

**The informal economy for local economic
development in South Africa: a
constitutional law approach**

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ABSTRACT

The *Constitution of the Republic of South Africa*, 1996 mandates local government to be developmentally oriented and proactively facilitate local economic development (LED). Although LED is not explicitly listed in Schedules 4B and 5B of the *Constitution*, it is succinctly provided for in both the objects of local government, and in the developmental duties of municipalities. In this sense, it is submitted that the informal economy sector in South Africa constitutes the fulcrum of LED, and the overall economy of local communities. This is particularly important because the informal economy accounts for 18 percent of the employed population of South Africa. For instance, the street trading sector exclusively ensures that more than an estimated 813 000 households live above the poverty line. Similarly, the National Development Plan 2030: Our future –make it work (2012) estimates that informal trading, as a mainstay of LED will produce between 1.2 million and 2 million jobs by 2030.

Despite their significant role in economic and social development, street traders continue to experience a continuum of persecutions and devaluation from local authorities and South African municipalities. These include sustained forceful evictions, incessant confiscation of their properties (goods), illegal soliciting of bribes by police officials to grant them permission to operate in certain areas, and the lack of provision of basic municipal services. This stifling situation is indicative of the repressive relationship between the street trading sector and local government in South Africa.

This study critically evaluates the legal validity of the current instruments used by South African cities in the regulation of street trading in their areas through the lens of the *Constitution*. The study concludes that some provisions in the instruments used to regulate street trading tacitly contradict the dictates of the *Constitution*. The study makes recommendations on how some of the values and principles in the *Constitution* should guide how cities regulate street trading in order to better facilitate LED.

Key words:

Cities; developmental local government; local economic development; informal economy; street trading; constitutional law perspective.

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LIST OF ABBREVIATIONS

AeT	<i>Asiye eTafuleni</i>
ANC	African National Congress
AG	Auditor-General of South Africa
AU	African Union
BOR	Bill of Rights
CBO	Community-Based Organisation
CCMA	Commission for Conciliation, Mediation and Arbitration
CLT	<i>Consolidação das Leis do Trabalho</i>
CSIR	Council for Scientific and Industrial Research
CT	<i>Carteira de Trabalho</i>
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution Strategy
HSRC	Human Sciences Research Council
ICLS	International Conference of Labour Statisticians
IDP	Integrated Development Plan
IDPR	International Development Planning Review
IDRC	International Development Research Centre
ILO	International Labour Organization
IUDF	Integrated Urban Development Framework
IRFA	Intergovernmental Relations Framework Act 13 of 2005
LED	Local Economic Development
LEPU	Local Economy Policy Unit
LGNF	Local Government Negotiation Forum
LGTA	Local Government Transition Act 209 of 1993

LRC	Legal Resources Centre
MAP-SEZ	Maluti-A-Phofung Special Economic Zone
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
MOA	Memorandum of Agreement
NDP	Reconstruction and Development Programme
NEMA	National Environment Management Act 107 of 1998
NP	National Party
NSDP	National Spatial Development Perspective
PAIA	Promotion of Access to Information Act 2 of 2000
PELJ	Potchefstroom Electronic Law Journal
PPP	Public-Private-Partnership
RDP	Reconstruction and Development Programme
UCLG	United Cities and Local Governments
UIF	Unemployment Insurance Fund
UN	United Nations
SACN	South African Cities Network
SAIIA	South African Institute of International Affairs
SAJHR	South African Journal of Human Rights
SALGA	South African Local Government Association
SALJ	South African Law Journal
SANCO	South African National Civics Organisation
SANTRA	South African National Retail Traders Association
SERI	Socio-Economic Rights Institute of South Africa
SDG	Sustainable Development Goal
SEWU	Self-Employed Women's Union

SEZ	Special Economic Zone
SMME	Small, Medium and Micro Enterprises
SAHRC	South African Human Rights Commission
Stats SA	Statistics South Africa
STEL LR	Stellenbosch Law Review
UCLG	United Cities and Local Governments
UN	United Nations
WIEGO	Women in Informal Employment: Globalizing and Organizing

CHAPTER 1

INTRODUCTION

1.1 Background

Prior to the adoption of the *Constitution of the Republic of South Africa* in 1996 (hereinafter the *Constitution*), local government was primarily responsible for the provision of municipal services to local communities.¹ Under the apartheid regime, service delivery was characterised by racial, social and economic inequalities.² Predominantly white areas had developed infrastructure for both businesses and residential areas, while black communities were underdeveloped areas marked by widespread poverty and unemployment.³ The discriminatory nature of apartheid policy was particularly evident at the local government level.⁴

The reversal of apartheid policy by the post-1994 government necessitated a deliberate re-evaluation of the role of local government.⁵ Currently, municipalities are non-racial institutions tasked amongst other things, with the integration of previously racially and economically divided societies.⁶ The restructuring of local government occurred in accordance with the imperatives of the *Constitution*.⁷ The *Constitution* embodies several features and principles of municipal governance that evince drastic transformations in the status of local government.⁸ One of the fundamental features of the local government is its extensive developmental mandate. This mandate implies that local government's task extends beyond the mere provision of services to communities.⁹ It is also tasked with the responsibility of providing a democratic and accountable government; the provision of municipal

¹ See *City of Cape Town and Others v Robertson* 2005 2 SA 323 (CC) para 53; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) (*Fedsure Life*) para 27.

² Steytler and De Visser *Local Government Law of South Africa* 7-8.

³ *Fedsure Life* para 2.

⁴ *Fedsure Life* para 121.

⁵ Steytler and De Visser *Local Government Law of South Africa* 27. "Local government", "cities" and "municipalities" will be used interchangeably throughout this study.

⁶ Steytler and De Visser *Local Government Law of South Africa* 10.

