Acknowledgements

This discussion document 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 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 discussion document 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 first paper, entitled Informal Trade in South Africa: Legislation, Case Law and Recommendations for Local Government (June 2018), analyses the laws and South African court decisions dealing with informal trade.

Photos by Thomas Coggin and Jonathan Torgovnik.
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 2030.1

Local government has a crucial role to play in developing and implementing a supportive and facilitative regulatory and policy environment for informal trade. For the most part, informal trade is regulated through by-laws or policies that apply within a particular municipal area (the Businesses Act 72 of 1991 – hereafter referred to as 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, other national laws and policies, and the decisions of the South African courts.3 These proposals are therefore legally enforceable and binding. These proposals have been indicated with an asterisk (*).

Some of the other recommendations or proposals discussed in this paper are based on a careful review of various municipal by-laws and policies in South Africa.4 The purpose of this review was to evaluate how municipalities have dealt with a range of issues associated with informal trade, including the legal tenure of informal traders; the provision of basic services; the installation, maintenance and upgrading of infrastructure; training and skills development programmes; products and services; tariffs and tariff structures; and law enforcement. These proposals may offer municipalities useful insight into how other municipalities have approached similar challenges, and are aimed at stimulating and informing learning exchanges and dialogues among local government officials and municipal councils.

We hope that the recommendations or proposals discussed in this document will be able to assist SALGA, municipal councils and local government officials to identify areas of agreement, gaps, lessons and obstacles, which will in turn enable us to finalise a set of nuanced, feasible and workable recommendations to guide the regulation of informal trade in South Africa.
### PROPOSALS FOR CONSIDERATION

#### BY-LAW & POLICY FOMULATION

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Municipal by-laws and policies should allow different types of informal trade.

Municipalities should provide for a flexible and differentiated tariff or rental structure based on site size, desirability of location, services provided and affordability for informal traders.

Municipalities should allow informal traders to provide a wide array of goods and services.

Municipalities (or their service providers) should be more transparent about how the tariffs or rental amounts are used for the management of markets or trading areas.

Municipalities (or their service providers) should “meaningfully engage” with informal traders before they take decisions that will adversely affect them.
Commentators have argued that a more nuanced understanding of the nature, structure and composition of the informal trading sector at municipal level is “critical to robust and successful policy-making”. For example, Michael Rogan (associate professor at the Neil Aggett Labour Studies Unit at Rhodes University) and Caroline Skinner (senior researcher at the African Centre for Cities at the University of Cape Town) argue in their detailed analysis of the informal sector in South Africa between 2008 and 2014 using Quarterly Labour Force Survey (QLFS) data that a greater understanding of the earnings, nature of employment, gender, industry and spatial differentiation in informal trade will assist policy makers in developing more empowering and successful regulatory and policy environments. Others have argued that the inherent complexity of the informal trading sector requires policy makers to “take a differentiated view of the informal economy and develop strategies tailored to different local needs”.

The legal framework governing informal trade also requires for decisions affecting informal traders to be based on reliable knowledge of how the informal trade sector works and how the decision is likely to affect the livelihoods of existing traders. For example, section 6A(2) of the Businesses Act, which sets out the process that a municipality needs to follow to restrict or prohibit informal trade in an area, requires that a municipality investigate how its decision to restrict or prohibit informal trade will affect informal traders.

More localised research is therefore necessary to ensure that policy makers at municipal level are equipped with the necessary information to enable evidence-based decision making.

1. Municipal by-laws and policies governing informal trade should be based on a better understanding of the nature, structure and composition of the informal trading sector within and across municipal boundaries.
Towards Recommendations on the Regulation of Informal Trade at Local Government Level

2.

Municipal by-laws and policies governing informal trade should create an enabling environment for informal trade.

Nearly all of the municipal by-laws and policies governing informal trade that were reviewed for the purposes of this discussion document identify the need to develop an enabling environment as a fundamental objective or underlying principle. However, in spite of these affirmations, municipal by-laws and policies are generally more focused on ensuring the control of the activities of informal traders or the strict compliance with by-laws than with facilitating more favourable conditions for informal traders. As Claire Bénit-Gbaffou, associate professor at the School of Architecture and Planning at the University of the Witwatersrand, writes,

“[t]here 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 the ‘does’.”

