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25 April 2023

To: The Democratic Alliance: Parliamentary Operations Legislation
By email: legislation@da.org.za

To Whom It May Concern,

RE: NDIFUNA UKWAZI'S COMMENT ON THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND AMENDMENT 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 per the email dated 29 March 2023 and first published in Notice 1267 published in Government Gazette no. 46847 on 2 September 2022. Ndifuna Ukwazi has read and considered the Bill and hereby makes this submission.

Yours faithfully,

Ndifuna Ukwazi
(Per: Mpho Raboeane, Attorney)

NDIFUNA UKWAZI COMMENT

Comment on proposed amendments to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the Principal Act)

1. We note and welcome the significant alterations to the Bill following the public comment process wherein we made our submissions on the Bill on 2 October 2022. Yet, Ndifuna Ukwazi remains deeply concerned that the Bill and its genesis reflect an approach to informality that echoes the apartheid government's vilification and subsequent displacement and forced removal of Black and Coloured people from urban centres. Such an approach will invariably affect the poor and working-class people who, because of continuing dispossession, are homeless and landless.

2. While we have made these submissions in our prior comment, we are of the view that our submissions on the clauses of the Bill under consideration warrant restating in as far as the clauses remain unchanged.

Comment on proposed amendments to Section 3 of the Principal Act

3. Section 3

"3(1)(a) No person may cause, directly or indirectly participate in, incite, arrange, organise, nor permit a person to occupy land without the consent of the owner or person in charge of that land."

4. Section 3 as amended seeks to introduce criminal liability for the causation of or conduct of unlawful occupation. The broad scope of liability in the proposed section 3(1)(a) nullifies one of the key undertakings of the Principal Act - the decriminalisation of unlawful occupation. One must remain cognisant of the context against which the Principal Act was legislated: one in which the Prevention of Illegal Squatting Act 52 of 1951 (PISA) subjected occupiers who held no permission to be on the land to summary eviction following criminal prosecution. Therefore, persons from whom permission to remain on land had been withdrawn by new owners were treated as criminals and subjected to summary eviction, even in cases where they had been born on the land and had lived their entire lives there.[1] The use of PISA was but one of the weapons in a legislative arsenal designed for the dispossession and erasure of the African population, as "[f]or all black people, and for Africans in particular, dispossession was nine-tenths of the law."[2]

[1] See *R v Zulu* 1959 (1) SA 263 (A).

[2] *PE Municipality* at para 9; See also *DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 41. See also the judgment of Madala J at

5. In view of the politically motivated precarity of black tenure in urban areas and the abuses of segregationist, exploitative apartheid era land legislation, the PIE Act was legislated with the manifest objective of bringing eviction processes in line with constitutional imperatives. Importantly, the Principal Act decriminalised unlawful occupation:

> "PIE not only repealed PISA but in a sense inverted it: squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus, the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common law remedies while reducing common law protections, was reversed so as to temper common law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgement of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect."[3]

6. This Bill is published in a context of rampant inequality anchored in the skewed pattern of land ownership and the acute shortage of well-located affordable housing.

7. While the causes of occupations are multiple and nuanced, treating occupiers as criminals fails to recognise that the vast majority of people are forced to occupy land out of need. Generations of dispossession, an inability to develop a coordinated response to rapid urbanisation, and a systemic failure on the part of government to deliver on the promise of a functioning state-subsidised housing programme have all contributed to the crisis.

8. As far back as 1997, the White Paper on SA Land policy recognised the causative factors of unlawful occupation:
"Rapid urbanisation is creating enormous pressure on urban land. It is taking place in the absence of clear and coordinated policies and strategies to provide for speedy land delivery, management and development. In the absence of these actions, informal settlements and land [occupations] will continue to grow in number and complexity."[4]

9. The Policy goes on to state that "…In the final analysis it is the delivery of appropriate land at a rapid pace that is the solution to land [occupations]."[5]

10. Urban informality is driven by historical, racial and class exclusion - and it is this exclusion that has defined the urban policies, priorities and processes of development in our country's cities

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paras 75-9. In terms of the Group Areas Act 36 of 1966, persons classified as Coloured and Indian were compelled to live in very small portions of the land from which Africans were excluded.

