

12 September 2022

The Director-General: Justice and Constitutional Development
For attention Ms A Botha

Private Bag X81

PRETORIA

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By E-mail: AIBotha@justice.gov.za

Dear Ms Botha

COMMENTS ON UNLAWFUL ENTERING ON PREMISES BILL, 2022

Free State Agriculture represents almost 3000 primary agricultural production entities in the Free State Province, responsible for a considerable input to the national food basket, employment and GDP. In the light of the aforementioned we regard the safety of our members, their families, their employees and their families of critical importance, not only for the agricultural sector but also for the country.

1. GENERAL REMARKS

The safety of communities has again come under the spotlight in recent events with specific reference to the murders which took place at Kestell in the Free State Province. The tragic loss of lives of members of the community who were not in a position to be afforded the rights as envisaged in the Constitution plays a significant role in assessing this Bill. This draft legislation will have an impact on the safety of the community should therefore be treated with the same importance as the rights envisaged in the Constitution. Dilution of this rights should therefore not be allowed.

2. BACKGROUND AND PURPOSE OF THE BILL

Although it is welcomed that the Bill aims to prohibit unlawful entry on premises, certain provisions of the Bill specifically relating to defences to the offence of unlawful entry are unacceptable and not in touch with the realities that farmers, their employees and family, face on a daily basis.

3. PREAMBLE

The preamble needs no further discussion.

4. DEFINITIONS

“**enclosed land**” – clause (d) refer to “*posted, in accordance with section 6(1), with signs prohibiting trespass;*” Trespass should rather read “entry”

“**unlawful entry**” – from the definition it is interpreted that unlawful entry will only take place in circumstances as indicated in clause (a) and (b) of the definition and the intruder fails to leave the premises or part of the premises. In the event that unlawful entry has taken place without the knowledge of the “lawful occupier” or where the intruder was not requested to leave the premises or part of the premises, such an act will not constitute “unlawful entry” and the intruder cannot be charged with the commission of “unlawful entry”

5. CLAUSE 2

The application of the Bill is quite clear and need no further discussion.

6. CLAUSE 3

The provisions of clause 3(4) are not acceptable. What can be regarded as believing you have title to or an interest in the premises is open for a broad interpretation depending on various factors. It is submitted that the provisions can create a loophole for criminals (intruders) to commit their unlawful acts whilst the legislature created provisions that will enable the intruder to seemingly escape prosecution if the wording of the specific clause is not clearly defined to enable proper interpretation. The fact remains that within the definition of “unlawful entry” there are basically two scenarios applicable.

In as far as the provisions of clause 3(5) are concerned, the factual situation is that the provision if implemented can allow any person access to property to the door of a building on premises if for lawful purposes. This can potentially mean that any person will be able to enter the premises up to the door of that building for “lawful” purposes. Once at the door that person can quite easily under the guise of lawful purposes commit acts of crime. The presumption and application thereof will be problematic especially on farms where vast areas are involved within the definition of “premises”.

7. CLAUSE 4

Permitted and prohibited entry and activities in terms of clause 4(2) creates ambiguity. If a farmer put a notice in terms of this clause on the farm gate that

“fishing is not permitted”, but omit to say that entry is prohibited, it means that a person can enter to hunt, because the farmer did not specify that entry and hunting is not permitted.

8. CLAUSE 5

The provisions of clause 5(2) are clear but should be read with the submissions pertaining to clause 4(2) above if the notice is not a graphic representation.

Where an area is not clearly defined or distinguishable, the provisions of clause 5(3) will be problematic. This is particularly applicable to a farm or a vast area defined as “premises”. The question especially relating to a farm or vast area is whether or not a single sign posted at or near an ordinary point of access will be adequate for compliance. If more than one sign is required, this provision will imply that the lawful occupier (owner) will in all probabilities have to incur huge expenses especially where a vast area is applicable.