This means that by-laws are more likely to be restrictive in nature, and often have the effect of inhibiting the growth and success of informal trade.

In addition, some municipal by-laws and policies seem to conceive of informal trade as a form of social assistance rather than legitimate economic activity. This is evident from by-laws or policies that give preference to informal traders who are on a municipality’s indigent register or that only allow one person in a household to obtain an informal trade permit. These allocation criteria or limitations on the number of persons from each household that are allowed to participate in informal trade are arbitrary as they have very little to do with an informal traders’ ability to trade. These provisions seem to treat informal trade more like a social security or government issued benefit rather than an enterprise or livelihood strategy. While there is nothing wrong with assisting poor and low-income persons, this approach is at odds with creating a facilitative environment for informal trade. An approach that views the granting of informal trade permits as a form of social assistance views informal trade as a “nuisance” or a challenge that needs to be overcome, rather than genuine “economic role player[s]”.

To enable informal trade at municipal level, a shift is needed in how municipalities approach informal trade. Instead of trying to primarily control or regulate informal trade or to utilise informal trade as a mechanism to collect revenue, by-laws should focus on delineating the rights and responsibilities of the different parties involved in informal trade and ensure that unnecessary bureaucratic requirements (or red tape) are done away with. Instead of a restrictive approach, by-laws should be focused on facilitating informal trade and instilling an approach that encourages the development of the informal trading sector.
3. Municipal by-laws governing informal trade and all actions of local government officials should be in line with the Constitution*

Municipal councils and local government officials must ensure that their by-laws, policies and actions are consistent with the Constitution, consistent with the rule of law, and “respect, protect, promote and fulfil” the constitutional rights of informal traders. This is due to the fact that the Constitution is the supreme law of South Africa and all laws and policies must be consistent with it. There are a number of rights that are contained in the Constitution that are associated with informal trade and traders’ ability to participate in and carry on informal trade. These include:

- **The right to human dignity (section 10):** The Constitutional Court has held that the “ability of people to earn money and support themselves is an important component of the right to human dignity”. The ability of informal traders to carry on informal trading is therefore integrally linked to the right to human dignity.

- **The right to be treated equally and not to be unfairly discriminated against (section 9):** This right means that everyone is equal before the law and that everyone is entitled to equal protection and benefit under the law. This provision means that unfair discrimination against informal traders on any basis could be considered unconstitutional (for example, by-laws or policies that unfairly discriminate against foreign nationals would be unconstitutional).

- **The right to freely choose a trade, occupation or profession (section 22):** This right is granted to all citizens of South Africa and is qualified by a provision that the “practice of a trade, occupation or profession may be regulated by the law”. This provision therefore allows for laws such as the Businesses Act and municipal by-laws to regulate informal trade. However, the regulation of trade, occupation or profession may not be arbitrary and must serve a legitimate government purpose.
• **The right to property (section 25):** This constitutional provision includes the right not to be arbitrarily deprived of one’s property. In the context of informal trade, this means that the impoundment of a traders’ goods must take place in terms of the law and must serve a legitimate governmental interest.

• **The right to just administrative action (section 33):** The Constitution entitled everyone to administrative action which is lawful, reasonable and procedurally fair, as well as the right to written reasons. This right is discussed in more detail at proposal 6 below.

• **The right of access to courts (section 34):** This right is discussed in more detail at proposal 8 below.

• **Other fundamental rights:** The Constitutional Court has recognised that an inability to trade will often mean that informal traders will be unable to provide for the basic needs of their families, including ensuring that their families have sufficient food, shelter and medical services. The court said that an inability to trade could therefore violate informal traders and their families’ rights to adequate nutrition, access to housing and access to health care services. The ability to participate in and carry on informal trade is therefore closely related to a wide range of other rights that are protected in the Constitution.

