SUBMISSION TO THE LIMPOPO PROVINCIAL ADMINISTRATION

ON THE

# LIMPOPO PREVENTION AND CONTROL OF INFORMAL SETTLEMENTS BILL, 2011

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**This submission is endorsed by the following individuals and organisations:**

- Socio-Economic Rights Institute of South Africa (SERI)
- Abahlali baseMjondolo Movement of South Africa (AbM)
- Landless People's Movement, Gauteng (LPM)
- Lawyers for Human Rights (LHR)
- Legal Resources Centre (LRC)
- Advocate Heidi Barnes, Member of the Johannesburg Bar
- Professor Marie Huchzermeyer, Wits School of Architecture and Planning
- Lauren Royston, Development Works
- Richard Pithouse, Rhodes University

**Contact Details:**
Kate Tissington
Research and Advocacy Officer, SERI
6th Floor, Aspern House
54 De Korte Street
Braamfontein
Johannesburg

Tel: 011 356 5860
Fax: 011 339 5950
Email: kate@seri-sa.org

LAWYERS FOR HUMAN RIGHTS

SERI
socio-economic rights institute of south africa

LRC
LEGAL RESOURCES CENTRE

Abahlali baseMjondolo

## A INTRODUCTION

1 The individuals and organisations whose names are set out above have read and considered the Limpopo Prevention and Control of Informal Settlements Bill, 2011 ("the Bill"). This document contains our detailed submissions on the Bill. In summary, we shall submit as follows –

1.1 Firstly, we shall submit that the Bill does not have sufficient regard to the decision of the Constitutional Court in Abahlali baseMjondolo v The Premier of KwaZulu Natal 2010 (2) BCLR 99 (CC). Far from being a qualified endorsement of the KwaZulu Natal (KZN) Slums Act (as the explanatory memorandum to the Bill suggests), the Court's decision was replete with criticism of that Act. The Court issued fairly detailed guidance as to the proper objects of law and policy dealing with informal settlements. In modelling itself on the KZN Act, the Bill does not come to grips with the depth and importance of this guidance.

1.2 The Bill equates the "elimination and control" of informal settlements with the promotion of the right of access to adequate housing. This is inappropriate. Informal settlements exist because the state and the market have as yet been unable to provide affordable and appropriate housing opportunities, sufficient to eliminate the need for informal settlements. It is only through the provision of more and better affordable housing opportunities in appropriate locations and the necessary reform of planning and urban land regulation that informal settlements will no longer be needed. Simply put, informal settlements will not need to be "eliminated" or "controlled" once there are sufficient housing opportunities available to informal settlers.

1.3 Accordingly, the Bill should reflect the reality that informal settlements are themselves meeting at least some of the housing needs of those who reside in them, and that legislation should support the efforts of informal settlers to gradually obtain, improve and consolidate access to safe, decent housing and secure tenure.

1.4 This can hardly ever be achieved by a forced eviction, or by criminalising the conduct of small scale landlords who let back-yard rooms at very low rentals. Despite purporting to take note of the Constitutional Court's strictures against the promotion of forced evictions and criminalisation of the poor[1], the Bill may, albeit indirectly, do both. This is because it over emphasises eviction as a means of control and does not place enough emphasis on upgrading informal settlements and on co-operation with and between informal settlers to achieve this.

1.5 Finally, in seeking to prevent the possibility of informal settlements expanding or new informal settlements developing, without giving some clear indication of how Limpopo's cities and towns are to deal with increasing urbanisation (through, for example, rapid release of appropriately located land programmes) the Bill creates an inevitable tension between the need to prevent the unlawful occupation of land and the increasing number of poor people seeking housing and employment opportunities in urban areas. If the state will not permit the growth and spread of new informal settlements, then how are the increasing number of poor people migrating to Limpopo's cities to be accommodated?

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[1] In this latter regard, see Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) para 12.

1.6 We emphasise that we do not support policies which allow the proliferation of informal settlements or of unsafe living conditions. We agree that the reduction in the number and size of informal settlements over time is an appropriate and achievable goal. However, the achievement of this goal lies primarily in informal settlement upgrading and/or the provision of appropriate alternative housing to people living in shacks, not in aggressive regulation and enforcement of formal building standards. If such enforcement is to play any role in addressing informal living conditions, it must be secondary to, and conditional upon, the provision of adequate housing. In our submission, the Bill does not adequately reflect this reality.

2 Accordingly, this submission is structured into the following sections:

2.1 First, we shall set out the key findings of the Constitutional Court in the Abahlali decision.

2.2 Second, we shall set out the ways in which the Bill inappropriately emphasises eviction as means of dealing with informal settlements.

2.3 Third, we shall show how elements of the Bill are likely to discourage upgrading of informal settlements and criminalise small-scale landlords who provide a valuable source of cheap accommodation to people who would otherwise be homeless or compelled to live in an informal settlement.