⁷ *Fedsure Life* para 38; Steytler and De Visser *Local Government Law of South Africa* 1.

⁸ Sections 151(2), 151(3) and 151(4) of the *Constitution*.

⁹ Fuo 2017 *De Jure* 325.

services in a sustainable manner; the promotion of a healthy and safe environment; the promotion of socio-economic development; and the promotion of public participation in matters of local government.¹⁰ In addition, municipalities must contribute towards the protection and realisation of a variety of rights guaranteed in the *Constitution*.¹¹

In terms of the *Local Government: Municipal Systems Act* 32 of 2000 (hereinafter the *Municipal Systems Act*)¹² development in the local government context is categorised into two parts. Firstly, the local government must utilise its resources to improve the lives of local community members.¹³ Secondly, the upliftment of the lives of community members should include social, economic, environmental, spatial and infrastructure development.¹⁴ In this respect, economic development encapsulates the use of local resources to facilitate conditions that enable job creation and poverty eradication within local communities, and strategies that boost the growth and development of local businesses.¹⁵ Therefore, the mandate of economic development requires municipalities to collaborate with communities to devise innovative ways of maximising the development of local economies and sustaining the livelihoods of the people.¹⁶ This implies that developmental local government in South Africa encompasses the proactive encouragement of innovation and growth of local enterprises, and the provision of maximum support for entrepreneurs with the principal aim of alleviating poverty, as opposed to simply attracting investment into local economies. This is called local economic development (LED).¹⁷

¹⁰ S 152(1) of the *Constitution*; Koma 2010 *Journal of Public Administration* 112–114; Fuo 2017 *De Jure* 325.

¹¹ Grigolo 2017 *Colombia Human Rights Law Review* 67-68; see generally Durmus 2020 *Netherlands Quarterly Human Rights* 46.

¹² *Local Government: Municipal Systems Act* 32 of 2000 (*Municipal Systems Act*).

¹³ S 1 of the *Municipal Systems Act*; also see part B of the White Paper on Local Government.

¹⁴ S 1 of the *Municipal Systems Act*.

¹⁵ United Cities and Local Governments (UCLG) *UCLG Policy Paper: The role of Local Government in Economic Development* 7.

¹⁶ Part B of the White Paper on Local Government.

¹⁷ See para 2.2.3 below; Abrahams 'Local Economic Development in South Africa: A Useful Tool for Sustainable Development' 189-190.

Nel departs from the premise that LED and the informal economy are equivalents in the South African context.¹⁸ The author bases his argument on the fact that the informal economy and communal farming have thrived remarkably without intervention and support from local government, thereby playing a significant role in the upliftment of the lives of millions of people in local communities.¹⁹ Although this study agrees with Nel that the informal economy has developed without the support of the government, it propounds the idea that a symbiotic and complementary relationship between the informal economy and the local government is indispensable to ensuring the sustained growth of the informal economy.²⁰ This is because the informal economy forms a significant part of LED. Thus, it involves the creation and development of a variety of small-scale operations by local people, primarily for the benefit of the residents of the local communities.²¹

The informal economy comprises a range of different sectors. One of which is street trading (also referred to as street vending). This sector is prevalent in developing countries.²² Even though street trading in South Africa is relatively small compared to other developing countries such as Ghana, India, and Thailand,²³ it remains an important feature of the domestic informal economy.²⁴ The street trading sector ranges from small service providers such as salons, car wash facilities, shoe and cell phone repairs,²⁵ to the selling of various goods including fresh vegetables and cooked foods. In South Africa, street traders utilise variations of stalls (infrastructure) ranging from well-equipped stalls, to umbrellas and boxes on the sidewalks.²⁶ Some street traders operate with no trading structure at their disposal.²⁷

¹⁸ Nel 2001 *Urban Studies* 1005.

¹⁹ Nel 2001 *Urban Studies* 1005.

²⁰ See para 3.6 below for a detailed discussion on the relationship between the local government and the informal economy.

²¹ See the more extensive discussion in para 3.3.1 below.

²² Hart 1973 *The Journal of Modern African Studies* 78.

²³ Chen 'The South African Informal Sector in International Comparative Perspective: Theories, Data and Policies' 42.

²⁴ Holness, Nel and Binns 1999 *Urban Forum* 289; Philip 'Limiting Opportunities in the Informal Sector: The Impact of the Structure of the South African Economy' 318.

²⁵ Holness, Nel and Binns 1999 *Urban Forum* 290-291; and Meyer 2015 <https://hsf.org.za/publications/hsf-briefs/informal-trading-in-johannesburg>.

²⁶ Skinner 2008 *Development Southern Africa* 227 and Holness, Nel and Binns 1999 *Urban Forum* 290.

²⁷ City of Cape Town *Informal Trading By-law* (2009).

Street traders usually work long hours catering to people who move through the city at different hours of the day.²⁸

The significance of street trading to urban economies and LED in South Africa cannot be overemphasised. Engaging in legal research on the subject of street vending as a crucial aspect of LED in South Africa is pertinent for three reasons. Firstly, the sector is dominated by disadvantaged, low-skilled women.²⁹ Secondly, it is the most preferred sector engaged in by participants of the informal economy.³⁰ Thirdly, street trading serves as an economic "safety net" for the unemployed and marginalised.³¹ As Skinner and Haysom³² aptly aver, the phenomenon of street trading is likely to increase due to rapid urbanisation.³³ However, Pieterse argues that street trading presents various issues for local authorities.³⁴ While municipalities seek to give recognition to the informal economy as a vehicle for promoting social and economic development, the local sphere of government is obliged to protect the rights of people who are outside of the informal economy.³⁵

Although this study acknowledges the existence of various relationships between the actors in the informal economy,³⁶ it focuses on the relationship between street traders and local authorities. This is because the exclusion and marginalisation of street traders in economic processes constitutes an urgent issue of global concern,

²⁸ Holness, Nel and Binns 1999 *Urban Forum* 290.

