Protecting the vulnerable

Attempt to remove informal settlers in conflict with Constitution

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THE POOR and the government, as interested parties, eagerly awaited the Constitutional Court's judgment on the KwaZulu Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 ("the Slums Act").
Security of tenure and the prevention of concentrated power in the hands of government were of great concern to the first two applicants, Abahlali Basejondolo Movement of SA and Sibusiso Zikode.

The applicants represent the hopes of the thousands of poor, informal occupiers.

In contrast, the then MEC of Local Government, Housing and Traditional Affairs Mike Mabuyakhulu's Slums Act was seized with great enthusiasm by the then Minister of Housing, Lindiwe Sisulu and other provincial housing MECs.
They represented, as it were, a different vision, hoping a favourable judgment that would enable the replication of the Slums Act in all provinces.

Through this column on February 3 2009, the judgment of Judge President Mr Justice Vuka Tshabalala in favour of the government was criticised. In summary, it was argued that the Slums Act:-

1. Secured the perimeters around any hope for a list of the objectives of engagement for the poor. There was no reference to co-operation or consultation between the government and the poor.
2. Will not benefit the many thousands who live in squalid conditions in the inner cities and suburbs, paying exorbitant rentals; families who lost their beloved ones, some decapitated by dysfunctional lifts.
3. Made no sense to promulgate the Slums Act when other legislation existed, like the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

Mabuyakhulu subsequently responded, belligerently arguing, among other things, that the rule of law was disrespected in criticising the honourable Judge President Tshabalala's judgment.
In a sense, what was advocated was that judges do not err and that once pronounced, a judgment cannot be interrogated meaningfully. In fact, it was the construction of section 16 of the Slums Act that offended the rule of law.
Mabuyakhulu defended the Slums Act and believed "that when judges rule, they make their ruling on the basis of law and not on the basis of opinion or feelings".
The majority judgment of ten Constitutional judges on October 14 most certainly did not agree with such obtuse views.
The applicants were granted leave to appeal the High court judgment before the Constitutional Court which delivered its judgment last week.
Yacoob J gave a dissenting judgment, considered to be a 'well-worked and comprehensive judgment' wherein section 16 of the Slums Act was not held to be inconsistent with section 26(2) of the Constitution.

He argued that there were existing legislative measures and together with the interpretation of the Slums Act, the poor and vulnerable would be protected.

The majority judgment found section 16 of the Slums Act to be in conflict with the National Housing Act and the National Housing Code, and this section failed in providing an interpretation to promote its salutary objectives.
In essence, the majority judgment protects the rights of the poor, upholds the Constitutional provisions, guarantees the right to housing, strikes down the intended coercive power to local government and prevents the Slums Act from being replicated in other provinces.

In paragraph 122 of the judgment, Moseneke DCJ states: "There is indeed a dignified framework that has been developed for the eviction of unlawful occupiers and I cannot find that section 16 is capable of an interpretation that does not violate this framework.

"Section 26(2) of the Constitution, the national Housing Act and the PIE Act all contain protections for unlawful occupiers. They ensure that their housing rights are not violated without proper notice and consideration of other alternatives."
"The compulsory nature of section 16 disturbs this carefully established legal framework by introducing the coercive institution of eviction proceedings in disregard of these protections."

At paragraph [127]: "We find section 16 to be unconstitutional in offending against section 26(2) of the Constitution and the rule of law.
To the extent that justification is in issue at all, the province sought to tender none, relying solely on interpretation. We can find none."

The respondents were ordered to pay costs, which will be paid for by taxpayers. Perhaps, provinces may realise the need for reasonable and meaningful engagement with the poor and vulnerable at the outset that would inform any legislative framework intended to improve the lives of the poor. Wasted legal costs could be spent in promoting a genuine partnership and towards protecting the vulnerable poor from criminal elements.

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