



COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE UNLAWFUL ENTERING ON PREMISES BILL

The Law Society of South Africa (LSSA) constitutes the collective voice of approximately 30 000 attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and the Independent Attorneys in representing the attorneys' profession in South Africa.

Having read and considered the Unlawful Entering on Premises Bill, published for comment in the Government Gazette Notice 1219 of 2022, and in consideration of South African Law in general, the LSSA hereby submits the following comments:

1. INTRODUCTION

The LSSA supports the position that the Trespassing Act is a relic of the apartheid era and that there exists a need to develop this area of the law.

It is a law that is included in the body of law that protects private ownership of property. In the era of the constitutional dispensation it is proper to re-visit legislation that was misused to further the ends of apartheid. In so doing, it is necessary to balance not only the rights of private ownership, but also of the dispossessed indigent members of our society. It is also crucial when making legislation that it speaks to the current South African context, whilst creating a "bridge" between the past and the new constitutional era and the transformed society of the future that we envisage.

It is a reality in South Africa that the majority of our people live in rural areas, farms and informal settlements. The dispossession of the indigenous people by colonization and later legislation such as the 1913 Natives Land Act has given rise to unique realities for many, many South Africans. This includes

ancestral land being farmland and privately owned. Due to poor spatial planning, nearby communities of farms or privately owned land have footpaths cutting across such privately owned property. The legislation must include protections for these citizens who find themselves in these circumstances.

We must also have cognizance of the high crime rate in South Africa. It is reported that South Africa's crime statistics covering the fourth quarter of the 2021/22 financial year saw an increase of reported crimes. Contact crimes increased by 15%. There was also an increase in property related crimes from 91 2223 to 91 278.

A well drafted bill will balance these interests.

2. THE TRESPASS ACT 6 OF 1959

Section (1) of the Trespass Act provides that 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.

Snyman submits that the crime of trespassing as derived from the outdated Act is supposed to complement the crime of housebreaking for the protection of homeowners and lawful occupiers from property incursions.¹

However the Act, was also abused to arbitrarily arrest people during the apartheid era.

The Trespass Act made punishable the conduct of entering the land or building. It created the following instances of conduct:

- I. Entering the land/building or a part thereof and being upon it without permission;

¹ Criminal Law, Snyman 6th edition, SA Lexis Nexis 2016
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- II. Entering the premises lawfully and such permission ceases once the lawful reason for entering the premises no longer exists.

The two situations created are:

- I. Entering the premises
- II. Being upon the premises

The defenses to this include:

- I. Permission
- II. A lawful reason for being upon the property
- III. Necessity

The law has also developed a definition of lawful occupier of land as somebody who, though not the owner, has the same rights of residence and control over the property as the owner would have.

We submit that the Unlawful Entering Bill should further develop some of these aspects of the law and bring the law in line with the Constitution and the Bill of Rights.

3. THE UNLAWFUL ENTERING ON PREMISES BILL

3.1. Definitions

3.1.1. "Enclosed land": This term appears in the definition clause, but no reference is made to enclosed land except for this definition to further describe land under the definition of premises. It is submitted that this definition should be reviewed and/or excluded as the definition of premises includes all types and forms of land.

3.1.2. "Lawful occupier": Specifically excluding an employee of a lawful occupier may lead to confusion in circumstances where an employee is in fact the lawful occupier.

3.1.3. "Occupied premises" and "unoccupied premises": These terms appear in the definition section only.

3.1.4. “Unlawful entry”: This definition creates the two instances as set out in the previous Act. It however refers only to a lawful occupier and not an owner. It should include that the permission of an owner as a lawful occupier may not be the owner and a person may obtain express or implied permission from an owner.

3.2 Application of the Act

3.2.1 In clause 2(1) of the Bill it states that “This Act applies throughout the Republic with regards to the unlawful entry on a premises by an intruder, irrespective if the intruder, after unlawful entry, occupies the premises”.

