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**THE SECRETARY GENERAL - UNITED NATIONS**

C/O Office of the High Commission on Human Rights

Per email: [ohchr-registry@un.org](mailto:ohchr-registry@un.org); [hrc-sr-housing@un.org](mailto:hrc-sr-housing@un.org); [hrc-sr-extremepoverty@un.org](mailto:hrc-sr-extremepoverty@un.org);  
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Dear Sir or Madam

**RE: SUBMISSION TO THE UNITED NATIONS SPECIAL RAPPORTEURS ON THE  
RIGHT TO ADEQUATE HOUSING AND ON EXTREME POVERTY AND HUMAN RIGHTS  
ON THE DECRIMINALISATION OF HOMELESSNESS AND POVERTY**

We refer to the above matter and your invitation to make submissions on *'measures necessary to eliminate legislation that criminalizes homelessness and poverty'*.

The National Association of Democratic Lawyers (NADEL) is a human rights NGO consisting of legal practitioners who are concerned with the intersection of human rights, development and democracy, the rule of law and access to justice in South Africa.

We enclose herein our submission to the OHCHR in the hope of contributing to the shaping of a raft of recommendations that can assist in local level advocacy and law and policy reform.

## INTRODUCTION

1. During May 2020, NADEL was compelled to intervene at local level when it encountered the City of Cape Town draft amendment to the by-law on streets, public spaces and the prevention of noise nuisances in terms of s17 of the *Local Government Municipal Systems Act 32 of 2000*.
2. NADEL actively opposed the draft amendment which sought to criminalize the poor, marginalized and indigent in the City of Cape Town and relegate them to the status of second-class citizens. In this regard, see attached a copy of our submission to the City of Cape Town marked annexure 'A' wherein we set out various objections to the draft amendment based on the values and precepts of the *Constitution Act 108 of 1996* and related case law and legislation, including the *Criminal Procedure Act*.
3. The submission, we submit, is still relevant, valid and of value to the current enquiry of the UN Special Rapporteurs and it is further submitted herein as an annex for the purposes of the document review to inform the report of the Special Rapporteurs.
4. In this submission, we do not repeat the legal principles set out in the annexure 'A' and our focus is rather on strategies, tactics and recommendations to avoid criminalizing homelessness and poverty, especially in rural and peri-urban areas.

## THE SOUTH AFRICAN CONSTITUTION

5. The *South African Constitution Act 108 of 1996* (the Constitution) provides a liberal and munificent framework for human rights perhaps unlike anywhere else in the world. It is unique in that it promotes socio-economic rights for all, especially the poor, marginalized and indigent. Notably in the case of: -

5.1. *S v Makwanyane 1995 (3) SA 391 (CC)* at para 262, Mahomed J described the Constitution as providing, '*a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos...*'; and in the case of

5.2. *Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC)* at para 117, Chaskalson P stated as follows:

*'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health care services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order'.*

6. NADEL therefore takes the view that the Constitution is an important mechanism for addressing homelessness and poverty in South Africa. In this regard, it is a means to achieve social and economic justice and it can therefore be viewed and experienced as a transformative mechanism for learning and change.

## **URBAN AND RURAL POVERTY AND HOMELESSNESS**

7. In South Africa, poverty is experienced differently in the urban and rural areas and the majority of poor people – reportedly more than 70% - live in rural areas.<sup>1</sup>
8. In this submission, we focus on the issue of land and housing since there is a notable increase in threats of evictions and evictions *per se*, especially in rural and peri-urban areas where farm workers and dwellers who constitute the poorest of the poor are the most vulnerable to violations of their housing and accommodation rights and where the question of suitable alternative accommodation is heavily contested.

#### **Case study – Evictions of rural and peri-urban poor and how to avoid criminalization**

9. In rural and peri-urban areas it is common for individuals and communities of farm workers and dwellers that have resided on farms for many years, often generationally, and raised their children and grandchildren there, to face threats of evictions and evictions from their homes by landowners because they may no longer work on the farms.
10. An important issue that arises in the context of eviction proceedings instituted by the landowners in the courts relates to suitable alternative accommodation for the farm workers and dwellers.
11. The *Constitution Act 108 of 1996* (s26(3)) and the *Extension of Security of Tenure Act 1997* comes to the aid of these farm workers and dwellers. The courts also have wide discretion but may nevertheless still grant an order for eviction even if no suitable alternative accommodation is available if it is just and equitable to do so.

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<sup>1</sup> May J (ed), *Poverty and Inequality in South Africa*, (1998) 27 – Report by the Inter-Ministerial Committee on Poverty and Inequality.

12. For this criterion to be weighed fairly, the courts must take into consideration *inter alia* the:-

12.1. respective efforts of the owner or person in charge and the occupier to secure suitable alternative accommodation; and the

12.2. interests of the respective parties, including the comparative hardship to which the land owner, and each of the farm workers and dwellers in their own right, would be exposed.