The Businesses Act is also an important law with which municipalities should align their by-laws and policies, as this Act gives practical effect to many of the constitutional rights that are afforded to informal traders. Given that the rights of informal traders are enshrined in the Constitution and the Businesses Act, municipal by-laws and policies should aim to create an environment in which informal traders can legally make a living through informal trade. Although the legal framework allows 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 declared unconstitutional by a court of law.
4. Municipal by-laws and policies governing informal trade and local government officials should ensure that informal traders’ right to trade is respected*

In South African Informal Traders Forum and Others v City of Johannesburg, South African National Traders Retail Association v City of Johannesburg (SAITF), the Constitutional Court recognised that the ability of informal traders to carry on informal trading is “an important part of the right to human dignity”. This finding was affirmed by the Supreme Court of Appeal (SCA) in Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism (Somali Association).

SAITF and Somali Association mean that the South African courts accept that there is a general right for informal traders to make a living through informal trade as part of the constitutional right to human dignity. The starting point in the formulation, enactment and implementation of by-laws governing informal trade should be that informal traders have the right to carry on and participate in informal trade in terms of the constitutional right to dignity.

In addition, the fact that the South African courts frequently locate their decisions dealing with informal trade within the difficult social contexts that informal traders face indicates that 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.
Towards Recommendations on the Regulation of Informal Trade at Local Government Level

SALGA

In Somali Association, the SCA found that the ability to carry on informal trade was integrally related to the right to human dignity. For the court, this implied that informal trade offered traders the "ability to live free of positive humiliation and degradation". As the court wrote:

"[I]f ... 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 ... such a person ought to be able to rely on the constitutional right to dignity..."

This means that the ability to earn a living through informal trade – like the constitutional right to human dignity – is granted to "everyone". The court strongly condemned government conduct that unfairly discriminated against foreign nationals and warned that officials must "guard against unwittingly fuelling xenophobia". Somali Association therefore means that all South African citizens and foreign nationals that are lawfully residing in South Africa (for example, permanent residents, refugees or asylum seekers) have the same rights to participate in and carry on informal trade.

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

Municipal by-laws governing informal trade should therefore ensure that foreign nationals are treated equally to South Africans, and should ensure that foreign nationals are not unfairly discriminated against. In doing so, municipal councils should also take care to ensure that possibly neutral language in municipal by-laws or policies governing informal trade does not have a discriminatory effect in practice. Any discriminatory by-laws or policies would be unconstitutional. An example of seemingly neutral provisions in municipal by-laws or policies that may have a discriminatory impact are permit requirements and eligibility criteria for informal trading permits. Some municipal by-laws and policies, for example, require potential traders to produce a South African identity document (ID) as proof of identity (which unfairly discriminate against foreign nationals) or refuse to accept proof of address from people living in informal settlements (which unfairly discriminate against people living in informal settlements).

In addition, local government officials should take special care to ensure that their conduct does not “fuel xenophobia” or unfairly discriminate against non-citizens.

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In addition, local government officials should take special care to ensure that their conduct does not “fuel xenophobia” or unfairly discriminate against non-citizens.
When making an administrative decision, 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*. In the context of informal trade, the following actions or decisions would qualify as administrative decisions:

- 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 informal traders’ goods, or
- Decisions to relocate or evict informal traders from their stalls.29

**Lawfulness** essentially means that any action taken by a local government official must be allowed in, and exercised strictly in accordance with, 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 governing informal trade. 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.
7. 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 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 discretionary powers, they should be given clear guidelines on how to exercise their discretionary powers. 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".30

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 which factors should be taken into account (or which factors would be irrelevant) when exercising his or her discretion.
8.

Municipal by-laws governing informal trade should provide dispute-resolution mechanisms that enable traders to appeal and challenge any official decision that negatively affect them.

In *Makwickana v eThekwini Municipality* (*Makwickana*), the High Court criticised eThekwini 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 government 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 mostly unable to do this as very few informal traders have the financial resources to pay for legal representation or the time to leave their trading stalls to pursue their case in court. In addition, their goods would often already have been sold in auction or been disposed of by the time their dispute had reached the courts. For this reason, the court found that the by-laws infringed informal traders’ 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” was included in the by-law. The court said that the dispute resolutions systems should take into account the constraints that informal traders face, including the fact that informal traders struggle “to secure legal representation and litigate before their goods are disposed of”. According to the court, these challenges call for a “more accessible and more expeditious dispute system design”.