[3] *PE Municipality* at para 12.

[4] Section 3.15.1, White Paper on South African Land Policy, Department of Land Affairs (1997).

[5] Section 4.8.1, An adequate response to land invasions.

and towns for decades. The COVID-19 pandemic has laid bare the deeply entrenched inequitable access to housing and land. Tenure insecurity has become a definitive tenet of the impact of the pandemic.

11. In seeking to criminalise the millions of landless people that resort to occupation, the Bill is strikingly blind to the causative circumstances that have led many in need of a home to occupy vacant land, including the state's failure to fulfil its obligations in terms of section 26(2) of the Constitution. Paradoxically, a significant contributing factor is the state's response to informality, which in turn reinforces informality. Spaces of informality are continually perceived as disquieting reminders of deeply entrenched inequality which finds reproduction through the politico-economic systems that fail the urbanised poor.[6] The state needs to proactively plan for informality which, given the socio-economic situation in our country, is only set to get worse.

12. Criminalising conduct bears a societal cost both on the ones convicted of a crime as well as on the public purse in as far as resourcing South Africa's overburdened criminal justice system. The severity of the consequences of criminalising conduct cannot be gainsaid, moreover, where the decision to criminalise leads to an unjustifiable societal net loss with the benefits being outweighed by social and economic costs. It has been posited that modern, notably westernised societies, have exhibited an over reliance on criminal sanction leading to a 'crisis of over-criminalisation'.[7] The nature of the crisis lies in the adverse effects on the administration of criminal justice that results from over criminalisation which are, *inter alia*, the lifelong stigma and economic harm of a criminal record (moreover when one's only crime is securing a home); lessening regard of criminal law and its resultant moral authority; encouraging further (organised) crime in response to artificially suppressed supply and further crippling the overburdened criminal justice system.[8]

13. As to whether conduct ought to be criminalised is thus a matter of balancing the societal gains to be accrued from the *successful* reduction of said conduct against the social, human and financial costs of invoking criminal sanction. In fact, authorities argue that such invocation be the last resort.[9]

14. We submit that this amendment will invariably criminalise poverty and necessary life sustaining actions such as providing shelter for oneself and thus infringes on one's autonomy and human dignity. Notably, the proposed provisions criminalising unlawful occupation are at odds with the trend on an African regional level which is to decriminalise all petty offenses on the continent. The Principles on the Decriminalisation of Petty Offences in Africa adopted by the African Commission in 2017, aims to holistically approach the challenges that arise in Africa at the intersection between poverty, justice and human rights which we argue are the same elements introduced by the proposed criminalisation of unlawful occupation. The enforcement of these laws also perpetuates the stigmatisation of poverty by mandating a criminal justice response to what are essentially socio-economic issues. In this regard, the criminalisation of

[6] Huchzermeyer, M. "Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa" (2011) at 29.
[7] See the Decriminalisation Act 107 of 1991, as amended.
[8] J M Burchell, 'Principles of Criminal Law', 3rd ed (2006).
[9] LAWSA vol 6,13.

petty offences reinforces discriminatory attitudes against marginalised persons. The criminalisation of this nature contributes to discrimination and marginalisation by pathologising poverty, homelessness and unemployment, and impact the poorest and most marginalised persons in our communities.

15. Further, lifelong condemnation through a criminal record not only fosters social stigma against convicted individuals, it also significantly reduces the prospects of securing gainful employment in the future. In a country where the unemployed number 8 million, and where a significant number of people are forced to live in informality or in insecure tenure, the passage of the proposed amendment will be placing a significant part of the population at risk of conviction at a scale not seen since influx control legislation of the apartheid era for comparable politically fuelled offences.

