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Ons verwysing/Our reference: MR HJ MOOLMAN / AF / AGRI NW
U verwysing/Your reference:

26 October 2021

**THE MINISTER OF POLICE
REPUBLIC OF SOUTH Africa**

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**THE PROVINCIAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICES
NORTH WEST PROVINCE**

BY E-MAIL: potchefstroom.sc@saps.gov.za

Sir/Madam,

**PROSECUTION OF TRESPASSING AND THE PRO-ACTIVE PREVENTION AND COMBAT
OF LAND INVASIONS IN THE NORTH WEST PROVINCE**

1. We confirm that we act for Agri NW, being a voluntary organisation that represents the interests of a large group of, amongst others, commercial, small scale and emerging

farmers in the North West Province (“our client”). Our client is organised into various North West Farmers Associations in all districts across the width and breath of the North West Province.

2. The majority of our client’s members are farm owners and/or lawful tenants of farms. However, our client also provides support to beneficiaries of post settlement claims in terms of the Restitution of Land Rights Act, Act 22 of 1994 (“the Restitution Act”) who are, increasingly becoming part of rural farms in South Africa and in the instance the North West Province and, as such, who are also the victims of land invasions of the land that has been restored to them as part of South Africa’s land reform program.
3. This letter pertains to land invasions and the response (and specifically a pro-active response) thereto by the South African Police Services (“SAPS”) in practice and, as repeatedly experienced by our client’s members, that is the consequence of what we understand to be an incorrect application of the interaction between the Trespass Act 6 of 1959 (“Trespass Act”) and the following legislation pertaining to tenure:
 - 3.1. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“the PIE-act”);
 - 3.2. The Extension of Security of Tenure Act, Act 62 of 1997 (“ESTA”); and
 - 3.3. The Land Reform (Labour Tenants) Act, Act 3 of 1996 (“LTA”)
4. From the onset, it is our instructions that there are two ways to respond to land invasions namely:
 - 4.1. The one is to implement and enforce pro-active lawful measures that prevent and discourage land invasions, and
 - 4.2. The other is to embark on costly and lengthy eviction proceedings (at the expense of landowners) that inevitably lead to the harsh consequences of the execution of an eviction order, in the absence of the unlawful occupiers voluntary vacating of the unlawfully occupied property. In most instances the execution of eviction orders will include the demolishing of unlawfully erected structures of poor and vulnerable persons and the removal of personal belongings from private property and to have same restored to the owner of such property.

5. It is our client's hope and understanding that the SAPS will, within the context of a Constitutional Democracy that is, amongst others, premised on human dignity, consider the first option (referred to in paragraph 4.1 above) as the preferred option in the fulfilment of Constitutional duties held towards both landowners and vulnerable persons. Vulnerable persons that are, more than often, the victims of unscrupulous persons that seek to use land invasions in the exploitation of South Africa's housing need for ulterior motives. This is not intended to be a generalisation, but is by far the most prominent cause of the land invasions that were encountered by our client and its members in the North West Province that has resulted in a variety of adverse consequences for our client's members and/or other interest groups that our client represents or assists in the agriculture sector.
6. It should be common cause that our client and its members are South African citizens and are therefore entitled to full protection in terms of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") and, in particular, to protection of their property and protection from crime in respect of their properties. Within the spirit and objectives of the Constitution, we are of the view that sections 7, 25 and 205 of the Constitution are of specific relevance to the issue that we are instructed to address in this letter. For ease of reference, the contents of the aforementioned sections of the Constitution will be quoted as follow:

Section 7 of the Constitution reads as follow:

Rights 7.

- (1) *This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*
- (2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*
- (3) *The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*

Section 25(1) of the Constitution reads as follow:

Property 25.

- (1) *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*

Section 205(3) of the Constitution reads as follow:

Police service 205.

