



Sonke Gender Justice Submission to the Special Rapporteur on the Right to Adequate Housing and the Special Rapporteur on Extreme Poverty and Human Rights on Decriminalisation of Homelessness in South Africa

November 2021

Sonke Gender Justice welcomes the opportunity to make submission to the Special Rapporteur on the Right to Adequate Housing and the Special Rapporteur on Extreme Poverty and Human Rights relating to the issue of extreme homelessness and extreme poverty in the South African context.

The Special Rapporteur on the right to adequate housing and the Special Rapporteur on extreme poverty and human rights have sent in June 2021 a request for information criminalisation of homelessness and extreme poverty.

The request is to respond to the enquiry in terms of the following issues:

- Laws or regulations that prohibit begging, eating, sleeping, or performing personal hygienic activities in all or certain public places, including their texts and whether they are still in force and enforced.
- Laws or regulations that allow for petty offences the detention or imprisonment of individuals who are unable to pay the respective fine.
- Comments whether any of these laws and regulations may violate international human rights law.
- Measures and services available at municipal, regional or national level to support people living in poverty from having to resort to beg, sleep, wash, defecate or

perform other hygienic activities in public places, because they lack access to employment, social assistance, adequate housing, public showers and toilets.

This submission will focus on existing provincial and municipal by-laws which contribute to conditions which criminalise poverty and homelessness.

Laws or regulations that prohibit begging, eating, sleeping, or performing personal hygienic activities in all or certain public places, including their texts and whether they are still in force and enforced.

South Africa has one of the most progressive Constitutions globally. It makes specific provision for adequate housing¹ for the realisation of socio-economic rights including health care, food, water and social security². The application of these rights is explained in the case of Government of the Republic of South Africa versus Grootboom³. In the Grootboom case, the Constitutional Court upheld the responsibility of the state to provide socio-economic rights in a manner that is just and reasonable. The court explained that providing to the long-term and short-term socio-economic needs were equally important and “A “reasonable” program must make provisions to provide relief to those individuals living in intolerable or crises situations”⁴.

By virtue of the Constitution, the municipalities are autonomous in terms of their area of responsibility, so that they can legislate in the specified areas at their own discretion, provided that the statutes do not contradict the constitution or national or provincial legislation. Notwithstanding the above legal position, we find that all of our major cities have municipal (local government) by-laws that criminalise homelessness by making certain actions illegal in public.

¹ Constitution of the Republic of South Africa 1996 Chapter 2 s26

² Constitution of the Republic of South Africa 1996 Chapter 2 s27

³ Government of the Republic of South Africa and Others versus Irene Grootboom and Others. (11) BCLR, 1169 (CC).

⁴ Ibid

Such by-laws are often drafted in a broad manner which allows law enforcement officials to interpret them widely at their own discretion – often leading to an abuse of power and harassment of the poor, marginalised and vulnerable populations including homeless persons, migrants and sex workers due to their socio-economic status.

Some examples are set out hereunder:

Cape Town has “the Streets by-laws”⁵, which makes it against the law to urinate or defecate, bath or wash, sleep or camp or erect any refuge in public. It additionally makes it unlawful to beg, stand, sit or lie down in a public place.

In 2015 the eThekweni Municipality enacted the Nuisances and Behaviour in Public Places By-Laws of 2015 and Beaches By-Laws. This by-law prohibits many of the activities that homeless people rely on to sustain themselves and includes provision related to movement, sleep, food security, sanitation and personal hygiene (bathing, urinating, defecating, menstruation) and livelihood activities (trading, touting and hawking)⁶

These by-laws had been enacted to ensure that the streets continue to be clean, to maintain pavements secure for pedestrians and to prevent “loitering” and “vagrancy”, however more than anything else it has criminalised poverty and homelessness.

Laws or regulations that allow for petty offences the detention or imprisonment of individuals who are unable to pay the respective fine.