Municipal by-laws should therefore include accessible and speedy dispute resolution mechanisms, and should strongly consider doing away with arbitrary rules about how many days or hours informal traders have to trade in order to retain a trading permit.
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*

In Makwickana, the High Court found that the provision empowering officials to impound informal traders’ stock for non-compliance in eThekwini Municipality’s informal trade by-law was “over broad” and unconstitutional as it “permit[ed] impoundment for all contraventions without differentiating between serious absolute contraventions and less serious, formal non-compliances”. 37

Municipal by-laws governing informal trade should therefore 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 or having an untidy trading stall). Municipal 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 written warnings or small fines for minor infractions, progressively heavier fines for repeat offenders, or, for more serious infractions, the impoundment of informal traders’ goods.

By-laws or policies governing informal trade 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.
Towards Recommendations on the Regulation of Informal Trade at Local Government Level

Local government officials 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 the informal trader. 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 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 licenses or lease agreements. This is because of the severity of impoundment, the often irreversible effect on traders’ rights to their goods or 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 to ensure that officials provide a receipt to informal traders whose goods have been impounded, rules that regulate how officials record the goods that have been impounded (e.g. by ensuring that officials provide a detailed, itemised list of the impounded goods to informal traders), rules that ensure that officials provide informal traders with the necessary information to enable them to claim back their impounded goods (after paying their fine), and a process by which traders can clearly, reliably and expeditiously reclaim their goods.

As is clear from the discussion of the Makwickana case above, the failure to sufficiently curtail local government officials’ power to impound may, on paper and in practice, result in violations of traders’ rights to property, access to courts and equality.

10. 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*. 
The ongoing harassment and intimidation of informal traders by the police and local government officials is frequently raised as a concern in the South African courts. Cases like Makwickana, Somali Traders and SAITF indicate that government 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."

Municipal councils should therefore ensure that municipal by-laws governing informal trade include mechanisms through which the government officials responsible for the implementation of the by-laws can be held accountable for their unlawful actions. Municipal by-laws should therefore include measures that enable informal traders to lay formal complaints against officials that act unlawfully, allow for the investigation of misconduct by officials, and could even include provisions to hold officials personally liable for the loss or damage of impounded or confiscated goods.
PROPOSALS
TENURE

12.

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 (e.g. by relocating or evicting informal traders from a specific area), section 6A(2) of the Businesses Act provides that certain steps have to be followed. These steps require municipalities to consider and investigate the possible effects of any restriction or prohibition of informal trade on the affected traders’ livelihoods, require municipalities to consider whether there are other ways that they could regulate informal trade that would not require the relocation or eviction of informal traders, and require municipalities 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.

Two important court cases – SAITF (which was decided in the Constitutional Court) and Thipe (which was decided in the Pretoria High Court) – affirm this principle. These cases show that the lawful processes set out in the Businesses Act and the Constitution must be followed when authorities attempt to relocate informal traders. 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 SAITF.

In addition, municipalities must distinguish between traders who trade lawfully and those who do not trade lawfully. 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 informal traders prior to embarking on any relocation plans and should attempt to find a solution which causes the least 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 seriously consider the alternative suggestions raised by informal traders.

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.

* Special Report on Informal Traders – a report by the South African Institute of Race Relations (SAIRR) in collaboration with the Human Rights Commission (HRC) and the Human Sciences Research Council (HSRC) (2013).
Municipalities should ensure that informal trade areas have the necessary level of access to basic services, including water, sanitation, refuse removal and cleaning services*

Local government holds the primarily responsibility for ensuring that people within their municipal areas progressively gain access to basic services. This is clear from the Constitution:

- Section 152(1) of the Constitution sets out the objects and obligations of local government, which include "ensur[ing] the provision of services to communities in a sustainable manner" and the "promot[ion of] social and economic development" in communities within their areas.42
- Section 153 of the Constitution set out municipalities’ key development duties, which include that municipalities are “obliged to prioritise the social and economic development of the community”.
- Section 139(5) of the Constitution imposes an obligation on municipalities to ensure that each member of the community has access to at least a minimum level of basic services.43
- Section 195(1) of the Constitution sets out the basic values and principles that public administration should adhere to and be guided by, including that “services must be provided impartially, fairly, equitably and without bias” and that “people’s needs must be responded to and the public must be encouraged to participate in policy-making”.44

