MEMORANDUM - THE POLICY IMPLICATIONS OF AMENDING OR ABOLISHING THE TRESPASS ACT NO 6 OF 1959.

INTRODUCTION

Is the crime of Trespass necessary? Where should one draw the limits between the civil and criminal law in dealing with unlawful incursions onto the land of another? What should be the basic objective of legislation relating to trespass?

These are the three essential questions posed in this paper. An attempt will be made to answer them by outlining the reasons underlying the implementation of trespass legislation in South Africa and the interpretations given by our courts to the legislation enacted.

THE COMMON LAW

The crime of trespass was not known in our common law (R V OSS (1903) 17 EDC 19 at 21 (check citation) and R V TAMPLIN (1886) 4 HCG 241.

In R V SCHONKEN 1929 AD 36 at p45 De Villiers ACJ states that in Roman-Dutch law an unlawful entry with an illicit purpose (regardless of whether the purpose was theft, adultery or any other unlawful purpose) is an injuria in the sense of contumelia to the owner or occupier punishable by law.

The position in Roman law was similar, allowing a criminal as well as a civil remedy for every injuria.

When the courts expressed doubt early this century whether these injuria still

constituted crimes, provisions were enacted criminalizing entry with intention to commit an offence.

The earliest forerunners of our present Trespass Act were the vagrancy laws enacted in the second half of the nineteenth century (The Vagrant Act 15 of 1869 (N); the Vagrancy Act 23 of 1879 (C); Law on Vagabondage and Vagrancy 1 of 1881 (T); Chapter CXXXIII of the Law Book 1891 (OFS).

Section four of the Cape Vagrancy Act is not dissimilar in substance to the present Act:

"Every person found without the permission of the owner (the proof of which permission shall lie upon such person), wandering over any farm, in or loitering near any dwelling house, shop, store...shall be deemed and taken to be an idle and disorderly person".

In THE QUEEN V JONES (9 JUTA, 210), it was held that the purpose of the legislature in passing the Act was to put a stop to idlers and squatters wandering upon farms as a prelude to stealing.

Milton (J R L Milton, "Trespass", in Milton and Cowling, South African Criminal Law and Procedure, Volume III, Statutory Offences, Jutas, 1988, par. J1-2) attributes the series of statutes at the turn of the century explicitly penalizing "trespass" on land to increased vagrancy and squatting resulting from people being dispossessed of land through conquest.

Milton points out that the nature of the prohibition varied from jurisdiction to jurisdiction. Natal's Law 13 of 1874 penalized "wilfull" trespass on land in defiance of a conspicuous notice forbidding trespassing. The Orange Free State Law 11 of 1899

prohibited the entry or presence on land without lawful reason and without the knowledge or consent of the owner. Transvaal's s9 of the Crimes Ordinance 26 of 1904 penalized those who wrongfully and unlawfully entered land and thereafter remained after having been requested to depart by the occupier or person in charge. The Cape Trespassers Act 23 of 1906 was to much the same effect as the Transvaal Ordinance.

The current Trespass Act No 6 of 1959 was enacted to bring uniformity to the various enactments. The substance of the Act is derived from the Orange Free State enactment.

THE TRESPASS ACT

THE OBJECT OF THE LEGISLATURE

Our courts have given no definitive statement of the purpose of the legislature in enacting the Trespass Act.

In TSOSE V MINISTER OF JUSTICE AND OTHERS 1951 (3) SA 10 A, at page 21, Schreiner JA the distinction between trespass, "in a wide sense, which would coer any presence without lawful title on another's property, and trespass in the narrower sense of an invasion of or entering upon his property without his leave and for presumably unlawful purposes." It was held that taking the narrower interpretation of trespass, that the statute under consideration "would be aimed at the preservation of the peace against the incursions of the lawless, as an extension, in effect, of the law against housebreaking."

R V FLEMMING 1939 TPD 260, Maritz J said of s9 of Transvaal Ordinance 26 of 1904, "The purpose of the section seems to me perfectly clear; it is designed to prevent

breaches of the peace, if a man, coming on to the premises o fanother and being told to leave, will not leave. Under the circumstances, one can well imagine that if there were no such penal provision the occupier for the time being might be inclined to take the law into his own hands and eject the person who has told to leave."

The basis of this principle is that trespass offences are aimed at preventing violence taking place or a possible breach of the peace (see R V MOORE 1925 TPD 80 AT 85). It is thus always necessary to obtain the permission of the person actually occupying and controlling the premises " because it is only when persons in that position make an attempt at ejectment that there is a possibility of a disturbance of the peace"

Milton (op cit J1-2) interprets the purpose of the Trespass Act and the legislation that preceded it, together with the provisions penalizing vagrancy to be (a) to achieve a degree of control over a fluid population; and (b) to preserve the peace against the incursions of the lawless upon others land or buiidings through extending the law against housebreaking. Later (op cit, J1-6) he states that the object of the Trespass Act is to "prevent intrusions which may give rise to breaches of the peace or threaten the safety of lawful occupiers".