13. In many rural and peri-urban eviction cases the question of who is obligated to provide suitable alternative is dealt with in a contested manner in terms where:-

13.1. the owner refuses to provide occupiers with suitable alternative accommodation;

13.2. the farm workers and dwellers are not able to identify and acquire suitable alternative accommodation themselves because they cannot afford market rentals or to purchase property; and

13.3. the local municipality does not provide and/or facilitate a clear and unambiguous plan or process to provide farm workers and dwellers with suitable alternative accommodation.

14. Landowners routinely argue that there is no obligation on them to find suitable alternative accommodation and that this obligation lies with the local municipality, whose response is to offer emergency accommodation in a 6 x 3 metre shack made of corrugated iron sheets, on a piece of land with basic communal services, within an artificially created community, without any

regard for labour mobility, health and well-being, children's safety and security, and so forth.

15. Housing options for the farm workers and dwellers are seldom properly explored through meaningful engagement and/or mediation amongst all the stakeholders, which include the municipality and the Department of Agriculture, Land Reform and Rural Development (DALRRD) who can avail itself of the subsidy mechanism in s4 of the ESTA to facilitate security of tenure.
16. Too often, having regard to the comparative hardships between landowners and occupiers, it is clear that landowners fail to provide any evidence that they will face hardship, conflict or social instability if they were to accommodate the farm workers and dwellers until suitable alternative accommodation is identified, acquired and transferred to the farm dwellers.
17. In these circumstances, the courts are called upon to determine whether an eviction is just and equitable in the absence of clear and unambiguous evidence of suitable alternative accommodation for the farm workers and dwellers.
18. In rural and peri-urban evictions an eviction without suitable alternative accommodation impacts the various rights of farm workers and dwellers, including: -
  - 18.1. section 5 of the ESTA which proclaims fundamental rights, including the right to family life in s 6(2)(d) of the ESTA;
  - 18.2. section 9(1) of the *Constitution Act 108 of 1996* and the *Promotion of Equality and Prevention of Unfair Discrimination Act* (the Equality Act) which guarantees 'equal benefit of the law' in addition to equal

protection. In this regard, it is necessary to cognisance of the fact that:-

18.2.1. there are different categories of occupiers amongst the farm workers and dwellers who are entitled to receive an equitable share of the advantages provided by the Applicant, the Municipality and the DALRRD; and

18.2.2. the Constitution's guarantees of substantive equality illustrates that it is intended to benefit individuals and groups which have historically had unequal access to socio-economic resources and both public and private bodies are enjoined to promote the equality of powerless, excluded and disadvantaged;

18.3. Section 10 (right to dignity) of the Constitution;

18.4. Section 25 and 26 of the Constitution; and

18.5. The rights of the children, in particular to an education, in s28 of the Constitution.

19. International law must be considered when interpreting the scope of the constitutional provisions – see s39(1) of the *Constitution Act 108 of 1996*. This includes the *International Convention on Economic Social and Cultural Rights* and *General Comment No. 4* which contains elements of the right to 'adequate housing' such as: -

19.1. legal security of tenure;

19.2. availability of services, materials and infrastructure;

19.3. affordable so that other basic needs are not threatened or compromised;

19.4. habitable;

19.5. accessible;

19.6. location; and

19.7. culturally adequate.

20. The courts must address both the positive and negative elements of the rights. It is enjoined to protect the farm workers and dwellers' housing rights against violation by both private and public bodies and to refrain from forced evictions, respecting the privacy of their homes and the principle of non-discrimination. However, it is also enjoined to promote and fulfil the realisation of the rights.
21. Further, a purposive approach to the interpretation of the rights in the Constitution entails looking at the values that the rights seek to protect and rejecting a technical and parochial interpretation of those rights. This means that the Constitution requires the values of equality, human dignity and freedom as the fundamental values of society against which the objects of the ESTA and indeed all legislation must be measured.
22. Section 38 of the Constitution '*provides for the enforcement of rights in the Bill of Rights (Chapter 2)*' and a court may grant '*appropriate relief, including a declaration of rights*' to the affected farm workers and dwellers.
23. In amplification, the constitutional imperatives in s26(3) of the Constitution and the special constitutional regard for the farm workers and dweller's place of residence, which they regard as their home, are compelling considerations.



24. Two important limitations on landowners must also be considered:

24.1. Firstly, landowners can no longer only rely on the mere ground that they are owners and that the termination of the farm worker and dweller's residence is lawful.

24.2. Secondly, the courts can place a limitation on the landowner's power to terminate the farm worker and dwellers right of residence and evict them without having regard to the principles of fairness and equity and the balance of hardship.

25. In all of this, it becomes necessary to promote the constitutional scheme regarding the regulation of eviction of vulnerable farm workers and dwellers from their home and to achieve long-term security-of-land tenure in a fair manner.

26. In this regard, the socio-economic position of the farm workers and dwellers is often insufficiently detailed so as to determine whether an eviction is just and equitable. For instance, the local municipality often compiles a report for the court in eviction cases but does not address *inter alia*: -

26.1. the farm workers and dweller's period of residence and the conditions of their security of tenure on the farm;

26.2. the structures erected and improvements to the property, plants and trees, etc;

26.3. education and schooling;

26.4. the fairness of the terms of any applicable agreement between the landowner and the farm work and dweller; and

26.5. the measures taken by the landowners or person in charge of the farm, the farm workers and dwellers and the municipality, to find suitable alternative accommodation.

