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16 September 2022

To: The Director-General: Justice and Constitutional Development
By email: AlBotha@justice.gov.za

Dear Ms Botha

RE: NDIFUNA UKWAZI'S COMMENT ON THE UNLAWFUL ENTERING ON PREMISES BILL

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing and build an integrated and inclusive city.

2. Over the last seven years, Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised housing, the management of public land in a manner that prioritises socio-economic needs and the promotion of social, transitional and inclusionary housing. We have published several resource guides and research reports on these issues. Ndifuna Ukwazi has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and the state's constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access land and affordable housing.

3. This comment is made pursuant to the invitation for comments as published on the Department of Justice and Constitutional Development's website on 16 August 2022. Ndifuna Ukwazi has read and considered the Draft Bill and hereby makes this submission.

Yours faithfully,

Ndifuna Ukwazi

(Per: Danielle Louw, Attorney and Mpho Raboeane, Attorney)

NDIFUNA UKWAZI COMMENT

Historical context

1. South Africa is a country marred by its pervasive legacy of conquest and dispossession or land theft which has resulted in the Black majority experiencing landlessness, a reality acutely evident in the urban context. It is against this background that the restorative aims of the Constitution became formative in the new dispensation which sought to create a society premised on the preservation of human dignity and the fundamental principles of equality and freedom.

2. Despite the aspirations of the Constitution, the persistent legacy of racially discriminative legislation has created a climate in which neutrality and substantive equality before the law cannot exist. Ndifuna Ukwazi understands that the Bill is part of the process of reforming the existing Trespassing law to align with the principles of our constitutional democracy. Therefore any remedial action must be premised on an acknowledgement of the perpetuation of injustice in placing the protection of ill gotten gains as paramount over redress.

3. This reality cannot be cured through a superficial sanitising of terminology. A considered, more appropriate approach, must take cognisance of the genesis of the Trespass Act 6 of 1959 ("the Trespass Act"). The crime of trespass was unknown in our common law[1] and the earliest forerunners were the nineteenth century vagrancy laws intended to penalise 'idlers' and 'squatters' wandering on farms.[2] These 'idlers' and 'squatters' were the indigenous population who were systematically being dispossessed of their land through conquest by the colonial powers.[3]

4. For instance, the Cape Vagrancy Act substantively provides the same as the Trespass Act and stated that:

> "Every person found without the permission of the owner (the proof of which permission shall lie upon such person), wandering over any farm, in or loitering

[1] R v Oss (1903) 17 EDC 19 at 21; R v Tamplin (1886) 4 HCG 241.
[2] The Queen v Jones 9 Juta 210.
[3] JRL Milton, 'Trespass' in South African Criminal Law and Procedure, Vol 3, Statutory Offences, Jutas, 1988 par J1-2.

near any dwelling house, shop, store … shall be deemed and taken to be an idle and disorderly person."

5. The indigenous population did not have a conception of land in the way in which the colonisers had. Colonisers employed the doctrine of *terra nullius* (nobody's land) which assumed that uninhabited territory belonged to nobody and could be lawfully acquired by a state through occupation.[4] *Terra nullius* allowed colonisers not to recognise the land rights of indigenous people[5] and in turn led to the dispossession of their land across the world. By contrast, indigenous people conceive of the land as *terra madre* (mother earth) and live in a way which reveres the earth's role in human kind's survival.[6]

Discussion

6. Repealing the Trespass Act created to keep the dispossessed and oppressed populations from their property and land cannot be of any decolonial or postcolonial effect where there is no simultaneous **advancement of equitable access to property and land** given the reality that those living in informality and facing insecure tenure in occupied spaces are predominantly black and coloured, poor and of the working class - descendants of the 'conquered'. Part of this task entails adopting an alternative, decolonial conception of property, one that recognises that land is more than soil, or a commodity, in that it relates to all aspects of existence for indigenous people.[7]

7. While the recognition of the irrelevance of the current Trespass Act is welcomed, it must be stated that this is overdue given the incompatibility of this legislation with the spirit, object and purport of the Constitution. The Act is further irreconcilable with the *Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act* 19 of 1998 ("the PIE Act"), which was enacted to give effect to section 26(3) of the Constitution. Section 26(3) and the PIE Act place an injunction on summary removals by mandating courts to consider all relevant circumstances, including socio-economic factors, prior to ordering an eviction and remove criminal sanction on those *taking* and *being in*[8] unlawful occupation of property.