Taken together, these provisions clearly affirm that local government carries the central mandate for ensuring that people within its municipal area are provided with basic municipal services, including water, sanitation and refuse removal.45 This includes extending the provision of services to informal traders and informal trade areas where these services are necessary for them to effectively and efficiently participate in informal trade. Municipalities are required to “strive” to achieve these objectives within their financial and administrative capacities46 by structuring and managing their administration in a manner that would give effect these constitutional duties, and budgeting and planning for the provision of basic municipal services.47 In doing so, municipalities are required to give priority to the basic needs of communities.48 This responsibility rests on local government because “[m]unicipalities are, after all,
Some municipal by-laws and policies provide for the possibility for municipalities to outsource the provision of services to a management company or a third party. While this is constitutionally and legally allowed, it is important to note that the municipality will still be responsible for ensuring that the management company performs their functions in terms of the contract they sign (in other words, the municipality will still be accountable for the actions of the management company) and for constant support and assistance to informal traders in instances where the management company is unable to adequately address their needs. Moreover, outsourcing the provision of services does not exempt the municipality from its constitutional obligations.

The provision of these services will also assist informal traders to comply with some of the requirements of municipal by-laws or policies or could contribute to the efficiency of informal traders (e.g. providing access to electricity or lighting may enable informal traders to prepare food faster or more efficiently and providing access to water may enable informal traders to clean their trading areas). There are various provisions in existing municipal by-laws that informal traders will be able to comply with more easily if they had greater access to basic services. For example, some municipal by-laws provide that informal traders are only allowed to dispose of their waste in waste disposal that has specifically been provided by the municipality for this purpose, some by-laws require informal traders to dispose of fluids in certain ways, and some by-laws require informal traders to clean up litter in the vicinity of their trading stalls. If a municipality does not provide adequate waste disposal mechanisms, many traders will be unable to comply with these obligations.

The provision of services is also a critical component of local government charging any tariff or rental from informal traders for the use of their trading stands. Contractual agreements, such as lease agreements or even trade permits, may entitle informal traders to basic services depending on the terms and conditions specified in these contracts. For example, many municipal by-laws and policies explicitly provide for differentiating or escalating tariffs based on the site size, desirability of location and level of service provision. This means that, under certain tariff or rental arrangements, access to basic services may be a contractual obligation that needs to be delivered by the municipality (or its service provider).

Some funding for the installation of bulk infrastructure for services can be obtained through the Shared Economic Infrastructure Facility (SEIF). However, ultimately municipalities are obliged to fund bulk infrastructure for the provision of services from their existing infrastructure budgets.
Municipalities should develop more concrete targets for the provision, upgrading and maintenance of basic services

Many municipal by-laws and policies state that the municipality will provide access to basic services to informal traders, however these by-laws or policies rarely go into specifics. Although there may be other mechanisms that may be more appropriate for specific targets or planning in relation to the provision of services for informal trade (e.g. a municipality’s Integrated Development Plan (IDP)), it is concerning that the promises to provide services in by-laws and policies are often vague and abstract.

Municipalities should therefore include provisions in their policies governing informal trade that oblige municipal councils or government officials to set measurable targets for the provision or installation of services for informal trade within the municipality. These targets could be adjusted from time to time. These provisions should also provide for a monitoring and review of the municipality’s achievements in relation to these targets. The City of Cape Town’s current informal trade policy, for example, provides that the implementation of the policy should be monitored annually, for the objectives of the policy to be evaluated bi-annually and for the entire policy to be reviewed every 5 years. There is therefore no reason why policies should not require councils to set clear, measurable targets for the provision of services and monitor the provision against these targets.
One of the key delivery arms of the **National Informal Business Upliftment Strategy (NIBUS)**, the primary national policy on the informal sector, is the **Shared Economic Infrastructure Facility (SEIF)**. SEIF provides funding for the development of new common or shared infrastructure or the upgrading or maintenance of existing infrastructure used for informal trade. The types of infrastructure that could be funded through SEIF are warehouses; storage facilities; the installation of services; the construction of parking, paving or fencing; the construction or maintenance of shelter for informal traders; cold storage for common use; administrative or information centres; and even child-care facilities for informal traders. The funding provided in terms of SEIF takes the form of a 50:50 cost-sharing grant to municipalities or municipal entities (maximum of R5 million).