16. The societal cost is further compounded by the added economic burden.[10] An increased reliance on criminal sanction to resolve a socio-economic issue will lead to more resources being required to prosecute and accommodate the added category of offenders. As it stands, prison overcrowding in the Western Cape alone is still at 90% or more.[11]

17. The South African prison population is particularly fluid with one of the highest incarceration rates in the world coupled with one of the highest recidivism rates in the world (estimates range from 60-90%).[12] Former Inspecting Judge Hannes Fagan warned that the harsh conditions created in the prisons because of overcrowding are 'not curbing crime' but are on the contrary, 'creating it'.[13]

18. Reliance on the criminal justice system to deal with inadequate housing is misplaced and will have a pernicious effect - on the correctional system, the convicted and especially on the 'law abiding citizen'. Fining and incarceration will have the reverse effect to what is intended: the need for shelter driving most occupations will continue where the state does not adequately plan for population growth, in-migration and other factors of urbanisation. A compromised criminal justice system be further incapacitated and offenders under this section will be exposed to other, more serious crimes thereby continuing the country's proclivity for recidivism. It is clear that the societal harm will thus outweigh any societal benefit to be gleaned from criminalising unlawful occupation.

<u>Comment on proposed amendments to Section 4 of the Principal Act</u>

19. Section 4

[10] C/f U Turn 'The Cost of Homelessness' report (2019) which shows that the current response to homelessness is expensive. Currently each person facing homelessness costs society an average of R445,000 whilst they are on the street. An amount in excess of R744m a year is spent on homelessness in Cape Town – that is R51,811 per person per year with R335m or 45% on reactive activities such as urban management costs and punitive activities such as the incarceration of people facing homelessness.

[11] E Cameron. "Comment and analysis - The crisis of criminal justice in South Africa". (2020). *SA Crime Quarterly* (69) at 1-15.

[12] Id.

[13] Id.

"4(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including—
(a) the unlawful occupier's financial means, health, and previous living arrangements;
(b) the intention of the unlawful occupation;"

"4(13) Where it is reasonable to do so, a court which makes an order for alternative accommodation or land to be made available to the unlawful occupier, must make an order stipulating the length of time the said alternative accommodation or land must be made available to the unlawful occupier by the municipality or any other organ of state."

20. The introduction of specific criteria as proposed by the Bill is not only unnecessary as the Principal Act does not comprise of a closed list of considerations, but it also presupposes nefarious intent on the part of occupiers which we submit is unwarranted. Instead of assisting the court in its enquiry as is the professed intention, the proposed amendment to section 4(6) unnecessarily introduces a vilification and mistrust of respondents in an eviction matter.

21. The proposed section intimates a logic that has historically been proven deficient and underpinned racially exclusionary legislation. The requirement to report on the residence of the unlawful occupier prior to the unlawful occupation must not be treated as justification to use this legislation as a means of banishing occupiers back to "wherever they came from". This short-sighted reasoning would fail to recognise the unabating phenomenon of urbanisation, population growth and the economic climate. It further promotes the misconception that the population is static and non-migratory which then leads to a myopic view of the housing landscape whereas dynamic, proactive planning is necessary to adequately anticipate and provide for the appropriate housing solutions.

22. A cautionary tale from pre-apartheid attempts to limit urban influx premised on the above thinking is illustrative of racist intent in limiting civil liberties such as the freedom of movement for a specific class of persons in an unfairly discriminatory fashion and short sighted reasoning with respect to human settlement - such imperatives are contrary to the Bill of Rights and would not pass constitutional muster in a democracy premised on dignity, equality, accountability, responsiveness and openness[14].