This clause seems to extend this unlawful conduct to include unlawful occupation, which area of law is governed by the Prevention of Illegal Eviction and Unlawful Occupation Act, 1998 (PIE).It has the potential to create the unintended consequence of a landowner removing unlawful occupiers of land without making the necessary application for their removal in terms of the PIE Act. If the drafter intends to create an exception in the law, it must do so in a clear and unambiguous manner.

3.2.2 Clause 2(2)(c) and Clause 2 (2)(d) create an absurdity in that broadly excluding any labour tenant in terms of the Labour Tenants Act 1996 and an occupier in terms of the Extension of Security Tenure Act 1997 may unlawfully enter another premises.

3.2.3 Clause 2 should also exclude learners (children/adults) who are found to be unlawfully entering a premises for the purposes of access to schools. It should also exclude footpaths.

3.3 Unlawful Entry on Premises Prohibited

3.3.1 Clause 3 creates the crime of unlawful entry. Included in the Bill is a definition of premises: “... (b) anything on the land including (i) any building or other permanent or temporary structure ;...(iii) a trailer, caravan, motorhome or a portable structure designed or used as a residence, for shelter or recreation...” Upon a reading of this definition unlawful entry applies to the entry of a person’s home or residence.

3.3.2 The Bill should **expressly exclude instances of house-breaking from this legislation.**

Upon publication of this Bill, the Ministry issued a statement that this legislation would not affect our common law. It is however closely related to the crime of house-breaking as developed by our courts over the years. Legislation can over-rule the common law, if both apply in the same area of law. Legislation can also have the effect of adding to an area of common law. This is one of the methods in which the law is developed.

The crime of housebreaking was developed as a means of protecting the sanctity of a home against intrusions that involve harm and danger, “not so much to protect the dwellings as a building but to protect its security that represented the indefinable idea, existent at all times that the home was inviolable: every individual exercised their greatest freedom at home” Burchell and Milton. Unlawful entry is said to be the gravamen of the crime of housebreaking. Unlawful entry should not replace the “breaking element in housebreaking” as it does not include any requirement that the intruder have any intent to commit a further crime or offence upon entry, and is obviously not punishing a preparatory crime. Instead, the harm being punished is simply an unlawful entry. The conduct in housebreaking is aggravated as compared to the act of unlawful entry (trespassing), in that it comprises an infringement of what someone has sought to secure and protect. Housebreaking results in serious psychological harm on the victims of the crime.²

3.4 Duty to Inform Intruder of Unlawful Entry

3.4.1 Clause 7 places a duty on the lawful occupier or an authorized person to request the intruder/s to leave and to thereafter call the police.

3.4.2 This clause has a bearing on Section 42 of the Criminal Procedure Act. In terms of Section 42 of the Criminal Procedure Act, a private person may effect an arrest without a warrant.

3.4.3 Section 42 (3) states that the owner, lawful occupier or person in charge of property on or in respect of which any person is found committing an offence, and any person authorized thereto by such owner, occupier or person in charge may without warrant arrest the person so found.

² The House-breaking Crime to Remain a Common Law Crime in South Africa, Richard Sbonelo Mkhize, University of KwaZulu Natal, 2015
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3.4.4 Further, the South African Police Service is overburdened. They do not respond timeously to urgent calls. Therefore, many South Africans now rely on private security companies for their security. This clause prevents private security companies and personnel from responding to distress calls.

3.5 Powers of Police

Clause 8 adds a further burden on an already burdened police service in that it refers to an "authorized member". There is no way of determining from this clause what the purpose is for the special appointment of an authorized member to deal with such matters. All members in the service of the police, should be able to deal with all forms of crime. There is nothing in the Bill that creates a special need for specially assigned members.

3.6 Defences to a Charge of Unlawful Entry

Clause 9 sets out the defences to unlawful entry. We submit that it should include specific reference to traditional and customary practices and including visiting a family grave.

3.7 Penalties

Clause 10 should be re-considered as two (2) years imprisonment is considered harsh if the person is unable to afford the payment of a fine.