

# INFORMAL TRADE IN SOUTH AFRICA

## Legislation, Case Law and Recommendations for Local Government



June 2018

**SERI**

socio-economic rights institute  
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## Acknowledgments

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This research paper was produced by the Socio-Economic Rights Institute of South Africa (SERI), in collaboration with the South African Local Government Association (SALGA). The paper was written by Tim Fish Hodgson (former senior researcher at SERI) and Michael Clark (senior research associate at SERI), and edited by Alana Potter (SERI's director of research and advocacy), Stuart Wilson (SERI's executive director) and Charles Parkerson (SALGA's economic development director).

The research paper forms part of two documents that have been developed to assist municipal councils and local government officials in understanding their legal duties in relation to informal trade. The second paper is a discussion document, entitled *Towards Recommendations on the Regulation of Informal Trade at Local Government Level* (June 2018), which sets out a number of recommendations and proposals on the regulation of informal trade.

Photos by Thomas Coggin Jonathan Torgovnik. The photos on page 33 were taken by Greg Nicholson.

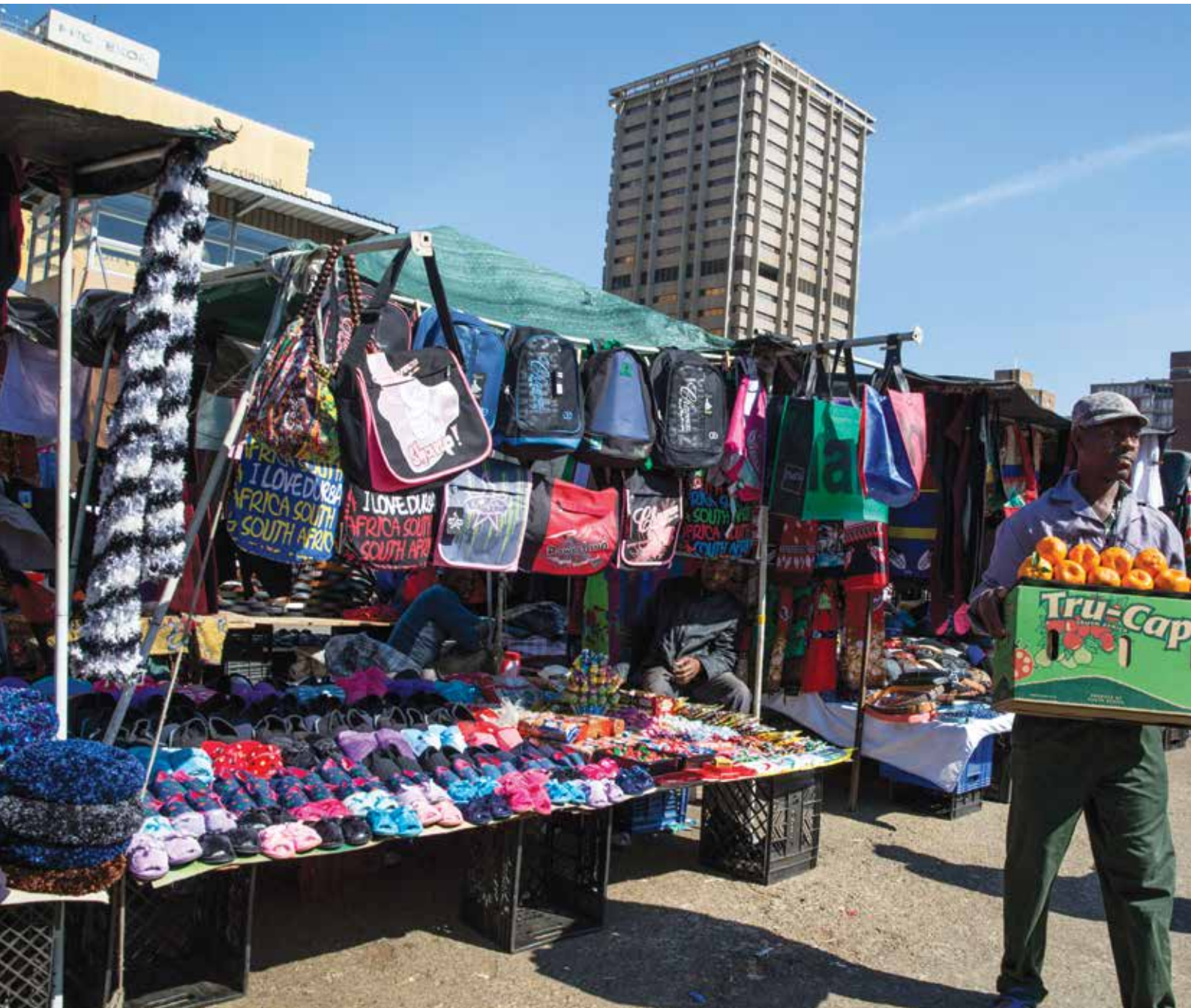


# **INFORMAL TRADE IN SOUTH AFRICA**

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# 1. INTRODUCTION

*“[T]he nature of the [informal] trading sector is such that unless officials are orientated to be empathetic towards street traders, the risk of powerful officials mistreating powerless poor people is real.”<sup>1</sup>*

South Africa faces a number of developmental challenges, including high levels of unemployment, poverty and accelerated rates of rural-urban migration. Informal trade has an important role to play in addressing these challenges. According to Statistics South Africa (Stats SA)’s April – June 2017 Quarterly Labour Force Survey (QLFS), 2 689 000 South Africans reported working in the informal sector. Of these people, approximately 1 101 000 or 41% are in informal trade. Informal trade therefore makes up a significant component of the economy. It is for this reason that the national government has acknowledged that it is important to ensure that the informal sector, and consequently informal trade, is given room to develop and flourish. The National Development Plan, for example, sees the informal sector creating between 1.2 and 2 million new jobs by 2030.<sup>2</sup>

During the apartheid era the law regarded informal traders as a nuisance by often merely placing responsibility for regulation of street trade on the traffic department.<sup>3</sup> In 1991, as part of the transition from apartheid-style regulation, the Businesses Act 71 of 1991 (the Businesses Act) was passed. The Act represents a “legal turnabout from a situation where traders could not trade (with few exceptions) to a situation where traders could trade freely (with few exceptions)”.<sup>4</sup>

Local government has a crucial role to play in developing a supportive and facilitative regulatory and policy environment for informal trade. South Africa’s Constitution confirms that local government has an obligation to facilitate economic development at municipal level. This is clear from section 152(2) of the Constitution, which lists the promotion of social and economic development as a primary objective of local government.<sup>5</sup> The Businesses Act, which must be interpreted “through the prism of the Bill of Rights”,<sup>6</sup> also gives local government broad powers to regulate informal trade.<sup>7</sup> In most instances, municipalities govern informal trade by passing municipal by-laws and formulating informal trade policies or plans. In practice, this is often where the constitutional duty on local government to enable informal trade falls by the wayside. As a result, despite local government’s duty to facilitate and promote (rather than restrict and control) informal trade,

*“there are a number of flaws in current policy and by-laws, intended to protect municipalities rather than empower traders. By-laws in particular are focusing on the ‘don’ts’, not on the ‘does’.”<sup>8</sup>*



This restrictive approach is inconsistent with the constitutional rights of informal traders. It is also mirrored in the daily experiences of street traders who are largely poor, often powerless and mostly plying their trades to earn a meagre living as a “survivalist strategy”.<sup>9</sup> It is therefore unsurprising that the South African courts have criticised the often heavy-handed approaches of officials tasked with the implementation of municipal by-laws on informal trade and implored them to be “empathetic towards street traders”.<sup>10</sup>

The aim of this research paper is to provide assistance to the South African Local Government Association (SALGA) and municipalities throughout the country to encourage a better understanding of the legal and constitutional obligations of local government in formulating and implementing municipal by-laws governing informal trade. In order to ensure that they do not fall foul of the appropriate constitutional standards, municipal councils and local government officials should understand their duties and obligations in the constitutional context.

For this reason, this paper takes stock of the national laws governing informal trade, focusing particularly on the Constitution and the Businesses Act.<sup>11</sup> The paper then turns to what the South African courts have said about the rights of informal traders in terms of the Constitution. It does so by examining four key cases dealing with the rights of informal traders. Three of these cases resulted in court judgments: *SAITF*,<sup>12</sup> *Somali Association*,<sup>13</sup> and *Makwickana*.<sup>14</sup> In the fourth case – *Thipe*<sup>15</sup> – a group of informal traders who were unlawfully removed from their trading areas reached an agreement with the City of Tshwane. The settlement agreement was made an order of court (with legally binding effect). Although the majority of these cases dealt with the unlawful removal or eviction of informal traders from the areas where they were trading, the cases also provide clarity on the rights of informal traders. The cases therefore highlight a number of faultlines on how municipalities and government officials have approached informal trade.



## Structure of the paper

### Section two of this paper

This section describes the legal framework governing informal trade in an attempt to assist local government in understanding their legal duties. This section is focused on the Constitution and the Businesses Act.

### Section three of this paper

This section deals with the constitutional right to human dignity, which the South African courts have found to grant informal traders the right to participate in informal trade. The section will show that the rights of informal traders to participate in informal trade has clearly and repeatedly been affirmed by our courts.

### Section four of this paper

This section clarifies that the right to trade applies to “everyone” (including non-citizens that are lawfully in South Africa) by analysing the Supreme Court of Appeal (SCA)’s judgment in *Somali Traders*. This case indicates that our courts will not tolerate xenophobia or unfair discrimination, including discriminatory by-laws that prevent foreign nationals from accessing informal trade licenses or permits and the discriminatory enforcement of by-laws.

### Section five of this paper

This section deals with the power of law enforcement officials to impound or confiscate informal traders’ goods if informal traders fail to comply with municipal by-laws. Using the *Makwickana* case, this section explains that informal traders’ constitutional rights to property, equality and access to courts may be violated by municipal by-laws that permit the impoundment of goods for “less serious, formal non-compliance” (like trading without producing proof of a permit). As a result by-laws that give overly broad powers of impoundment to law enforcement officials are likely to be unconstitutional. The *Makwickana* case also highlights that the decisions of local officials to impound goods, reject traders’ license applications or relocate traders to other areas are administrative decisions. This means that any decision by a government official or person exercising a public power that adversely affects the rights of informal traders has to be lawful, reasonable and procedurally fair. Traders are also entitled to written reasons for administrative decisions.



## Section six of this paper

This section deals with the lawful processes that municipalities must follow if they seek to relocate informal traders from one area to another. This section draws on two critically important court cases – *SAITF* (which was decided in the Constitutional Court) and *Thipe* (which was decided in the Pretoria High Court). Using these cases, this section shows that the lawful processes set out in the Businesses Act and the Constitution must be followed when authorities attempt to relocate traders either individually, in small groups or in large numbers. If a municipality fails to respect the rights of informal traders and fails to follow the legal processes laid out in the Businesses Act, the relocation of informal traders will be unlawful. This would mean that the relocation could be set aside by a court, as was done in the case of Operation Clean Sweep in Johannesburg. It could also result in municipalities being held liable to pay civil damages for the financial losses incurred by informal traders as a result of the relocation or eviction. This section will show that municipalities are legally required to follow the processes set out in the Businesses Act, regardless of how desirable or convenient a relocation might be.

