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Our ref: GEL01/001

27 November 2024

To: Leon Wentzel
Law Enforcement Department
The City of Cape Town
By email: public.places@capetown.gov.za

Dear Mr Wentzel

**RE: COMMENT ON CITY OF CAPE TOWN: STREETS, PUBLIC PLACES
AND PREVENTION OF NOISE NUISANCES AMENDMENT BY-LAW,
2024**

1. We address this correspondence on behalf of all of the applicants in the matter of *Gelderbloem & 10 Others v City of Cape Town* brought in the Western Cape Division of the High Court and Equality Court sitting at the High Court (Case Numbers 5708/2021 and EC 06/2021, respectively (herein referred to as the *Gelderbloem* case).
2. We enclose below our client's comment on the 2024 proposed amendments to the Streets, Public Places and Prevention of Noise Nuisances By-law.

Yours sincerely,
Ndifuna Ukwazi Law Centre
(Per: Dr Jonty Cogger & Caitlin Turok, Attorneys)



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I. INTRODUCTION

1. The issue of criminalising homelessness has gained increasing attention in recent years, largely due to the more punitive approach adopted by the City of Cape Town (“the City”). Central to this approach is the power granted through the Streets, Public Places and the Prevention of Noise Nuisances By-law of 2007 (“the Streets By-law”), which allows the City to issue fines for various transgressions, including for individuals living on the streets.
2. The practice of issuing fines under the Streets By-law has sparked significant concern, as it infringes upon the fundamental human rights of people experiencing homelessness and has been widely viewed as discriminatory. In response, a constitutional challenge was brought by eleven individuals (collectively known as the Gelderbloem applicants) on 31 March 2021. The applicants, all of whom have been fined for living on the streets, are seeking to have certain provisions in the By-law declared unconstitutional and invalid in its application to homeless individuals (“the Gelderbloem matter”).
3. Two months after the filing of the Gelderbloem matter, in June 2021, the City proposed amendments to the Streets By-law (“the 2021 Streets By-law Amendment”). These amendments to the 2007 Streets By-law significantly intensified criminal enforcement measures against street-based individuals. Key changes included granting authorised officials the power to remove any obstruction to pedestrian or vehicle passage, forcibly evict people living on the streets, arrest individuals who refuse offers of alternative shelter, and impound materials used by street-based persons to construct transient structures or camp overnight.
4. Following these proposed By-law amendments, the parties agreed to a process that would allow for a full and fair consideration of the amendments in the context of the ongoing constitutional challenge. This process included the Gelderbloem applicants amending their notice of motion and filing supplementary affidavits once the amendments were gazetted, while also providing the City an opportunity to respond to the supplementary case.
5. The City Council passed the 2021 Streets By-law Amendment on 29 September 2021, and the amendments were officially gazetted on 17 February 2022.

6. In July 2022, the Gelderbloem applicants submitted supplementary papers addressing the 2021 Streets By-law Amendment. Following this, the matter was set down for hearing before a three-judge bench of the High Court from 31 October to 2 November 2023, where the constitutional challenge would be fully ventilated, including the impact of the amendments on the relief sought by the applicants.
7. Following further discussions between the parties in September 2023, the City has now proposed an additional amendment to the Streets By-law, which it has published for public comment for a 30-day period in November 2024 (“the 2024 Streets By-law Amendment”).
8. The primary difference between the 2021 and 2024 amendments to the Streets By-law lies in the removal of the power to arrest individuals who refuse alternative shelter. The amendments also stipulate that impoundments cannot be used for evictions or dispossession of personal belongings and introduce a requirement that an offer of alternative shelter must precede criminalisation. Moreover, under the 2024 Streets By-law Amendment, should the alternative shelter be refused, a social worker is required to consult with the individual to explain the alternative shelter option and why acceptance is in their best interests, before further enforcement action is taken.
9. The 2024 Streets By-law Amendment, while removing the power to arrest individuals for refusing alternative shelter, in effect, represent a return to the enforcement powers of the original 2007 Streets By-law, with a few modifications. Thus, despite these changes, the amendments continue to criminalise homelessness by maintaining provisions allowing for the conviction of individuals who refuse shelter and sleep overnight in public spaces. Thus, in effect, the 2024 Streets By-law Amendment still criminalises the refusal of alternative shelter by an individual sleeping on the street.
10. While the removal of arrest powers may be seen as a step back from the more punitive approach of the 2021 amendments, the continued criminalisation of sleeping in public places – combined with the imposition of a conviction for refusing shelter – indicates that the City still

views homelessness as a matter to be dealt with through punitive measures rather than addressing the underlying social and economic factors contributing to homelessness.