²⁹ Small Enterprise Development Job Creation and Enterprise Department of the International Labour Office *Organizing in the Informal Economy: A Case Study of Street Trading in South Africa* 7; and Statistics South Africa (Stats SA) *Quarterly Labour Force Survey* 63. In terms of this survey, there are 269000 more men who are self-employed in the informal trading sector than there are women. Women are prone to being employees rather than independent workers.

³⁰ Small Enterprise Development Job Creation and Enterprise Department of the International Labour Office *Organizing in the Informal Economy: A Case Study of Street Trading in South Africa* 7.

³¹ Holness, Nel and Binns 1999 *Urban Forum* 290.

³² Skinner and Haysom 2016 http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/4527/wp_44_informal_sector%E2%80%99s_role_food_security_2016.pdf?sequence=1&isAllowed=y.

³³ Yuki 2007 *Journal of Development Economics* 76-77. The author defines the concept of urbanisation as the increase in the number of people who live in cities as opposed to the rural areas. Urbanisation is linked to the drastic changes in the economic structures of a country.

³⁴ Pieterse 2017 *Potchefstroom Electronic Law Journal (PELJ)* 3.

³⁵ Pieterse 2017 *PELJ* 3.

³⁶ See para 3.5 below.

one that has been an ongoing point of contestation since the early 1970s.³⁷ Street trading has been particularly viewed as a source of public nuisance; an obstruction to human and vehicle traffic; and as a cause for criminal activities.³⁸ Several local authorities have designed and implemented by-laws and regulations aimed at responding to the aforementioned challenges seemingly posed by street trading.³⁹ Oftentimes, these laws are not suited to the dynamics of the informal economy. Subsequently, their implementation leads to the unlawful eviction of street vendors from their stalls, the confiscation of their goods and deprivation of basic municipal services.⁴⁰

Arguably, there are contradictions between the dictates of the *Constitution* and municipal reaction to the informal economy, specifically regarding street trading. This situation holds devastating repercussions for the advancement of LED and the overall fight against poverty and unemployment. In fact, it raises the urgency for the examination of the matrix of values and principles enshrined in the *Constitution* regarding the autonomy and governing powers of local government in relation to the regulation of street trading on the one hand, as well as the rights and duties of street traders on the other hand. Considering a series of recent events and cases involving the unlawful eviction and confiscation of street traders' goods with minimal recourse across South African cities, this sort of benchmarking is extremely important.⁴¹ Such an examination would provide an invaluable yardstick for assessing the legal soundness of some existing by-laws and policies currently utilised in the regulation of local or municipal informal economies.

Based on the foregoing, this study critically evaluates the validity of the current applicability of existing municipal by-laws, policies, and events concerning street trading in two South African cities. The objective is to decipher whether the

³⁷ Skinner 2008 *Development Southern Africa* 228; and Holness, Nel and Binns 1999 *Urban Forum* 268.

³⁸ Tissington 2009 *The Business of Survival: Informal Trading in Inner City Johannesburg* 6.

³⁹ See para 4.1 below.

⁴⁰ Socio- Economic Rights Institute of South Africa 2018 https://www.seri-sa.org/images/SERI_SALGA_Informal_Trade_Jurisprudence_WEB.pdf.

⁴¹ News24 2018 <https://www.news24.com/SouthAfrica/News/overlooked-and-undermined-the-challenges-durban-street-vendors-face-20180725>.

mentioned municipal instruments⁴² comply with the dictates of the *Constitution*. By doing so, this study aims to proffer a fresh insight into the growing discourse surrounding law, informality, LED, and local governance in contemporary South Africa.

1.2 Research objectives

The primary objective of this study is to investigate how the adoption of a constitutional law approach to the informal economy (particularly street trading) can optimise its growth as an inextricable part of LED in South Africa. The subsidiary objectives of the study are:

- To explore and evaluate some of the theoretical perspectives on LED as part of developmental local government in South Africa.
- To explore and contextualise theoretical perspectives on the rationale for, the features and sectors of, and the relationship between street traders and local authorities in the informal economy in South African municipalities.
- To use the *Constitution* as a yardstick to decipher how municipalities should approach the recognition and regulation of the street trading sector.
- To establish whether the by-laws, policies and the IDPs of the City of Johannesburg and eThekweni Metropolitan Municipality regarding street trading sector currently conform with the dictates of the *Constitution*.
- To conclude the study with critical views on how the adoption of a constitutional law approach to municipal action may optimise the role of the informal economy in LED in South Africa.

1.3 Study outline

This first chapter of this study has provided an explanatory contextualisation of the topic under discourse. The second chapter of this study presents a brief historical

⁴² The term governance instruments and tools will be used interchangeably throughout this study.

overview, and definition of, as well as theoretical perspectives on developmental local government and LED. The third chapter of the study discusses the features, sectors, and role-players in the informal economy in South Africa. In the fourth chapter, the discussion focuses primarily on informal trading (specifically, street trading) with the aim of using the *Constitution* as a yardstick to determine how municipalities should approach the recognition and regulation of the street trading sector. Chapter 5 briefly examines the current *status quo* of municipal reaction to street trading using the City of Johannesburg and the eThekweni Metropolitan Municipality as case studies. Chapter 6 presents a conclusion to the study and offers practical recommendations on how the adoption of a constitutional law approach to municipal action may optimise the role of the informal economy in LED.

1.4 Research methodology

The study is a desktop-based literature review approach that traverses different disciplines such as law, development studies and economics. The study is conducted through an integrated review of primary and secondary sources of law. The primary sources used in this study include the *Constitution*, case law and legislation. These sources focus on aspects of developmental local government, LED, and the constitutional law approach to the development of the informal economy, specifically street trading.