## Section seven of this paper

This section concludes with some recommendations for municipal councils and local government officials that relate to the formulation, assessment and enforcement of by-laws and policies governing informal trade. It is hoped that these recommendations, which are based on the legal framework and the court judgments governing informal trade, will act as a guide for local government officials in interpreting, understanding and adapting their existing by-laws or policies to ensure that they are in line with the Constitution.



## 2. LEGAL FRAMEWORK GOVERNING INFORMAL TRADE

A number of laws and policies have been put in place to give effect to informal trading in South Africa. This includes a number of rights and protections set out in the Constitution, the Businesses Act and municipal by-laws and policies. Despite these protections, informal traders often remain vulnerable.

For the most part, informal trade is regulated through by-laws or policies that apply within a particular municipal area (the Businesses Act gives municipalities the power to adopt these by-laws subject to certain limitations). Although municipal by-laws governing informal trade are subject to the rights set out in the Constitution and the Businesses Act, municipalities have considerable scope to regulate informal trade within the boundaries of their municipal areas.

### 2.1 THE CONSTITUTION

In 1996, South Africa adopted the final version of the Constitution after a long process of constitutional negotiations with a range of political parties. The Constitution is the supreme law of South Africa,<sup>16</sup> which means that all laws and policies must be consistent with it. The Constitution contains a number of fundamental rights and protections associated with informal trade in the Bill of Rights, including the rights to human dignity, equality, to choose one's trade, occupation or profession, and just administrative action.

Two overarching principles that govern the regulation of informal trade are the *rights to equality* and *human dignity*. According to section 9 of the Constitution, everyone is equal before the law and everyone is entitled to equal protection and benefit of the law.<sup>17</sup> This provision also includes a right not to be unfairly discriminated against on any ground, including race, gender, sex, ethnic or social origin or any other ground.<sup>18</sup>

Section 10 of the Constitution enshrines the right to human dignity. This provision states that everyone has the right to inherent dignity and to have their dignity respected and protected.<sup>19</sup> The South African courts have found that the right to human dignity is integrally connected to the informal traders' ability to participate in and carry on informal trade (this is clear from *Somali Association and SAITF*).<sup>20</sup>

The Constitution also provides, in section 22, that “[e]ach citizen has the *right to choose their trade, occupation or profession* freely”. However, this provision is also qualified by a provision that states that the “practice of a trade, occupation or profession may be regulated by the law”. Therefore, while the freedom to trade extends to informal traders, the Constitution provides that informal trade may be regulated by the state in legislation or policy documents. The Businesses Act is the piece of legislation that regulates informal trade. The Act expressly grants municipalities the power to regulate informal trade by enacting municipal by-laws on informal trade. It should be noted that any regulation of the right to participate in and carry on informal trade is still required to give effect to a range of other fundamental constitutional rights. The power to regulate informal trade is therefore not an unlimited power for municipalities to do as they see fit with informal trade.

Section 25 prohibits the arbitrary deprivation of *property* by stating that no one may be deprived of their property unless such deprivation is provided for in terms of a law of general application.<sup>21</sup> In essence, this provision means that legislation may provide for a person to be deprived of his or her property, but only if the deprivation will serve a legitimate governmental purpose.<sup>22</sup> The right not to be arbitrarily deprived of property is particularly important in the context of informal trade as municipal by-laws often give local government officials the power to confiscate or impound informal traders’ goods as a measure to ensure compliance with by-laws. As will be discussed in more detail below, by-laws that enable law enforcement officials to confiscate or impound informal traders’ goods may not always be constitutional.<sup>23</sup>

Another important component of the legal framework governing informal trade, is the constitutional right to *just administrative action*, which is enshrined in section 33 of the Constitution. Administrative law is the form of law that governs the exercise of public power or the performance of public functions.<sup>24</sup> This is the branch of law that regulates the action of government bodies, government officials and any companies that perform public functions on behalf of the government (for example, companies that perform government functions in terms of an outsourcing agreement).<sup>25</sup> Section 33(1) provides that everyone has the right to administrative action which is *lawful, reasonable* and *procedurally fair*. This means that, when making an administrative decision, local government officials must ensure that they act lawfully, reasonably and in a manner which is procedurally fair. There are many decisions related to informal trade that would constitute administrative decisions, including:

- decisions to grant, suspend, revoke or withhold a trading license or permit,
- decisions to impose any conditions or restrictions on a trading license or permit,
- decisions to impound or confiscate informal traders’ goods, or
- decisions to relocate or evict informal traders from their stalls.





If any of the above decisions are taken by a local government official and the decision is not lawful, reasonable and procedurally fair, the informal traders who are adversely affected by the decisions may approach a court to have the decision reviewed and set aside (this essentially means that the decision will be undone by a court).<sup>26</sup> Section 33(2) further provides that anyone whose rights are adversely affected by an administrative action has the right to be given written *reasons* explaining why the decision was taken.<sup>27</sup>

The area of law regulating just administrative action has been spelled out in more detail in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and various decisions of South African courts. This paper provides a brief summary of some of the most important aspect of administrative law below:

- *Lawfulness* essentially means that any action taken by a government official must be allowed in, and exercised strictly in terms of, the law or by-law that gives the official the power to act.<sup>28</sup> In the context of informal trade, this will usually mean either the Businesses Act or the specific municipal by-law. Lawfulness therefore ensures that only those officials that are specifically given the power to do something are allowed to do so, and that officials do not abuse their powers. For example, if a municipal by-law only allows police officers of a certain rank to impound goods, then only police officers of that rank are able to do so. Decisions should also be carefully considered and should not be taken arbitrarily.
- Any action taken by an official must be *reasonable*. This means, at the very least, that any action must be rational (the action must be rationally or logically linked to the purpose that the official wanted to achieve) and proportional (the action or means used by the official should be well-tailored or proportionate to the purpose the official wanted to achieve).<sup>29</sup> For example, it would be unreasonable for a local government official to impound an informal traders' goods because his or her trading stall is untidy or his or her merchandise is only a little outside of the demarcated stall line. This is because the action (impounding the traders' goods) is not rationally or proportionally connected to the goal that the official seeks to achieve (to get the trader to clean up his stall or move his goods to inside the demarcated line).
- All actions by local government officials must also be *procedurally fair*. This means that, if a decision or action by an official negatively affects an informal trader, the informal trader should be afforded the opportunity to present their case to the official and have an impartial and proper hearing.<sup>30</sup> The context within which the decision is taken will, of course, play a role in determining how extensive the process should be, but in all cases, the process should be fair.
- Finally, informal traders may also require officials to justify their actions by requesting written *reasons* for a decision. If reasons are requested, they should be specific, written in clear and plain language, and provide a justification for the decision.<sup>31</sup> For example, if an informal trader applies for a trading license and the municipality does not grant him or her a license, he or she could ask for the municipality to explain why his or her application was unsuccessful.

In addition, section 7 of the Constitution mandates the state to “respect, protect, promote and fulfil” the rights contained in the Bill of Rights. Although these obligations are interconnected, the duties these obligations place on the state differ in practice.<sup>32</sup> The obligation to “respect” places a duty on the state not to impair the existing rights of informal traders. In other words, the state must refrain from interfering directly or indirectly with the rights that informal traders have realised for themselves. The state would fail to comply with this obligation if it were to pass legislation that weakens the rights that informal traders already have. The obligation to “protect” requires the state to take measures to prevent others, including individuals, groups and corporations, from interfering

with the rights of informal traders. The Businesses Act is an example of a legislative measure that the state passed to protect the rights of informal traders. However, this obligation does not end with the passing of protective legislation, it also requires that the state ensure that the protective legislation is effectively implemented in practice. The obligation to “promote” and to “fulfil” the rights in the Constitution requires that the state to “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realisation of the right”.<sup>33</sup>

## 2.2 THE BUSINESSES ACT

The Businesses Act 72 of 1991 (the Businesses Act) is the primary piece of legislation governing informal trade in South Africa. The Act brought about a significant shift in how informal trade was governed in South Africa by effectively inverting the legal framework – from a framework primarily aimed at repressing, persecuting and prosecuting informal economic activities; to a framework which recognises informal trade as a critical sector that contributes to the economy and peoples’ ability to support themselves.<sup>34</sup> The Act was a key measure in deregulating business activities by removing the barriers to informal trade.<sup>35</sup> As Caroline Skinner, a senior researcher at the African Centre for Cities (ACC) at the University of Cape Town, writes:

*“[The Businesses Act] sought to reduce the powers of local authorities to develop and implement laws that would restrict informal trading. Thus legally there was a complete turnabout from a situation where traders were not being allowed to trade, with few exceptions, to traders being allowed to trade freely, with a few exceptions.”<sup>36</sup>*

The Businesses Act regulates a number of issues that are related to informal trade, including issuing trading permits or licenses (particularly with regard to the selling of meals and perishable foodstuffs);<sup>37</sup> the right to have written notice of why a license request was denied or repealed and the reasons for this;<sup>38</sup> makes provision for the opportunity to appeal a decision to issue or refuse a trading permit or license;<sup>39</sup> provisions relating to fines and criminal offenses associated with non-compliance;<sup>40</sup> regulations;<sup>41</sup> and the power of local authorities regarding informal traders.<sup>42</sup>

In 1993, the Businesses Act was amended by the Businesses Amendment Act 186 of 1993 (the Businesses Amendment Act). The Businesses Amendment Act introduced section 6A into the Act, which gave municipalities more powers to restrict informal trading in their municipal areas by allowing municipalities to formulate by-laws that govern informal trade and allowing municipalities to declare informal trade to be restricted and prohibited in certain geographic areas. In effect, the Amendment Act gave municipalities more powers to decide how to regulate informal trade. The effect of the Amendment Act has been that different municipalities across the country have adopted vastly different approaches to informal trade within their municipal areas.

Section 6A(1)(a) of the amended Act provides that municipalities are empowered to make by-laws about the supervision and control of street vendors, pedlars or hawkers; and provides a detailed list of exceptions in terms of which informal trade may be regulated. This means that the provision essentially allows municipalities to make by-laws that regulate, restrict or prohibit trading in a specific area. Section 6A(1)(c) enables municipalities to provide for trading permits or licenses to be issued in order for informal traders to carry on informal trade at a specific location or stand. Section 6A(1)(d) provides for mechanisms through which municipalities can enforce their informal trade by-laws, by empowering municipalities to provide for penalties (in the form of fines or imprisonment) or the impoundment of goods in cases of non-compliance.

