

The Punishment is the Process

An investigation into the volatile situation at eKhenana Informal Settlement in Cato Manor, Kwa-Zulu Natal

*Independent Accredited Monitor Report
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(eKhenana resident working in her collective farm)

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Summary

Over the past eight (8) months, I have been following and investigating the situation at eKhenana Settlement. During this time, a total of eleven (11) residents in the settlement, all members of the human rights organisation, Abahlali baseMjondolo, have been arrested on various charges.

The first three were arrested for murder, refused bail, and held in Durban's Westville Prison for a full six months until their case was thrown out. Another three were arrested for conspiracy to commit murder, two of whom were held for over two weeks without bail and the third for six months without bail. Just over two weeks ago three more AbM members and residents of the settlement, all women, were arrested and charged with assault against the same witness in the above cases. They were denied bail for over two weeks and were finally released yesterday, the 21 of October. On the 22nd, police were back in eKhenana looking for more members of the movement to arrest. On Saturday the 23rd of October a mob of people entered the settlement and assaulted four AbM women. While this was happening, police returned yet again and arrested another 2 members of the movement. Then on the evening of Tuesday 26 October, the homes of the most recent two arrested members were burned down in a clear case of arson.

While in prison, these activists were allegedly threatened by other inmates as well as members of the South African Police Service. It is unlikely that this is an empty threat. Over the past 15 years, 19 leaders of the human rights movement have been assassinated. Because of this, despite their release, many members from eKhenana are now in safe-houses. Five members are also barred from going back to their homes because of bail conditions. Other residents in eKhenana say they live in constant fear of attacks by hit-men or by rogue forces within SAPS.

Based on my research over the past eight months, including extensive interviews with a number of residents as well as being present at the court proceedings, I recommend that SAHRC take this issue up as a matter of urgency. (See detailed recommendations below).

Background information



(Aerial view of eKhenana Settlement)

EKhenana is an informal shack settlement in the Durban suburb of Cato Manor. It was founded in 2018 and the name is a isiZulu iteration of Canaan, the biblical land of “milk and honey”, that the wondering Israelites sought out as they fled enslavement in Egypt.

The area is very well located: Only about six kilometres from the Durban CBD and just over the hill from UKZN and the middle class suburbs of Glenwood, Musgrave, Essenwood, etc as well as other key sites of employment. Cato Manor is the site of Durban’s most notorious apartheid era evictions – the local equivalent of District Six and Sophiatown. It is also the site of significant activism and social movement resistance against these forced removals.

In recent years, a lot of open government land in the area has come under occupation by desperate people seeking a place to stay close to work, schools and other basic services. These new shack settlements are quite large. EKhenana, on the other hand, is a relatively small settlement of under 100 households sandwiched inside a small valley between a road and a collection of formal bond houses. The land is owned by the eThekweni municipality which in the past couple weeks re-opened a previously abandoned PIE eviction application to remove residents of the property.

Socio-economic situation in the settlement

EKhenana is an extremely poor community that is, for the most part, made up of economic migrants from rural areas. Residents in the community came to Durban seeking a better life for themselves and their families. As the large majority of the residents are unemployed, underemployed or informally employed, they could not afford the high rental costs of living in the city and its suburbs.

Without such options, they were left with two choices: 1) Go back to their rural homes and be unable to make ends meet and feed their families, or 2) build themselves a home in one of Durban’s many shack settlements. Their occupation of the the land that is now known as eKhenana was brought about by the fact that many other settlement are now full and/or controlled by illegal landlords (so-called “shack farms”) who control and rent out shacks for large sums of money. Not only is such a situation illegal, but it leaves them at the mercy of greedy and often violent landlords who take advantage of their precarious situation.

EKhenana, however, is distinct from other shack settlements in the area in the way its residents have decided to organise their community. Most shack settlements in South Africa are organised around small household units of immediate family. In many democratised and politicised settlements, land is held in common and managed by elected resident’s committees who discourage landlords selling property and charging rent. Still, in all of these situations, the majority of socio-economic life within these settlements is organised individualistically. In other words, each household unit seeks out income and purchases food on an individual basis. They generally rely only on other members of household for social and economic survival.

