of the KZN Slums Act includes more than slum settlements and extends to residents of land and buildings who are predominantly poor, without security of tenure and with poor infrastructure and sanitation.

97. Another clear objective of the KZN Slums Act recorded in the preamble and in the objectives specified in section 3 is to promote interaction between municipalities and the Province in addressing slums in the Province within the context of constitutional rights to have access to adequate housing and within the framework of national and provincial housing legislation and provincial and municipal housing programmes.

98. Chapter 2 of the KZN Slums Act prohibits unlawful occupation of land and buildings without the consent of the owner (section 4) and provides for the evictions of persons who breach this prohibition to be evicted in accordance with the PIE Act.

99. Section 5 of Chapter 2 prohibits the use of substandard accommodation for financial gain and it is clear from these provisions that it is designed to ensure that accommodation provided by owners or persons in charge of buildings or structures meets the requirements of national and municipal building standards as well as minimum standards for human habitation, including access to natural light, a supply of running water and ablution facilities. The section prohibits the provision of accommodation for gain if buildings or structures constitute a health nuisance as defined in the National Health Act 61 of 2003 or if its is in a serious state of neglect or disrepair.

100. Section 6 places duties on municipalities to monitor substandard accommodation within their areas of jurisdiction and to give notice to owners of such substandard buildings or structures to evict occupants from these buildings or structures and if the owner fails to do so, to institute proceedings for the eviction of the occupiers of such substandard accommodation, which proceedings must be instituted in terms of the PIE Act.

101. These provisions must be read with the provisions of section 14 which oblige municipalities to given notice to owners or persons in charge of substandard accommodation requiring them to upgrade such

accommodation or to remove unhygienic conditions. Failure to do so constitutes an offence.

102. Chapter 3 of the KZN Slums Act specifies the role of the second respondent and obliges the second respondent as follows:

> **"Subject to the provisions of the Housing Act, 1977 (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 housing policy on housing development"**(emphasis added).

103. Section 8 specifies the powers and functions of the second respondent, which include:

(a) ensuring that municipal slum elimination programmes are consistent with provincial policies and plans on housing development;

(b) monitoring the progress made by municipalities for the eradication of slums within their areas;

(c) co-ordinating activities within the Province on the elimination of slums and related activities;

(d) supporting municipalities in their programmes for the progressive elimination of slums;

(e) administering the provincial housing programme and provincial housing code which includes approving municipal projects "recommended by a municipality to upgrade and improve a slum or informal settlement within its area of jurisdiction" and "any project adopted by a municipality to relocate persons living in a slum or informal settlement within its area of jurisdiction" as well as financing such projects.

104. Chapter 4 specifies the duties of municipalities with regard to the progressive realisation of the right to adequate and affordable housing, as part of their integrated development planning and within available resources. These duties specified in section 9 include, *inter alia*:

(a) taking reasonable measures to achieve the progressive realisation of the right of access to adequate housing in section 26 of the Constitution; and

(b) promoting the establishment of socially and economically viable communities with safe and healthy living conditions "to ensure the prevention of slums and slum conditions;"

105. Although section 9(1) uses permissive language when describing what municipalities may do in relation to the progressive realisation of the right to adequate and affordable housing, it is submitted that these powers when read with the reporting duties placed on municipalities in section 11, mean that municipalities have legislative duties to plan for and implement programmes to eliminate slum settlements and improve the living conditions of residents of slum settlements.

106. Section 11(1) requires each municipality within the Province, within six months of the commencement of the Act, to submit to the second respondent "a status report" reflecting, *inter alia*:

(a) the number and location of slum settlements, including estimates of the numbers of residents "and key performance indicators to measure progress in the implementation of such programme;"

(b) the identification of land or buildings that may be made available for the relocation of unlawful occupiers of slums,

particularly where the residents have been in occupation for a period longer than six months; and

(c) recommendations as to which slums are suitable for upgrading and improvement and estimated costs thereof.

107. Section 11(2) requires municipalities to submit annual reports reflecting:

> "**(a) the steps taken towards the realization of its slums elimination programme during that financial year, as well as the improvements made in the living conditions of the persons concerned as a result thereof;**
> **(b) a comparison of the progress referred to in paragraph (a) with targets set in the key performance indicators referred to [in section 11(1)(a)] and the performance in the previous financial year; and**
> **(c) measures taken by the municipality to improve on the progress made to bring it in line with the targets set in the key performance indicators"** (emphasis added).

108. Reverting to section 9, section 9(2) empowers the second respondent to direct the provision of sanitary or other services to occupants of slums or informal settlements or transit areas (defined as "any land or building acquired or used by a municipality for temporary accommodation or settlement of persons who are removed from a slum or informal settlement") by and between municipalities if he is

the of the opinion that the relevant municipality is best suited to provide such service. If so directed, the relevant municipality is obliged, through the provisions of section 9(3) to give priority to the provision of such service by utilising its Municipal Infrastructure Grant funding.