PERMISSION

The nature of the permission required is not clear (R V TRAHOE 1892 7 EDC 145). Some sort of permission, even qualified may be sufficient.

In GEORGE MUNICIPALITY V VENA 1989 (2) SA 263 (A) it was held that consent in squatting act could be given during, before or after the erection of the structure, "in any manner whatsoever...expressly or impliedly, orally or in writing or by conduct."

Given the principle of statutory interpretation requiring criminal provisions to be strictly interpreted in favour of the accused, it seems likely that our courts would accept that

where land has been occupied for a time without objection, the failure to object would amount to implied consent.

Where the permission flows from a contract of employment or labour tenancy, it can only be withdrawn by a valid termination of the contract giving rise to the permission. See S V HADEBE TPD, CASE NO. A 1765/88, UNREPORTED.CHECK JEREMIES CASE and contrary cases. Thus, farmworkers who are dismissed on notice who are prosecuted for trespass before the notice period has ended, would be entitled to raise the defence of permission

LAWFUL OCCUPIER

The Trespass Act creates two different offences, depending on whether the land or buildings in question are lawfully occupied or not. Whether the land or buildings are lawfully occupied determines whose permission is required in order to enter or be upon the property. A clear understanding of the term "lawful occupier" is accordingly crucial to understanding the Act.

In S v Mdunge 1962 (2) SA 500 N, the land in question was owned by a Mr Hope but occupied and managed by his son. The court held the permission of the son as lawful occupier not the father as owner was relevant. Had the State failed to lead evidence that the accused had entered the farm without the permission of the son, the conviction would have been set aside.

What is a "lawful occupier"?

S V DAVIDS 1966 (1) PH26 (N) held that a lawful occupier must exercise greater rights of control over the property than a "mere tenant, bywoner or squatter".

In a case, R V LOMBARD 1948 (2) SA 31 T at p31, which predates the Trespass Act,

the court held that the lawful occupier is a person, who though not the owner, has the same rights of residence on and control over the property.

OWNER

Proof of ownership in court proceedings is usually established by the production of the title deeds in terms of the best evidence rule. In S v LECHUDI 1945 (1) PH K31 (GW) it was held that in certain circumstances the document need not be produced.

PERSON IN CHARGE

It has not been decided who precisely constitutes "a person in charge".

Decisions in terms of the earlier legislation were to the effect that the "person in charge" must exercise some degree of immediate control over the premises (R V FLEMMING 1939 TPD 261).

ENTRY AND PRESENCE

The penal provision covers anyone who "enters or is upon" land or buildings without the necessary permission.

Personal presence is required. S V BROWN 1978 (1) SA 305 NC held that simply to purchase a house or to authorize the placement of building materials on land does not constitute trespass.

Once the entry is completed, one "is upon" the land or building. The duration of the presence is irrelevant for the purpose of establishing the commission of the offence

(R V BADENHORST 1960 (3) SA 563 A).

Milton (op cit, J1-6) points out that strictly, the mere crossing of a boundary is sufficient to constitute entry. For example, stepping onto a wall or into doorway without proceeding further.

However, he reasons that as the object of the legislature seems to be the prevention of intrusions which might lead to breaches of the peace or threaten the safety of lawful occupiers, an entry must be substantial and not merely technical in order to constitute trespass.

LAWFUL REASON

The onus of proving lawful reason falls on the accused. If the prosecution has established an entry without the required permission, the accused must justify their presence by proving, on a balance of probabilities, a lawful reason for their presence.

In R V JAKWANE 1944 OPD 139, the court found that an accused would have lawful reason to be on land if they were "engaged in innocent pursuits ... having no reason to anticipate objection on the part of the owner or the occupier".

A clear example of entry onto premises with lawful reason is entry to deliver goods or to obtain permission to enter.

MENS REA

Mens rea, or criminal intention, is an important element of the offence.

In R V VENTER 1961 SA 363 (T), it was decided that when an accused believes that they have a right to be on land, the Crown cannot succeed on a charge of trespass.

In a number of other cases the absence of mens rea has led to acquittals. In R V MBEKI 1950 (2) SA 53 (E), the accused knocked at the door of a house on what he believed was a lawful errand. He was instructed to leave, but did not understand the instruction. His appeal was upheld on account of lack of mens rea.

A number of cases (such as S V NKOPANE 1962 (4) SA 279 O and S V ZIKI 1965 (4) SA 14 E) have held that the onus lies on the accused to establish the absence of mens rea. The contrary position, taken in S V BROWN 1978 (1) SA 305 NC, would appear to be the more authoritative.

CIVIL LAW

Two civil actions are available to safeguard possession of immovable property. The mandament van spolie is an extraordinary procedure aimed at preventing unlawful self-help. All a possessor needs to establish is : (1) that they had peaceful and undisturbed possession of the property ; and (2) that they have been deprived of that possession against their will. Once these requirements have been proved the court will order the restoration of possession.

The court will not enquire into the merits of a dispute over possession. The purpose of the remedy is to prevent people taking the law into their own hands (see NINO BONINO V DE LANGE 1906 TS 120).