Section 6A(2) of the Businesses Act sets out a detailed process that a municipality must follow in order to legally restrict or prohibit informal trading in an area (or if a municipality seeks to relocate existing informal traders from one area to another).<sup>43</sup> A municipality is legally required to follow this process. If it does not follow the process laid out in the law, the restriction or prohibition of informal trade is unlawful and can be set aside by a court. The process consists of various steps, most of which are aimed at ensuring that informal traders and others who are directly affected by the decision to restrict or prohibit trade have the opportunity to challenge the plans of the municipality. These steps have to be followed by municipalities in the order that they appear in the Act.

## THE STEPS TO PROHIBIT OR RESTRICT INFORMAL TRADE ARE:

1. **Investigation:** Before a municipality can consider restricting or prohibiting trading in an area, section 6A(2)(c) of the Businesses Act provides that the municipality must investigate how its decision to prohibit or restrict informal trade will affect informal traders. This is important because municipalities are required to encourage informal trade in their areas and should usually not make decisions that have a negative impact on informal trade. When the municipality is doing this investigation, it is required to consider two issues:
  - Firstly, the municipality should consider whether the aims it wants to achieve can be achieved by more effective supervision or control of informal trade in the area. This could include negotiating with informal traders or informal trade organisations and considering alternative management models. If the municipality could achieve its aims in this way, it is not allowed to prohibit trading in the area.
  - Secondly, the municipality has to investigate whether restricting or prohibiting trading in an area would mean that traders would go out of business. For example, sometimes informal traders trade close to transport interchanges or in places where there is considerable pedestrian traffic. If traders are prohibited from trading in those areas, it could mean that they would not have as many customers and that some could go out of business. The municipality has to investigate whether this could happen if it restricts or prohibits trading in an area.
2. **Council resolution:** After this investigation, a municipality can resolve to take steps to restrict or prohibit trading in an area. This is done by passing a resolution in the city council.
3. **Develop a plan:** The municipality must then draw up a plan to show in which areas it wants to restrict or prohibit informal trade.
4. **Public consultation on the plan:** A municipality is then required to publish a notice in a local newspaper. This notice must state that the municipality wants to restrict or prohibit informal trade in a specific area, give reasons for why it wants to do this and say that the plan it drew up is available at a specific place so that the public can inspect it. The municipality must then allow at least 21 days for the public to inspect the plan, consider it and submit comments or objections to the plan. The municipality must consider every objection made against the plan.
5. **Issue declaration restricting or prohibiting informal trader in an area:** Only after the municipality has considered every objection made against the plan can it declare informal trade prohibited in the area. The decision to prohibit trade must be published in the Government Gazette (the government's newspaper in which it publishes laws and by-laws).





6. **Premier can amend or revoke council resolution:** After a municipality has resolved to restrict or prohibit trading in an area, the Premier of the province has the power to amend or revoke the council resolution. The Premier must do this within 60 days after the decision of the municipality is published in the Government Gazette. The Premier must speak to the municipality before he or she can do this.
7. **Enforce restriction or prohibition:** Only after all of the above steps have been followed are municipalities entitled to enforce the restriction or prohibition of informal trade in the area concerned.

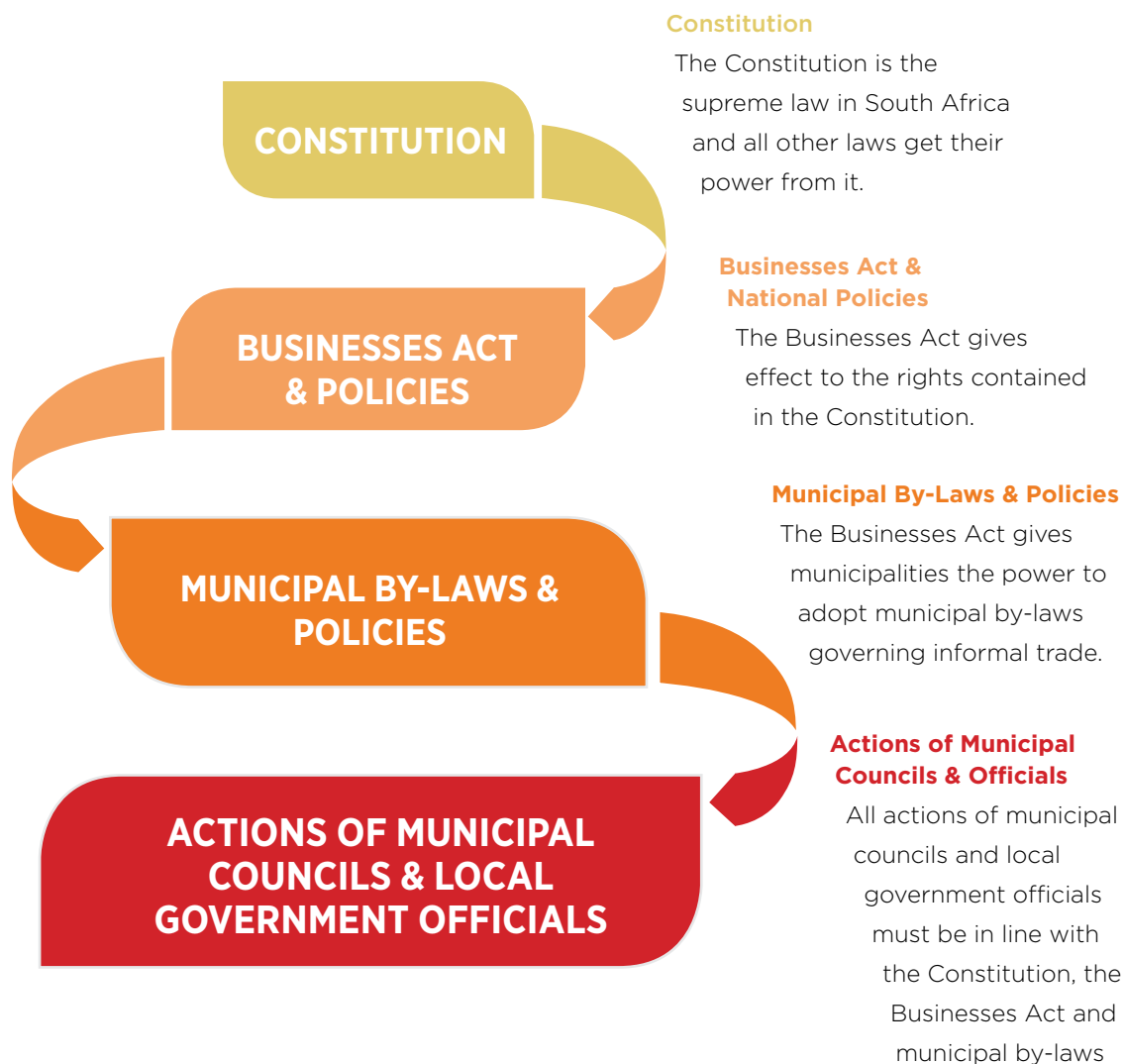
The Businesses Act therefore firmly places the regulation and enablement of informal trade in the hands of local government, while also providing clear guidelines on what actions local government is entitled to take in certain circumstances.

## 2.3 MUNICIPAL BY-LAWS

Another critical form of the regulation of informal trade is municipal by-laws that each municipal council can adopt in order to enable, regulate and control informal trade within its municipal area. As this paper shows, the Businesses Act give municipalities the power to adopt these by-laws subject to certain limitations.

Any municipal by-law has to comply with the provisions of the Constitution and the Businesses Act. It is clear then that the supremacy of the Constitution means that all actions and decisions of local government officials must be in line with the Constitution. All municipal councils and officials must consider their constitutional obligations in the context of policy formulation and its implementation on informal trade.

### The Hierarchy of Laws









### 3. THE RIGHT TO TRADE

The South African courts have clearly indicated that the social context of informal traders is crucial to determining the content of their constitutional rights. In this light, our courts have recognised the important role that informal trade plays in South Africa with a reference to our high rates of poverty and unemployment. These are indeed serious developmental challenges facing South Africa. Roughly 28% of working-age adults in South Africa are unemployed, with even higher rates of unemployment among employable youth.<sup>44</sup> In a country where employment opportunities are rare and social grants – which are only available to a narrow group of individuals – are insufficient to cover all of a family’s needs, it is unsurprising that many people resort to informal self-employment to make ends meet by selling small quantities of consumer goods (sweets, tissues, cigarettes, clothing, fruits and vegetables etc) or providing informal services (hairdressing, shoe and clothing repair etc).<sup>45</sup> These jobs are what experts describe as “survivalist strategies”.

Informal traders therefore often engage in informal trade to provide for their families’ basic needs and protect their and their families’ dignity. In the *SAITF* case, the Constitutional Court explicitly acknowledged this by stating that:

*“[t]he ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it [informal traders] faced ‘humiliation and degradation’. Most traders, we were told, have dependants. Many of these dependants are children...”*<sup>46</sup>

The Constitutional Court also acknowledged that an inability to trade will often mean that families are incapable of providing for their basic needs such as food, shelter and medical services thereby violating their rights to nutrition, access to housing and access to health care services.<sup>47</sup>

In *Somali Association*, the Supreme Court of Appeal (SCA) accepted that some of the informal traders were in “dire financial straits”, “destitute” and “unable to buy food or support their families”.<sup>48</sup> For this reason, the SCA found that disallowing informal trade violates the right to dignity of persons who, having no realistic possibility of employment, would be rendered destitute in the absence of the right to trade. As the court stated:

*“[I]n circumstances such as this, where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated... [I]f, because of circumstances [a person] is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade ... such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade...”*<sup>49</sup>

This means that both the Constitutional Court and the SCA accept that there is a general right for informal traders to make a living through trade as part of the constitutional right to human dignity. The importance of this recognition should not be underestimated. The right to dignity is both an enforceable right enshrined in the Constitution<sup>50</sup> and a fundamental value underpinning all of the other rights contained in the Constitution.<sup>51</sup> The Constitutional Court has referred to human dignity as the “fountain of all rights”<sup>52</sup> and the “cornerstone of our Constitution”.<sup>53</sup>

Informal traders' right to trade therefore goes to the very core of the South Africa's constitutional democracy. It is with this in mind that municipalities must develop and implement by-laws on informal trade and comply with the requirements of the Businesses Act.





## 4. WHO HAS THE RIGHT TO TRADE?

*“The authorities must also guard against unwittingly fuelling xenophobia... Put differently, if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid.”<sup>54</sup>*

The right to dignity, like the overwhelming majority of rights in the Constitution, is afforded to “everyone”. Section 10 of the Constitution reads:

*“Everyone has inherent dignity and the right to have their dignity respected and protected.”*

The Constitutional Court has said that when the Constitution says everyone it means just that – everyone – and that this “cannot be construed as referring only to ‘citizens’”.<sup>55</sup> This means that everyone in South Africa has a right to human dignity, including foreign nationals.