In the case of Ekhenana, however, not only has selling and renting shacks been categorically banned, but the entire settlement have been organised along cooperative / communal lines. The overgrowth in the middle section of the settlement has been cleared and turned into a cooperatively managed urban farm. Residents of Ekhenana contribute a minimum number of hours each week collectively clearing the land, removing weeds, preparing the soil and planting basic food crops such as spinach and cabbage, and then tending to and harvesting these crops. There are also a number of collectively managed chicken coops with hundreds of chickens being raised for food and for eggs. The produce from the farm and coop are sold in the collectively run spaza shop at the entrance to the settlement and revenue generated from these sales goes towards communal dinners for all residents, except for a handful of outlier residents who do not participate in these collective activities.



(eKhenana residents working their communal farm. Credit: NewFrame)

Finally, residents have build a communal hall where dinner is served, meetings are held and where various workshops take place. As the residents have affiliated with the shackdweller’s rights movement Abahlali baseMjondolo, many workshops and events of the movement are also held in the hall.



(eKhenana’s collectively run chicken coop)

What is important to recognise here is that the communal and de-commodified nature of life in this community has created a strong sense of solidarity among participating residents. At the same time, this has created a threat for those seeking the occupation of the land for purposes of personal and individual gain, such as, notably, the selling and renting of plots of land and shacks within the settlement. In preventing the commodification of land and shacks in eKhenana, conflict has emerged between about half a dozen residents – backed by the local ANC councillor – and the overwhelming majority of the community -- affiliated with Abahlali baseMjondolo.

Case #1: Murder accusation

In March 2021, Lindokuhle Mnguni (Chairperson of eKhenana) and Landu Tshazi (another AbM leader in eKhenana) were arrested by the Cato Manor station of the South African Police Service. Another member, Ayanda Ngila, was arrested soon after when he attended the bail hearings of Mnguni and Tshazi. They were charged with the murder of a former resident of eKhenana, Vusi Shandu. Shandu was returning home from work and was murdered on the 16th of March about 2 kilometres away outside the Checkout Supermarket in Cato Crest. The SAPS arrest came after two people who claimed to have witnessed the murder, pointed out Mnguni, Tshazi and Ngila as the perpetrators.

The movement initially took a hands-off approach to the case, hoping that justice would take its course fairly and impartially. However, after the accused were denied bail and after it emerged that the witnesses in the case were coincidentally also a former and a current resident of eKhenana and who AbM are convinced are actively colluding with the local ANC leader who they claim had a political agenda against the movement and its leadership, AbM decided that it would have not been in the interests of justice to stay on the sidelines. Since that case, as AbM put it, was concocted against the three AbM leaders as part of what they deem to be a much larger crackdown on AbM -- arresting other leaders and removing AbM from eKhenana -- the movement backed them up publicly and with legal representation. Still however, the three leaders were denied bail for a full six (6) months while awaiting trial.

Even though the one witnesses in this murder case, Mabongi Luthuli, admitted in family court on the 21st of May that she had made a false statement in the murder case, the prosecution still refused to withdraw the case.

On Wednesday the 29th of September, after being postponed a significant number of times, the state finally withdrew all charges against the accused. The autopsy that was done on Shandu showed conclusively that the murder of Shandu took place in a way that contradicted the original witness statements. Subsequent to this finding, both state witnesses, Mabongi Luthuli and Ntokozo Ngubane recanted their initial affidavits, admitting to having lied under oath. This is a criminal offence.

Despite the case being withdrawn, Mnguni, Tshazi and Ngila claim to have been threatened with assassination while in prison and again by a police officer. They are now living in a safe-house for their own protection.

Case #2: Conspiracy to commit murder

On the 4th of May 2021, police from Cato Manor SAPS arrested two AbM members, eKhenana resident Siniko Miya and AbM Deputy President Mqapheli Bonono, on the charges of conspiracy to commit murder. About a week later, another eKhenana resident, Maphiwe Gasela, was also arrested as part of the same case.

The prosecution claimed that the three of them had convened a meeting at the AbM offices in the CBD whereby they planned to kill the witnesses in the above murder case. AbM's position was that Bonono had convened the said meeting as part of the movement's fact-finding investigation into the murder of Shandu. That it had nothing to do with any conspiracy, but was merely an attempt to ascertain whether or not Mnguni, Tshazi and Ngila had anything to do with Shandu's murder.