- (1) *The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.*
- (2) *National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.*
- (3) *The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*

7. Over and above the duty on the State to **respect, protect, promote, and fulfil** the Bill of Rights, section 205(3) of the Constitution imposes three explicit obligations (with preference to anyone of the three) on the South African Police Services, namely the **prevention, combat and investigation of crime**. In terms of implementation these obligations can be described as a constitutional duty that must be executed proactive, active, and reactive to protect South Africans from crime and the adverse effects thereof.
8. Apart from the duties imposed on the State (including the SAPS in terms of section 7 and 205 of Constitution, there can be no doubt that section 25(1):
- 8.1. Prohibits arbitrary deprivation of property; and
- 8.2. Laws that permit arbitrary deprivation of property
9. The Constitutional prohibition of arbitrary deprivation of property can have vertical (State versus citizens and *vice versa*) and horizontal (amongst citizens) application. The duty to protect citizens from arbitrary deprivation applies to both vertical and horizontal occurrences of arbitrary deprivation. In ***President of the Republic of South Africa and Another v***

Modderklip Boerdery (Pty) and Four Others 2005 (5) SA 3 (CC) the Constitutional Court held as follows pertaining to the State'(including the SAPD's) duty to act:

“[40] In Chief Lesapo v North West Agricultural Bank and Another, Mokgoro J pointed to some of the consequences that section 34 and the rule of law seek to avoid when she stated that

“[t]he right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.” [footnote omitted]

[41] The mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders. In this case, the legislative framework includes the provisions of the Act which are directed at assisting both the landowner and the unlawful occupier. In argument, the state has accepted the existence of this obligation but claimed that it had been fulfilled.

[42] It is obvious in this case that only one party, the state, holds the key to the solution of Modderklip's problem. There is no possibility of the order of the Johannesburg High Court being carried out in the absence of effective participation by the state. The only question is whether the state is obliged to help in resolving the problem, in other words, whether Modderklip is entitled to any relief from the state.

[43] The obligation on the state goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in

the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the state's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case...

“[49] The state is under an obligation progressively to ensure access to housing or land for the homeless. I am mindful of the fact that those charged with the provision of housing face immense problems. Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy. The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best laid plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons. Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable.”

10. In a more recent, but unreported judgement of the Mpumalanga High Court of ***Impangle Logistics (Pty) Ltd en 'n Ander teen All Truck Drivers' Foundation (ATDF) and Others*** Case number: 3647/2019 and ***Mbali Coal Proprietary Limited v Buthelezi Ntuthuko and Others*** Case number 3564/2019 the following was held by Legodi AJP in respect of the duty of the SAPS:

“[15] In a paragraph devoted to the failure of the police to assist the applicants and to prevent the respondents from committing acts of criminality, the following is alluded to: On 22 June 2019 the applicants as a result of the unlawful activity of the respondents approached the SAPS for its assistance to prevent the aforesaid

unlawful actions. The deponent to the supplementary affidavit Mr Hermanus Frederich De Waal 'was advised by SAPS that he should 'firstly procure a court order to enable the SAPS to come to the applicants' assistance'.

[16] *This court is not hearing about this kind of responses by the SAPS for the first time. When matters deserving maintenance of public order by the police are reported to the police, immediate response is required. It would constitute a wanting conduct on the part of the police not to act on a criminal activity reported to them. Our courts often hear these kinds of stories against our police officials particularly in this part of the Province where mining activities are very high. To seek an order of court before an action is taken on a criminal activity can only serve to bring the criminal justice system into a disrepute.*

[17] *It is not the responsibility of our courts to prevent, combat and or investigate crimes. Neither is it the function of the courts to maintain public order, secure the 6 inhabitants and their property. That is a power and authority constitutionally bestowed on the police in term of section 205 of the Constitution.*

[18] *If what is said about the police is true, then one wonders whether it is training offered to our law enforcement officers, or is just dereliction of duties by police officials. These concerns are what prompted this court to say something in the form of a judgment for the attention of the provincial Commissioner. It is up to the Provincial Commissioner to consider whether or not to launch an investigation with a few to avoid further occurrence of this conduct.*