This approach was also specifically affirmed in the *Somali Association* case in relation to refugees and asylum seekers that are in South Africa lawfully in terms the Refugees Act 130 of 1998 (the Refugees Act).






## SOMALI ASSOCIATION OF SOUTH AFRICA V LIMPOPO DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM

In early 2013, a large number of lawful Ethiopian and Somali nationals who were legally working as informal traders by selling commercial goods and running spaza shops in Musina, Limpopo, were forcibly prevented from carrying on their businesses as part of the Limpopo Department of Economic Development, Environment and Tourism (the Department)'s "Operation Hardstick". During the operation, the South African Police Services (SAPS) shut down over 600 businesses on the basis that these businesses were trading without licenses, confiscated informal traders' equipment and stock, and arrested traders and their employees. The majority of the businesses that were shut down were run by either Somali or Ethiopian refugees or asylum seekers. Many of these traders had valid trading license or permits, while others did not.

The traders who did not have valid trading licenses claimed that the Department refused to award trading licenses to refugees and asylum seekers (even if they were in the country lawfully), because the Department claimed that only South African citizens were entitled to these licenses. Some managed to get temporary business permits but were closed down in spite of being in possession of these permits. Some traders were told that they required building plans to get trading permits, while others were told that their landlords had to apply for trading permits on their behalf. When the informal traders' landlords applied for these permits, their businesses were nevertheless shut down as they were told that they could not operate businesses on behalf of their landlords.

Those whose businesses were shut down in terms of "Operation Hardstick" were issued with Admission of Guilt fines and their stock was confiscated. The police did not provide the informal traders whose stock was confiscated with itemised lists of confiscated stock. This meant that when traders paid their fines, their stock could not be returned to them.

A large number of the informal traders were members of the Somali Association of South Africa and the Ethiopian Community of South Africa, two non-profit organisations that promote and protect the interests of foreign nationals who originate from those countries, and turned to these organisations for assistance. With the help of Lawyers for Human Rights (LHR), a public interest legal services organisation, the traders argued in the SCA that "Operation Hardstick" and the refusal of municipal officials to allow them to apply for, obtain and renew trading permits violated the constitutional rights of informal traders.



The SCA found that the informal traders, as refugees in South Africa, enjoy the protection of constitutional rights allocated to “everyone”. The court recognised that the constitutional right to human dignity requires that the traders should be able to earn an income. Earning an income ensures that traders are afforded the “ability to live without positive humiliation and degradation”.<sup>56</sup> This, the court concluded, is the case irrespective of whether such employment is “wage-earning employment” or “self-employment”.<sup>57</sup>

The SCA also registered a sharp warning about the danger of “fuelling xenophobia” in the current social context where it is increasingly prevalent. In this case, the traders alleged that SAPS, who were responsible for implementing “Operation Hardstick”, repeatedly told traders that “foreigners are not allowed to operate businesses in South Africa”, that “asylum seeker and refugee permits ... did not entitle them to operate a business in South Africa”; and that “foreigners should leave the municipality”.<sup>58</sup> The court’s condemnation should be taken on board by municipalities and SAPS alike. As the court stated:

*“When, during argument before us, we enquired of counsel what was to happen to destitute asylum seekers and refugees, no answer was forthcoming. There appeared to be some suggestion that, regrettably, some persons might be left to their destitution. This attitude is unacceptable and contrary to constitutional values. The frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations. It must especially not be allowed to diminish their humanity. The authorities must also guard against unwittingly fuelling xenophobia. In the present case, one is left with the uneasy feeling that the stance adopted by the authorities in relation to the licensing of spaza shops and tuck-shops was in order to induce foreign nationals who were destitute to leave our shores. The answer to the frustration experienced by [the provincial government] is to facilitate and expedite applications for refugee status.”<sup>59</sup>*

The court therefore declared the closure of the Somali and Ethiopian traders’ businesses in terms of “Operation Hardstick” unlawful and issued an order declaring that asylum seekers and refugees were entitled to apply for or renew business or trading licences in terms the Businesses Act or relevant municipal by-laws, or apply for or renew written consent to operate tuck-shops or spaza shops in terms of the relevant zoning laws.

The *Somali Association* case therefore unequivocally affirms that foreign national have the right to participate in and carry on informal trade and highlights how the South African courts understand the constitutional rights of foreign nationals more generally. This is consistent with our courts’ approaches in other cases related to the rights of foreign nationals.<sup>60</sup>







## 5. THE IMPOUNDMENT OF GOODS

*“Impoundment is a necessary measure for absolute prohibitions against street trading, that is, those that are a direct and immediate threat to the public. Not all contraventions of a by-law can validly result in impoundment ... Less serious, formal non-compliances such as trading without producing proof of a permit ... [does] not pose a threat to the public”.<sup>61</sup>*

Section 6A of the Businesses Act grants municipalities the power to pass by-laws to regulate various aspects of informal trade. As mentioned above, these by-laws cannot be inconsistent with the Constitution or they will be unlawful and could be declared invalid by a court. In addition, the state’s obligation to respect, protect, promote and fulfil *all* of the rights in Constitution mean that any municipal by-laws should protect and promote informal trade by aiming to facilitate lawful trade. The object of municipal by-laws is therefore to enhance and organise traders’ rights, not eliminate them.

Informal traders’ goods are fundamental to their livelihoods and business operations. The temporary or permanent impoundment of an informal traders’ goods can therefore have an enormous impact on the continued viability of their businesses and their ability to cater for their and their families’ basic needs. Although the Businesses Act provides that municipalities “may” make regulations permitting the impoundment of goods in certain circumstances,<sup>62</sup> it is a power which should be provided for narrowly, used sparingly and applied with sensitivity towards traders’ rights.

In addition to ensure that informal traders’ rights are not violated, when a municipal official or law enforcement official makes a decision to impound or confiscate goods in terms of a by-law or the Businesses Act, that official makes an **administrative decision** which must comply with the requirements of administrative law. Amongst other things, this means that he or she must act within his or her lawful authority and with a proper purpose. The body of rules that sets out the standards that all **administrative action** must comply with is called administrative law.

After detailing the facts of the *Makwickana* case, which deals with impoundment, this paper analyses how the impoundment of goods can violate the rights of informal traders; and how the impoundment of goods can fall short of the requirements for the lawful exercise of public power in terms of administrative law.

## MAKWICKANA V ETHEKWINI MUNICIPALITY

John Makwickana, a 65 year old man, made a living as an informal trader selling plastic and rubber sandals on the streets of eThekweni for over 20 years. Makwickana made a small profit on his stock, earning roughly R300 a week. He was the sole bread winner for his family of eight. His dependents included his wife, children and three grandchildren.

The relevant laws regulating the informal trade in eThekweni are the Businesses Act and the eThekweni Municipality Informal Trading By-Law, 2014. To operate his business Makwickana was required to pay a fee to acquire a trading permit with a photograph attached to it. In 1996, Makwickana obtained his permit. He later also procured a trading permit for his assistant. Allowing another person, without their own permit, to even temporarily operate their business was considered unlawful in terms of the municipal by-law. This meant that Makwickana and his assistant could not leave their trading stand, even to go to the toilet or get something to eat. Makwickana was also actively involved in informal traders community forums. He was the president of the Masibambasane Traders Association (MTA) and an active member of an organisation called Traders Against Crime.

On 6 August 2013, Makwickana set out his table at 7am and left to attend an MTA meeting. He left his assistant to attend to the table and conduct the day's business. At some stage during the day, Makwickana's assistant also left the table to get food - Makwickana's assistant did not go further than 20 metres from the table. Makwickana's assistant left his and Makwickana's trading permits with a neighbouring trader. When Makwickana's assistant returned to their trading spot, he found that a police officer had impounded 25 pairs of sandals valued at approximately R750. The police officer had left a receipt without providing information about where the goods would be kept or how they could be recovered. She also left a R300 fine. No itemised list of the impounded goods was taken, as is required in terms of the by-law. When Makwickana attempted to have his goods returned he was unable to do so, as the police claimed that his goods had been sold at auction or destroyed.

Makwickana, with the help of the Legal Resources Centre (LRC), approached the Durban High Court to obtain an order declaring the by-laws unconstitutional, reviewing and setting aside the decision of the police officer to impound his goods, and requiring the municipality to pay him compensation for the loss of his goods.

The Durban High Court recognised that Makwickana and his assistant's experience with the police "typif[ies] the abuse that street traders suffer at the hands of [eThekweni Municipality] officials" who "persist in harassing, intimidating and unlawful impounding [traders'] goods". Makwickana also claimed

that the municipal by-law was unconstitutional because it permitted municipal officials to impound goods “for all contraventions of the by-law or any other law”, regardless of whether these contraventions were serious infringements (for example, trading in an area where informal trade was specifically prohibited) or less serious instances where traders failed to comply with legal formalities (for example, trading in an area legally designated for informal trade without being able to show that the trading stand had been leased or showing a trading permit). In addition, in terms of the by-law, trading without a permit could result in a substantial fine of up to R5000 or imprisonment for a year.

## 5.1 IMPOUNDMENT AND ADMINISTRATIVE LAW

In *Makwickana*, the High Court decided that the impoundment of Makwickana’s property, was “an exercise of public power constituting an administrative action”.<sup>63</sup> The effect of this conclusion is that the decision to impound was required to be lawful, reasonable and procedurally fair and that Makwickana had the right to request written reasons for the decision to impound his goods. While a full discussion of the requirements of administrative law in the context of informal trade is beyond the scope of this paper, the basic principles and their application to Makwickana’s case are discussed briefly below.<sup>64</sup>





## The right to lawful decisions

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To comply with the lawfulness standard, when impounding goods, municipal officials are required to act within the legal authority granted to them in terms of the law. In the case of informal trade, this requires that municipal officials, at the very least, comply with the Constitution, the Businesses Act and the relevant municipal by-law governing informal trade. In addition, the by-laws made by municipalities in terms of the Business Act must stay within the bounds of the authority that the Act designated municipalities to create such by-laws.

In the *Makwickana* case the court decided that, unlike the Businesses Act, the eThekweni by-law did not distinguish between non-compliance with formalities (less serious contraventions of the by-law) and absolute prohibitions against trading (a more serious contravention of the by-law). The court found that this inconsistency meant that both the by-law and eThekweni officials' actions taken in terms of the by-law were unlawful. The court stated that this was because the municipality exceeded the lawful authority granted to it in terms of the Businesses Act by adopting a by-law that failed to distinguish between more and less serious contraventions of the by-law.

Other requirements of the lawfulness standard include:

- Decisions must be made by the specific person or entity that the law gives the power to make. For example, if a law or by-law gives a power to a city official, that power cannot be exercised by a police officer.
- Decisions that were lawfully made cannot be arbitrarily revoked. For example, a decision to grant an informal trader a trading license or permit cannot be randomly revoked without providing valid reasons.
- The person making the decision must understand and interpret the law and facts correctly.
- The person making the decision must take into account all of the relevant considerations and must ignore all of the irrelevant considerations.
- The person making the decision must not abuse his or her discretion by acting with an improper purpose.