109. Section 10 authorises municipalities "subject to" section 6 of the PIE Act, "the Constitution and any other national legislation protecting the housing or occupational rights of persons" to evict unlawful occupiers of land or buildings in its area "if such eviction is in the public interest".

110. The phrase "subject to" has a well established meaning: the phrase is used to establish what is "dominant" and what is "subordinate or subservient".[69] In the context of evictions by municipalities in terms of section 10, it means that the power to evict is subservient to and governed by the provisions of the PIE Act, the Constitution and any other national law protecting housing or occupational rights.

111. Section 12 obliges municipalities which make available alternative land or buildings for the relocation of the residents of slums to ensure

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[69] *S v Marwane* 1982 (3) SA 717 (A), at 747H-748A. *See also*: *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC), at paragraph 27.

that these areas are "in reasonable proximity to one or more economic centres."

112. Section 13 deals with the establishment of municipal transit areas to be used "for the temporary accommodation of persons who are evicted from a slum pending the acquisition of land or buildings for their permanent accommodation."

113. However, municipalities are obliged to ensure that these transit areas are serviced and suitable for accommodation of people (section 13(2)).

114. Municipalities are also empowered to expropriate land "whether temporarily or otherwise, required by it for the purpose of establishing a transit area or, alternatively, for permanent settlement of persons who are removed or evicted from a slum", by virtue of the provisions of section 18 of the KZN Slums Act.

115. Chapter 5 of the KZN Slums Act deals with duties of owners and persons in charge of land or buildings which include ensuring that unlawful occupation of such land or buildings does not occur and provides for a municipality to monitor this.

116. Section 16(1) provides:

> "**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 [PIE Act], institute proceedings for the eviction of the unlawful occupiers concerned.**"

117. If an owner fails to comply with such notice, a municipality is empowered through the provisions of section 16(2) to institute proceedings for the eviction of unlawful occupiers through the provisions of section 6 of the PIE Act.

118. Chapter 6 of the KZN Slums Act which deals with general matters places obligations on the respondent, in section 17 to report annually to the Provincial Legislature on, *inter alia*:

(a) progress made by municipalities in eliminating slums and "improvements made in the living conditions of the persons residing within the area of jurisdiction of each municipality;"

(b) challenges encountered by municipalities in the implementation of slum elimination programmes and proposed solutions to those challenges; and

(c) the provincial programme on elimination of slums.

119. Section 22 empowers the second respondent to make regulations or issue guidelines, *inter alia* for the upgrading of slums and informal settlements within the Province, the contents of the annual reports to be submitted by municipalities, prerequisites for financing upgrading or relocation slum projects, financing of municipalities to assist with their slum eradication programmes, the acquisition of land identified by municipalities for the relocation of residents of slum or informal settlements and administrative or procedural matters to give effect to the Act.

120. It is submitted that this overview of the KZN Slums Act demonstrates a coherent legislative framework for the implementation of the national and provincial legislative and policy frameworks described in section D.

121. Against this overview, we now deal with the constitutional challenges to the KZN Slums Act.

F. FIRST CONSTITUIONAL ATTACK: IS THE ACT *ULTRA VIRES* THE PROVINCE'S LEGISLATIVE COMPETENCE?

122. This complaint is dealt with at volume 1, paragraphs 32-38, pages 20-23 of the founding affidavit. In essence, the applicants assert that although the KZN Slums Act makes reference to housing and slum settlements, its manifest purpose is to deal with matters of "land use, land tenure and eviction" which fall outside the legislative competence of the Province provided for in section 104 of the Constitution.

123. We accept the principles expressed in the cases referred to in paragraphs 89-92 of applicants' heads of argument. The basic principle is that what must be distilled in the enquiry into provincial legislative competence must be the substance of the legislation.

124. The proper approach to the interpretation of legislation, when assessing whether it falls within provincial legislative competence, was expressed by Ngcobo J in *DVB Behuising* as follows:

> **"[36] The inquiry into whether the proclamation dealt with a matter listed in Schedule 6 involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the proclamation is about. In determining the subject-matter of the proclamation it is necessary to have regard to its purpose and effect. The inquiry should focus**

> **beyond the direct legal effect of the proclamation and be directed at the purpose for which the proclamation was enacted. In this inquiry the preamble to the proclamation and its legislative history are relevant considerations, as they serve to illuminate its subject-matter. They place the proclamation in context, provide an explanation for its provisions and articulate the policy behind them."**
>
> **[37] The relevance of the purpose and effect of legislation in an inquiry such as this was discussed by Chaskalson P, writing for this Court, in *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 C Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995*. 54 He stated:**
>
> > **'If the purpose of legislation is clearly within Schedule 6, it is irrelevant whether the Court approves or disapproves of its purpose. But purpose is not irrelevant to the Schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature.**

125. The enquiry is therefore all-encompassing: regard must be had not only to the provisions of the law in context but also to its overall purpose as well as the legislative history and policy framework underpinning the law.