23. In 1944, parliament enacted a War Measure in terms of the War Measures Act 13 of 1940.[15] The War Measure was inadequate, being premised on the hope that once evicted, these people "would go back to where they came from".[16] However, with nowhere else to go, the evictees merely moved to another piece of land nearby and waited for the process to start again. The city councils were forced to use a range of measures, mostly unsuccessful, to stem the influx of black people who flocked to the cities in search of employment opportunities. It was soon

[14] Section 1 Constitution 1996.
[15] Procl 76, GG Extraordinary 3325 of 6 Apr 1944.
[16] HA Fagan Report of the Commission of Enquiry into the Disturbances at Moroka, Johannesburg, on the 30th August 1947 (1948) at 25.

realised that a single measure would not solve the problem of urban squatting, and that a co-ordinated legislative framework was required.[17]

24. The Principal Act gives a wide discretion to the court to determine whether an eviction is just and equitable.[18] This discretion is exercised having had regard to *all* relevant circumstances *including* the rights and needs of the elderly, children, disabled persons and households headed by women. The word 'includes' is, as a general rule, a term of extension.[19] It thus cannot be read to circumscribe the circumstances to be considered by the courts. Currently the courts are enjoined to consider all relevant circumstances therefore the proposed amendment is of no additional use or effect and may be deemed superfluous.

25. Court ordered limitations on the provision of alternative accommodation belies the fact that this form of accommodation was intended to be a temporary measure offered to those in emergency situations which per the Emergency Housing Programme is inclusive of evictions into homelessness. The real issue underpinning this amendment is not the length of time for which alternative accommodation must be provided but the fact that the *de facto* permanence of such accommodation is a symptom of the lack of permanent affordable housing solutions for evictees to take up after a transitional period in emergency or transitional housing. The lack of permanent alternatives creates a bottleneck effect where occupiers of state or privately provided alternative accommodation stagnate both in terms of abode and economic mobility given that most of the emergency housing currently provided in the form of Transitional Relocation Areas (TRAs) are far flung encampments - marred by corruption and far from opportunities, amenities, community networks and livelihood strategies. The approach proposed by this amendment implicitly positions the evictee as the cause of this stagnation, when it is in fact the unmet imperative in section 26(2) of the Constitution that creates situations of permanence.

26. Further, the amendment fails to factor relevant considerations such as the average period it takes for a job seeker to find employment.[20]

27. The Emergency Housing Programme (EHP) is contained in Part 3 Volume 4 of the National Housing Code and makes provision for municipalities to apply for grants from the provincial government to provide emergency housing to those affected by emergencies. As the EHP states, the aim is to enable municipalities to "provide temporary relief to people in urban and rural areas who find themselves in emergencies" through the provision of land, municipal

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[17] G Muller. 'The legal-historical context of urban forced evictions in South Africa.'(2014) Fundamina. 19 at 367.
[18] The discretion is one in the wide and not the narrow sense. *Ndlovu v Ngcobo, Bekker and Another v Jika* (1) (240/2001, 136/2002) [2002] ZASCA 87 at para 18. C/f *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* [1992] ZASCA 149; 1992 (4) SA 791 (A) 800, *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (A) 360G-362G.
[19] Ndlovu at para 20.
[20] See Statistics South Africa's Q4 2020 Quarterly Labour Force Survey available at http://www.statssa.gov.za/publications/P0211/P02114thQuarter2020.pdf.
According to the survey, approximately the vast majority of South African youth (over 1 million) are stuck without work for a minimum of 12 months. This is exacerbated by low levels of education, where the largest proportion of unemployed youth are those with a matric, or without any formal qualifications at all (1.23 million), and these South Africans are also the least likely to find any formal employment over a longer period of time.

engineering services, relocation assistance and accommodation or shelter.[21] In addition, the cost of consumption of certain basic services can also be funded through the programme for a period of three years (provided approval is obtained from the MEC and the municipality is unable to fund these services from its own resources)[22]. Evictions and the threat of imminent evictions are specifically classed in the programme as emergencies. [23]