This means that impounding informal traders' goods in order to harass, intimidate or teach the informal traders a lesson would be an improper purpose and would make the decision to impound the traders' goods unlawful. It would also be unlawful to impound informal traders' goods for the purpose of achieving an eviction of traders (as was the case in *SAITF*) or to impound goods in an attempt to discourage foreign nationals from participating in informal trade (as was the case in *Somali Association*).



## The right to reasonable decisions

For a decision to be reasonable it must be both **rational** and **proportional**. Any unreasonable decisions that are taken by municipal councils or local government officials would be unlawful and could be set aside by a court.

A **rational** decision is one in which there is a rational connection between the purpose for which the power is given and the decision. Rational decisions are not arbitrary and the person making the decision must be able to show that there is a clear, logical connection between the decision he or she made and the lawful government purpose that he or she wanted to achieve. For example, in the *SAITF* case, the City of Johannesburg could have acted with the lawful purpose of closing down the stalls of unlawful traders by doing just that. Instead it sought to evict all traders whether lawful or unlawful.<sup>65</sup> This could be argued to be irrational because the City's decision (to evict all the informal traders) is not rationally connected to its purpose (to evict unlawful traders).

A **proportional** decision is one in which the means taken are fair and balanced given the object that is sought to be achieved. Determining whether a decision is proportional requires balancing the impact of a particular decision against the lawful purpose that the decision is aiming to achieve. For example, in the *Makwickana* case, the decision to impound Makwickana's goods because he was not present at his trading stall is not proportional. This is because the measure taken (impoundment of goods) has a disproportionately harsh effect on Makwickana, when one considers the purpose that the police officer sought to achieve (to ensure that traders comply with legal formalities such as having a licensed trader at a trading stall for every minute of the day). The harsh impact of the decision therefore outweighs the purpose. Proportionality requires government officials to make use of **less restrictive measures** (measures that have a less harmful impact on informal traders) before making use of more restrictive measures (such as impounding a trader's goods).

## The right to procedurally fair decisions

The requirement of procedural fairness means that before a municipal council or government official takes a final decision that is likely to effect the rights of informal traders, the informal traders should be given an opportunity to explain their side of the issue or be heard. In addition, procedural fairness also requires that the person making the decision is neutral, impartial and unbiased.

The right to be heard could take different forms depending on the situation and the type of decision taken. This could range from a right to adequate notice of the decision that has been or will be taken, the right to make representations (explain their side of the issue) and even the right to a fair hearing. In the *Makwickana* case, neither

Makwickana nor his assistant were there at the time the decision was made. They were not given any opportunity to make representations whatsoever nor were they given any notice of the decision. They merely returned to the stall to discover that the goods had been impounded. The court therefore concluded that the decision to impound the goods was "procedurally unfair".

The court also mentioned that there was doubt about whether the police officer that impounded Makwickana's goods acted impartially. The court noted that "the nature of the sector is such that unless officials are orientated to be empathetic towards street traders, the risk of powerful officials mistreating powerless poor people is real".<sup>66</sup>

## The right to reasons

Because of the serious effect that administrative decisions like the decision to impound an informal traders' goods can have on his or her rights, the trader whose rights were adversely affected by such a decision has a right to request written reasons for the decision. If requested, **adequate reasons** must be provided by the person who made the decision **in writing**.

When giving reasons for a decision, municipal councils or local government officials must ensure that reasons are specific, set out in clear language, long and detailed enough to

be adequate in the specific circumstances, and clearly illustrate the full reasoning process that went into the decision. This means that the reasons that are provided by a government official cannot simply state the conclusions that the official reached. Instead, reasons should explain how the official understands the law that he or she was acting in terms of, how the official understands the facts, and why the official came to his or her decision. For example, if an official simply restates what he or she wrote on a fine, this will not be adequate.

## Conclusion

The court in *Makwickana* therefore concluded that the decision to impound Makwickana's goods violated the requirements that an administrative action should be lawful, reasonable and procedurally fair. All three findings – unlawfulness, unreasonableness and absence of procedural fairness – are alone sufficient to oblige a court to set the decision aside and declare it unlawful. The court therefore set aside the decision to impound Makwickana's goods and declared it unlawful.

It is important for municipal councils and local government officials to always be aware of the need for administrative decisions to be lawful, reasonable and procedurally fair.

## IMPOUNDMENT, CONFISCATION AND OTHER ADMINISTRATIVE DECISIONS

While this section of the paper and the *Makwickana* case deal primarily with impoundment, it is important to keep in mind that whenever a government official makes a decision in relation to informal traders their conduct will usually be subject to the constraints and protections provided for in administrative law. This means that most decisions taken by government official in relation to informal trade will be administrative decisions that need to be lawful, reasonable, and procedurally fair. This includes decisions to register, deregister, relocate or evict traders, and decisions to confiscate or impound their goods.

This becomes even more clear when one looks at the cases dealing with informal trade that have come before the South African courts. In *Somali Traders*, the decision to renew or reject foreign national's trading licenses or permits was an administrative decision that was subject to administrative law. In *Thipe*, the decision to evict the informal traders and confiscate their goods was an administrative decision that was subject to administrative law. In *SAITF*, the decision to relocate the informal traders was an administrative decision that was subject to administrative law. In terms of the law, all of these decisions must be lawful, reasonable and procedurally fair and the people making these decisions have a duty to provide written reasons for their decisions.



## 5.2 IMPOUNDMENT AND THE RIGHTS OF TRADERS

The court in the *Makwickana* case also found that eThekweni's by-laws could violate the rights of informal traders if the by-law was too restrictively framed or implemented. This was because of the provision that gave municipal officials the power to impound informal traders' goods for any violation of the by-laws (regardless of the seriousness of the violation). In *Makwickana's* case, the court found that the eThekweni by-laws violated his and other traders' rights of access to courts, property and equality.

### The right of access to courts

The right of access to courts is contained in section 34 of the Constitution. This section reads:

*“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”*

The right of access to courts has to do with the “importance of a fair resolution of social conflict by impartial and independent institutions”.<sup>67</sup> This right is violated in cases where legislation, a by-law or practice “effectively prevent disputes that could give rise to social conflict from reaching the courts”.<sup>68</sup>

It is in this context that the court in *Makwickana* explained that the provisions in eThekweni's informal trade by-law that deal with impoundment violated informal traders' right of access to the courts. According to the judge, the power to impound goods was not a problem on its own, but this power became a problem because it had the effect, when it was combined with other provisions, of “effectively prevent[ing] disputes ... from reaching the courts”.

The judge explained that the by-law permitted officials to impound informal traders' good for any contravention of the by-law (the by-laws did not distinguish between “less serious, formal non-compliance like trading without producing proof of a permit” and other more serious offences that “pose a threat to the public”).<sup>69</sup> Once a traders' goods had been impounded, his or her goods could be sold without notifying the trader of the sale. This meant that the impoundment was

no longer a temporary limitation of the informal trader's property rights, but could become a permanent confiscation. For the court, this meant that the by-laws allowed “officials [to] effectively confiscate the impounded goods” without due process or the intervention of a court.<sup>70</sup>

The judge found that *Makwickana* repeatedly attempted to have his goods returned or refunded, but his goods were either sold or lost before he could challenge the lawfulness of the impoundment in court (this was because the by-laws allowed for an informal traders' goods to be sold after three or six months, which would be before a court hearing could be arranged). For this reason, the by-law renders the refund or return of goods “theoretical as long as court proceedings are not finalised” and it does so without any opportunity for people in *Makwickana's* position to first be heard in court.<sup>71</sup>

The court warned that “the luxury of litigation is no option for every street trader whose property is impounded” and that often “employing legal assistance is not realistic”.<sup>72</sup> In fact, in *Makwickana's* case “having legal representation (unusual for street traders) to recover the goods did not improve his position either once the goods were disposed of”.<sup>73</sup>

In the end, the court said that both the fact that impoundment was permitted for all contraventions regardless of their seriousness and the power to dispose of street traders' property without having a judge or magistrate decide on the validity of the disposal violated *Makwickana's* right of access to court.

## The right to property

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The right to property is contained in section 25 of the Constitution. Section 25(1) of the Constitution reads:

*“No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”*

In the context of informal trade, the impoundment of informal traders' goods may sometimes affect their right not to be arbitrarily deprived of property.

In the *Makwickana* case, Makwickana was permanently deprived of his impounded sandals (his property). According to the court, the deprivation of property will be arbitrary if it does not take place for a “compelling” and legitimate governmental purpose. This means that the reason for the impoundment or deprivation must be compelling and legitimate. The court also found that the reason for the impoundment or deprivation must be balanced against the interests of the informal trader.

When the court did this in relation to the deprivation of Makwickana's sandals, it found that there was not a compelling reason for

depriving Makwickana of his goods because the effect that the deprivation had on him was incredibly serious:

*“Deprivation of ... property is so invasive of [street traders'] property rights that it impacts on the welfare of the street traders and their large families. For most the impounded goods are their only assets and means to a meal. Impoundment is therefore serious irrespective of the commercial value of the goods. Deprivation also impacts on their identity and dignity as people with property, however little that is. On the facts of this case the deprivation was permanent, without notice and without compensation.”<sup>74</sup>*

For the court this meant that the by-law was “irrational and [gave] rise to arbitrary deprivation of property of street traders”,<sup>75</sup> because it allowed law enforcement officials to impound informal traders' good (even for less serious offences such as non-compliance with legal formalities or the possession of a permit) and it allowed officials to indiscriminately dispose of traders' goods.

## The right to equality

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The right to equality can be found in section 9 of the Constitution. The right has two components: Section 9(1) provides that everyone is “equal before the law and has the right to equal protection and benefit of the law”, while section 9(3) provides that the government “may not unfairly discriminate directly or indirectly against anyone on one of more grounds”.

In the *Makwickana* case, the court was very aware of the social, political and historical context of informal trade in South Africa. This led the court to say that “apartheid layered poverty over race” and that “the degree of coincidence or intersectionality of race with socio-economic status results in the greatest impact being on

Africans”.<sup>76</sup> The judge recognised that informal traders are forced to participate in informal trade “because their socio-economic status or race or both are barriers to better opportunities”.<sup>77</sup> For this reason, the impoundment of informal traders' good for no good reason “effectively ... compound their historical disadvantages” and prevent them from trying to make a living.<sup>78</sup>

The Constitution prohibits discrimination based on any of the grounds listed in section 9(3), including race and ethnic or social origin, and any similar grounds (even if those grounds are not listed in the Constitution).<sup>79</sup> Although not fully spelled out in the judgment, in *Makwickana* case, the court seems to have found that “socio-

economic status” is a ground upon which discrimination is implicitly prohibited and a ground connected to racial discrimination (which is explicitly prohibited).