126. We submit that it is clear from the analysis in Section E, as well as the contextual legislative and policy frameworks described in Section D, that the KZN Slums Act manifestly deals with informal settlements and the need to eradicate and prevent the re-emergence of slum settlements and sub-standard housing conditions in the Province.

127. The preamble to the KZN Slums Act records that everyone has a constitutional right to have access to housing, records the legislative obligations on the province to achieve housing obligations as set out in the National Housing Act and the KZN Housing Act and records further that it seeks "to enable the control and elimination of slums, prevent the re-emergence of slums, in a manner that promotes and protects housing construction programmes of both provincial and local governments."

128. We dealt previously with the objectives of the KZN Slums Act. Six objectives are specified and it is unclear why the applicants contend in paragraph 96 of their heads of argument that there are only two objectives. The six specified objectives, in our submission demonstrate that the purpose of the law is to deal with slums and slum conditions within the context of improving the living conditions of residents of those settlements or buildings. The core of the KZN

Slums Act relates to housing and to decent standards of accommodation.

129. Housing is an area of concurrent national and provincial competence in Part A of Schedule 4 to the Constitution, read with section 104 of the Constitution.

130. It is submitted that the argument advanced at paragraphs 97-98 of the applicants' heads of argument is misconceived. Section 2 which deals with the application of the KZN Slums Act is not to be equated with the scope of the Act. The objectives specified in section 3 of the KZN Slums Act, read in the context of the preamble, the long title, the Act as a whole (and the national and provincial legislative and policy background), demonstrate that the scope of the KZN Slums Act is much more expansive than mere "regulation of unlawful occupiers".

131. It is submitted further that the example presented at paragraph 98.4 of the applicants' heads of argument is unhelpful. If all of the elements of the definition of "slum" are not present, for example, if land is not overcrowded, the KZN Slums Act will not apply.

132. We submit that these arguments are not advanced by homing in on specific sections of the KZN Slums Act, as is done in paragraph 100

of the applicants' heads of argument, to the exclusion of the national and provincial legislative and policy content and to the exclusion of other sections of the Act to say that this affords evidence of a legislative intent to deal with land use and land tenure. It equally does not follow that a narrow focus on the prohibition, eviction and offence sections on substandard accommodation and unlawful occupation of land or buildings demonstrate a legislative intent to regulate land use or land tenure.

133. The applicants recognise in paragraphs 102 -109 of their heads of argument that other sections in the KZN Slums Act refer to and deal with matters related to housing. They say that these sections are irrelevant because there are equivalent provisions in other laws. We submit that this argument is misconceived for the following reasons.

134. First, the argument that the Preamble cannot be determinative of the content of the KZN Slums Act misses the point that it cannot be ignored in the interpretation of the KZN Slums Act.

135. Second, the prohibition in section 5 which prohibits substandard accommodation for financial benefit is not replicated in the National Building Regulations and Building Standards Act 103 of 1977.

136. Third, the applicants are mistaken when they argue that owners of substandard accommodation are not required to upgrade such accommodation. This is precisely what section 14 of the KZN Slums Act contemplates. It empowers a municipality to give notice to an owner of land or building to "upgrade and refurbish such land or building to remove the unhygienic conditions prevailing therein. This, with respect, demonstrates what the court *a quo* warned about: "… [O]ne can not pull out sections of an Act and consider them in a piecemeal fashion" and that the Act must be looked at in its entirety.[70]

137. Fourth, the references to the National Housing Act and the KZN Housing Act in sections 7, 8 and 9 cannot simply be said to be irrelevant to the enquiry because they "do not create any new powers or obligations with respect to the provision of housing" (paragraph 105 of the heads of argument). These sections ensure that provincial and municipal approaches towards slums and slum conditions are consistent with national and provincial housing laws, plans and frameworks.

138. Fifth, the reporting requirement in section 17, while it might overlap with a general reporting requirement in section 15A(7) of the KZN Housing Act focuses in the KZN Slums Act on slum and slum

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[70] Volume 11, paragraph 32, page 941.

conditions in the Province based on initial and thereafter annual reports on these matters, including progress on improving living conditions in slums, received from municipalities in terms of section 11.

139. It is submitted that the court a quo correctly found that when properly interpreted the KZN Slums Act deals with housing and housing conditions and falls within the legislative competence of the Province.

140. It is submitted that this complaint is without merit and that the applicants have not demonstrated any basis on which to conclude that the court *a quo* erred in its approach to this argument.