Relevant secondary sources consulted in this study include journal articles, and international and African regional instruments such as the *African Charter on the Values and Principles of Decentralisation, Local Governance and Development* (2014) and *Agenda 2063: The Africa We Want*. As previously mentioned, the City of Johannesburg and the eThekweni Metropolitan Municipality serve as the case examples in this study. This is done with the aim of establishing whether these cities' forced encounters with street traders and the general reaction of local authorities to the street trading sector as embodied in their policies and by-laws, conform with the dictates of the *Constitution*. The study also aims to decipher the consequences of the contravention thereof.

The cities under study have been specifically chosen because they both have a significant population of street traders operating in their areas. Moreover, some of the disputes arising from the relationship between street traders and municipal officials in these cities have been previously adjudicated and resolved in court.⁴³

⁴³ See para 4.4 below.

CHAPTER 2

LOCAL ECONOMIC DEVELOPMENT AND DEVELOPMENTAL LOCAL GOVERNMENT

2.1 Introduction

Local economic development is not a foreign term within the discourse of developmental local government, neither is it an extra-ordinary or a special service required from South African local government. Although the term LED is not explicitly cited in the *Constitution*, it inextricably mandates municipalities to promote the social and economic development of local communities.⁴⁴ The legal and policy framework of the local sphere of government provides for mechanisms and processes to realise this mandate including the setting of "special tariffs for a category of commercial and industrial users" amongst other things.⁴⁵ The categories of commercial users operating in local communities include both formal and informal enterprises.⁴⁶ To fully comprehend the discussions in this chapter, it is necessary to clarify the meaning of these concepts: "local economic development", "developmental local government" and the "informal economy" within the South African context. In line with the aims of this study, this chapter evaluates the theoretical perspectives on LED as part of the developmental responsibility of local government in South Africa. These perspectives will help to illuminate the role of local government in ensuring the optimal growth of the informal economy.

This chapter is divided into five parts. The first part critically discusses LED strategies from (a) an international perspective, (b) an African regional perspective and (c) a South African perspective. The second part provides a historical overview, meaning and objectives of developmental local government. The third part of the chapter briefly discusses the importance of local governments to LED as is alluded to in global and African regional policies and documents. The fourth part examines the

⁴⁴ S 152(1)(c) of the *Constitution*.

⁴⁵ S 74(2)(g) of the *Municipal Systems Act*.

⁴⁶ S 74(2)(g) of the *Municipal Systems Act* does not expressly distinguish between informal and informal commercial users.

successes and shortcomings of developmental local government in South Africa. The fifth and last part provides a combined analysis of the relationship between developmental local government and LED. The argument here is that inefficient local governance has negative repercussions for LED and that static or stifled LED could adversely affect the progress of developmental local government. The chapter traverses scholarship and applicable discourse from disciplines such as development studies, economics, and law regardless of geographical distinctions.

2.2 The evolution and contemporary meaning of LED

2.2.1 Initial understandings of LED

The notion of LED originated in countries of the North, including Denmark, Finland and Sweden.⁴⁷ The term was first mentioned in the 1960s.⁴⁸ From its inception, LED was identified as a process that would firstly, react to the unequal and inequitable outcome in the economic landscape at an international and national level; and would secondly, highlight the concerns of local actors that were unsettled about the pace and extent of local investment.⁴⁹ As a result, local governments in the countries of the North developed local policies to deliberately improve the state of their local economies.⁵⁰ Initially, the focus was not on the development of existing local enterprises, but on attracting strategic economic investment from industries such as fashion and pharmaceuticals.⁵¹ To achieve this goal, cities typically offered tax-breaks, loans at favourable rates, and infrastructure development as incentives.⁵²

⁴⁷ The World Bank *Local Economic Development as an Alternative Approach to Economic Development in Sub-Saharan Africa 2*; Rogerson and Rogerson 2010 *Development Southern Africa* 467; Rogerson 2010 *Africa Insight* 40. The "Global North" or the "North" refers to developed countries in Western Europe and North America.

⁴⁸ Rogerson and Rogerson 2010 *Development Southern Africa* 466; Rogerson 2000 *Tijdschrift voor Economische en Sociale Geografie* 399.

⁴⁹ Rogerson and Rogerson 2010 *Development Southern Africa* 466; Pike, Rodríguez-Pose and Tomaney 2007 *Regional Studies* 1254.

⁵⁰ Lee, Lee and Feiock 2012 *Policy Studies Journal* 548.

⁵¹ Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>.

⁵² Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>; Humby 'Local Economic Development and the Pursuit of a Green Economy' 202; Department of Provincial and Local Government "A Policy Paper on Integrated Development Planning Africa (2007)" 3; Rogerson and Rogerson 2010 *Development Southern Africa* 468.

By the 1980s, the focus of cities shifted drastically from the aforementioned industries to the so-called "clusters" of industries.⁵³ Therefore, a city would typically identify a specific cluster where it presumably held a competitive advantage, for example, the fashion or health industry.⁵⁴ In identifying such a cluster, the city would invest in it through tax-breaks, low rates on loans, and infrastructural development in return for job creation and economic growth.⁵⁵ However, the major shortcomings of this LED strategy was the risk of assembling an investment portfolio concentrated on one type of industry.⁵⁶ An inference that can be drawn from these strategies is that, during this era, LED was practically imposed on local communities. This means that the role of local communities themselves in the design and implementation of LED as a strategy was minimal, if not non-existent.