Importantly, the Constitution says that everyone has “equal protection and benefit of the law” and that everyone has “full and equal enjoyment of all rights and freedoms”. This means that the Constitution does not only require laws to be neutral in their formulation, but also in the way they impact people. In other words, the Constitution protects traders’ rights to both **formal equality** and **substantive equality**. Formal equality requires that the rules and processes that apply to traders must be the same for everybody on paper. Substantive equality means that the effect of laws, policies and the actions of state officials must be equal.

## Conclusion

In conclusion, the court in the *Makwickana* case found the eThekweni informal trade by-laws violated the informal traders’ rights of access to the courts, rights to equal treatment (and right not to be unfairly discriminated against) and rights not to be arbitrarily deprived of their property. The court found said that these rights were violated because of two reasons. First, the by-laws allowed officials to impound informal traders’ goods for any contravention of the by-law (the by-laws did not distinguish between more and less serious contraventions). Second, the by-laws allowed local government officials to indiscriminately dispose of impounded goods.

In the end, the court declared the relevant sections of the by-laws unconstitutional and invalid. The *Makwickana* case therefore means that the municipality had to redraft its informal trade by-laws to make sure that its by-laws were in line with the Constitution.

The court therefore concludes that the *effect* of the broad power to impound and dispose of traders’ goods discriminates against people in Makwickana’s position based on race and socio-economic status:

*“The power of the [eThekweni Municipality] to remove, impound and dispose of informal traders’ goods in s 35 of the By-law discriminates against street traders as members of a depressed socio-economic class and not any other group. Street traders are such because their socio-economic status or race or both are barriers to better opportunities. Effectively, the impoundment provisions compound their historical disadvantages. Notwithstanding the altruistic aims of s 35 of the By-law and although it is facially neutral its effect is to discriminate directly and indirectly against poor and mainly African people.”<sup>180</sup>*



## 6. EVICTION OR RELOCATION OF TRADERS

In *Somali Association*, the SCA declared that the “closure” of the businesses of Ethiopian and Somali traders was unlawful and invalid because they were prevented from applying for licenses based on the misapprehension that, as non-citizens, they did not have the right to engage in trade in South Africa.

What was styled by the City of Johannesburg as a “closure” of a business has often elsewhere been characterised as “mass evictions” or “relocations” of informal traders which ultimately have much the same effect as closures. Whatever these massive campaigns are called they have devastating effects on the rights of informal traders and should therefore be approached with significant caution and in full compliance with constitutional principles.

### SOUTH AFRICAN INFORMAL TRADERS FORUM (SAITF) V CITY OF JOHANNESBURG

In this Constitutional Court case, two informal traders’ associations called the South African Informal Traders Forum (SAITF) and the South African National Traders Retail Association (SANTRA) and 2162 informal traders who had been lawfully trading on 24 blocks in inner-city Johannesburg challenged their forced removal by the City of Johannesburg and the Johannesburg Metropolitan Police Department (JMPD). Each of the 2161 informal traders had been lawfully trading because the City had granted them valid permits “to trade in a manner consistent with its By-Laws read with its Trading Policy. Most ha[d] traded there for many years. Some as long as twenty years”.

However, in October 2013, JMPD officials forcibly evicted all of the informal traders in inner-city Johannesburg from their trading stalls and confiscated their goods. The most worrying feature of the mass eviction was that the JMPD evicted *all* of the traders without bothering to distinguish between traders who were trading legally or traders who were trading illegally.

The evictions took place under the auspices of “Operation Clean Sweep” which had the aim to “rid the City of unsightly and disorderly trading areas” which “gave rise to disorderliness, criminality and obstruction of citizens’ rights to the proper use and enjoyment of facilities in and around trading areas”.



The City initially indicated that those who re-registered would be allowed to return to trading. After the 2162 informal traders re-registered themselves the City still refused to allow them to return to their trading stalls. At this point it became clear that the real reason the traders were removed was not to ensure that all traders were operating legally, but rather “to remove them permanently from their trading stalls and relocate some or all of them to unknown ‘alternative designated areas’” and prohibit them from trading in the meantime.

The informal traders, assisted by the Socio-Economic Rights Institute of South Africa (SERI), approached the Constitutional Court arguing that the City had not followed the lawful processes to evict or relocate them (this process is explained in the Businesses Act) and that “their livelihood was and continued to be threatened by the City’s evictions”. The traders therefore requested that the court interdict the City from interfering with their trading operations.

The Constitutional Court acknowledged that the reason the City gave for undertaking Operation Clean Sweep could be legitimate, but said that the way in which it tried to achieve its purpose completely disregarded the rights of informal traders. In fact, the City admitted in court that the JMPD officials had acted unlawfully but that they had done so because it had been “convenient”. This is a clear violation of the rule of law.

To succeed in having the interdict granted, the traders had to illustrate:

1. that they have a *prima facie* right which will be;
2. irreparably and imminently harmed if an interdict is not granted;
3. that the balance of convenience favours granting the interdict; and
4. that there is no other effective remedy.

### Prima facie right

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A *prima facie* right is a right which exists on the face of it, but could potentially be outweighed by other considerations on a full analysis. Because of the urgency of the proceedings for an interim interdict, proof of a final right is not required and can only be confirmed in proceedings to consolidate a final interdict. The court indicated that the rights of the traders’ were violated

because the requirements of the Businesses Act were simply ignored by the City. It is also arguable, based on the court’s reasoning, that the traders’ rights to human dignity and to “earn money and support themselves and their families” without facing “humiliation and degradation” were violated by the City’s conduct.<sup>81</sup>



*Informal traders protest the City of Johannesburg's Operation Clean Sweep outside the Johannesburg High Court (26 November 2013).*





## Irreparable harm

When the traders appeared in the Constitutional Court, “they had been rendered destitute and unable to provide for their families for over a month” already. The court noted that without an interim interdict, it would have been “at least another two and a half months” until the traders

could appear in court and begin attempting to vindicate their rights.<sup>82</sup> This, the court reasoned, put traders in a “financially perilous condition” and that “it is hard to imagine how any destitute street vendor would survive a ruinous delay of that kind”.<sup>83</sup>

## Balance of convenience

The court found that the City had not done any more than illustrate that residents of the City may suffer “temporary [harm] as opposed to the severe irreparable harm the [traders] suffered and would have suffered”. Any “chaotic” or

“uncontrolled” trading that would continue while the City proceeded to follow the legal process required for the eviction and/or relocation of traders would therefore be significantly outweighed by the harm to the traders.<sup>84</sup>

## No other effective remedy

The City argued that after finalising the administrative law review of the decision to evict traders, the traders would, if successful in having the state’s actions declared unlawful, be entitled to claim damages suffered.

The court emphatically rejected this emphasising that the City’s conduct “spawned immediate and acute hardship that left the applicant traders

destitute. It was never disputed that they were unable to feed or house themselves or their families. The situation would have only worsened if it persisted.”<sup>85</sup> Approaching the court, it concluded, was therefore within the traders’ rights and the “promise of future recompense” eluded to by the City “may well border on the cynical”.<sup>86</sup>

## THIPE V CITY OF TSHWANE

The Denneboom Station street traders had been trading at the station for 60 years. A new mall development was initiated on the same property where the traders had always traded. Neither the City of Tshwane nor the developers consulted with the traders about the development or the future of their businesses before proceeding with the mall development which was valued at R850 million.

In an effort to get the traders to move, the developers cut off their electricity and water and removed the paving around their trading areas. These actions had the effect of disrupting the informal traders’ ability to trade. The traders, with the assistance of Lawyers for Human Rights, approached the North Gauteng High Court to interdict the demolition of the traders’ structures and ensure that the City reconnect the water, electricity and sanitation facilities that the traders’ require to operate their businesses.

In the case of the Denneboom traders it is clear that the effect of the actions taken by the developers and the City was to **constructively evict** the traders without following the appropriate legal processes required. It would also have the effect of preventing traders from making a dignified living by lawfully plying their trade.

After an interim interdict preventing the construction company from demolishing the traders' structures was issued by the North Gauteng High Court and some further argument had taken place in court the traders, developers and the City reached a negotiated settlement which was, by agreement, made into an order of court. A settlement agreement reached in this manner is binding on the City in the same way that another court judgment would be.

The settlement included an agreement that during the construction the traders will be able to continue trading in a temporary trading area made available to them. This would include containers for traders who were trading with fixed structures, trading spaces for those who were trading from informal stores and proper, communal sanitation, water and electricity facilities. It was also agreed that to ensure the continued viability of the traders businesses that commuters through the station should be redirected to and from the transport facilities via this temporary trading area.

Finally, to ensure that the traders' ultimately continue to be able to trade once construction is finalised, it was agreed that three trader representatives would be placed on the Dennebloem Facilities Management Board and that layout, design, location and allocation criteria for trade will be developed in consultation with the traders with the ultimate aim of "as far as possible" producing trading facilities "comparable to the traders' current trading conditions".

## MEANINGFUL ENGAGEMENT

LRC commended the City and developers "for meaningfully engaging with our clients during the negotiations". The concept of "meaningful engagement" which has been held by the Constitutional Court to be a constitutional obligation on municipalities prior to the initiation of eviction proceedings is one which reoccurs several times in these four cases.

In *Makwickana*, the court noted that "[a]fter litigation commenced it remained the best option for the parties to address the dysfunctional aspects of impoundment and the legitimacy of the penalties." It questioned "why no meaningful engagement occurred in this dispute" suggesting that it "must have its roots in our adversarialism cultivated by litigation being the only form of state sponsored dispute resolution." The court's order in *Makwickana* therefore required further meaningful engagement between the parties and implies that this should have taken place prior to the impoundment of the goods.

In *SAITF*, the court noted that it found "nothing dilatory in the efforts of the applicants to engage the City and persuade it to restore them to their trading positions in the inner city", thereby implying that instead of immediately rushing to court for an urgent interdict they were wise to attempt to resolve the issue through engagement. The implication, again, is that it would have been better if the municipality had resolved the situation – in which it was clearly acting with disregard to the traders' rights – before litigation proceed.

## 7. RECOMMENDATIONS FOR LOCAL GOVERNMENT

This paper discusses four key judgments handed down by the South African courts about the rights of informal traders, namely *Somali Association*, *Makwickana*, *SAITF* and *Thipe*. These cases have important implications for the way in which municipalities should approach and regulate informal trade within their municipal areas. By carefully unpacking these judgments, this paper aims to assist municipal councils and local government officials throughout the country in understanding their legal and constitutional obligations in relation to the formation and implementation of informal trade by-laws and policies.

The following recommendations have been extracted from the legal principles coming out of the decisions of courts dealing with informal trade. The recommendations therefore stem from binding legal principles. Avoiding compliance with these recommendations is therefore likely to result in unlawful conduct by municipal councils or local government officials which may be set aside by the South African courts.