G. SECOND CONSTITUTIONAL ATTACK: DOES THE KZN SLUMS ACT VIOLATE SECTION 26 OF THE CONSTITUTION?

141. The initial complaint was that section 16 of the KZN Slums Act "without more, mandates and compels the institution of eviction proceedings against all unlawful occupiers in the Province of KwaZulu-Natal within a fixed period" which was said to be a contravention of section section 26(2) of the Constitution which

requires reasonable legislative and other measures to achieve the progressive realisation of the right of access to adequate housing.[71]

142. In response, the second respondent contended that when read in the context of national and provincial housing laws and policies, the KZN Slums Act is "in fact designed to achieve the progressive realisation of the right of access to adequate housing as is required in section 26(1) read with section 26(2) of the Bill of Rights. The KZN Slums Act provides the legislative basis through which reasonable plans can be identified, assessed, formulated and implemented in the Province to improve the quality of housing in informal settlements and to eventually achieve, in line with international law commitments, the elimination or upgrading of slums and informal settlements."[72]

143. The applicants' reformulated attack emerges from paragraphs 35-39, volume 4, pages 359-360 of the replying affidavit. The reformulated argument is that sections 16, 9, 11, 12 and 13 of the KZN Slums Act are inconsistent with section 26(2) of the Bill of Rights.

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71 Volume 1: Applicants' founding affidavit, paragraph 42, page 26.

72 Volume 2: Second respondent's answering affidavit, paragraph 65, page 169.

144. The second respondent contends that the applicants have misinterpreted the ambit and reach of section 16 which does not sanction province-wide once-off massive evictions:

> **"It is a provision designed to deal with the particular circumstances presented in particular areas of the Province. When read in the context of the planning and reporting exercise contemplated in sections 11, 12 and 13 section 16 permits me to deal, on a flexible basis, with specific areas requiring attention in the Province. It is a provision subject to the Constitution, and to be read consistently with it**."[73]

145. The applicants' argument proceeds as follows.

146. First it is argued that the KZN Slums Act does not require municipalities to implement Chapter 13 of the Housing Code. It is submitted that this argument is patently incorrect as the provisions of the Housing Code are binding on all spheres of government by virtue of the provisions of section 4(6) of the Housing Act.

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[73] Volume 8: Second respondent's supplementary answering affidavit, paragraph 19(g), page 727.

147. Next it is argued that section 11(1)(d) only requires municipalities to submit recommendations "if any" on upgrading slums which conflict with Chapter 13 of the Housing Code. It is submitted that this argument cannot be sustained in view of the legislative duties and planning and reporting requirements placed on municipalities as described in the analysis in Section E as well as the binding nature of the national policies on housing described in Section D.

148. Then it is argued that the effect of section 9, 11, 12 and 13 of the KZN Slums Act give "**municipalities an open-ended discretion whether to upgrade or relocate informal settlements, and in the latter event whether to provide alternative accommodation at all**" with the related complaint that the KZN Slums Act gives municipalities "no guidance" on how to exercise such discretion in a manner consistent with the Housing Act and Housing Code.

149. It is submitted that this argument fails on two bases. First, it fails on the law given the binding nature of the national and provincial housing legislation and policies on municipalities, which provide a compulsory framework for municipal planning and implementation of housing programmes.

150. Second, the argument fails on the facts, because it is evident from the affidavit of **PATHER**, who is the head of the Housing Unit of the eThekwini Municipality, that even prior to the enactment of the KZN Slums Act, that municipality formulated its housing plans and policies consistently with national and provincial housing laws and policies. It continues to do so.[74]

151. The approach of the eThekwini Municipality to informal settlements was considered in *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D), at 109I-110H, and a consideration of the policies recorded therein demonstrates consistency with Chapter 13 of the Housing Code.

152. That approach is an approach the second respondent wants to see replicated through the Province through the implementation of the KZN Slums Act.[75]

153. It is submitted that the legislative duties placed on municipalities, together with the planning and reporting requirements, described in Section E, demonstrate that municipalities are obliged to take active

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74 Volume 8: Second respondent's supplementary answering affidavit: Pather, paragraphs 5-9, pages 766-768.

75 Volume 8: Second respondent's supplementary answering affidavit, paragraph 45, page 742.

and progressive measures to achieving the progressive eradication of slums and slum conditions, as part of their housing programmes and policies, in accordance with national and provincial housing laws and policies. This is, in any event, how the second respondent interprets the KZN Slums Act.[76]

154. It is to be noted that the second respondent indicates that section 16 is a measure designed to deal, not only with recalcitrant slumlords, but also with municipalities who are slow in making progress on their constitutional commitments to achieve the progressive realisation of the right of access to adequate housing. The second respondent states:

> "**The KZN Slums Act emerged as a result of my experience as MEC for Housing in the Province that there was an urgent need for expeditious and co-ordinated action across the Province and that obligatory legislative measures were needed not only to deal with private "slum" lords but also with tardy municipalities to ensure that the living conditions of residents of informal settlements are steadily and progressively improved."**[77]

155. In the context of the right to housing, the Constitutional Court has stated that legislative measures designed to give effect to

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[76] Volume 8: Second respondent's supplementary answering affidavit, paragraph 55, pages 745-746.