II. CRIMINALISING HOMELESSNESS: A MODERN-DAY MANIFESTATION OF APARTHEID POLICIES

11. The City's Streets By-law echoes South Africa's apartheid past, when the state sought to criminalise "illegal squatting" through laws like the 1951 Prevention of Illegal Squatting Act (PISA). Under apartheid, Black South Africans were systematically removed from urban areas to make way for White-only developments, and the enforcement of this system was justified by portraying the homeless as criminal elements.
12. PISA was designed to remove "illegal" occupants through force and legal penalties, making homelessness itself a punishable offense. In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) ("*PE Municipality*"), Sachs J explains that the purpose of PISA and the governments' response to "squatting" as "simple and drastic":

"In terms of the Prevention of Illegal Squatting Act 52 of 1951 (PISA), the only question for decision would have been whether the occupation of the land was unlawful. Once it was determined that the occupiers had no permission to be on the land, they not only faced summary eviction, they were liable for criminal prosecution. Expulsion from land of people referred to as squatters was accordingly accomplished through the criminal and not the civil courts, and as a matter of public rather than of private law. The process was deliberately made as swift as possible: conviction followed by eviction. Thus, even if they had been born on the land and spent their whole lives there, persons from whom permission to remain on land had been withdrawn by new owners were treated as criminals and subjected to summary eviction."

13. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (**PIE**) effectively decriminalised "squatting" and recognised the right to housing as a constitutional imperative.

¹ PE Municipality at para 8.

14. The legal landscape shifted significantly with the introduction of PIE. Enacted to give effect to Section 26(3) of the Constitution, PIE protects the right not to have one's home or shelter demolished without a court order. Such an order can only be granted after considering all relevant circumstances, and any eviction must be deemed just and equitable. In contrast to the criminalisation of unlawful land occupation under PISA, section 8(3) of PIE makes it a criminal offence to evict someone without a court order.

15. Sachs J explains in *PE Municipality* that "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."²

16. This marks a significant shift from the pre-constitutional era, where the focus was on criminalising 'squatting' and unlawful land occupation. In the post-apartheid, constitutional era, the emphasis has changed to criminalising illegal evictions, with a strong focus on ensuring that evictions adhere to the procedural and substantive safeguards set out in the law. However, this does not mean that evictions can never occur. PIE also reflects the constitutional protection of property rights under Section 25(1), which safeguards against arbitrary deprivation of property as well as instances requiring urgent evictions. The challenge has been to strike a balance between the rights in Section 25(1) (protection from arbitrary deprivation of property) and Section 26(3) (protection from unlawful eviction), a balance that can be difficult to achieve in practice.

17. PIE reframes land occupation from a criminal matter to a civil one. It places emphasis on the protection of human dignity and the recognition that homelessness is the consequence of systemic failures rather than a voluntary decision. The 2024 Streets By-law Amendment, however, attempts to reverse this understanding by making the refusal of alternative shelter the basis for criminal conviction. This approach treats homelessness as an individual's fault –

² PE Municipality at para 12.

reminiscent of the apartheid-era logic that blamed individuals for their circumstances – rather than recognising it as a complex issue that stems from economic, social, and policy failures.

18. Criminalising homelessness through the retention of enforcement measures in the Streets By-law fundamentally misunderstands the nature of blameworthiness for the causes of homelessness that often the result from external factors such as poverty, unemployment, mental illness, or substance addiction – conditions that are beyond an individual's control and deeply rooted in systemic inequalities. Treating these social issues as crimes not only fails to address their root causes but also places undue blame on individuals for circumstances they cannot escape without support.
19. Poverty, mental illness, and addiction are not moral failings or intentional misconduct; they are socio-economic challenges that require compassionate and constructive responses. Criminal enforcement measures ignore the structural drivers of homelessness and unfairly punish individuals who are already vulnerable, rather than holding the system accountable for failing to provide adequate housing, healthcare, and social services. By perpetuating a narrative of blameworthiness, these measures stigmatise the homeless population and divert attention from the broader societal responsibility to create equitable opportunities and safety nets. Addressing homelessness as a social issue, rather than a criminal one, is the only rational and humane approach to fostering long-term solutions.
20. While we appreciate that the City has proposed deleting provisions in the Streets By-law that empower the demolition of street-based people's homes and the arrest of individuals who refuse offers of alternative accommodation, the retention of provisions that criminalise the refusal to go to shelter, in our view, remains unconstitutional and in violation of PIE. The proposed amendments to the By-law represent a serious departure from a progressive approach to homelessness, perpetuating a punitive, apartheid-era mindset that treats homelessness as a criminal issue rather than addressing it as a socio-economic challenge. Such laws render the constitutional principles of dignity and the right to housing meaningless, as they criminalise the survival strategies of the most vulnerable members of our society.

