Submission to the Mpumalanga Department of Human Settlements

Mpumalanga Eradication, Prevention and Control of Informal Settlements Bill, 2012

November 2012

Contact person:
Kate Tissington
6th Floor, Aspern House
54 De Korte Street
Braamfontein
Johannesburg

Tel: 011 356 5862
Email: kate@seri-sa.org
THIS SUBMISSION IS ENDORSED BY THE FOLLOWING INDIVIDUALS AND ORGANISATIONS:

1. Abahlali baseMjondolo [http://www.abahlali.org/]
2. Batho Land and Shelter (BLS)
3. Associate Professor Claire Benit-Gbaffou, Acting Director of the Centre for Urban and Built Environment Studies (CUBES), School of Architecture and Planning, University of the Witwatersrand
4. Built Environment Support Group (BESG) [http://www.besg.co.za/]
5. Centre for Applied Legal Studies (CALS), University of the Witwatersrand [http://www.wits.ac.za/academic/clm/law/cals/11159/cals_home.html]
6. Centre for Urbanism and Built Environment Studies (CUBES), University of the Witwatersrand [http://www.wits.ac.za/cubes/4881/cubes.html]
7. Community Organisation Resource Centre (CORC) [http://sasdialliance.org.za/corc/]
8. Professor Phillip Harrison, NRF/SARChI Chair for Development Planning and Modelling, School of Architecture and Planning, University of the Witwatersrand
9. Professor Marie Huchzermeyer, Acting Head of School and Convenor of the MBE (Housing) degree, School of Architecture and Planning, University of the Witwatersrand
11. Lauren Royston, land tenure expert
12. Margot Rubin, PhD student at the University of the Witwatersrand
13. Kecia Rust, affordable housing expert
14. School of Architecture and Planning, University of the Witwatersrand
15. Socio-Economic Rights Institute of South Africa (SERI) [http://www.seri-sa.org/]
The individuals and organisations whose names are set out above have read and considered the Mpumalanga Eradication, Prevention and Control of Informal Settlements Bill, 2012 (“the Bill”). This document contains our detailed submissions on the Bill. In summary, we shall submit as follows –

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 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 “eradication, prevention and control” of informal settlements with the promotion and protection of the government’s housing construction programmes and the fulfilment of “each citizen’s right to adequate housing”. This is inappropriate.
settlements exist because the state and the market have as yet been unable to provide affordable and appropriate housing opportunities through the housing construction programmes, 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. The Bill 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. There is both statutory provision and budget available for this, clearly articulated in the Upgrading of Informal Settlements Programme (UISP) contained in the 2009 National Housing Code. While the Upgrading of Informal Settlements Programme (UISP) and “informal settlement upgrading” are referred to several times in the Bill, it is unclear why this approach is not the priority of the Bill, which focuses primarily on the “eradication” and “prevention” of settlements.

1.5 In seeking to prevent the possibility of informal settlements expanding or new informal settlements developing, without giving some clear indication of how Mpumalanga’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 Mpumalanga’s cities to be accommodated?

1.6 One of the stated objects of the Bill - “to prevent the illegal occupation of Government Built houses approved for specific individuals who have applied and approved through the Government Information System” - does not appear to belong in a Bill purportedly dealing with informal settlements. It is unclear why this issue has been inserted into a Bill of this nature.

1.7 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.

1.8 An example of this inadequacy can be found in sections 10 and 11 of the Bill, which describe the powers and functions of the municipal Informal Settlements Officer. Nowhere do these sections mention upgrading informal settlements or the participation of informal settlement communities in upgrading projects. The Informal Settlements Officer is described as promoting liaison and communication with local communities “in order to obtain their cooperation in the prevention of informal settlements”. It is unclear what this means in practice.

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 report¹ 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.

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 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.\(^2\) 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.\(^3\) The Court also suggested that where it is possible to upgrade an informal settlement \textit{in situ} this must be done.\(^4\)

Accordingly, after \textit{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.

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.\(^5\) 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.

Accordingly, the \textit{Abahlali} decision does not simply disapprove of the specific measures set out in section 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:

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

8.2 \textit{In situ} upgrades should be the primary method of dealing with informal settlements.

\(^2\) \textit{Abahlali} para 122.  
\(^3\) para 113 – 115.  
\(^4\) para 114.  
\(^5\) para 126.
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.⁶

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. While the Bill states that it “prioritises the department's programme of informal settlements upgrading in the elimination and prevention of informal settlements”, it does not make clear how this operates in practice. The focus on the Bill is on eviction, relocation and control of existing settlements, rather than in situ upgrading.