[19] *Lack of swift consequences for criminal actions by whoever can only encourage people to take the law into their own hands and sometimes in full view of the police officers as was apparently the situation in this matter. For example, in paragraph 6.2 of the supplementary affidavit, Mr De Waal states: "On the 15th August*

2019 upon another incident, I specifically approached the eighth respondent (being Middelburg Police Station) for its assistance and the eighth respondent simply refused to even open a docket and investigate the matter". Clearly something like this needs to be investigated to establish the veracity of the statement so as to ensure that confidence in our police services is maintained and at the same to ensure that there are consequences for any unlawful activity."

From our client's perspective the case law recorded above reflects an appropriate description and important redirection of what South Africans, in general, can expect from the SAPS, but more importantly why it should not be left up to citizens of the country to resort to litigation and to obtain court orders to define the parameters within which the SAPS is required to fulfil its Constitutional and statutory obligations and to protect South Africans from crime by means of both pro-active and active measures. In the same vein, and regretfully so, it is also a concerning finding and that is perhaps indicative of some of the causes of South Africa's alarming crime statistics.

11. A recent challenge of the Trespass Act was unsuccessful in the matter of ***Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*** 2021 (2) SA 1 (CC). There can therefore no longer be any concerns about the continued existence of this act. In fact, it is our client's submission that, in the absence of any other enabling legislation that gives effect to this important Fundamental right, the Trespass Act is an essential part of the State's (and in particular SAPS's) ability to fulfil its obligations in terms of section 25(1) read together with section 7 of the Constitution towards the landowners as the intended holders of such rights.
12. In a logical sequence of events, for land invasions to be preceded by trespassing. The Trespass Act defines trespassing in section thereof:

“(1) Any person **who without the permission-**
(a) of the lawful occupier of any land or any building or part of a building;
or

- (b) *of the owner or person in charge of any land or any **building or part of a building that is not lawfully occupied by any person, enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence** unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.”*

Save for emphasising the requirement of the absence of permission, we are instructed to also highlight that most land invasions that are of concern to our client, occur on vacant land (land that is not lawfully occupied) like open spaces on farms and vacant land in proximity of cities and rural towns.

13. In respect of South Africa’s tenure laws and which reference was made in paragraph 3 above, section 1A of the Trespass Act only exempts persons, who qualify and enjoy protection under **ESTA**, from the application Trespass Act. Persons who enjoy protection under ESTA are primarily defined as “occupiers” in section 1 of ESTA. “Occupiers” are defined as:

*“ **“occupier”** means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter **had consent or another right in law** to do so, but excluding—*

- (a) ...
- (b) *a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and*
- (c) *a person who has an income in excess of the prescribed amount;”*

“Labour Tenants” as defined in section of the LTA were initially excluded from the definition “occupiers” in paragraph a) of the definition above, but the exclusion was removed by an amendment of the of ESTA in 2001. Therefore, and ESTA should be regarded as overarching legislation that includes the protection of labour tenant under the

LTA. For purposes hereof, the exclusion of ESTA from the application of trespassing under the Trespass Act, should include the exclusion of Labour Tenants.

14. In a SAPS National Instruction 7 of 2017 - *“Unlawful Occupation of Land and Evictions”* the following instruction was issued and is currently applied by the SAPS:

“4.3 Whenever an owner or a person in charge of vacant land, place, premises or property approaches the Service to lay a charge of trespass in terms of the Trespass Act, the members must ascertain whether the rights of the person against whom the charge is laid are not protected by other legislation, e.g. the ESTA, LTA or PIE (abbreviation of the PIE-act).

4.4 If it is clear that the person against whom the complaint is lodged does not reside on the land or the property and that the person is not an occupier, the police member attending to the complaint must deal with the matter according to the normal procedures for trespassing.