2.4 Finally, we submit that the Bill is an incomplete, and potentially counter-productive, response to urbanisation.

## B THE ABAHLALI DECISION

3 In the Abahlali case, the Constitutional Court was asked to consider the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007. Section 16 of the Act authorised the MEC for Housing in KwaZulu-Natal to issue a notice directing that eviction proceedings be instituted by municipalities and landowners against all informal settlements listed in the notice within a period determined by him. The applicants argued that section 16, read together with various other provisions of the Act, constituted a regressive measure which retarded access to adequate housing, contrary to section 26 (2) of the Constitution. In theory, it allowed the MEC to set a deadline for the eviction of every single unlawful occupier in the province in one notice.

4 The applicants brought their challenge section 16 before the MEC had purported to act in its terms. This was because they dared not wait until a notice requiring their eviction had already been issued. They argued that section 16 was facially incompatible with section 26 of the Constitution. In addition, however, they tendered into evidence a report[2] on widespread unlawful evictions carried out by the eThekwini Municipality. They argued that section 16 of the Act would merely encourage more state officials to take the law into their own hands. They also argued, on the basis of the report, that section 16 was incapable of orderly implementation.

5 The Court agreed that section 16 was unconstitutional. It held that section 26 of the Constitution, the PIE Act and the cases decided under these provisions had

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[2] *Business as Usual? Housing Rights and Slum Eradication in Durban, South African*, Centre on Housing Rights and Evictions (September 2008).

constructed a "dignified framework for the eviction of unlawful occupiers" and that section 16 was, on its face, incapable of an interpretation consistent with the framework.[3] In reaching this conclusion, the Court suggested that eviction must normally be a measure of last resort, after all reasonable alternatives have been explored through engagement.[4] The Court also suggested that where it is possible to upgrade an informal settlement *in situ* this must be done.[5]

6 Accordingly, after Abahlali, exploring an upgrade of an informal settlement is a necessary precondition to the implementation of an eviction or relocation. Poor people should also be able to propose alternatives to their eviction if these exist. These alternatives must be explored prior to the institution of eviction proceedings.

7 The Court took note of the fact that legislation similar to the KZN Act was being considered in other provinces and expressed the hope that its judgment would provide guidance to provinces considering such legislation.[6] It criticised the lack of clarity in the KZN legislation and underscored the need for future legislation in other provinces to be more carefully crafted.

8 Accordingly, the Abahlali decision does not simply disapprove of the specific measures set out in s 16 of the KZN Slums Act, it establishes at least three important principles against which a provincial government's efforts to deal with informal settlements must be evaluated. These principles are:

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[3] Abahlali para 122.

[4] para 113 – 115.

[5] para 114.

[6] para 126.

8.1 Evictions are not to be encouraged. They are a last resort after all alternatives have been explored through engagement.

8.2 In situ upgrades should be the primary method of dealing with informal settlements.

8.3 Legislation addressing informal settlement conditions should be clear and unambiguous about how informal settlement conditions are to be dealt with.

9 The above principles are also subject to the now well-established constitutional precept that evictions, where they do occur, should not lead to homelessness.[7]

10 In our submission, the Bill does not have adequate regard to the above principles. We give our reasons for saying so below.

## C WHY THE BILL WILL ENCOURAGE EVICTIONS AND HOMELESSNESS

11 The Bill may encourage illegal evictions or the institution of inappropriate eviction proceedings. This is chiefly because the Bill does not make clear that the upgrading of an informal settlement is the preferred way of addressing informal settlement conditions.

12 Municipalities often seek to relocate informal settlements to greenfield housing projects, even where an in situ upgrade is possible. In order to prevent this, the Bill should make clear that municipalities are obliged to apply the National

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[7] See *Port Elizabeth v Various Occupiers* 2005 (1) SA 217 (CC); *The Occupiers, Shulana Court,11 Hendon Road, Yeoville v Mark Lewis Steele* 2010 (9) BCLR 911 (SCA) *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA).

Upgrading of Informal Settlements Policy, contained in the National Housing Code, 2009, unless it is naturally impossible to do so. Municipalities should be required to justify to the MEC why an in situ upgrade is not possible before even considering a relocation.

13 There are two specific provisions of the Bill which appear to encourage eviction. We address each of these provisions, in turn, below:

Section 4: Eviction from Sub-standard Accommodation Let for Financial Benefit

13.1 Section 4 (1) of the Bill prohibits the use of substandard accommodation for financial benefit. Substandard accommodation is defined as accommodation which –

- Does not have access to natural light;
- Does not have running water supply available or connected (sic);
- Does not have ablution facilities available or connected;
- Is a health nuisance as defined in the National Health Act, 2003; or
- Is in a serious state of neglect or disrepair.

13.2 Section 4 (2) of Bill states that "if an owner or person in charge of buildings or structures referred to in subsection (1) fails to evict occupiers" a municipality may institute proceedings to do so.

13.3 Section 4 (2) of the Bill accordingly assumes that the remedy for the nuisance of substandard accommodation as defined in section 4 (1) must be an eviction. We see no reason why this must be so. Should not an owner or person in charge be required to improve or upgrade substandard accommodation he or

she has let out for financial benefit? Section 4 (2) of the Bill leaps to the most drastic measure to deal with slumlords without placing any responsibility on them to improve the accommodation they let out.