With time, the so-called "smokestack-chasing" of LED strategies such as the cluster strategy, failed.⁵⁷ This failure instigated the "community economic development" school of thought.⁵⁸ According to this model, the only reliable source of economic growth for local communities was home-grown local businesses.⁵⁹ Through these home-grown businesses, local communities embraced their capacity and diversity and attempted to reverse patterns of uneven development.⁶⁰ The community economic development strategy was attractive because of the occasional handouts from the government to community organisations and enterprises.⁶¹

What this implies is that the definitions and approaches to LED are multivalent. For example, while authors such as Blakely, Reddy and Willis define LED as an intricate

⁵³ Cluster referred to the grouping together of related industries. According to Porter, related industries had the tendency to bunch together. See Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>.

⁵⁴ Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>.

⁵⁵ Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>.

⁵⁶ Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>.

⁵⁷ Smokestack-chasing referred to the act of states and local government's use of tax and other incentives to lure jobs to their communities, see Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>.

⁵⁸ "Community economic development refers to municipal assistance aimed at the grassroots." See Bond and McDonald *Local Economic Development Debates in South Africa* 10.

⁵⁹ Bond and McDonald *Local Economic Development Debates in South Africa* 2.

⁶⁰ Bond and McDonald *Local Economic Development Debates in South Africa* 2.

⁶¹ Polèse 2011 <https://www.city-journal.org/html/urban-development-legends-13426.html>.

process,⁶² contrarily, others such as Lukhele, Madzivhandila and the Urban Development Unit of the World Bank define it in terms of its desired outcomes.⁶³

LED can be defined as a process through which local governments, community-based organisations (CBOs), and local communities stimulate and maintain business activities to create employment.⁶⁴ The process of LED involves building on the existing resources of a local area, and accentuating its human, capital and institutional resources.⁶⁵ The process typically unifies the local community, private business entities, local government and non-governmental organisations (NGOs) requiring them to forge a symbiotic relationship towards shaping and preserving the economic future of their territory.⁶⁶

It is not surprising then that as a process, LED must be initiated by the local sphere of government in partnership with local communities and NGOs. Yet, it must be maintained and progressed through institutional, financial, and human resources provided by a range of stakeholders, including local authorities. It is also vital to note the process is protean and not static, this implies that it must constantly be readjusted to ensure that it continues to meet the ever-evolving needs of local communities.⁶⁷ When understood as a process, LED takes on a flexible approach to economic development that encourages the formation of new industries, the capacity improvement of existing local firms and the creation of enterprises to produce high-demand products, propel the transfer of knowledge and skills, as well

⁶² Blakely *Planning Local Economic Development: Theory and Practice* XVI; and Reddy and Willis 2012 *Politeia* 72.

⁶³ Lukhele and Madzivhandila 2018 *The Journal for the Local Economy Policy Unit* 877-888; Urban Development Unit: The World Bank 2003 [http://siteresources.worldbank.org/INTLED/Resources/3396501105473440091/BackgroundpaperforGwenLEDQuickReference Guide \(December 2003\).pdf](http://siteresources.worldbank.org/INTLED/Resources/3396501105473440091/BackgroundpaperforGwenLEDQuickReferenceGuide%20(December%202003).pdf).

⁶⁴ Blakely *Planning Local Economic Development: Theory and Practice* XVI; Reddy and Willis 2012 *Politeia* 72; the World Bank *Local Economic Development: A Primer Developing and Implementing Local Economic Development Strategies and Action Plans 2*.

⁶⁵ The World Bank *Local Economic Development: A Primer Developing and Implementing Local Economic Development Strategies and Action Plans 1*; Department of Provincial and Local Government "A Policy Paper on Integrated Development Planning Africa (2007)" 47.

⁶⁶ Canzanelli *Overviews and learned lessons on Local Economic Development, Human Development and Decent Work* 9; Malefane and Mashakoe *Journal of Public Administration* 477; Blakely *Planning Local Economic Development: Theory and Practice* 49.

⁶⁷ Patterson *Country Report Local Economic Development in South Africa* 3; Department of Provincial and Local Government "A Policy Paper on Integrated Development Planning Africa (2007)" 47.

as the identification of new markets.⁶⁸ Put differently, LED as a process transcends the provision of employment to the creation and sustenance of locally owned enterprises, programmes and projects.⁶⁹

When defined in reference to its desired outcomes, LED focuses simultaneously on improving local economies and the living standard of local communities.⁷⁰ In this respect, a typical desired outcome could be to remedy market failures and to make provision for the inclusion of still-excluded small businesses and entrepreneurs as potential local market contributors.⁷¹ In a similar vein, LED is expected to stimulate economic opportunities in sectors that improve the wellbeing of the community, especially those sectors that have firmly established themselves in a specific local area.⁷² By doing so, it is envisaged that LED would ultimately unlock the ability of local economies to create wealth for local communities.⁷³

As an outcomes-based strategy, devoted and accountable local authorities should ideally spearhead, adopt, and implement LED in partnership with local communities. This could either take the form of ad hoc projects geared towards the achievement of the above outcomes or take the form of municipal investments in existing established sectors of the local economy. This means that outcomes-based LED may not necessarily be based on all the well-known principles of LED such as the creation of employment, the reduction of poverty and ensuring the growth of local economies. Nonetheless, it can still contribute to the development of local communities.⁷⁴ Expanded Public Works Programme (EPWP) is an example of an

⁶⁸ Mongake *Local Economic Development and Globalisation: The International Competitiveness of Certain South African Municipalities* 16.

⁶⁹ Williams 1989 as cited in Mongake *Local Economic Development and Globalisation: The International Competitiveness of Certain South African Municipalities* 16.

⁷⁰ The World Bank *Local Economic Development: A Primer Developing and Implementing Local Economic Development Strategies and Action Plans* 1; Urban Development Unit: The World Bank 2003 [http://siteresources.worldbank.org/INTLED/Resources/3396501105473440091/BackgroundpaperforGwenLEDQuickReferenceGuide\(December2003\).pdf](http://siteresources.worldbank.org/INTLED/Resources/3396501105473440091/BackgroundpaperforGwenLEDQuickReferenceGuide(December2003).pdf).