Various **municipal by-laws and policies** governing informal trade also prioritise the development, upgrading and maintenance of bulk infrastructure for informal trade. These by-laws and policies, for example, state that municipalities (or their chosen service providers) should develop infrastructure that would enhance informal trade in their municipal area. In addition, these by-laws or policies provide that the provision of infrastructure should be accompanied with a maintenance plan setting out how the infrastructure will be maintained in the future. However, none of the municipal policies that were reviewed for the purposes of this discussion document indicated what type of infrastructure would be provided with any specificity – a critical missed opportunity to ensure greater monitoring of targeted deliverables.

SALGA can encourage municipalities to provide, upgrade or maintain the necessary infrastructure for informal trade by creating awareness among municipalities of the funding programmes available and the need for municipalities to allocate their own infrastructure funding for the purposes of informal trade infrastructure. In addition, SALGA may be able to provide support or assistance with structuring or developing funding proposals in terms of available funding mechanisms.
PROPOSALS
TRAINING AND SKILLS DEVELOPMENT

16. Municipalities should ensure that the rights of informal traders are promoted by providing adequate training to 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 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 understanding the rights of traders and the legal regime that applies to informal trade.

17. To create an enabling environment for informal trade, municipalities should develop and make available comprehensive skill development programmes for informal traders.

The Department of Small Business Development (the Department) has developed various programmes to provide enterprise development support in the form of skills development to informal businesses. For example, the Informal and Micro Enterprise Support Programme (IMESP) provides funding for skills development support in the form of technical support (including marketing, product improvement and regulatory compliance support), organisational support, or management and governance training through a grant of up to R60 000. However, the programme is aimed at providing support to “informal businesses”. This seems to suggest that informal traders would not be eligible for the programme.

A similar programme that focuses on skills development for informal traders should be provided by municipalities. In particular, municipalities should provide skills development programmes that provide support to informal traders in relation to the legal, regulatory and policy environment governing informal trade (which will encourage greater compliance with by-laws and policy); basic business skills; and training in relation to advocacy and lobbying (this will enable traders to organise more effectively if they are not organised and participate meaningfully in decision-making processes).
Towards Recommendations on the Regulation of Informal Trade at Local Government Level

The vast majority of municipal by-laws and policies that were reviewed for this discussion document defined informal trade broadly and provided for different types of informal trade to take place. This includes informal trading in different locations or fora, with different levels of permanence, and even forms of trading that are not location based. Some of the types of trading that are commonly listed in by-laws are street trading, trading in pedestrian malls, trading in linear markets, trading at trading interchanges, beach trading, mobile trading (usually trading from a caravan or light delivery vehicle), roving trading (usually on foot) or trading at special events. Each form of trading may be regulated differently in municipal by-laws. In practice, most municipalities simply acknowledge that informal trading can take many different forms and impose a set of rules and regulations that applies uniformly to all types of trading (with the exception of informal trading at special events, which is often subject to its own regulations). This approach is reflective of the dynamic and often complex nature of informal trade.

To the extent that municipal by-laws and policies do not make provision for different types of informal trade, they are encouraged to do so.

PROPOSALS

PRODUCTS AND SERVICES

18. Municipal by-laws and policies should allow different types of informal trade
Municipalities should allow informal traders to provide a wide array of goods and services. Many municipal by-laws or policies governing informal trade allow municipalities to curate the array of goods and services sold by informal traders through regulation. In almost all of these by-laws, the municipality is given the power to limit or restrict the sale of specific types of goods and services if similar goods or services are sold in the vicinity by other informal traders or formal businesses. The regulation seems to be largely focused on protecting the formal sector from the informal sector.

While it is doubtful that an informal trader will be a financial threat to an established formal business, these by-laws and policies fail to recognise the often complex and interconnected relationship between formal and informal trade, in terms of which each sector may bolster the other.

Municipal councils should therefore be cautious of limiting the type of goods of services provided by informal traders in a specific area or market without considering what the broader implications of such limitation will be. In particular, municipalities should consider the impact of any such decision on informal traders’ ability to earn a livelihood.
PROPOSALS
TARIFFS AND TARIFF STRUCTURE

20.
Municipalities should provide for a flexible and differentiated tariff or rental structure based on site size, desirability of location, services provided and affordability for informal traders.