Like the three AbM members before them, the case of Bonono, Miya and Gasela was postponed numerous times thereby effectively denying them bail and imprisoning them prior to trial in Westville prison. On the 20th of May, after more than two weeks, Bonono and Gasela were released on bail. Miya was remanded back to custody because he had another pending case.

On Friday the 1st of October, after having been postponed four times, the case against Bonono, Gasela and Miya was dropped. AbM has maintained from the beginning that the case was politically motivated, farcical and that there was never any evidence against the three members.

Case #3: Assault

On 8 October 2021, three women leaders of the movement in eKhenana, Nokuthula Mabaso, Thozama Mazwi and Sindiswa Ngcobo, were arrested together and charged with assault against a previous witness in the murder case, Nkosi Ngiphile Nsele. They were arrested and denied bail for about two weeks. After two full days bail hearing, on the 21th of October, the magistrate in the case finally granted the three women bail.



(Mabaso, Mazwi and Ngcobo posing for a photo after having having spent two weeks in prison)

The case relates to an alleged incident that took place in June 2020. The initial denial of bail in this case seemed illogical because of the time lapse between the alleged incident and the filing of charges earlier this month. If no further incident directed at Nsele was recorded since June 2020, despite her living in eKhenana, could there be any credible threat to Nsele's safety if the accused were given bail?

The human rights concern in this case, as with the previous two cases, is that it seems the legal process is being manipulated to keep AbM members in jail as long as possible before the case is heard months later or before bail is finally granted. Also of concern was the fact that Mabaso, Mazwi and Ngcobo were given bail conditions which bar them from going back to eKhenana, effectively constituting their eviction from their homes for the duration of the cause.

Case #3: Further arrests

On Friday 22 October 2021, police came back to eKhenana. Their aim was unstated and they eventually left the settlement. Residents report feeling terrified that they would also be arrested like the nine other AbM members before them. Those fears were born out the following day.

On Saturday the 23rd of October around 10am, residents report that a large group of people known to residents entered the settlement and reportedly assaulted four AbM members Phumelele Mkhize, Snothando Mkhize, Nomlindelo Madlala and Nomfundo Mhlongo. While they were resisting this assault and being dragged through the settlement, a police contingent arrived. They allegedly ignored the attack taking place and proceeded to arrest Phumelele Mkhize. After Police left with P. Mkhize, the three remaining women claim that they continued to be assaulted by group. They were later taken to hospital (see attached documentation) where their injuries were treated by a doctor. It is unclear at the moment who the attackers were but residents in the settlement claim that they are connected to local ANC politician NS Ngubane.

S. Mkhize, Madlala and Mhlongo then went to Cato Manor SAPS to lay a charge against the attackers. At first, the police refused to open a case on behalf of the women. After much pressure, they eventually allowed them to open a case. The visit to SAPS was recorded and I have listened to the recording (attached) which reveals that the Cato Manor SAPS are under certain instruction to act by NS Ngubane. During the recording, the SAPS officer called NS Ngubane to set up a meeting with him for the following day. The SAPS officer, after hanging up with Ngubane, admits in the recording that Ngubane has been calling his provincial superiors to instruct them to make arrests in the above cases.

After police arrested Phumelele Mkhize they found the temporary home of Maphiwe Gasela who was previously arrested along with Bonono and Miya a few months prior and arrested her as well. Both of them have now been charged with assault in the same case as Mabaso, Mazwi and Ngcobo.

On Monday the 25th, After spending the weekend in jail, P. Mkhize and Gasela were granted bail on the condition that they not return to eKhenana until the case is heard. In affect, the bail conditions of all five members in the case have rendered them homeless and the movement has had find them alternative accommodation. Using bail to effect an eviction of poor shack-dwellers should be seen as a misuse of legal procedure to undermine the constitutional rights of the accused. In this context, the bail conditions seem to be assisting the alleged aim of those opposing the movement: the removal of all movement members from eKhenana settlement.

Ongoing repression

On 26 October, residents report a meeting of people in the home of Ntokozo Ngubane, the daughter of NS Ngubane. After this meeting, at about 21h00, Nkosingiphile Nsele was allegedly seen with four men walking through the settlement with a container of petrol which they claim was used to burn the homes of Maphiwe Gasela and Phumelele Mkhize. Gasela and Mkhize were not present and able to defend their homes on account of their bail conditions. This in itself is making the residents of eKhenana even more vulnerable to repression. See photo below of one of their homes on fire.