⁵ By-regulation Relating to Streets, Public Places and the Prevention of Noise Nuisances (Provincial Gazette 6469 of 2007)

⁶ In Johannesburg these acts are criminalised by the PUBLIC OPEN SPACES BY-LAWS (PUBLISHED UNDER NOTICE NO 831 IN GAUTENG PROVINCIAL GAZETTE EXTRAORDINARY NO 179 DATED 21 MAY 2004) and the PUBLIC ROAD AND MISCELLANEOUS BY-LAWS (PUBLISHED UNDER NOTICE NO 832 IN GAUTENG PROVINCIAL GAZETTE EXTRAORDINARY NO 179 DATED 21 MAY 2004)

In terms of the EtheKwini and Cape Town by-laws⁷ urinating or defecating in a public place other than a public toilet; Bathing and washing without or showering (and not as part of a religious or cultural ceremony); bathing or washing clothes or animals; lying or sleeping on a bench, seat, street, or sidewalk; All of this can result in a fine of R500. All of these are essentially human and physical functions that people with their own rental or accommodation can perform in the safety of their living or workspaces⁸.

Begging by “gestures, words or in any other way” is prohibited and is punishable by a fine of R100. Loitering "for the purpose of the commission of a crime or with the intention to commit it" is classified as a criminal offense and is punishable by a fine of R500. In Cape Town these criminalised life sustaining activities can incur a fine of R2000.

In March 2021, 11 applicants supported by civil society launched an application in the Western Cape High Court and with the Equality Court of South Africa. The plaintiffs' challenge consisted of two actions: First, the superior court action contested the constitutionality of those laws for violating the basic human rights of the homeless, including the rights to equality, human dignity, liberty and security. Second, the lawsuit in the Equality Court sought an order from the court finding that the law unfairly discriminates against the homeless. The applicants were seeking from the court to conduct a comprehensive review of the city's guidelines on laws that are harmful to homeless people and forbids the city to punish homeless people in the future. The court judgement favoured the applicants, and the applicants were granted a court order to return to the land they were evicted from and for the City to return all confiscated items to the applicants.⁹

Whether any of these laws and regulations may violate international human rights law

The UN Special Rapporteur on extreme poverty and human rights and the UN Special Rapporteur on adequate housing highlight a number of international instruments that seem to support the decriminalisation of homelessness and poverty.

⁷ *Province of Western Cape (2007). City of Cape Town: By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances. Western Cape Provincial Gazette, No. 6469, 28 September 2007*

⁸ eThekweni's discriminatory bylaws: criminalising homelessness - <http://dx.doi.org/10.17159/2077-4907/2020/1dd.v24.19>

⁹ <https://www.news24.com/news24/southafrica/news/city-of-cape-town-dragged-to-court-over-by-laws-criminalising-homeless-people-20210601>

South Africa is a member of the United Nations and also signatory to the conventions on adequate housing and extreme poverty. In addition, the South African Constitution of South Africa directs the courts of the country must consider international law.¹⁰

In addition, the Principles on the Decriminalisation of Petty Offences in Africa was adopted by the African Commission in 2017 which sought to guide States, States on measures that can be taken to enhance human rights protections at the critical intersection of poverty and criminal justice.¹¹

Measures and services available at municipal, regional or national level to support people living in poverty from having to resort to beg, sleep, wash, defecate or perform other hygienic activities in public places, because they lack access to employment, social assistance, adequate housing, public showers and toilets.

Currently there seems to be no national coordinated plan to support homeless people and people living in extreme poverty. The advent of Covid-19 has seen the roll out of certain measures that mainly focus on the distribution of grants. These grants are temporary and accessing these grants have difficult in particular for those who are struggling to access home affairs, or provide an address.

Batho Pele, a Sesotho word, which means “People First”, is an initiative that was launched in 1997 to transform the Public Service at all levels. Batho Pele was launched because democratic South Africa inherited a Public Service that was not people-friendly and lacked the skills and attitudes to meet the developmental challenges facing the country.

The Batho Pele Measure is plans to make public toilets, each with at least one bathing facility, available to all South Africans across the country. This initiative has been hugely unsuccessful and has had to compete with growing numbers of homelessness and extreme poverty.