## RECOMMENDATIONS FOR MUNICIPAL COUNCILS AND LOCAL GOVERNMENT OFFICIALS:

### **1** Municipal by-laws governing informal trade and all action of local government officials should be in line the Constitution

To ensure compliance with the basic requirements of constitutionalism, local government officials must always act consistently with the rule of law and respect, protect, promote and fulfil the rights of informal traders.

Given that the right of informal traders are enshrined in the Constitution and the Businesses Act, municipal by-laws and policies should aim to create a facilitative environment in which informal traders can legally make a living. Although the legal framework allows for municipalities to impose certain regulations on informal traders, these regulations should always serve a legitimate government purpose and should not unjustifiably infringe on the rights of informal traders or they run the risk of being unconstitutional.

### **2** Municipalities should ensure that the rights of traders are promoted by providing adequate training to the local government officials

Municipalities should ensure that the local government officials who are responsible for implementing the municipal by-laws governing informal trade have the necessary resources, capacity, and awareness of the legal and regulatory framework governing informal trade in South Africa. This means that local government officials should be trained to understand that the point of departure should be an understanding that their role is to promote rather than restrict and control informal trade.

In addition, municipalities must run awareness campaigns for local officials, businesses, members of the public and street traders to promote public understand the rights of traders and the legal regime applying to informal trade.

### **3** Municipal by-laws governing informal trade and local government officials should ensure that informal traders' right to trade is respected

The precarious position of informal traders must be at the core of every action or decision local government officials take in connection with informal trade. The starting point in the formulation of policies, enactment of by-laws and implementation of both of these should be that traders have the right to trade in terms of the constitutional right to dignity.

#### **4** Municipal by-laws governing informal trade should ensure that informal traders are treated equally (especially foreign nationals) and discourage unfair discrimination by officials

Like the majority of constitutional rights, informal traders' right to trade applies to "everyone". This means that all foreign nationals lawfully residing in South Africa (for example, permanent residents, refugees or asylum seekers) have the same right to trade as South Africans. Municipal by-laws governing informal trade should ensure that foreign nationals are treated equally to South Africans, and should ensure that foreign nationals are not discriminated against. In doing so, municipal councils should also take care to ensure that possibly neutral language in municipal by-laws would not have a discriminatory effect.

In addition, local government officials should take special care not to create permit requirements and trade conditions which discriminate against non-citizens lawfully residing in South Africa because doing so may encourage societal stigma and xenophobia.

#### **5** Municipal by-laws governing informal trade should ensure that the conduct of the local government officials responsible for the implementation of the by-laws complies with the standards of administrative law

When making an administrative decision, including decisions to grant, suspend, revoke or withhold a trading license or permit, impose any conditions or restrictions on a trading license or permit, impound informal traders' goods or relocate or evict informal traders from their stalls, local government officials must ensure that they act lawfully, reasonably and in a manner which is procedurally fair. In addition, any decision by a local government official may require justification through the provision of written reasons.

Lawfulness essentially means that any action taken by a local government official must be allowed in, and exercised strictly in terms of, the law or by-law that gives the official the power to act. In the context of informal trade, this will usually mean either the Businesses Act or the specific municipal by-law. Lawfulness therefore ensures that only those officials that are specifically given the power to do something are allowed to do so, and that officials do not abuse their powers. For example, if a municipal by-law only allows police officers of a certain rank to impound goods, then only police officers of that rank are able to do so. Decisions should also be carefully considered and should not be taken arbitrarily.

Any action taken by an official must be reasonable. This means, at the very least, that any action must be rational (the action must be rationally or logically linked to the purpose that the official wanted to achieve) and proportional (the action or means used by the official should be well-tailored or proportionate to the purpose the official wanted to achieve). For example, it would be unreasonable for a local government official to impound an informal traders' goods because his or her trading stall is untidy or his or her merchandise is only a little outside of the demarcated stall line. This is because the action (impounding the traders' goods) is not rationally or proportionally connected to the goal that the official seeks to achieve (to get the trader to clean up his stall or move his goods to inside the demarcated line).

All actions by local government officials must also be procedurally fair. This means that, if a decision or action by an official negatively affects an informal trader, he or she should be afforded the ability to present their case and have an impartial and proper hearing. The context within which the decision is taken will, of course, play a role in determining how extensive the process should be, but in all cases, the process should be fair.

Finally, informal traders may also require officials to justify their actions by requesting written reasons for a decision. If reasons are requested, they should be specific, written in clear and plain language and provide justification for the decision. For example, if an informal trader applies for a trading license and the municipality does not grant him or her a license, he or she could ask for reasons from the municipality why his or her application was unsuccessful.

## **6** Municipal by-laws governing informal trade should distinguish between more and less serious contraventions of the by-law, and should provide for a variety of measures to encourage informal traders to comply with the by-laws

Municipal by-laws governing informal trade should distinguish between serious contraventions of the by-laws (e.g. trading in an area where trading is prohibited or trading in a way that endangers the public) and less serious failures to comply with the by-law (e.g. not being able to produce a copy of a lease contract). The by-laws should also provide for a variety of different measures that local government officials could use to encourage informal traders to comply with the by-laws. These measures should range in their severity and impact on the informal traders, and may include a small fine for minor infractions, progressively heavier fines for repeat offenders, or, in serious infractions, the impoundment of informal traders' goods.

The by-laws should provide clear guidance on when particular measures may be used by local government officials and should ensure that officials consider the potential negative impact of the decision on the informal trader.

## **7** Municipal by-laws governing informal trade should ensure that the use of impoundment as a measure to ensure compliance with by-laws is only permitted in exceptional circumstances and used sparingly

Municipal councils must ensure that by-laws only permit local government officials to impound informal traders' goods in exceptional circumstances where other, less restrictive measures, would not achieve compliance with the by-laws. Practically, this means that any municipal by-laws governing informal trade should include a wide array of enforcement measures that range in the impact that they have on informal traders. For example, for less serious instances of non-compliance with the by-laws (such as failing to carry a trading permit) informal traders could be given a small fine, while repeat offenders could be given progressively heavier fines.



The impoundment of an informal traders' goods cannot lawfully be permitted for less serious instances of non-compliance with the by-law, and should not ordinarily be used in instances where informal traders are unable to provide proof of their trading license or lease agreement. This is because of the severity of impoundment, the often irreversible effect on traders' rights to property, and the potentially negative impact of their ability to earn a livelihood. For this reason, impoundment should only be permitted in circumstances in which there is repeated non-compliance with legal requirements which pose a threat to the public.

In addition, any municipal by-law governing informal trade should provide for the return of property that was impounded from informal traders. This means that any municipal by-law governing informal trade should include detailed rules for government officials on how impoundment should take place. This should include rules on the duty on officials to provide a receipt to informal traders, how officials should itemise the goods that are impounded, the duty on officials to provide informal traders with the necessary information to enable them to claim back their goods after paying their fine, and a process by which traders can clearly, reliably and expeditious reclaim their goods.

As is clear from the discussion the *Makwickana* case above, the failure to sufficiently curtail the power to impound may, on paper and in practice, result in violations of traders' rights to property, access to court and equality.

## **8** Any relocation or eviction of informal traders from their trading spaces must comply with the legal provisions governing informal trade (in particular section 6A(2) of the Businesses Act)

Before municipalities are allowed to restrict or prohibit informal trade in an area (for example, relocate or evict informal traders from a specific area), section 6A(2) of the Businesses Act provides that certain steps have to be followed.<sup>87</sup> These steps include various duties on municipalities to consider and investigate the possible effects of any restriction or prohibition of informal trade on traders' livelihoods, to consider whether there are other ways in which the municipality can regulate informal trade that would not require the relocation or evictions, and to proactively plan for how any negative effects to traders' livelihoods can be addressed. A relocation or eviction that will leave traders without any meaningful source of income will infringe informal traders' rights and will be unlawful and unconstitutional.

In addition, municipalities must distinguish between traders who are trading lawfully and those who are not. Care should be taken to understand why traders who are trading unlawfully are doing so and if there is a way to regularise their trade without relocating or evicting them.

In all cases municipalities should meaningfully engage with traders prior to running eviction campaigns and attempt to find a solution which causes less harm to traders' businesses. Such engagements should, where practicable, involve traders' organisations and organisations with knowledge and expertise in human rights. Local government officials must act in good faith during these engagements and take the alternative suggestions of traders seriously.

As administrative decisions, evictions and relocations of traders should meet the requirements of the Businesses Act and be lawful, reasonable and procedurally fair. Evictions undertaken for an improper purpose (any purpose which is not lawful or any purpose that the municipality does not disclose) will never be lawful.

## 9 Where municipal by-laws grant local government officials discretionary powers, the by-laws should provide clear guidelines on how those powers should be exercised by the officials

A basic principle of the rule of law is that a government official can only do what they are legally allowed to do in terms of an enabling law. If government officials are given a discretion on how to exercise their powers, they should be given clear guidelines on how to exercise their powers appropriately in the circumstances. As the South African courts have recognised:

*“[I]f broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of these powers or in what circumstances they are entitled to seek relief from an adverse decision”.<sup>88</sup>*


This means that municipal by-laws governing informal trade should include clear guidelines on how government officials who are responsible for implementing the by-laws should exercise their powers. This should include clearly informing the official of what factors would be relevant to consider and what factors would be irrelevant under the circumstances.

## 10 Municipal by-laws governing informal trade should provide dispute resolution mechanisms through which informal traders can appeal and challenge the decisions of officials

In *Makwickana*, the court criticised the eThekweni Municipality’s informal trade by-laws on the basis that the by-laws failed to provide meaningful dispute resolution mechanisms for informal traders to appeal and challenge the decisions of the officials who were charged with implementing the by-laws. The only recourse available to informal traders was to approach a court to have the decision of the official set aside. As the court pointed out, informal traders were often unable to do this as very few of them could afford legal representation or leave their trading to pursue their case in court. In addition, their goods would often already have been sold in auction or have been disposed of by the time their dispute had reached the courts. For this reason, the court found that the by-laws infringe Makwickana’s right of access to the courts and were, as a result, unconstitutional.

The court found that the municipality should reform its by-laws to ensure that “a functional dispute system design” that factors in the constraints of informal traders that struggle “to secure legal representation and litigate before their goods are disposed of”.<sup>89</sup> According to the court, this calls for “more accessible and more expeditious dispute system design”.<sup>90</sup>

Municipal by-laws should therefore include accessible and speedy dispute resolution mechanisms.



## 11 Municipal by-laws governing informal trade should include mechanisms to hold local government officials responsible for the implementation of the by-laws accountable for any unlawful actions

The ongoing harassment and intimidation of informal traders by the police and local government officials was emphasised in all of the court cases discussed in this paper. Officials often implement municipal by-laws in ways that are unlawful and fail to give effect to informal traders' rights. These are pervasive challenges that need to be addressed proactively. As the court in *Makwickana* said:

*“Without a firm hand on officials who misbehave, conflict with informal traders will persist as respect for law enforcers wanes.”<sup>91</sup>*

Municipal councils should therefore ensure that municipal by-laws governing informal trade should include mechanisms through which the government officials responsible for the implementation of the by-laws can be held accountable for their unlawful actions. This could include provision for complaints to be laid against officials by informal traders, making provision for the investigation of misconduct by officials, and could even include provisions to hold officials personally liable for the loss of impounded or confiscated goods.