[77] Volume 8: Second respondent's supplementary answering affidavit, paragraph 19, pages 725-729.

governmental obligations in section 26(2) must be supported by appropriate policies and plans:

> **"The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented."**[78]

156. This demonstrates what we submit is the proper approach to interpret the provisions of the KZN Slums Act, that is, in the context of the laws and policies described in Section D and in the context of the act as a whole, as set out in Section E.

157. Next, the applicant's argue that the threats of infringement to housing rights in section 26 of the Constitution, "**looms larger when regard is had to the unlawful evictions and shack demolitions which are regularly carried out in the Province of KwaZulu-Natal**."[79]

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78 *Grootboom, supra*, at paragraph 42.

79 Volume 4: Applicants' replying affidavit, paragraph 39, page 360.

158. These allegations are disputed on the papers and we submit must be resolved in favour of the respondents.[80] In any event, the applicants have deliberately elected to advance their case on the basis of facial invalidity: if they wished to attack (executive and administrative) implementation, they had to make out such a case, and join the eThekwini Municipality in particular.

159. The reliance by the applicants on the unreported decision in *Jaca and Others v Ethekwini Municipality* (Case no. 1020/2008: 26 August 2008), in any event does not demonstrate the allegation that evictions are carried out unlawfully in Durban. That case dealt with the limited enquiry as to whether the applicants were entitled to an interdict to prevent what they perceived was a threat to the demolition of their homes.

160. We dealt previously with the deficiencies of the draft COHRE report on these allegations.

161. However, it is submitted that the applicants misconceive the proper approach to determining whether the provisions of the KZN Slums

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[80] Volume 8: Second respondent's supplementary answering affidavit and paragraph 19(f), page 727, paragraph 50, page 744 read with the affidavit of Pather, paragraph 23, page 772.

Act comply with the constitutional obligations in section 26 of the Bill of Rights.

162. The enquiry into whether the KZN Slums Act is a reasonable measure designed to meet the Province's obligations in section 26(2) of the Constitution, must be assessed against the backdrop of the principles described by the Constitutional Court in *Grootboom, supra*:

> **"[39] What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The last of these may, as it does in this case, comprise two tiers. The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.**
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> **[40] Thus, a co-ordinated State housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chap 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the**

State's s 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.

[41] The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on s 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by s 26(2), the question will be whether the legislative and other measures taken by the State are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

[42] The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the State's obligations. The programme must also be reasonably

> **implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.**
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> **[43] In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.**
>
> **[44] Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test".**

163. We have quoted these principles in some detail as they have consistently been applied by our courts in the enquiry into whether

laws, policies and conduct which affect rights to housing are in compliance with section 26(2) of the Constitution.[81]

164. We dealt previously with the fact that it is undisputed on the papers, that on any assessment of the statistics, those living in substandard conditions in slums and informal settlements are a sizeable and growing reality, in the country and in the Province. The KZN Slums Act focuses on those living in unsafe and unhealthy conditions, identifies these communities in accordance with international, national and provincial policy and commitments as a critical area requiring priority and co-ordinated action in the Province and provides a legislative framework for the implementation of housing policies in the Province.

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[81] M*inister of Public Works and Others v Kyalami Ridge Environmental Association*, *supra*, at paragraphs 37-38 dealing with emergency transit camps for people affected by natural disasters; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC), at paragraphs 66-68; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), in which this Court refused to grant eviction orders against various unlawful occupiers who had occupied property for a substantial period of time and in circumstances in which the municipality had not engaged in mediation with the affected community and land owners; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), at paragraphs 29-32 which deals with the "negative obligation" imposed on government not to interfere with existing exercises of the right to housing in certain circumstances.

165. In this regard, it is to be noted that the second respondent contends that the KZN Slums Act is not a provincial plan to eradicate slums without more:

> "**I specifically reject the repetitive and emotive focus on the term "eradication" of informal settlements. This suggest, as HUCHZERMEYER does, that the Province plans to eradicate slums with no plan or thought for what is to become of the residents of those informal settlements. "Eradication" of slums means more than the eradication of informal settlements. It includes the upgrading of informal settlements, relocation of residents only where this is not possible or where emergency situations prevent *in-situ* upgrades with the central and sole objective to improve the living conditions of those living in sub-standard human conditions. "Eradication" in this context does not equate to eviction without more."**[82]

166. Accordingly, the applicants' assertions that the KZN Slums Act will result in massive evictions and related wide-scale homelessness and loss of tenure are unfounded.

167. It is submitted that there can be no legitimate complaint about the fact that these are legitimate and compelling governmental aims and objectives and that the KZN Slums Act constitutes a reasonable

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[82] Second respondent's supplementary answering affidavit, paragraph 42, page 617.

legislative response, backed by the policies described previously, to respond to the plight of a vulnerable group in society. It is thus a measure designed to give effect to the Province's obligations in section 26(2) of the Constitution.