27. In its report, the local municipality usually raises an important issue for consideration namely the housing policy and emergency accommodation programme. According to the municipality this entails, '*the temporary relocation of households where in situ upgrading takes place in informal settlements or as temporary housing after natural or man-made disasters (including evictions)*'.

28. However, on closer assessment it is evident that: -

28.1. this does not constitute suitable alternative accommodation within the meaning of s1 of the ESTA;

28.2. it is unclear how evictions and man-made disasters are simply lumped together with natural disasters; and

28.3. it does not comply with international norms and standards.

29. There are possibly two bases on which to challenge the local municipal housing policy and emergency accommodation programme, apart from assessing and challenging it through the lens of the ESTA: -

29.1. Firstly, whether such a policy and/or programme is reasonable and rational in terms of s33 of the *Constitution* and the *Promotion of Administrative Justice Act 3 of 2000*;

29.2. Secondly, whether it meets the standards in the constitution, the legislation and international law, and in particular the *reasonable*

*measures test* in the Grootboom<sup>2</sup> judgment of the Constitutional Court.

30. If the housing policy and emergency accommodation is assessed properly, it will become clear that farm workers and dwellers cannot accept the local municipalities purported and vague offer of 'a *site as emergency accommodation*' because: -

30.1. this purported '*site as emergency accommodation*' does not constitute '*suitable alternative accommodation*' as defined in the ESTA;

30.2. this purported 'offer' does not meet the requisite constitutional and legislative standards and neither does it meet the standards set by International Law; and

30.3. emergency housing and/or temporary accommodation in the vague terms described in the municipal report will not alleviate the plight of the farm workers and dwellers but would instead significantly worsen their conditions.

31. It can further be argued that: -

31.1. an eviction order without the provision of suitable alternative accommodation would be unconstitutional in that it would result in an egregious violation of the farm workers and dwellers' rights in the Bill of Rights;

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<sup>2</sup> Government of the Republic of South Africa vs Irene Grootboom & Others 2000 (11) BCLR 1169 (CC)

31.2. the municipalities conditions must meet the needs and interests of the farm workers and dwellers and they must be reasonable and rational in the circumstances of each case; and that

31.3. the emergency housing and/or temporary accommodation programme of the municipality must meet the standards which the legislature intended in the Constitution, the ESTA and in terms of International Law, especially as it relates to the needs of farm workers and dwellers in general.

### **LESSONS FROM THE CASE STUDY**

32. There are potentially many lessons that can be learnt from the above case study, which was chosen to illustrate that ordinary eviction cases in rural and peri-urban areas can be argued wholistically in the courts on the bases of the values and precepts of the Constitution with a focus on socio-economic rights which are interrelated and interdependent.

33. One profound lesson is that, if these types of cases are properly presented in the courts on the bases of the constitutional scheme of rights and remedies, they have the potential to: -

33.1. shift additional resources towards the poor, which enables them to sustain themselves; and

33.2. change the power relations between powerful landowners and the poor, particularly since poverty is a function of powerlessness.

34. Further lessons which illustrate the importance of facilitating power shifts in favour of the poor include:

- 34.1. Providing the poor with effective legal representation and to enable them to protect, promote and fulfil their rights.
  - 34.2. Advocating, especially in the context of litigation proceedings through meaningful engagement and/or mediation, for a change in and the implementation of the local municipal by-laws, housing policies and emergency accommodation programmes and the full expenditure of the budget, which lead to a significant shift of resources towards the poor.
  - 34.3. Ensuring that the poor have a voice and are able to participate in decisions affecting them relating to issues such as suitable alternative accommodation. In so doing, the poor become genuine stakeholders in the projects that are intended for their benefit ultimately.
35. The poor can then be in a position to access various other benefits and resources such as pensions, welfare grants, employment opportunities, and so forth.
36. The relevant organs of state such as the local municipalities and DALRRD can then also be lobbied to provide the necessary resources to the poor individuals and communities and to fully expend their budgets for land and housing.
37. In the circumstances, our advocacy and litigation strategies and tactics must be directed at getting the necessary approvals for the projects for the communities that we serve and to ensure that they are implemented to completion. This will produce real benefits for the poor and reduce poverty and homelessness.

## **CONCLUSION**

38. In this submission, NADEL makes the call for a strategic, tactical and wholistic approach to eliminating legislation and policies that, directly or indirectly, criminalizes homelessness and poverty.

39. We need to choose cases carefully and use the Constitution as a transformative mechanism thereby ensuring that we can achieve the greatest impact for the benefit of the poor, marginalized and indigent.

40. NADEL therefore advocates for a much broader constitutional litigation strategy in which lawyers and advocates actively work together to build coherent community organisation.

We thank the Special Rapporteurs for the opportunity to make this submission and can avail ourselves for further engagements, if necessary.

Yours sincerely

**NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (NADEL)**

A handwritten signature in blue ink, appearing to be the initials 'N. Jali', enclosed in a light blue rectangular box.

Per: N Jali (National Secretary General)