⁷¹ Meyer-Stamer 'Why is Local Economic Development So Difficult?' 12.

⁷² Blakely *Planning Local Economic Development: Theory and Practice* XVI; also see Reddy and Willis 2012 *Politeia* 72.

⁷³ Kane and Sand (1988) as cited by Bartick *Local Economic Development Policies* 1.

⁷⁴ Mongake *Local Economic Development and Globalisation: The International Competitiveness of Certain South African Municipalities* 16.

outcome-based LED strategy. EPWP is a government initiative that seeks to provide income and poverty relief through temporary work for the unemployed.⁷⁵

Based on the foregoing analysis, there are two LED strategies that can be adopted by local governments. The first is the process approach to LED which emphasises the importance of flexibility in the formulation and implementation of LED strategies. In this approach, different territories can tailor the LED strategy to fit their specific needs. The second approach is the outcome-based approach. This strategy is also important since it highlights the need to create jobs, reduce poverty and grow local economies. The major flaw of outcome-based strategies to LED is that they do not create long-term relations with stakeholders.⁷⁶

2.2.2 Contemporary understandings of LED

As previously mentioned, although the initial understandings of LED pivoted around the attraction of big businesses or investments and infrastructural development by local governments, the notion progressively evolved.⁷⁷ Around the 1970s, some local governments in Africa started adopting and experimenting with LED strategies.⁷⁸ The initial focus of many African states including Nigeria, Ghana and Ethiopia,⁷⁹ was for local businesses and entrepreneurs to engage in all sorts of economic activities in the agriculture, transport and trading sectors with the sole purpose of escaping poverty and unemployment.⁸⁰ Soon afterwards, local government began to regulate these activities, which were then referred to as 'self-reliant strategies of LED'.⁸¹ Entities and entrepreneurs whose economic activities could be classified as self-reliant under the umbrella term of LED, functioned in the

⁷⁵ Department of Public Works and Infrastructure 2018 epwp.gov.za.

⁷⁶ See Cunningham and Meyer-Stamer 2005 *Africa Insight*.

⁷⁷ See para 2.2.1 above.

⁷⁸ Nel and Rogerson 2015 *Local Economy Policy Unit*; The World Bank *Local Economic Development as an Alternative Approach to Economic Development in Sub-Saharan Africa* 3; Olowu 1989 *Canadian Journal of African Studies* 201; Nel 2001 *Urban Studies* 1003-1024.

⁷⁹ United Cities and Local Governments of Africa (UCLG Africa) *State of Local Economic Development (LED) Ethiopia* 4; Mensah, Bawole and Ahenkan 2017 *Development Southern Africa* 611-612; UCLG Africa *State of Local Economic Development (LED) Nigeria* 6.

⁸⁰ United Cities and Local Governments of Africa (UCLG Africa) *State of Local Economic Development (LED) of Malawi* 9.

⁸¹ Also known as 'development from below', and 'development from within', Binns and Nel 1999 *The Journal of Modern African Studies* 390.

absence of technology and external support, including the support of local government. Certainly, these economic activities challenged the rigid descriptions and initial understandings of LED.⁸² These businesses and entrepreneurs relied solely on local knowledge, skills, and local resources to propel their economic activities.⁸³ The key focus of LED was on "endogenous development",⁸⁴ thus allowing local businesses to exploit local human, institutional and physical resources of a community.⁸⁵ This meant that challenges such as poverty, inequality and high rates of unemployment could be effectively addressed through the promotion and development of local businesses.

The previous absence of the local sphere of government during the preliminary stages of LED in African countries and cities is currently being reversed by the recent wave of decentralisation across the African continent. This is because, globally, local governments are expected to advance sustainable development at their local levels and to contribute towards addressing global challenges such as poverty alleviation.⁸⁶ Within the African context, article 7(1) of the *African Charter on the Values and Principles of Decentralisation* enjoins central governments of Member States to put in place legislation, mechanisms and other measures that will "give local governments the authority to mobilise and disburse resources at the local level for local economic development". In terms of article 1 of the *African Charter on the Values and Principles of Decentralisation*:

Local economic development means an element of local development which emphasizes the mobilisation of endogenous resources and local knowledge and skills in a manner that attracts investments to generate inclusive economic activities and growth and promotes the equitable redistribution of resources.

The above definition and a gleaning of several articles in the *African Charter on the Values and Principles of Decentralisation* confirm that local governments in Africa

⁸² Nel 2001 *Urban Studies* 1005.

⁸³ Blakely *Planning Local Economic Development: Theory and Practice* 50.

⁸⁴ Endogenous development refers to internal or rural survival strategies. See Nel 2001 *Urban Studies* 1005.

⁸⁵ Blakely *Planning Local Economic Development: Theory and Practice* 50.

⁸⁶ Fuo 2019 *African Journal of Democracy and Governance* 48; Du Plessis 2017 *Law, Democracy and Development* 239-240.

will be increasingly expected to promote LED.⁸⁷ Also, there is an increasing need for local development at the African regional level to balance "human, economic, social-cultural, political and natural resources to ensure sustainable development of the continent".⁸⁸ This Charter seeks to empower local governments by providing them with powers, responsibilities and resources that will promote local resource mobilisation, LED and eradicate poverty.⁸⁹ Generally, one of the tasks of local governments in African countries is to implement strategies that develop local economies.⁹⁰

Evidently, decentralisation in Africa seeks to promote the participation of local communities in matters of local governance including the advancement of LED.⁹¹ To achieve this goal, a decentralised local government must bridge the gap between the government and the people, facilitate a bottom-up approach to development and actively take cognisance of the needs of local communities.⁹² By doing so, it inevitably becomes easier to develop and implement effective LED strategies.