¹⁰ Constitution of the Republic of South Africa of 1996 Chapter 2 s(39)(1)(b)

¹¹ <https://acjr.org.za/resource-centre/decriminalisation-of-petty-offences-web.pdf/view>

The responsibility of providing services to the homeless and people living in extreme poverty has been mostly resting with local municipalities and non-government organisations. In the Western Cape, the Department of Social Development assist the homeless by fully or partially funding Non-Governmental Organisations that work directly to get people off the streets and to empower them with skills-training, uniting them back with their families and integrating them into communities. The Western Cape Government's Department of Social Development's Winter Readiness Programme prioritises the homeless by providing R47.6-million to 29 shelters, which provides 1 401 beds each day. The shelters render key social work services aimed at reunifying homeless adults with their families, with R16-million allocated to sustained family reunification services. The department is also working with NGO's, to provide extra mattresses, food, and care packs to the poor. The Sustainable Livelihoods Programme funds a total of 75 targeted feeding sites across the province. Access to these sites is via the Department of Health, following an assessment by a registered social worker.¹²

Similar support services are provided in particularly the metros of South Africa where urbanisation and overpopulation has been aggravated by lack of development and poor service delivery in rural areas and neighbouring countries. The amounts differ and its effectiveness can barely be measured because the number of homeless people and people living in extreme poverty are mostly estimated. Government and organisations working in the sector are often at loggerheads about the amount of people affected.

The National Homeless Network announced that it was developing a policy to coordinate efforts to address the homeless situation in South Africa. During the network's national conversation on homelessness members of the network, the network worked with the National Department of Social Development, the Policy Unit of the Presidency and the Association of Local Governments of South Africa to fill the loophole. Failure to respond were due to the lack of clear and coherent national policies. Often the provinces and municipalities do not know who is ultimately responsible and defer responsibility to one another. At the moment, none of the national departments were responsible for the

¹² <https://www.westerncape.gov.za/general-publication/homelessness-0>

homeless situation, which means that there is neither an action plan nor a budget allocation and provincial and municipal actions have been uncoordinated. At a 2020 national parliamentary question put forward to the Minister of Social Development on *[which] sphere of Government is responsible for accommodating homeless persons*”, it was responded that *“there] is currently no clarity at National level in terms of the lead Department dealing with Homelessness.”*¹³

Municipal statutes have often been criticized for violating the basic human rights of street dwellers. The development of the policy is still in the initial phase, but in addition to consultations with the presidency, the ministry had partnered with several provinces and municipalities that already had policies in place to deal with the homeless. The ministry commissioned a rapid assessment study to collect data on the extent of the national homeless problem and has set up a task force with the provincial social development departments, which will later include other ministries. The National Homeless Network in 2020, also released a National Manifesto for the Homeless to prioritize five broad needs in the homeless community: access to shelter and housing; Access to medical care; Access to sanitary facilities and washing facilities; Equal treatment by local laws and security forces; and Increased Economic Opportunities. Statistics SA has also announced that further efforts will be made to count homeless people in the 2022 national census¹⁴.

It is clear that current existing by-laws go against both national legislation under the Constitution in the form of Section 9 of the Constitution enshrines the right to equality and non-discrimination and the right to equal protection before the law, Section 10 and the right to dignity and Section 12(1) on the right to freedom and security of a person and o tot be arbitrarily deprived of freedom and not subject to cruel, degrading or inhuman treatment. In addition, the by-laws may impact the right to freedom of movement, healthcare and social security and privacy.

¹³ <https://www.da.org.za/2020/07/national-government-does-not-know-who-is-in-charge-of-addressing-homelessness>

¹⁴ <https://www.dailymaverick.co.za/article/2021-11-11-steps-taken-to-develop-a-national-policy-on-homelessness/>

Laws should be designed to address poverty and promote the realisation of fundamental human rights and echo the values of the Constitution and the National Development Plan, which aims to eliminate poverty and reduce inequality by 2030.¹⁵

¹⁵ <https://www.gov.za/issues/national-development-plan-2030>