13.4 For example, if the problem is simply that there is no water supplied to the premises, then should not the owner simply be compelled to supply running water?

13.5 If the intention is for a municipality to issue a notice in terms of s 5 of the Act to improve the condition of the property in question before considering whether to institute eviction proceedings, then the legislation should expressly say so. At present, the vagueness of section 4 (2) will tend to precipitate unnecessary eviction proceedings.

13.6 Section 4 (2) furthermore gives no indication of how, if the occupiers of substandard accommodation are to be evicted by an owner or person in charge, their housing needs are to be identified and catered for. The responsibility on the owner to evict is not even made explicitly subject to the need to engage with the occupiers or apply to court for an eviction order. It bears emphasis that many landlords (especially those who are manifestly letting out substandard accommodation) are likely to be unfamiliar with, or unwilling to observe, the procedural and substantive protections of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”).

13.7 Section 4 (2) of the Bill violates the constitutional principle that an eviction should be a measure of last resort.

Section 7 (4): the six month limitation on occupation of temporary transit areas

13.8 Section 7 (4) places a limit of six months on the occupation of temporary transit areas. However, it does not specify what is to happen thereafter. In the absence of specific guidance contained in the Bill on what the occupiers of a transit area are to expect after the six month period has elapsed, the default position is likely to be that the municipality in charge of a transit area will institute eviction proceedings, or, worse, execute an eviction without a court order.

13.9 Moreover, according to the National Housing Code, 2009, temporary relocation areas are only for to be use in emergency circumstances, as a last resort. As housing developments are almost always delayed, former informal settlement residents will be rendered homeless if transit areas are to be operational only for 6 months. The National Housing Code does not, in any event, support the idea of using transit areas as a stepping stone to achieve informal settlement elimination.

13.10 The Bill's reliance on transit areas as a means of delivering housing to informal settlements ought to be re-considered and the power to establish a transit area carefully circumscribed. At the very least, in our submission, section 7 (4) should be made subject to a proviso that, after six months in a transit area, the occupiers of such an area are entitled to be provided with permanent housing in terms of a municipality's housing programme, and may not otherwise be evicted.

## D CRIMINALISATION OF SMALL SCALE LANDLORDS

14 Thousands of poor people across Limpopo let out backyard rooms in order to supplement their incomes. Small scale backyard rental is an important form of livelihood for many landlords who cannot afford to construct more expensive units, but who also charge low rents that are affordable to people with very low or only informal and irregular incomes. Given the high levels of unemployment in the Province's urban areas, back yard rental make an important contribution to meeting the affordable shelter need.

15 Backyard room rooms, while often constituting "substandard" accommodation for the purposes of the Bill, provide affordable accommodation for very poor people which is not immediately available from the state or the formal market. Sections 4 and 5 of the Bill will criminalise people who let out backyard rooms, and will encourage the eviction of very poor people living in them. In the absence of measures to enable small scale landlords to improve the condition of backyard dwellings (such as a small scale subsidy to enable a dwelling to be improved), or to provide adequate alternative accommodation to people living in backyard dwellings, this is inappropriate.

## E THE BILL IS AN INAPPROPRIATE RESPONSE TO URBANISATION

16 In adopting the philosophy of "elimination" and "control" the Bill seeks to stifle the inevitable movement of poor people from rural to urban areas in Limpopo. In particular –

16.1 Section 6 seeks to ensure that no possibilities for the informal construction of shacks exist in the Province. The Bill makes it an offence for a landowner not to take measures to prevent shack construction on his/her land. In combination with section 4 set out above and with the obligation of the Informal Settlements Officer to prevent control informal settlements and prevent incremental growth, this ensures that there is no way for a poor person to enter urban areas in Limpopo Province.

16.2 While the Bill has regard for the need to address living conditions in existing informal settlements (section 12(4)(a)), it ignores urbanisation rates and has no regard for those who for socio-spatial and economic reasons will be compelled to seek entry to urban areas.

16.3 Without making some other provision for those migrating from rural to urban areas, such as rapid land release for new, affordable housing projects which will keep pace with urbanisation, the Bill is not likely to check significantly the rates of urbanisation in the province. Even if greater tracts of land are secured against unlawful occupation in response to the Bill, the net result will be a larger number of rural / urban migrants pursuing ever small parcels of available, unsecured land. This will, at best, lead to smaller, denser, informal settlements, in which conditions with be less healthy and hygienic.

## D CONCLUSION

17 The Bill is, at best, a partial response to the need to address informal settlement conditions in Limpopo. In focussing on “elimination” and “control” at the expense of upgrading, rapid release of appropriately located land and positive measures to cater for new migrants to urban centres, the Bill does little to address the

needs of people currently living in informal settlements, or those likely to seek housing opportunities there in future.

18 On the other hand, through its emphasis evictions and the creation of new criminal offences as means of “elimination” and “control”, the Bill is likely to undermine security of tenure for Limpopo’s poorest and most vulnerable citizens.