Furthermore, the Bill requires that the sign be clearly visible and legible under normal weather conditions. No provision is however made for activities in the dark when most malicious activities occur.

As mentioned earlier, farms and farmsteads are open places. Theft of animals and farming equipment is a tremendous problem whilst the murder of farmers and their employees is well documented. No effort is made in the Bill to provide any protection to farmers, their employees and farming equipment by specifically limiting or regulating access to farms.

9. CLAUSE 6

The provisions are clear and do not need further discussion.

10. CLAUSE 7

The provisions relating to an “authorized” member of the South African Police Service as referred to in clause 7(2) is problematic and should be read with the comments on clause 8.

11. CLAUSE 8

The contents of clause 8(1)(a) referring to an “authorized member” should be assessed within the context of the current factual situation. Members of the South African Police Service are trained and qualified for the capacity they need

to act in. If the purpose of this clause is to indicate that in order to enforce the provisions of this Bill, an official need to be authorized, the whole purpose thereof will be defeated. As it is, police stations are under staffed and there is a shortage of resources – that is in fact the two favorite excuses offered to the public when a crime is reported and the scene needs to be attended to. The provision that a police official first needs to be authorized and to be authorized that official needs to be suitable qualified and experienced is creating another hurdle that will in the end affect service delivery which already is one of the major concerns raised by the public.

In as far as clause 8(1)(b) is concerned, the comments on clause 8(1)(a) also find application. Given the importance of the subject of this Bill, the reasoning is unclear as to why a police official needs to be authorized in order to carry out his or her duties in terms of this Bill.

The contents of clause 8(2) are clear on what is expected of the police. The problem lies in the practical execution of the provisions. As indicated above, the two most prominent excuses put to the public are inadequate staff at the police station and secondly the availability of a vehicle to respond to a complaint. This is especially prevalent in the rural areas although communities within an urban environment are also experiencing these issues. It is submitted that in the absence of good reasons, this provision actually is an impediment to the effective execution of the provisions of the draft legislation.

The Bill do not make provision for the procedure that needs to be followed when an arrest in terms of section 42 of the Criminal Procedure Act, 51 of 1977 can be affected. Is this an omission or is an arrest in terms of section 42 of the Criminal Procedure Act not authorized?

12. CLAUSE 9

The purpose of judicial oversight is to inter alia adjudicate criminal matters based on the available facts and evidence presented to the court. It is submitted that the contents of this clause are to an extent prematurely made applicable and as such is interfering with a court's discretion. It should be clear that an "intruder" will still be charged with the offence of unlawful entry but can raise a defence when in the position to place evidence before court. The situation where an intruder can rely on the contents of this clause in order not be arrested should be avoided and persons arrested in terms of the provisions of this Bill should state their case with judicial oversight.

As mentioned earlier in this document, dilution of the rights especially relating to immovable property to which this draft legislation finds application must not be allowed.

13. CLAUSE 10

The contents of this clause are clear and do not need further discussion.

14. CLAUSE 11

The contents of this clause are clear and do not need further discussion.

15. CONCLUSION

Communities and not only farming communities, are on a daily basis terrorized by criminals with no respect for the law. Caution should be applied that parts of this Bill will not enable criminals to act under the guise of “reasonably believing that they had title to or an interest in the premises” that entitled them to enter the premises and, in the process, will be making it easier to avoid prosecution. The question needs to be raised if parts of the Bill are in contention with the provisions of the Farm Protocol that was put in place under the auspices of the National Rural Safety Strategy.

As mentioned earlier in this document we are concerned that especially the clauses which envisages the creation of a defence to a charge in terms of the Bill, should rather be adjudicated by a competent forum which under judicial oversight will ensure that the *audi alteram partem* principle will find application.

We trust you find the above mentioned in order and look forward to acknowledgement of receipt of this correspondence.

Yours sincerely

GS BOTHA
CHIEF EXECUTIVE OFFICER
FREE STATE AGRICULTURE