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Huchzermeyer, Marie

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Ruling in Abahlali case lays solid foundation to build on

Marie Huchzermeyer, 4th November

ABAHLALI baseMjondolo hit the headlines recently. First, attacks on Durban's Kennedy Road informal settlement drew a ground swell of newsworthy international condemnation, including a statement from US intellectual Noam Chomsky. A week later, media reported on the outcome of Abahlali's Constitutional Court appeal on the KwaZulu-Natal slums act.
What is Abahlali? And was anything really noteworthy about the ruling?

Abahlali, a shack-dwellers movement that started in Durban in 2005, is a deeply democratic, nonpartisan political organisation. Its elected leadership makes itself accountable to its membership through regular consultations with its structures on its every move. Its central concern is to secure participatory informal settlement upgrading for its members. Abahlali has built a sympathetic network of support among a small group of faith-based organisations, legal entities, nongovernmental organisations and academics. Its website keeps overseas sympathisers abreast. However, Abahlali remains independent, cautious that its struggle not be "gentrified" or utilised for the realisation of middle-class agendas. This has gained the movement enemies in the much romanticised realm of "civil society".

Its other enemies are in the increasingly autocratic local structures of the African National Congress (ANC), which find it hard to distinguish themselves from the state.

Abahlali's approach to engaging the state is to exhaust other democratic avenues, before resorting to legal action and, where appropriate, peaceful protest. In the case of the KwaZulu-Natal Slum Elimination and Prevention of Re-emergence of Slums Act, Abahlali requested participation in the mandatory public hearings on the bill. The provincial legislature reluctantly conceded, but dismissed all of Abahlali's submissions (and many others) and enacted the law irrespectively. Immediately, Abahlali's members felt more vulnerable, as section 16 of the act gave the housing MEC the powers to make it mandatory for landowners and municipalities to institute eviction proceedings. The act undermined tenure security for all informal settlement residents in the province.
Abahlali then sought legal representation. With legal support sourced within its sympathetic network, Abahlali challenged the act in the Durban High Court. An unsympathetic judge dismissed the case. Abahlali's appeal to the Constitutional Court raised only two questions. First, was the act concerned primarily with land tenure or housing? If land, the province had no power to enact it. Assuming that the act was about housing, the question then became whether its operative provision — section 16 — was constitutional. The ruling handed down by Deputy Chief Justice Dikgang Moseneke last month found that the act was primarily concerned with housing, and therefore fell within the legislative power of the province.More significant was the court's ruling that section 16 of the act is unconstitutional. This section harked back to a provision in the 1951 Prevention of Illegal Squatting Act, which mandated landowners to evict illegal occupants irrespective of their desperation. It was a very worrying regression in law that needed to be challenged.

In our recent history, some landowners have been sympathetic to desperate households and have consented to informal occupation. In other cases, landowners (including municipalities) have unintentionally allowed informal settlements to emerge.

We have to accept that this is often how the desperately poor get access to land, in some cases well-located land. When this opportunity is closed by decree, then desperate people are even worse off. This is not to condone conditions in informal settlements. No doubt, our legislation must evolve to regulate and improve the conditions of such occupation. In Brazil, the constitution provides that anyone occupying (a moderate portion of) privately owned land informally for an uncontested period of five years has the right to ownership. SA needs to go further in ensuring not only legalisation but also servicing, infrastructural integration, access to social facilities and housing. In short: proper upgrading.

The focus of section 16 was not on upgrading informal settlements. Instead, it equated the elimination of slums with the eviction of people living in them and was intended to make this much more frequent and easily facilitated. Abahlali's victory was to ensure section 16's deletion from the statute books before it could do any real damage.

Of course shack dwellers' struggles do not end here. Collectively, we need to find ways to ensure that relevant provisions in existing legislation and policy are consistently implemented, especially insofar as they promote upgrading. It is also important to propose policy and legislative changes that don't take us back to an apartheid-era attitude to informal settlers, but take us forward.

Some argue that the ruling is insignificant because living conditions remain the same as before. But what is different since the judgment is that the fear of unfair eviction is removed for shack dwellers in the province.

But it is removed only in law. Expecting this judgment, the local ANC has unlawfully evicted Abahlali from its base in Kennedy Road. Since the judgment, this hatred has intensified and severe intimidation of Abahlali activists, including death threats and arrests, has spread to other settlements. Abahlali activist Zodwa Nsibande, a part- time student at Wits University's School of Public and Development Management, was publicly threatened for her comments on TV about the judgment. A sympathetic commentator has suggested that the "Constitutional Court is just about the only place (Abahlali) are not being beaten up, criminalised, evicted and blamed for the state's own failure to make good on its promises". And that is the issue that South African society, including ANC leaders, must be concerned about.

Collectively, we must also note that the judgment goes beyond restoring the "dignified" legal framework (as the judgment calls it), which has been evoked successfully in defending many an unlawful eviction since 1994. It underlines — and for the first time cements into law — provisions of the much ignored Upgrading of Informal Settlements Programme, introduced into the national Housing Code in 2004. Moseneke states clearly that "the owner or municipality may only evict as a matter of last resort and after having taken all possible steps to upgrade areas in which homeless people live". Further, "eviction can take place only after reasonable engagement.... This of course means that no evictions should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted, whether the areas where they live may be upgraded in situ; and whether there will be alternative accommodation."

The Constitutional Court has once again underscored that informal settlements need "proper" treatment. The ruling states unambiguously what this means. It is now up to all of us to ensure that this is realised in every informal settlement in SA.

There is no other way under South African law that informal settlements can be made a thing of the past.

Huchzermeyer is from the School of Architecture and Planning at Wits University.