The role of cities in development has changed considerably.⁹³ Local government is considered as a central role-player in development generally.⁹⁴ Cities have historically contributed to the pursuance of the economic and social objectives of communities.⁹⁵ In this regard, the role of local governments is two-pronged. Firstly,

⁸⁷ Article 10(3) employs African states to adopt pro-poor initiatives for the development of the livelihoods of local communities; and article 11(f) states that local government is accountable to local communities about local development decision, including how financial resources are being managed by this government.

⁸⁸ Article 1 of the *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development*.

⁸⁹ See article 7 of the *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development*.

⁹⁰ Binza 2010 *Administratio Publica* 250.

⁹¹ Edoun and Jahed *The Merits of Decentralisation and Local Economic Development in South Africa* 10; also see Hussein 2003 *Development Southern Africa* 273.

⁹² Parnell and Pieterse (2002) as cited by Eduon 2012 *International Journal of African Renaissance Studies- Multi-, Inter- and Transdisciplinarity* 103.

⁹³ See generally Addaney and Cobbinah 'Climate Change, Urban Planning and Sustainable Development in Africa'; Du Plessis 2019 'The Global Aspirations of "Safe, Sustainable, Resilient and Inclusive Cities' 13; also see *Agenda 2063: The Africa We Want* para 10.

⁹⁴ See Palanivel 2017 <http://hdr.undp.org/en/content/rapid-urbanisation-opportunities-and-challenges-improve-well-being-societies>.

⁹⁵ Bithas and Christofakis 2006 *Sustainable Development* 181.

local government is a custodian of the resources of local communities,⁹⁶ and secondly, local government is tasked with the maintenance of its relationship with relevant stakeholders in development including the private and civil sector, and the local community.⁹⁷ Additionally, cities are expected to fund their development through the sustainable and effective use of local resources.

2.2.3 LED in the South African context: meaning, rationale and actors

Currently, the prevalent understanding of LED within the South African context is linked to developmental local government.⁹⁸ By the virtue of its mandate, local government is the main actor in LED in South Africa. According to the 1998 White Paper on Local Government (the White Paper on Local Government), developmental local government denotes municipalities whose central responsibility is to work with local communities to devise innovative and sustainable ways of meeting the basic needs, and improving the wellbeing of such communities.⁹⁹ This suggests that LED in South Africa necessitates a symbiotic relationship between municipalities and local communities where both stakeholders collaboratively devise innovative ways of improving the livelihoods of local communities. The objectives and duties of local government, as listed in the *Constitution* revolve around the progressive realisation of socio-economic rights.¹⁰⁰ They include ensuring sustainable service delivery, promoting social and economic development, and encouraging the involvement of communities and community organisations in matters of local government.¹⁰¹

Additionally, the White Paper on Local Government identifies four interrelated features that characterise developmental local government.¹⁰² The first characteristic requires local government to maximise economic growth and social

⁹⁶ Part A para 10 of *Agenda 2063: The Africa We Want*.

⁹⁷ See para 2.4 below.

⁹⁸ Rogerson 2010 *Africa Insight* 40; Koma 2014 *Administratio Publica* 41; Koma 2012 *African Journal of Public Affairs* 126.

⁹⁹ Section B of the White Paper on Local Government (the White Paper on Local Government); and Asmah-Andoh 2009 *Journal of Public Administration* 104.

¹⁰⁰ De Visser 2009 *Commonwealth Journal of Local Governance* 9.

¹⁰¹ De Visser 2009 *Commonwealth Journal of Local Governance* 9 and s152 as well as 153 of the *Constitution*; also see Madumo 2012 *Administratio Publica* 43.

¹⁰² De Visser 2009 *Commonwealth Journal of Local Governance* 9.

development. This characteristic is two-fold. First, the economic growth must have maximum impact on the development of the community.¹⁰³ Secondly, a municipality must actively contribute towards social and economic development through the provision of basic municipal services to communities in an equitable and sustainable manner.¹⁰⁴ The second characteristic pertains to the integration and coordination of different agencies including national and provincial departments.¹⁰⁵ Municipalities must further integrate the developmental objects of national and provincial government into their (local) objectives.¹⁰⁶ The third characteristic concerns the democratisation of development, and implies that development must be for every member of society. The final characteristic employs local government to lead and learn.¹⁰⁷ It requires municipalities to be strategic in their dealings with local communities, provincial and national government, and other actors beyond national borders.¹⁰⁸ This characteristic also means that even though local government is the 'governor',¹⁰⁹ it must be willing to listen to and learn from its people.

These characteristics seek to achieve the following key outcomes in local communities: ensuring the provision of household infrastructure and services; creating liveable, integrated cities, towns and rural areas; as well as ensuring the development of the people of South Africa through, amongst other things, LED.¹¹⁰ To empower poor and marginalised societies, local government must ensure that they are included in local government programmes and taken into consideration in the process of policy and decision making. Therefore, LED is a practical means of

¹⁰³ Part B para 1.1 of the White Paper on Local Government.

¹⁰⁴ S 73(1)(a) of the *Municipal Systems Act*, and part B para 1.1 of the White Paper on Local Government.

¹⁰⁵ Part B para 1.2 of the White Paper on Local Government.

¹⁰⁶ S 153 (b) of the *Constitution* and; De Visser 2009 *Commonwealth Journal of Local Government* 9.

¹⁰⁷ Part B para 1 of the White Paper on Local Government.

¹⁰⁸ *Fuo Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 94.

¹⁰⁹ The concept of 'governor' in local government means that municipalities have constitutional and legislative powers and exclusive mandates that allow them to govern the legal and natural persons that live and work within their designated areas of jurisdictions. See Nel, Du Plessis and Retief 'Key elements for municipal action' 44.