## ENDNOTES

- <sup>1</sup> *Makwickana v Ethekwini Municipality* 2015 (3) SA 165 (KZD) (*Makwickana*), para. 135.
- <sup>2</sup> National Planning Commission, "National Development Plan: Vision 2030" (2012), p. 121.
- <sup>3</sup> Caroline Skinner, "Getting Institutions Right: Local Government and Street Traders in Four South African Cities", *Urban Forum*, 11(1) (2000), p. 60.
- <sup>4</sup> Skinner, "Getting Institutions Right", *Urban Forum*, p. 51.
- <sup>5</sup> Section 152(1)(c) of the Constitution of the Republic of South Africa (the Constitution).
- <sup>6</sup> Section 39(2) of the Constitution, as interpreted in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).
- <sup>7</sup> Section 6A of the Business Act.
- <sup>8</sup> Claire Bénéit-Gbaffou, "In Quest for Sustainable Models of Street Trading Management: Lessons for Johannesburg after Operation Clean Sweep", Centre for Urbanism and Built Environment Studies (CUBES) Research Report (8 April 2015), p. 11, available at: <https://www.wits.ac.za/media/wits-university/faculties-and-schools/-engineering-and-the-built-environment/research-entities/cubes/documents/In%20quest%20for%20sustainable%20models%20of%20street%20trading%20management.pdf>.
- <sup>9</sup> Bénéit-Gbaffou, "In Quest of Sustainable Models of Street Trading Management", p. 51.
- <sup>10</sup> *Makwickana v Ethekwini Municipality* 2015 (3) SA 165 (KZD) (*Makwickana*).
- <sup>11</sup> A comprehensive evaluation of the requirements of the Businesses Act and the common provisions of municipal by-laws fall beyond the scope of this paper. For more on these points, see Socio-Economic Rights Institute of South Africa (SERI), "Towards Recommendations on the Regulation of Informal Trade at Local Government Level", SERI and SALGA Discussion Document (2018).
- <sup>12</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC) (SAITF).
- <sup>13</sup> *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism* and 2015 (1) SA 151 (SCA) (*Somali Association*).
- <sup>14</sup> *Makwickana v Ethekwini Municipality* 2015 (3) SA 165 (KZD) (*Makwickana*).
- <sup>15</sup> *Thipe v City of Tshwane*, North Gauteng High Court, Case Nos 7922/17 & 6048/17 (10 February 2017), available at: [http://www.lhr.org.za/sites/lhr.org.za/files/final\\_order.pdf](http://www.lhr.org.za/sites/lhr.org.za/files/final_order.pdf).
- <sup>16</sup> Section 2 of the Constitution.
- <sup>17</sup> See section 9(1) of the Constitution.
- <sup>18</sup> See section 9(3) of the Constitution.
- <sup>19</sup> See section 10 of the Constitution.
- <sup>20</sup> See section three of this paper for a full description of these cases.
- <sup>21</sup> See section 25(1) of the Constitution.
- <sup>22</sup> See section 25(1), read with section 36, of the Constitution.
- <sup>23</sup> See section five of this paper.
- <sup>24</sup> Lauren Kohn, "Using Administrative Law to Secure Informal Livelihoods: Lessons from South Africa", Women in Informal Employment Globalizing and Organizing (WIEGO) Technical Brief No 10 (May 2017), p. 2.
- <sup>25</sup> Kohn, "Using Administrative Law", p. 2.
- <sup>26</sup> Kohn, "Using Administrative Law", pp. 7 and 19.
- <sup>27</sup> Kohn, "Using Administrative Law", pp. 17-19.
- <sup>28</sup> Kohn, "Using Administrative Law", pp. 10-13.
- <sup>29</sup> Kohn, "Using Administrative Law", pp. 14-15.
- <sup>30</sup> Kohn, "Using Administrative Law", pp. 15-17.
- <sup>31</sup> Kohn, "Using Administrative Law", pp. 17-18.
- <sup>32</sup> See, for example, Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010), pp. 54-55.
- <sup>33</sup> See the United Nations Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The Right to the Highest Attainable Standard of Health" (2000), UN Doc E/C.12/2000/4, p. 33. Although the quote relates to the right of access to adequate health care, it remains relevant in relation to the steps the state should take to "promote" and "fulfil" the right to trade.
- <sup>34</sup> Kate Tissington, *The Business of Survival: Informal Trading in Inner City Johannesburg*, Centre for Applied Legal Studies (CALS) Research Report (December 2009), p. 12.
- <sup>35</sup> Caroline Skinner, "The Struggle for the Streets: Processes of Exclusion and Inclusion of Street Traders in Durban, South Africa", *Development Southern Africa*, 25(2) (2008), p. 232.
- <sup>36</sup> Caroline Skinner, "Local Government in Transition - A Gendered Analysis of Trends in Urban Policy and Practice Regarding Street Trading in Five South African Cities", CSDS Research Report No 18, University Of Natal (May 1999), pp. 9-10.
- <sup>37</sup> Section 2 and schedule 1 of the Businesses Act. See also Tissington, *The Business of Survival*, p. 12.
- <sup>38</sup> Section 2(1) of the Businesses Act. See also Tissington, *The Business of Survival*, p. 12.
- <sup>39</sup> Section 3 of the Businesses Act. See also Tissington, *The Business of Survival*, p. 12.
- <sup>40</sup> Section 5 of the Businesses Act. See also Tissington, *The Business of Survival*, p. 12.
- <sup>41</sup> Section 6 of the Businesses Act. See also Tissington, *The Business of Survival*, p. 12.
- <sup>42</sup> Section 6A of the Businesses Act. See also Tissington, *The Business of Survival*, p. 12.
- <sup>43</sup> For more information on the legal process a municipality has to follow to restrict or prohibit informal trade, see Socio-Economic Rights Institute of South Africa (SERI), "Protecting the rights of informal traders: What process must municipalities follow if they want to restrict or prohibit informal trading in an area?", SERI Informational Pamphlet (2013), pp. 1-2, available at: <http://>

[www.seri-sa.org/images/Informal\\_traders\\_pamphlet\\_FINAL.pdf](http://www.seri-sa.org/images/Informal_traders_pamphlet_FINAL.pdf).

<sup>44</sup> Statistics South Africa (Stats SA), “Quarterly Labour Force Survey: Quarter 3 – 2017” (31 October 2017), pp. 7-8.

<sup>45</sup> This is not to say that people only participate in informal trade when they are unable to obtain formal employment or that the informal trading sector absorbs those who would otherwise find employment in the formal sector during times of economic difficulty. Recent research shows that the interrelationship between the formal employment sector and the informal sector is much more complicated. See, for example, Michael Rogan and Caroline Skinner, “The Nature of the South African Informal Sector as Reflected in the Quarterly Labour-Force Survey, 2008-2014”, REDI 3x3 Working Paper No 28 (February 2017).

<sup>46</sup> *SAITF*, para. 31.

<sup>47</sup> *SAITF*, para. 31.

<sup>48</sup> *Somali Association*, para. 9.

<sup>49</sup> *Somali Association*, para. 43.

<sup>50</sup> Section 10 of the Constitution.

<sup>51</sup> Section 1(a) of Constitution.

<sup>52</sup> *S v Makwanyane* 1995 (3) SA 391 (*Makwanyane*).

<sup>53</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6, para. 28 (*National Coalition*).

<sup>54</sup> *Somali Association*, paras. 43-44.

<sup>55</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).

<sup>56</sup> See *Somali Association*, para. 33, where the Court quotes *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA), paras. 31-32.

<sup>57</sup> *Somali Association*, para. 43.

<sup>58</sup> *Somali Association*, para. 4.

<sup>59</sup> *Somali Association*, para. 44.

<sup>60</sup> See, in particular, *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social De Another v Minister of Justice (Khosa)* in which the court determined that permanent residents have the right to social assistance from the South African state; and *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (1) All SA 21 (SCA) (*Watchenuka*) in which the court determined that refugees have the right to pursue wage-earning employment and further their studies.

<sup>61</sup> *Makwickana*, para. 90 read with para. 80.

<sup>62</sup> Section 6A(1)(d) of the Businesses Act.

<sup>63</sup> *Makwickana*, para. 75.

<sup>64</sup> For an in-depth discussion of administrative law in

the context of informal trade, see Lauren Kohn, “Using Administrative Law to Secure Informal Livelihoods: Lessons from South Africa”, *Women in Informal Employment Globalizing and Organizing (WIEGO) Technical Brief No 10* (May 2017).

<sup>65</sup> *SAITF*, para. 7.

<sup>66</sup> *Makwickana*, para. 136.

<sup>67</sup> *Makwickana*, para. 78 (where the court quotes *Zondi v MEC for Traditional Local Government Affairs* 2005 (3) SA 589 (CC) (*Zondi*), para. 61).

<sup>68</sup> *Makwickana*, para. 79 (where the court quotes *Zondi*, para. 68).

<sup>69</sup> *Makwickana*, para. 81.

<sup>70</sup> *Makwickana*, para. 85.

<sup>71</sup> *Makwickana*, para. 85.

<sup>72</sup> *Makwickana*, para. 88.

<sup>73</sup> *Makwickana*, para. 86.

<sup>74</sup> *Makwickana*, para. 98.

<sup>75</sup> *Makwickana*, para. 100.

<sup>76</sup> *Makwickana*, para. 116.

<sup>77</sup> *Makwickana*, para. 125.

<sup>78</sup> *Makwickana*, para. 125.

<sup>79</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), pp. 22-29.

<sup>80</sup> *Makwickana*, para. 125.

<sup>81</sup> *SAITF*, para. 31.

<sup>82</sup> *SAITF*, para. 29.

<sup>83</sup> *SAITF*, para. 30.

<sup>84</sup> *SAITF*, para. 32-34.

<sup>85</sup> *SAITF*, para. 36.

<sup>86</sup> *for Gave t.* 34.

<sup>87</sup> For a detailed discussion of these steps, see Socio-Economic Rights Institute of South Africa (SERI), “Protecting the rights of informal traders: What process must municipalities follow if they want to restrict or prohibit informal traders in an area?”, *Informational Pamphlet* (2013), available at: [http://seri-sa.org/images/Informal\\_traders\\_pamphlet\\_FINAL.pdf](http://seri-sa.org/images/Informal_traders_pamphlet_FINAL.pdf).

<sup>88</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), para. 47.

<sup>89</sup> *Makwickana*, para. 143.

<sup>90</sup> *Makwickana*, para. 143.

<sup>91</sup> *Makwickana*, para. 144.





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