III. THE LACK OF MEANINGFUL ALTERNATIVES

21. One of the key issues with the proposed amendment is its focus on penalising individuals who refuse alternative shelter, without addressing whether such alternatives are genuinely adequate or accessible. The question must be asked: what does 'alternative shelter' actually mean in the context of Cape Town? The reality is that many of the shelters currently offered by the City are overcrowded, poorly resourced, and not equipped to meet the diverse needs of the homeless population, which includes individuals with mental health issues, substance abuse problems, and families with children.
22. Moreover, the City's reliance on the acceptance of shelter as a condition for avoiding criminal penalties ignores the fact that homelessness is not merely about having a roof over one's head. By criminalising refusal to enter shelters, the City is not solving the underlying issue of homelessness but instead coercing people into inadequate, temporary solutions that fail to address their long-term needs. The lack of safe, dignified, and permanent housing solutions is a far more pressing issue than whether an individual refuses a temporary shelter.
23. Using criminal means to force homeless individuals into shelters is not only irrational but counterproductive. The fundamental flaw of this amendment lies in the idea that criminalising homelessness or using the threat of criminal sanctions to compel individuals to accept shelter is an effective or just solution. This approach ignores the human dignity, autonomy, and complex social realities of people living on the streets.
24. Moreover, the retention of criminal enforcement measures in The 2024 Streets By-law Amendment is fundamentally illogical, given that the City has already acknowledged its obligation to comply with the processes outlined in PIE when evicting individuals whose structures qualify as their homes. PIE provides a structured, lawful, and rights-based process for eviction that balances the need to manage public spaces with the constitutional rights of vulnerable individuals to dignity, shelter, and adequate housing. By maintaining criminal penalties for individuals who refuse alternative shelter, the City is introducing a parallel, punitive mechanism that is not only damaging but also redundant. This approach undermines the protections offered by PIE and disregards its effectiveness as a remedy. It is nonsensical to

rely on criminal enforcement when PIE offers a more just and effective framework for addressing the complexities of homelessness. Such measures only serve to harm the most vulnerable while failing to address the systemic causes of their displacement.

25. The decision to retain criminal enforcement measures in The 2024 Streets By-law Amendment appears to reflect an unwillingness to engage with lawful eviction processes under PIE, opting instead for a faster, punitive approach to displace homeless individuals. This approach suggests a prioritisation of expediency over legality and human dignity, revealing a troubling intent to “manage” homelessness through criminalisation rather than addressing its root causes. However, this is fundamentally irrational, as it offers no constructive resolution to the systemic issues that underpin homelessness. Criminal enforcement merely perpetuates cycles of displacement, marginalization, and harm.
26. In our constitutional democracy, the right to human dignity and the right to make personal choices are fundamental values. Homeless people, like all citizens, should have the freedom to make decisions about their own lives, including where to live and whether to accept shelter. While some may choose voluntarily to go to a shelter, others may find the restrictions placed upon them in such environments – such as loss of autonomy or restrictions on socialising – unacceptable. Shelters may not also accept them, if they were for example, chronic substance users who could not immediately and safely abstain from substances. To force a person to relinquish their personal freedom or risk their health by threatening criminal sanctions for refusing to go to a shelter is an infringement on their dignity. The ability to make choices about their living situation is an essential part of their humanity, and criminalising that choice is both unfair and unjust.
27. Furthermore, this coercive approach is likely to backfire. The imposition of criminal sanctions does not incentivise individuals to seek shelter; it is far more likely to exacerbate the underlying issues that led to homelessness in the first place. Reputable organisations, including Khulisa Social Solutions NPC, New Hope SA NPO, and MES Mould Empower Serve NPC, have all filed supporting affidavits in the Gelderbloem matter who confirm that criminalising refusal to accept shelter will not encourage people to seek help. Instead, it will likely perpetuate their poverty, addiction, and mental health challenges. Arresting and fining homeless individuals only

deepens their marginalisation, reinforces their vulnerability, and undermines efforts to build trust and relationships that are essential for effective social work and rehabilitation.