Traders within the municipal area. In other instances, municipalities employ a differentiated (or escalating) tariff structure in terms of which informal traders are required to pay more or less depending on a number of factors including the size of the trading space, the desirability of location (e.g. the trading stall could be in an area with high pedestrian foot traffic) or the level of services provided. There are various municipal by-laws and policies that provide for municipalities to use a differentiated tariff structure. Some government development networks have also supported this kind of tariff or rental structure.57

A differentiated tariff may be appropriate in certain circumstances. However, any such structure should also take cognisance of the affordability of the tariff or rental based on the income of informal traders. Many informal traders are poor and struggle to earn a livelihood. For this reason, it would allow informal traders to be more financially viable if their income is also taken into account when considering what tariff or rental they should pay for a specific trading space.
Towards Recommendations on the Regulation of Informal Trade at Local Government Level

21. Municipalities (or their service providers) should be more transparent about how the tariffs or rental amounts are used for the management of markets or trading areas. There is anecdotal evidence that suggests that informal traders are more enthusiastic about paying their tariffs or rental amounts if a significant portion of the resources collected is directly reinvested into the management, maintenance or upgrading of the market or trading area where they trade. A similar sense of ownership might be achieved by allocating a certain portion of resources collected from informal traders directly to the maintenance or refurbishment of the market or trading area where traders trade.

Municipalities are therefore encouraged to be transparent about how the tariffs or rental amounts collected are used and aim to find ways to visibly and demonstrably reinvest the resources collected from informal traders into the markets or trading areas where they trade.
22.

Municipal by-laws and policies governing informal trade should create genuinely participatory and inclusive spaces through which informal traders can participate in decision-making processes.

Municipal by-laws and policies should provide regular and ongoing opportunities for the informal trading sector to participate in decision-making processes that would affect informal traders. This should not only be limited to the adoption of informal trade policies or the enactment of by-laws, but should also extend to any decision or action on the part of local government that will materially affect informal traders. This might include identifying sites for new markets, identifying development priorities or developing dispute resolution mechanisms.

Some municipal by-laws and policies provide for informal traders to be accommodated in formal decision-making structures. It is strongly encouraged for informal trade organisations or representative bodies to have more than a mere nominal representation on any formal decision-making structure. This approach would allow informal trade associations or organisations to effectively articulate or defend the interests of informal traders in these forums.

Commentators note that local government can play an important role in assisting with the organisation of representative bodies in the informal trade sector and developing mechanisms through which these bodies can actively participate in material decisions.
Towards Recommendations on the Regulation of Informal Trade at Local Government Level

Municipalities should “meaningfully engage” with informal traders before they take decisions that will adversely affect them*

The South African courts have in two cases related to informal trade, Makwickana and SAITF, indicated that municipalities, property owners or services providers may be obliged to “meaningfully engage” with informal traders about decisions that adversely affect them. Meaningful engagement is a legal principle that was developed by the Constitutional Court in a series of eviction cases. It can be described as a two-way process where the parties involved in a dispute “engage with each other in a proactive and honest endeavour to find mutually acceptable solutions”. Meaningful engagement requires the parties to a dispute to engage in “proper discussions, and where fitting, mediation”. In the context of informal trade, the courts have referred to the need to meaningfully engage with informal traders in the context of the impoundment of a traders’ goods or the relocation or eviction of informal traders without following due process. In Makwickana, the High Court stated 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.” The court questioned “why no meaningful engagement occurred in this dispute” and suggested that the parties had failed to meaningfully engage because of the “adversarialism cultivated by litigation being the only form of state sponsored dispute resolution.” The court’s order in Makwickana 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 Constitutional Court said that it found “nothing dilatory in the efforts of the [traders and traders’ organisations] to engage the City and persuade it to restore them to their trading positions in the inner city”. This implies that they were wise to attempt to resolve the issue through engagement instead of immediately rushing to Court for an urgent interdict. It also implies 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 proceeded.
Towards Recommendations on the Regulation of Informal Trade at Local Government Level