28. The programme provides for a broad range of possible emergency housing options, including various types of temporary and permanent housing.[24] A housing option that is particularly relevant in the context of evictees is "temporary assistance with resettlement to a permanent temporary settlement area" in cases where municipalities choose to establish such areas for affected persons until permanent housing at another location becomes available.[25]

29. Importantly, the EHP provides that the provision of alternative accommodation in the wake of an eviction or emergency should, wherever possible, be "an initial phase towards a permanent housing solution" [26] Moreover, if this is not possible, the EHP says that temporary alternative accommodation should be provided "while steps are being taken to prepare and develop land for permanent settlement purposes in terms of the approved municipal IDP and development priorities".[27] These provisions ensure that the EHP can be used to provide immediate relief to people rendered homeless due to an eviction or other emergency and indicates that funding provided in terms of the EHP could be used strategically to ensure that the housing or infrastructure developed through the EHP could be upgraded or redeveloped through other housing programmes.

30. The proposed amendment fails to take into account the state's mandate per the Housing Code as set out above. It is ultimately the state's failure to take the necessary steps towards providing permanent housing that renders the provision of alternative accommodation indefinite. Without the progressive provision of permanent housing solutions, a court order specifying a time period for the provision of alternative accommodation would ultimately force evictees into homelessness, contrary to the purposes of the Principal Act.

Comment on proposed amendments to Section 6 of the Principal Act

31. Section 6

''(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
(a) the circumstances, [under which] including the intention, of the unlawful occupier when he or she occupied the land and erected the building or structure;
(b) the period the unlawful occupier and his or her family have resided on the land in question; [and]

[21] EHP, 2009.
[22] Id at 18.
[23] Id at 15-16.
[24] Id at 31-37.
[25] Id at 34.
[26] Id at 14, 31 and 38.
[27] Id.

(c) the availability to the unlawful occupier of suitable alternative accommodation or land within the area of the municipality's jurisdiction; and (d) the resources of the municipality or any organ of state.''; and

(b) by the insertion after subsection (3) of the following subsection:

''(3A) A court that grants an order for eviction after considering whether it is just and equitable to grant an order for eviction, may make an order that alternative accommodation or land must be made available by the organ of state instituting proceedings, and where reasonable to do so, if such alternative accommodation or land is only made available temporarily, must stipulate the period for which the alternative accommodation or land must be made available.''

32. See above comment on section 4.

Concluding Remarks

33. This Bill as it currently stands seeks to "assign the blame for the exclusion from their rights as citizens to the poor themselves" [28] by introducing superfluous provisions that serve only to vilify and treat unlawful occupiers with suspicion.

34. Were the imperatives of section 26(2) adequately met, including the appropriate planning for and treatment of evictees in terms of a Transitional Housing Policy then the issues proffered as the bases for these amendments by Member Powell would not be necessary. Further, the state may not abdicate its constitutional duty to provide accommodation where evictions will lead to homelessness. We caution against a symptomatic treatment of the challenges encountered in the application of the Principal Act and favour a more integrated approach rooted in harmonising housing policies and prioritising appropriate urban planning and well-located affordable housing.

35. These amendments effected in isolation would not serve to remedy the 'severe dysfunctionality in cities' as the Bill is contemplated outside of a proactive addressing of the causes of land occupations in the first place. Reactive punitive measures in response to actions of necessity are scarcely a sign of good governance but rather signals a failing state whose legitimacy pails in view of the lack of accountability, responsiveness and openness required of a democratic society and which instead rules by punitive measures enabled by the state's monopoly on violence.

36. As such, the Bill in its entirety must be abandoned as it presents no substantial grounds for the amendment of the Principal Act.

Ends.

[28] B Bradlow, J Bolnick, & C Shearing, 'Housing, institutions, money: The failures and promise of human settlements policy and practice in Africa.' (2011) Environment and Urbanization, 23(1) at 267–275. https://doi.org/10.1177/0956247810392272.

This submission is endorsed by the Socio-Economic Rights Institute of South Africa (SERI – SA).