168. In this context, it is difficult to understand how it could be contended that the provisions of sections 9, 11, 12 and 13 could be said to be "unreasonable" legislative measures given that they place positive duties on municipalities to plan for and implement policies and programmes on upgrading and improving the living conditions of residents of slum or informal settlements within the national and provincial legislative and policy frameworks described previously.

169. In their heads of argument, the applicants deal with this complaint at paragraphs 115-131. Three essential complaints are raised. It is said that section 16 by mandating eviction precludes meaningful engagement with unlawful occupiers and undermines security of tenure as no provision is made for a municipality to provide alternative accommodation. Then it is said that that municipalities are given no guidelines on how to exercise the powers given to them in the KZN Slums Act.

170. We demonstrated earlier that the applicants have misinterpreted section 16 of the KZN Slums Act.

171. It is submitted that consultation with people sought to be evicted is a constitutional imperative, as we demonstrate in the next section, and there is no need for legislation to stipulate for this.

172. The argument that municipalities are given no "guidance" comes apart when one considers the national and provincial legislative and policy frameworks described previously. In this regard, it is submitted that the decision in *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) dealt with a different matter entirely. At issue in that case was the exercise of an administrative discretion given to a governmental official. In this matter few are dealing with spheres of government with constitutional, legislative and policy obligations.

173. This Court has in any event held that the provision of guidelines to control administrative discretions is not necessarily required in all instances and remain subject to judicial review on both procedural and substantive grounds.[83]

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[83] *Armbruster and Another v Minister of Finance and Others* 2007(6) SA 550 (CC), at paragraphs 47-50, 61 and 75-80.

174. The KZN Slums Act deals with municipal duties in respect of informal settlements and planning for and implementation of focused policies to reduce informal settlements and to re-integrate the residents of informal settlements into the urban housing fabric. In formulating and implementing these policies municipalities will of course be bound by the national and provincial laws and policies on these issues.

175. It is submitted that this argument fails for another reason which we identified at the very outset. The applicants do not seek to challenge the implementation of the KZN Slums Act, but challenge its provisions in the abstract. This means that it is not permissible for the applicants at this stage to surmise that municipalities will not implement the KZN Slums Act properly. If and when that reality eventuates, the applicants can then mount a challenge based on the improper or unlawful implementation of the Act.[84]

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[84] As was the case *albeit* in a different context in *Kyalami Ridge, supra,* at paragraphs 58-59, where the Constitutional Court drew a distinction between the taking of an executive decision and the actual implementation of that decision which it said could be challenged if the decision was unlawfully implemented, for example, without statutory compliance.

176. It is submitted that these complaints are without merit and that the applicants have not demonstrated any basis on which to reverse the decision of the court *a quo* on these issues.

H. THIRD CONSTITUTIONAL ATTACK: DOES THE KZN SLUMS ACT CONFLICT WITH PROVISIONS OF THE PIE ACT AND HOUSING ACT?

177. The third constitutional challenge is that sections 16, 9, 11, 12 and 13 of the KZN Slums Act conflict with provisions of the PIE Act and he National Housing Act.

178. The argument,[85] is that section 16 of the KZN Slums Act provides for evictions without:

(a) any consideration of whether it would be just and equitable to evict in any particular case;

(b) meaningful engagement with affected people;

(c) implementing Chapter 13 of the National Housing Code;

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85 Originally formulated in Volume 4: Applicants' replying affidavit, paragraph 43.2, page 362 and expanded upon in paragraphs 135 to 142 in the heads of argument.

(d) giving municipalities a discretion on whether to evict or not in a particular case;

(e) regardless of whether alternative accommodation is available and

(f) even if a private landowner is willing to let occupiers remain on the land.

179. This is said to conflict with the spirit and purpose of the PIE Act and the National Housing Act and Code.

180. It is submitted that these arguments cannot be sustained in the light of the clear provisions of the KZN Slums Act specifically incorporating the provisions of the PIE Act, whether evictions are brought at the instance of land or property owners or at the instance of municipalities.

181. Accordingly, all safeguards of a judicial enquiry into whether it is just and equitable to evict in a particular case are incorporated into the Act. That is an important safeguard because it maintains judicial

oversight and control over evictions to ensure that all relevant circumstances, including the needs of vulnerable groups (identified in sections 4(6)-(7) of the PIE Act) are taken into account in the determination of whether eviction would be just and equitable in the circumstances.