4.5 However, when the person ‘trespassing’ is an occupier, that person enjoys the protection of the LTA, ESTA or PIEA and the police member should immediately advise the complainant to obtain legal advice or consult an attorney in order to obtain an eviction order in terms of the applicable legislation. No person may evict an unlawful occupier except on the authority of an eviction order of a competent court

4.6 Evictions outside the applicable legislation are illegal and the legislation provide for criminal offences – section 8(1) of PIEA and section 23(1) of ESTA provide that eviction without a court order is an offence.”

15. Notwithstanding the fact that the PIE-act and unlawful occupiers were not exempted from the Trespass Act, the author of the National Instruction acted *ultra-virus* by including unlawful occupiers under the PIE-Act as persons who enjoy statutory immunity from prosecution in terms of the Trespass Act. This *ultra-virus* instruction and in our client’s view wrong interpretation of the legislation has the absurd result that a person/s who initially trespass onto land and for all purposes makes him or herself or themselves guilty of all

elements of the crime of trespassing undergoes a metamorphoses as a person who has committed a crime (trespassing) to person who is by virtue of further step in the process (the invasion of the land unlawful erection of structure), constitutionally protected and immune from prosecution. Put differently, an already committed offence under the Trespass Act is undone when the same trespasser erects a structure and is able to claim the status of an “unlawful occupier” under the PIE-act.

16. Our instructions are that, apart from being *ultra-virus*, the abovementioned interpretation of National Instruction is bad in law and the product of an incorrect simplification of the relevant legislation that sterilises the SAPS from any responsibility to protect private property and effectively removes the deterring effect that Trespass Act is required and intended to have on land invasions.
17. If regard is had to the preamble of the Trespass Act, the abovementioned SAPS National Instruction 7 of 2017 - “*Unlawful Occupation of Land and Evictions*” (“the National Instruction”) is irrational and in contravention of the aim, ambit, provisions and the consequences of contravention of the provisions of the Trespass Act (as amended by ...). The preamble of the Trespass Act reads as follows:

“To prohibit the entry or presence upon land and the entry of or presence in buildings in certain circumstances, and to provide for matters incidental thereto.”

18. The contravention of the provisions of the Trespass Act is a crime. You are referred to the contents of section 1 of the Trespass Act as quoted above. Whilst we do not wish to be repetitive in respect of the law and legislation that governs the functions and statutory duties of the SAPS, but it is within the context of what we are mandated to address herein, necessary to remind you of the contents of Chapter 11 of the Constitution as well as the South African Police Service Act 68 of 1995 (“SAPS Act). Chapter 11 of the Constitution stipulates the SAPS is responsible for the following:

- 18.1. Preventing (trespassing), combating (trespassing) and investigating crime (trespassing);**
- 18.2. Maintaining public order;**
- 18.3. Protecting and securing the inhabitants of the Republic (of the crime of trespassing);**

- 18.4. Upholding and enforcing the law (including the provisions of the Trespass Act);
- 18.5. Creating a safe and secure environment for all people in South Africa;
- 18.6. Preventing anything (including the crime of trespassing) that may threaten the safety or security of any community;
- 18.7. Investigating any crimes (of trespassing) that threaten the safety or security of any community;
- 18.8. Ensuring that criminals (trespassers) are brought to justice;
- 18.9. Participating in efforts to address the causes of (trespassing as a) crime;
- 18.10. And providing for the establishment, organisation, regulation and control of the South African Police Service; and to provide for matters in connection therewith.

This is your Constitutional and statutory mandate of the SAPS

19. An attempt at the justification for the position in the National Instruction appears in the contents of paragraph 4.2 of the instruction where reliance is placed on section 26(2) of the Constitution and the fact that South Africa's Tenure Laws criminalise evictions without court orders. Our client takes no issue with the fact that persons (lawful and unlawful occupiers) cannot be evicted without court orders, but our client takes issue with the fact that unlawful occupation of land is in practice considered to establish immunity from prosecution for Trespassing. This is simply because there is huge legal difference between prosecuting a person for a crime already committed and an order for the eviction of a person. In amplification of this view, due regard should be given to this distinction in the wording of section 2 of the Trespass Act.