Endnotes

2 For more on SERI, see our website: http://seri-sa.org.
7 SALGA and LEDNA, Managing Informality, p. 89.
8 See section 6(2)(c) of the Businesses Act. See also Socio-Economic Rights 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 (June 2014).
9 See, for example, the Buffalo City Metropolitan Municipality, “By-Law on Street Trading”, preamble; City of Cape Town, “Informal Trading By-Law, as amended”; para. 13; City of Johannesburg, “Informal Trade By-Laws”, para. C. See also SALGA and LEDNA, Managing Informality, pp. 89-90.
11 See City of Tshwane Metropolitan Municipality, “Street Trading Policy”.
12 See City of Cape Town, “Informal Trading By-Law, as amended”, para. 8.5.6; and City of Cape Town, “Informal Trading Policy”, para. 9.5.4 (j).
14 See section 7 of the Constitution, which provides that the state is obliged to “respect, protect, promote and fulfill” all of the rights contained in the Bill of Rights.
15 See section 2 of the Constitution, which states that: “The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”
17 See section 9(1) and (3) of the Constitution.
18 See, generally, Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism 2015 (1) SA 151 (SCA) (Somali Association).
19 See section 36 of the Constitution. See also, generally, Somali Association.
20 SAITF, para. 31.
21 SAITF, para. 31.
22 See Somali Association, paras. 9 and 43.
23 See SAITF, para. 31; and Somali Association, paras. 9 and 43.
24 See Somali Association, paras. 33 and 43.
25 Somali Association.
26 See the wording of section 10 of the Constitution.
27 Somali Association, para. 44.
28 See, for example, Rustenburg Local Municipality, “Rustenburg Street Trading By-Law”; Rustenburg Local Municipality, “Street Trading Policy”.
29 All of these decisions are likely to amount to administrative actions, which means that they will be subject to the rules of administrative law. See, for example, Makwickana v Ethekwini Municipality 2015 (3) SA 165 (KZD) (Makwickana), para. 75, where the High Court found that the impoundment of an informal traders’ goods is “an exercise of public power constituting an administrative action.” See also L. 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).
30 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.
31 Makwickana, paras. 77-91.
32 Makwickana, para. 87.
33 Makwickana, paras. 84-86.
34 Makwickana, para. 91.
35 Makwickana, para. 143.
36 Makwickana, para. 143.
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37 Makwickana, para. 80 (emphasis added).
38 Makwickana, para. 144.
41 See, generally, SAITF.
42 Section 152(1)(b) and (c) of the Constitution.
44 Section 195(1)(d) and (e) of the Constitution.
45 Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) (Joseph), para. 34.
46 Section 152(2) of the Constitution.
47 Section 153(a) of the Constitution.
48 Section 139(5) of the Constitution.
49 Joseph, para. 45.
50 This example is used by the eThekwini Municipality to indicate why “[m]ore understanding is needed of the way that the provision of services themselves change the way that economic activities take place...” (eThekwini Municipality, “Informal Trading Policy”, para. 8.3). The municipality therefore seems to recognise that the provision of services could assist informal traders in positive ways.
51 See, for example, City of Cape Town, “Informal Trading By-Law, as amended”, paras. 5.3.4.5 and 8.2.3; City of Johannesburg, “Informal Trade By-Laws”, para. 11.3; and eThekwini Municipality, “Informal Trading Policy”, paras. 5.3, 5.4, 7.3 and clause 4 of the rental policy (annexure 4).
52 See City of Cape Town, “Informal Trading Policy”, para. 10.
53 See the Department of Small Business Development’s website: http://www.dsbd.gov.za/?page_id=1222.
54 See, for example, City of Cape Town, “Informal Trading By-Law, as amended”, paras. 3.1 and 3.2; City of Johannesburg, “Informal Trade By-Laws”, para. 3(1); and eThekwini Municipality, “Informal Trading By-Law”, para 31 (which deals with trading at special events).
57 SALGA and LEDNA, Managing Informality.
58 See the case study of the management of a market that was delegated to informal traders in Bamako, Mali in SALGA and LEDNA, Managing Informality, pp. 35-43 and 86.
59 SALGA and LEDNA, Managing Informality, p. 89.
60 SALGA and LEDNA, Managing Informality, p. 89.
62 PE Municipality, para. 43.