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[4] S B Nxumalo, 'The role of property in postcolonial contexts', African Law Review, Vol 10, Issue 3, 2022 at 32.
[5] Ibid.
[6] See for example the Indigenous Terra Madre Network which advocates for the continued custody by indigenous peoples of their native lands. Available at: https://www.slowfood.com/our-network/indigenous/about-us/.
[7] Nxumalo 'The role of property in postcolonial contexts' at 33.
[8] Ndlovu v Ncgobo; Bekker v Jika 2003 (1) SA 113 (SCA), paras 1, 11 and 23.

8. Thus, strong grounds exist to argue that the Trespass Act[9] was rendered unconstitutional and had been impliedly repealed upon the enactment of the PIE Act in as far as both section 26 of the Constitution and the PIE Act decriminalised the unlawful occupation of land for residential purposes and the Trespass Act made no such distinction.

9. Furthermore, the proposed Bill fails to adequately consider and cater for what is a deeply complex societal issue. The Bill substantially upholds the original premise of the Trespass Act which viewed societal relations through the simple lens of property ownership rights:[10] the normality assumption.

> "The 'normality' assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law. However, it had disastrous results for non-owners under … apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid to effect the evictions and removals required to establish the separation of land holdings along race lines."[11]

10. This approach, while favouring those resourced enough to be granted protection and personhood under the law, offers little protection for those living in precarity and serves to 'legislatively intensify' the weak position of black non-ownership rights given that it reinforces the normality assumption. Should these rights not be clearly provided for as attempted in the PIE Act, the Bill may suffer the unintended consequence of facilitating evictions and removals without the procedural safeguards contemplated in the Constitution and the PIE Act.

Recommendations

11. Therefore, to avoid an ill-fated attempt at reform, and in lieu of abolishing the Trespass Act as it is wholly provided for by other criminal and civil offences, we submit that the following considerations be taken into account:

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[9] Specifically section 1(1) of the Trespass Act.

[10] For alternative conceptions of property rights centered around community and inclusion instead of exclusionary single-ownership rights, see M Shandu & M Clark 'Rethinking Property: Towards a Values-Based Approach to Property Relations in South Africa' Vol 11, 39-77.

[11] Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation" 2002 TSAR 254 at 258, quoted with approval by Olivier JA in Ndlovu v Ngcobo; Bekker and Another v Jikka 2003 (1) SA 113 (SCA) at para 65; 2002 (4) All SA 384 (SCA) at para 69.

11.1. Section 1 - Definition of "premises"

11.1.1. The definition is exceptionally wide and includes "land not enclosed or which was previously enclosed, or partially enclosed." There exists no reasonable basis for land which is not enclosed to be inaccessible to members of the public.[12]

11.1.2. The definition further includes 'foreshore and land covered by water' which seems to denote natural settings. This encroaches on the enjoyment of natural, public space by members of the public. We request that this definition be considerably narrowed in order to cure the aforementioned defect.

11.2. Section 2 - Application of the Act

11.2.1. Section 2(1): The section currently makes no distinction between an intruder with criminal intent, and an unlawful occupier who views the premises as their home. This will invariably have the effect of criminalising unlawful occupation which was specifically decriminalised as discussed above.

11.2.2. In addition, section 9 of the Bill does not include as defence that occupation has taken place with the intent of establishing a home.

11.2.3. In order to pass constitutional muster, the application of the Act may not extend to an unlawful occupier as contemplated in the PIE Act. i.e, we recommend that the following be inserted:

"*2(2) this Act is not applicable to –*

...

(f) an unlawful occupier contemplated in the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act, 1998 (Act No.19 of 1998)."

Ends.

[12] For example, cf 'Allemansratt' https://web.archive.org/web/20110720025317/http://www.regeringen.ax/.composer/upload/socialomiljo/allemansratt.pdf ; "Everyman's right". www.ymparisto.fi. Retrieved 2014-10-19.