However, the mandament van spolie is probably not available to someone who has simply been disturbed in their possession.

HJ Erasmus (in "Jones & Buckle - The Civil Practice of the Magistrates Courts of South Africa", vol I, 8th ed, Jutas, p98 at note 753) states :

"As Kleyn Mandament 377-9 rightly points out, while a partial deprivation of possession may justify the grant of a spoliatory order, the mere disturbance of possession does not."

But a possessor need not be in possession of the whole of a property, and the deprivation of possession by the spoliator need not be of the whole of the property, before they are entitled to a spoliation order (VAN ROOYEN V BURGER 1960 (4) SA 230 E).

Where a mere disturbance of possession (or even a mere threat of disturbance) has taken place, the possessor may apply to court for a prohibitory interdict. Should the invader continue with their threats or disturbance after having been interdicted, they would be in contempt of court.

The requirements for an interdict (stated in SETLOGELO V SETLOGELO 1914 AD 221) are :

(1) a clear right (in this instance the right to possess or factual possession with its right to a temporary continuance in that possession);

(2) that the respondent is disturbing, or threatening to disturb the applicants possession; and

(3) there is no alternative remedy available to the applicant.

The requirements for an interim interdict, which can be sought as a matter of urgency, are less stringent, but the applicant is required to establish also that the balance of convenience is in his or her favour.

The shortcomings of this remedy for an elderly couple in a lonely farmhouse when faced with a nighttime intruder are self-evident and will be discussed in greater detail below.

CONCLUSION

It is arguable that the crime of trespass was unknown to our common law, there is no equivalent offence in English law and accordingly trespass situations should be dealt with through civil law rather than criminal law remedies.

However the civil procedures tend to be both cumbersome and costly. It is cold comfort for the farmer faced with a night-time intruder in an isolated farmhouse, to know that they can contact their attorney, who might or might not (particularly at night and over weekends) be able to contact a court official and a magistrate or judge to obtain an urgent interdict which can be served on the intruder.

In addition, where the intruder is without means, which often will be the case, the property owner will not be able to recover legal costs and have to bear the not inconsiderable expense of bringing an urgent application.

On the other hand, the Trespass Act as it presently stands, is so broad in its scope that disputes which are essentially of a civil nature are frequently resolved (or attempts made to resolve them) through bringing criminal charges under the Act. In no less than three reported cases the courts have strongly condemned this practice (See S V ZIKI 1965 (4) SA 14 E, S V BROWN 1978 (1) SA 305 NC and R V VENTER 1961 (1) SA 363 T).

It appears that a clear distinction should be drawn between situations where there is a disturbance of possession (eg the presence of an intruder at night for no apparent

good reason) and a deprivation of possession (eg the occupation of land where there is no immediate threat to the safety or property of the lawful occupier). In the latter case, civil remedies are more appropriate and the scope of any trespass legislation should be narrow enough to ensure that it cannot be used, or that attempts be made to use it, in such circumstances.

Two alternatives suggest themselves. Either the Trespass Act is abolished or amended in favour of a more limited statute that is focused directly on the legal interest that requires protection, the right of lawful occupiers to undisturbed possession of their property. Alternatively, more robust civil procedures should be introduced that provide speedy and inexpensive relief to lawful occupiers.

In the latter regard, the English law provision (see Lord Hailsham, "Halsburys Laws of England", Vol 11(1),4th ed, Butterworths, 1985, para 165) which empowers police officers to direct trespassers to leave land, could be adapted to South African conditions.

In English law, a police officer who reasonably believes that two or more people have entered land as trespassers and have the common purpose of residing there for a period, may, where the occupier has taken reasonable steps to ask them to leave the land, order them to leave the land. The police officer must also have reasonable grounds for believing that the people have caused damage to property on the land or threatened or insulted the lawful occupiers or their families and that the people have brought twelve or more vehicles onto the land.

Failure to leave as soon as reasonably possible when instructed to do so or returning within three months of having been instructed to leave is a criminal offence.

For South African purposes, police officers could be empowered to order people, who they on reasonable grounds believe, have without good reason entered without

permission lawfully occupied land or buildings, to leave the premises. People who are peacefully residing on or occupying the premises should be specifically exempted from the provision.

Failure to comply with such an instruction should be an offence in the same vein as failure to furnish a police officer with ones name and address.

If a criminal sanction is deemed more appropriate, the scope of the offence should be restricted to the purpose underlying the enactment, namely the prevention of intrusions likely to lead to breaches of the peace or pose a threat to lawful occupiers.

Accordingly, people who are peacefully occupying or residing on or in the land or buildings should be specifically excluded from the scope of the provision.

The offence should only relate to land or buildings that are lawfully occupied, although the presence of the occupants at the time should not be required to constitute the offence.

The requirement of lawful reason or good cause to enter the premises without permission of the lawful occupants should be part of the offence itself and not an excuse or exception to the offence, so that the onus of establishing the absence of lawful reason would fall on the prosecution.

The present section 1(2) of the Act which excludes a servant of the lawful occupier from being a lawful occupier with regard to buildings should be scrapped in its entirety.

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