28. Moreover, criminalising homelessness undermines the objectives of shelters and social development programmes. Shelters are meant to provide a supportive environment where homeless individuals can rebuild their lives, but the threat of arrest and punishment creates a hostile environment that undermines these efforts. When individuals are coerced into shelters under threat of criminal sanctions, they are less likely to engage meaningfully with the support programmes offered, such as addiction counselling, job training, and mental health services. Instead of helping individuals, the threat of punishment creates a barrier to the very social development interventions that shelters aim to provide.
29. The City already has access to civil remedies under PIE, including the ability to seek urgent eviction orders where necessary. These remedies provide a balanced approach, ensuring that judicial oversight is maintained while allowing for the protection of public spaces in cases of genuine urgency. PIE requires courts to consider all relevant circumstances, including the availability of alternative accommodation and the needs of vulnerable individuals, ensuring that evictions are carried out in a fair and just manner.
30. By relying on civil remedies under PIE, the City can address pressing concerns without resorting to punitive enforcement measures that infringe on constitutional rights. Judicial oversight ensures that the eviction process is lawful, transparent, and respects the dignity of those affected. This approach not only upholds constitutional principles but also fosters trust in the legal system by demonstrating a commitment to equitable solutions. Retaining criminal enforcement mechanisms when more appropriate and constitutionally sound civil remedies exist is not only unnecessary and counterproductive but is unconstitutional, as it undermines the rights of the most vulnerable while failing to address the root causes of homelessness.
31. The City's enforcement of the Streets By-law, based on the assumption that criminalising homelessness will create order and encourage compliance, rests on an unproven and flawed premise. The reality is that criminalising the poor and homeless does not restore order to public spaces; it simply creates further disorder and alienation. It fails to address the social ills

of poverty and homelessness and instead exacerbates the cycle of poverty, marginalisation, and criminalisation. Coercing individuals into shelters under threat of punishment is an irrational, ineffective, and unjust solution to the issue of homelessness. It undermines the social objectives of shelters, violates the dignity of homeless individuals, and perpetuates the very problems it seeks to resolve.

32. Rather than criminalising homelessness, the City should focus on addressing the root causes of homelessness through social, economic, and civil interventions – such as providing affordable housing, mental health services, addiction treatment, and access to social welfare – that empower individuals to make choices that best support their well-being and dignity. The criminal justice system should not be used as a tool to manage poverty or homelessness; it is not an effective solution, and it ultimately harms the very individuals it seeks to help.

IV. NO JUDICIAL OVERSIGHT AND LACK OF LEGAL PROTECTIONS

33. If someone is convicted and imprisoned under these by-law amendments, it effectively amounts to an eviction, using a parallel and more punitive mechanism to address homelessness.
34. Instead of following the legally mandated eviction process under PIE, which requires judicial oversight and considers the rights and circumstances of vulnerable individuals, this approach circumvents these protections entirely. Imprisonment forcibly removes a person from the streets—essentially evicting them—without adhering to the procedural safeguards established under PIE. This not only undermines constitutional protections but also exacerbates the harm to individuals by punishing them for their poverty rather than addressing the structural issues that contribute to their homelessness. Such a punitive approach does not resolve the underlying problem and perpetuates cycles of displacement, marginalization, and systemic injustice. It represents a return to the punitive practices of the past, rather than a forward-looking, rights-based approach to addressing homelessness.

35. This is not just a theoretical concern. The history of forced removals and illegal evictions in South Africa is littered with instances where vulnerable populations were removed from land and displaced with little or no recourse. The City's proposal risks repeating this history, undermining the constitutional rights of homeless individuals and leaving them without meaningful recourse.

V. CONCLUSION

36. The City's proposed amendments to the Streets By-law, by criminalising homelessness and making convictions contingent on the refusal of alternative shelter, represent a regressive, harmful, and misguided approach to an issue that should be handled with compassion, dignity, and a focus on human rights. It echoes apartheid-era tactics of criminalising the poor and neglecting the structural causes of inequality, and it risks further entrenching the cycles of poverty and marginalisation that South Africa has long struggled to overcome. A far more effective and just approach would be to prioritize solutions that address the root causes of homelessness – such as access to affordable housing, employment, and healthcare – while upholding the constitutional rights of all South Africans.

END