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 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 Further, in terms of Output 1 of the Outcome 8 presidential delivery agreement, signed between the Minister of Human Settlements and the President of the Republic of South Africa in 2009, there is a national target to “upgrade 400 000 households in well located informal settlements with access to basic services and secure tenure”. According to Outcome 8, “many of the

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⁶ 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).
approximately 2,700 informal settlements are in good locations (i.e. well located close to metropolitan areas and basic services), have high densities and, in 2008, housed approximately 1.2 million households. The key challenge is providing these households with adequate basic services and an improved shelter.”

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

Section 5: Prohibition on use of substandard accommodation for financial benefit and notice for eviction to owner

14.1 Section 5 (1) of the Bill prohibits the use of substandard accommodation for financial gain. This accommodation appears to be defined as follows –

(a) The building or structure is not approved for human utilization by the appropriate building inspection body

(b) The person is not the owner

(c) The building is in a state of disrepair,

(d) The building or property poses a danger to the occupants,

(e) The building does not conform to the provisions of the Occupation Health and Safety Act (Act 85 of 1993),

(f) The building does not have the necessary running water supply and ablution facilities.

14.2 Section 5 (2) states that the municipality must give a notice to the owner or person in charge of the property to upgrade or refurbish within three months.

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7 Annexure A: For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life Department of Human Settlements (2010):
14.3 Section 5 (3) of Bill states that "If the owner or person in charge of the land, building or structure fails to comply with the notice referred to in subsection 2, the municipality must institute legal proceedings for the eviction of the occupants of such building or structure as provided for in section 6 of the Prevention of Illegal Eviction form and Unlawful Occupation of Land Act."

14.4 Section 5 (3) of the Bill accordingly assumes that the remedy for the nuisance of substandard accommodation as defined in section 5 (1) must be an eviction. Granted, the Bill includes a clause that compels the owner to remedy the situation within three months. However if the owner fails to comply with the notice, there should be a series of processes to further compel the owner to comply with the notice and rectify and defects, rather than simply evict the occupants after three months when the notice lapses. As stated above, eviction should always be the last resort.

14.5 The Bill currently offers no incentive for the owner to upgrade or refurbish the property and it is envisaged that many owners will simply ignore the notice or will not have the financial means to respond adequately. It cannot be that eviction of the occupiers is the next step.

14.6 Furthermore, section 5 (3) gives no indication of how, if the occupiers of substandard accommodation are to be evicted by the municipality, their housing needs are to be identified and catered for. The responsibility on the municipality 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 PIE Act.

14.7 Section 4 (3) of the Bill violates the constitutional principle that an eviction should be a measure of last resort.
Section 8 (4): the six month limitation on occupation of temporary transit areas

14.8 Section 8 (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.

14.9 Moreover, according to the 2009 National Housing Code, temporary relocation areas are only for to be use in emergency circumstances, as a last resort. As housing developments are almost always delayed and can take on average 7 years to develop, 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.

14.10 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 8 (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

15 Thousands of poor people across Mpumalanga let out backyard rooms in order to supplement their incomes. This is not a parasitic or exploitative commercial activity. 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, backyard rental make an important contribution to meeting the affordable shelter need.

16 Backyard 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. Section 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

17 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 Mpumalanga. In particular –

17.1 Section 7 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 5 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 Mpumalanga Province.

17.2 Section 6 of the Bill tells people in need of housing not to build shacks but to record their name on the waiting list, “be alert and be kept abreast of any new or proposed housing developments” and “be always aware and ready with the relevant documentation required for qualification of a house in terms of the Department’s qualification criteria.” This is not a
solution to someone’s housing needs. Given the waiting time for a state-subsidised house, and the current housing backlog in the Province, this is probably not even a long-term solution for those in need.

17.3 While the Bill has regard for the need to address living conditions in existing informal settlements (section 13(1)(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.

17.4 Urbanisation – which includes urban-rural migration as well as urban growth as a result of new household formation (an often neglected reality of cities) - can be addressed through the building state subsidised houses but also, importantly, can be addressed through the effective release of serviced, affordable land by municipalities. This proactive release of safe, serviced land in reasonable locations for settlement, ahead of urbanization, has been a neglected part of municipal policy in the past and should be a focus of efforts going forward, in addition to a focus on in situ informal settlement upgrading.⑧

17.5 Without making provision for those migrating from rural to urban areas, and for population growth within towns and cities, 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 will be less healthy and hygienic.

F CONCLUSION

18 The current Bill is, at best, a partial response to the need to address informal settlement conditions in Mpumalanga. 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.

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