182. The enquiry into whether it is "just and equitable" for a court to sanction an eviction, in terms of PIE, is wide-ranging:

> "**"[30] There is nothing in s 6 [of the PIE Act] to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive. It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of occupiers referred to in s 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under s 6. Similarly, justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them.**
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> **[31] … This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis. Each case, accordingly, has to be decided not on generalities but in the light of its**

> **own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least, for the time being), and its own creative possibilities that have to be explored as far as reasonably possible. The proper application of PIE will therefore depend on the facts of each case, and each case may present different facts that call for the adoption of different approaches."**[86]

183. The importance and purpose of this judicial safeguard in the context of the PIE Act has been described as follows:

> **[32] The obligation on the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject-matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes. Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or**

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86 *Port Elizabeth Municipality, supra.*

> **uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances. 'Just and equitable'**
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> **…**
>
> **[35] … The phrase 'just and equitable' makes it plain that the criteria to be applied are not purely of the technical kind that flow ordinarily from the provisions of land law. The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutually reinforcing. The necessary reconciliation can only be attempted by a close analysis of the actual specifics of each case.**
>
> **[36] The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process …**
>
> **[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law …"**[87]

184. The applicants are therefore incorrect in arguing that evictions will be carried out without a consideration of whether it is just and equitable to do so in a particular case.

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87 *Port Elizabeth Municipality*, *supra*.

185. Our courts have in certain circumstances, in any event, refused to sanction the eviction of unlawful occupiers from relatively well-established and serviced community settlements.[88]

186. The argument that section 16 will make evictions compulsory even if a landowner is willing to permit continued occupation, is a factor that will obviously have to be taken into account by a Court when considering whether an eviction is just and equitable in a particular case. However, consent to reside on land would mean that the occupiers do not occupy land unlawfully, which is the focus of section 16(1). Moreover, notwithstanding such consent, it may nevertheless be just and equitable for a Court to order an eviction if the living conditions are sub-standard and in contravention of the provisions of section 5 of the KZN Slums Act or if a landowner refuses to upgrade living conditions after being called upon by a municipality to do so in accordance with section 14 of the KZN Slums act.

187. On any scenario, the availability of alternative land for the residents of informal settlements will be a crucial factor in the consideration of whether it is just and equitable to evict.

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88 *Port Elizabeth Municipality*, *supra*, at paragraph 59*; Modderklip Boerdery*, *supra*, at paragraph 54.

188. We submit that on a proper interpretation of the KZN Slums Act including the legislative duties placed on municipalities to plan for and to implement upgrading or relocation of slum settlements, the identification of suitable, alternative accommodation is a critical obligation. We submit that this flows from a contextual analysis of the provisions of sections 9, 11, 12, 13 and 18 and is reinforced by the national and provincial policy and legislative frameworks described previously.

189. The applicants argue that compelling eviction contravenes Chapter 13 which contemplates relocation of residents of informal or slum settlements as a last resort. This is not an accurate interpretation of Chapter 13, which contemplates in section 13.3.2 (Volume 1, page 86) that relocation might be required for de-densification of existing settlements or as a result of revised township layouts. Further, Chapter 13 in section 13.4 (Volume 1, commencing at page 94) provides for relocations where communities are living in hazardous circumstances or need to move to make way for essential engineering or municipal infrastructure.

190. Furthermore, this is not the approach in the *Breaking New Ground* policy, described earlier, which also contemplates relocation of residents of informal settlements in those scenarios.

191. It is submitted that there is equally no substance to the argument that evictions through section 16 of the KZN Slums Act will be conducted without municipal engagement with the affected communities.

192. We have already referred to the provisions of section 2(1)(b) of the Housing Act which requires all spheres of government to "consult meaningfully with individuals and communities affected by housing development."

193. Those obligations are reflected in Chapter 13 of the Housing Code which emphasises consultation with and reaching consensus with residents of informal or slum settlements with regard to upgrading or relocation.[89]

194. Consultation and engagement with affected communities or residents is in any event a constitutional imperative grounded in various provisions of the Constitution, including section 26(2), as has recently

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[89] These obligations emerge clearly in Chapter 13 from the principle of "community partnership" in section 13.2.2 at Volume 1, page 84 and in the "community approved relocation strategy" in section 13.4, Volume 1at page 94.

been explained by this Court in *Occupiers of 51 Olivia Road, Berea, supra* as follows:

> **"[14] Engagement is a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine -**
>
> **(a) what the consequences of the eviction might be;**
> **(b) whether the city could help in alleviating those dire consequences;**
> **(c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;**
> **(d) whether the city had any obligations to the occupiers in the prevailing circumstances; and**
> **(e) when and how the city could or would fulfil these obligations.**
>
> **[15] Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.**
>
> **[16] The city has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, promote social and**

economic development, and encourage the involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person'. Most importantly it must respect, protect, promote and fulfil the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.

[17] But the duty of the city to engage people who may be rendered homeless after an ejectment to be secured by it is also squarely grounded in s 26(2) of the Constitution. 26 It was said in *Grootboom* that '(e)very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing'. Reasonable conduct of a municipality pursuant to s 26(2) includes the reasonableness of every step taken in the provision of adequate housing. Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with s 26(2).