After the fire, community members went to Cato Manor SAPS to report the case of arson. SAPS allegedly refused to open the case or to come to eKhenana to investigate the incident.



(AbM member's home burning due to arson, 26 October 2021)

Targeting activists: Punishment is the process

All the above four cases seem to revolved around a few key individuals: Firstly Nkosingiphile Nsele who is a witness in Case 1 and the alleged victim in Cases 2 and 3. Secondly, Ntokozo Ngubane, the other witness in Case 1 and someone who is allegedly coordinating the cases. Finally, Ntokozo's father NS Ngubane seems to be ever-present in all four cases. Evidence has emerged of his direct influence on key officials within the justice system. Audio recordings have indicated he has been instructing Cato Manor SAPS through high-level connections at in the province. He has also allegedly been seen in chambers with the Chief Magistrate at Durban Magistrates Court. If this is true, it is highly irregular as Ngubane is neither a lawyer nor an advocate. The writer of this report has also spotted him in court during the bail hearing for Case #3 whereby he has allegedly threatened AbM members rallying peacefully outside court. I can confirm his presence during at court that day.

Finally, AbM also alleged the presence of an "informer" named Mazwenjabulo Ndwandwe who they claim has tried to infiltrate the movement after setting up a home in eKhenana during the early days of the occupation. He was previously seen attempting to work with a number of other movements including Right 2 Know in Cape Town. It is unclear to me what Ndwandwe's

relationship to the state actually is. However, it would be important to investigate his role and whether he is acting on the instruction of police, security forces or anyone else.

In legal theory, the process of using the justice system, its courts, and its legal procedure, to infringe on the rights of the accused is often referred to by the phrase: “The process is the punishment”.² This is not only against the basic rights of the accused to be presumed innocent until proven guilty; it is also an example of how politically well-connected individuals can use the justice system to punish activists without a case ever having to go to trial. This is no different from the common practice whereby police arrest activists on public violence charges while knowing full well that the case will be dropped after the accused spend the weekend languishing in jail.

In the case of eKhenana, my investigation has to conclude that the activity of various officials linked to the police and the justice department are highly irregular and may constitute an abuse of process with the purpose of punishing entirely innocent human rights activists.

Recommendations

If poor activists and shack-dwellers are being arrested and punished, not through a fair trial in a fair court, but through the legal process itself, this presents a significant perversion of the rule of law. Here the legal system and police seem to be used to harass, abuse, evict and deny the freedom of poor shack-dwellers merely for daring to assert their human rights. In a democratic South Africa that guarantees equal constitutional rights to all its residents, this cannot be condoned. It is the task of institutions of the state as well as Chapter Nine institutions to investigate and oppose this perversion of justice and attack on basic human rights and dignity. It is also necessary to hold those who are manipulating the legal process accountable.

The situation is highly volatile and the situation could easily spiral out of control resulting in further victimisation as well as violence and even death.

I therefore strongly recommend the following immediate actions:

1. Firstly, the South African Police Service institute an immediate investigation into their members at the Cato Manor Police station as well as the irregular influence of NS Ngubane into the conduct at that police station.
2. Secondly, the National Prosecuting Authority institute an investigation into the conduct of the Chief Magistrate at the Durban Magistrate Court and whether he is being influenced by NS Ngubane.
3. Thirdly, the intervention of SAHRC to use its influence and powers to bring attention to the violations taking place against Abahlali baseMjondolo and the residents of eKhenana.
4. Finally, if the repression continues, I recommend further intervention by the South African Human Rights Commission through bringing an urgent interdict against the further harassment and victimisation of the eKhenana community. Chapter Two of the South African Constitution guarantees all people in South Africa rights to human dignity, safety, security, housing, among other inalienable rights. The constant harassment of this community without anything more than rumour and accusation constitute a dire infringement on those rights. The courts have often ruled in favour of interdicting individuals and state institutions that use their powers in such a way that those rights are infringed. It seems entirely reasonable that the legal system should be empowered to protect such vulnerable persons.

² See for instance the ground-breaking book *The Process is the Punishment: Handling Cases in a Lower Criminal Court* by Malcolm Feeley published in 1992 by the Russell Sage Foundation (New York).