"2 Penalties

- (1) *Any person convicted of an offence under section 1 shall be liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.*
- (2) *A court which convicts any person under subsection (1) may make an order for the summary ejection of such person from the land concerned:*

Provided that an occupier who has a right of residence or right to use land in terms of the Extension of Security of Tenure Act, 1997, shall not be ejected in terms of this subsection from land in respect of which he or she has such a right.”

20. Our client's view is that, besides the fact that only ESTA occupiers are exempted from evictions in terms of subsection 2(2) of the Trespass Act, that section 25(2) and the criminalisation of evictions without court orders, only impacts on the effect that can be given to subsection 2(2) of the Trespass Act in respect of unlawful occupiers under the PIE-Act. A correct interpretation of subsection 2(2) should be aligned with eviction proceedings that also comply with the provisions of the PIE-act. In fact, the relief sought in the EFF case referred to above, included a request for a declaratory order that the Trespass Act does not apply to occupiers of land protected by ESTA and PIE. In this case the Constitutional Court refused the Applicant's application for an order to declare that the Trespass Act does not apply to unlawful occupiers under the PIE. The SAPS National Instruction 7 of 2017 - *“Unlawful Occupation of Land and Evictions* is accordingly and for this reason and on the strength of a finding and order of South Africa's apex court not in line not aligned with the current and correct legal position.
21. However, it is our client is of the view that it would be totally incorrect to interpret and give effect to the Trespass Act in a manner where evictions proceedings should comply with the PIE-Act also and automatically nullifies the consequences of section 2(1) for a person or persons who, prior to their unlawful occupation of the land, entered upon such land without the consent of the owner or person in charge of such land and a committed a statutory crime of Trespassing. The PIE-Act pertains to eviction proceedings and should apply and or be aligned to the remedy created in sub-section 2(2) of the PIE-act. There is no legal reason for the PIE-act to have any impact on the application and prosecution of trespassers in terms of section 2(1) of the Trespass Act.
22. Our client and its members have over the past few years encountered repeated instances and were the victims of land invasions that could have been, pro-actively avoided, if the response by the SAPS thereto was not dictated or directed by the abovementioned incorrect application of the Trespass Act. By inaction and instances of passive delays in taking action against trespassers, members of the SAPS allowed the aforementioned metamorphoses from trespassers (entering upon land without the consent of the

landowner or person in charge of the land) to unlawful occupiers (persons who have erected structures and who are occupying land without the consent of the owner or person in charge of the land) to take place. In doing so and based on what we, for reasons stated above, regard as an incorrect interpretation of the legislation and the consequential National Instruction referred to above, the SAPS have abdicated any role in protecting landowners and have left them to fend for themselves. By inaction, a blind eye was turned to crime that was supposed to be prevented and combatted in terms of section 205 of the Constitution.

23. We are, accordingly, instructed to hereby demand the following:

- 23.1. The amendment of the National Instruction to be in line with the judgment by the Constitutional Court in the EFF matter and to ensure that trespassers are prosecuted in terms of section 2(1) of the Trespass Act;
- 23.2. The immediate alignment of the SAPS response to trespassing and land invasions with the pro-active duties imposed by section 205(3) of the Constitution.
- 23.3. All reasonable measures to be taken to ensure that all structures and stations of SAPS are aware of such approach and can respond in the correct and lawful manner to prevent trespassing and land invasions.
- 23.4. A written undertaking within 30 (thirty) days from date hereof that the appropriate measures were implemented to ensure that our client's members are, onwards, able to rely on the necessary protection and pro-active assistance from the SAPS when persons trespass onto and invade private land.

24. We look forward to your feedback.

Yours faithfully



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