[18] And, what is more, s 26(2) mandates that the response of any municipality to potentially homeless people with whom it engages must also be reasonable. It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless. It must not be forgotten that the city cannot be expected to make provision for housing beyond the extent to which available resources allow. As long as the response of the municipality in the engagement process is reasonable, that response complies with s 26(2). The Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless because it evicts them. It also follows that, where a municipality is the applicant in eviction proceedings that could result in homelessness, a

> **circumstance that a court must take into account to comply with s 26(3) of the Constitution is whether there has been meaningful engagement.**
>
> **…**
>
> **[21] … Moreover, as I have already pointed out, it is the dutyof a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order."**

195. On the basis of the foregoing, it is submitted that there is no merit in the argument that evictions required by section 16 of the KZN Slums Act will not require consultation or engagement with affected communities and residents. The fact that every constitutional obligation is not recited in a given statutory provision does not make the provision in conflict with the Constitution. The obligations apply, because the Constitution requires that.

196. It is submitted that there is no merit in this element of the argument and that the applicants have not demonstrated any basis on which to alter the determination of these issues in the court *a quo*.

I. SECTION 36: LIMITATION OF SECTION 26 RIGHTS

197. In the alternative to the foregoing, and in the event that the applicants demonstrate that the impugned provisions of the KZN Slums Act violate rights to housing in section 26 of the Constitution, it is submitted that having regard to the extent of the ever-increasing challenges of substandard living conditions in slum and informal settlements, universally, in the country and provincially, such limitations would be sanctioned by section 36 of the Constitution as reasonable and necessary in an open and democratic society.

198. In this regard, it must be emphasised that the second respondent states that the focus and purpose of the KZN Slums Act, properly construed, is:

> **"… on the eradication of informal settlements in tandem with progressive housing delivery, coupled with the upgrading, where this is possible of the living conditions of residents of informal settlements."[90]**

199. It is accordingly a legislative measure to be assessed within the overall context of "reasonable legislative and other measures" designed to

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[90] Volume 8, Second respondent's supplementary answering affidavit, paragraph 51, page 744.

achieve the progressive realisation of the right of access to adequate housing.

200. In this context, it is submitted that any violations of housing rights, even on the basis of a contravention of the "negative obligation" not to interfere with existing housing rights, would be in accordance with section 36 of the Constitution.[91]

201. The approach to applying the limitations section of the Constitution is well-established.[92] It requires a consideration of the various factors in section 36, once a violation of a right is established.

202. The approach in *Mkwanyane, supra,* was as follows:

> **"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s33(1)[Interim Constitution]. The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no**

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91 This "negative obligation" is described in paragraphs 29-32 in *Jaftha*, *supra*.

92 See generally, Currie and de Waal, *The Bill of Rights Handbook*, Juta, 2005, at pages 168-185. Section 36, the current limitations section in the Bill of Rights derives largely from the Constitutional Court decision in *S v Makwanyane* 1995 (3) SA 391 (CC), at paragraphs 103-104.

> **absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for a balancing of different interests …(at paragraph 104)**

203. The factors to be considered in determining whether rights are justifiably limited in accordance with section 36 include the following.

(a) The nature of the right

204. There can be no doubt that the right of access to adequate housing is a compelling constitutional commitment. Implicit in this is the need to improve the lives of those living in substandard, dangerous and unhygienic living conditions.

(b) The importance of the purpose of the limitation

205. The purposes to be served by the KZN Slums Act is to improve the lives of those living in sub-human living conditions and to reverse and stem the tide of informal settlements. We demonstrated previously that on the common cause statistics these are on any reckoning compelling international, national and provincial realities and the KZN Slums Act seeks to address those challenges.

(c) The nature and extent of the limitation

206. We demonstrated earlier, that the ultimate aim of the KZN Slums Act is to improve the living conditions of residents of informal settlements and other slum buildings. To the extent that these residents might lose their existing places of accommodation, properly implemented, the Act will mean that residents either have their homes upgraded or are moved to other, improved accommodation. The limitation is accordingly temporary and will be balanced by the provision of improved living conditions.

(d) The relation between the limitation and its purpose

207. The purpose of the KZN Slums Act is to improve the living conditions of those living in unacceptable conditions. It is also to ensure that such settlements do not continue to proliferate. These, it is submitted are important public purposes against which the limitations of housing rights must be balanced. It is submitted that these aims are in any event compelling governmental challenges and implicit in the duties contemplated in section 26(2) of the Constitution.

208. In the result, it is submitted that any limitation of rights are reasonable and justifiable, in furtherance of compelling governmental objectives, and consistent with section 36 of the Constitution.

J. CONCLUSION

209. It is accordingly submitted that there is no merit in the constitutional challenges directed at the KZN Slums Act.

210. In the result, we submit that the application ought to be dismissed.

J J GAUNTLETT SC

A A GABRIEL

Chambers

Cape Town and Durban

28 April 2009

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