¹¹⁰ Part B para 2 of the White Paper on Local Government; also see Mokale and Scheppers *An Introduction to the Developmental Local Government System in South Africa: A Handbook for Councillors and Officials* 23.

promoting the maximum and equitable economic growth referred to in the first characteristic of developmental local government.

There are two plausible reasons for the adoption of LED in South African policy. The first is the need to reverse the patterns of economic development that characterised the apartheid regime.¹¹¹ These patterns included the deliberate stifling of economic development in predominantly black communities, and the racial and communal exclusion of the majority of the black population from economic opportunities.¹¹² As a post-apartheid policy, the *Reconstruction and Development Programme* (RDP) of 1994 recognised the need to ensure inclusive economic growth.¹¹³ The programme had a two-sided agenda that focused on racial reconciliation and ensuring the equal development of local communities.¹¹⁴

The second reason for adopting LED relates to the necessity for sustainable development.¹¹⁵ LED is invaluable to local government which is faced with the challenge of providing adequate human settlements and economic opportunities that can improve the quality of the lives of local communities.¹¹⁶ As soon as a municipality has identified the social and economic challenges of its communities, it is better equipped to adopt the appropriate LED strategies that would efficiently address those challenges.¹¹⁷ This means that the social development and economic growth of local communities should be prioritised by local government. LED also enables people in local communities to liaise with their local municipalities instead of depending on the government to improve their livelihood. Therefore, the fact that local government is the main actor in LED does not make it the only stakeholder, in fact, local communities are the driving force behind LED initiatives.

¹¹¹ Department of Provincial and Local Government *National Framework for Local Economic Development (LED) in South Africa (2006-2011)* 13.

¹¹² Nel and McQuaid 2002 *Economic Development Quarterly* 60.

¹¹³ Para 1.3.6 of the Reconstruction and Development Programme.

¹¹⁴ Para 1.3.6 of the Reconstruction and Development Programme.

¹¹⁵ Department of Provincial and Local Government *National Framework for Local Economic Development (LED) in South Africa (2006-2011)* 3.

¹¹⁶ Abrahams 2003 *Urban Forum* 185. Adequate human settlements refer to the ability of local government to meet the basic needs of its inhabitants.

¹¹⁷ Abrahams 2003 *Urban Forum* 185.

2.3 Developmental local government post-1994

Local government in South Africa consists of municipalities that are established across the country's entire territory.¹¹⁸ Municipalities play an especially significant role in the transformation and maintenance of constitutional democracy.¹¹⁹ As a sphere of government, local government is obligated to improve the lives of people in local communities. This is reiterated in its developmental objectives, which requires it to structure and manage its processes to prioritise the needs of its local communities, including the need for sustained social and economic development.¹²⁰ Therefore, as will be deliberated in chapter 2.3.3 of this study, a comprehension of the *Constitution* is a prerequisite for understanding developmental local government in South Africa. What follows is a historical overview of the transformation of local government.

2.3.2 Historical background to a profound transition

South African local government structures were designed in accordance with the policy objectives of the (national) government of the day.¹²¹ As alluded to in chapter 1, one of the policy objectives of the pre-democratic government in South Africa comprised racial segregation, the disenfranchisement of certain ethnic groups, and the division of cultural and racial groups.¹²² The systems of government that preceded the current constitutional democracy include colonialism, the Union of South Africa and subsequently, apartheid¹²³ Thus, it would be misleading to view the apartheid regime as the absolute beginning of the systematic geographic, institutional, and social segregation at local government level.¹²⁴

¹¹⁸ S151(1) of the *Constitution*.

¹¹⁹ Foreword in the White Paper on Local Government.

¹²⁰ S135(a) of the *Constitution*.

¹²¹ Tsatsire *et al* 2009 *New Contree* 133; part B para 1 of the White Paper on Local Government; Maharaj 1997 *Urban Geography* 135.

¹²² Part B para 1 of the White Paper on Local Government; and Bekink *The restructuring (systemization) of local government* 46.

¹²³ De Vos and Freedman *South African Constitutional Law in Context* 5-15.

¹²⁴ Part A para 1 of the White Paper on Local Government; also see Binza 2005 *Journal for Contemporary History* 69-87.

Before the emergence of colonialism, several communities in Africa including the indigenous populations in South Africa, governed themselves in a fairly structured manner.¹²⁵ The establishment of recognised formal local authorities in present day South Africa only occurred in 1682.¹²⁶ In the same year, the area presently known as Cape Town was transformed from being a hamlet into a town and afterwards a city.¹²⁷ Thus, Cape Town became the first urban area to be established in South Africa.¹²⁸ The power to govern municipalities was vested in the so-called *heemraden* and the *landdros*.¹²⁹ The former served as a council used for dispute resolution, while the latter was a magistrate that managed local affairs.¹³⁰ The *landdros* and *heemraden* of Cape Town were a form of local authority comparable to the present-day municipal authority.¹³¹

The colonial history continues to influence some of the systems and features of local government. For example, the system of elected councils, which is comparable to the present-day elected municipal councils is traceable to the Municipal Ordinance of 1836 of the Cape Colony.¹³² The Cape Municipal Ordinance served as a framework within which other colonies including Natal, the Orange Free State, and Transvaal could create regulations for the governance of their colonies.¹³³ Subsequent to the Municipal Ordinance of 1836 was the *South African Act* of 1909. Apart from creating a Westminster system of government,¹³⁴ the Act placed local government under the

¹²⁵ De Vos and Freedman *South African Constitutional Law in Context* 5; Olowu *The African Experience in Local Governance* 1.

¹²⁶ Tsatsire *et al* 2009 *New Contree* 130; Binza 2005 *Journal for Contemporary History* 71.

¹²⁷ Tsatsire *et al* 2009 *New Contree* 130; Cloete *South African Municipal Government and Administration* 2. The first form of local authority comparable to present-day municipal council was established in Stellenbosch in 1682 when the Governor of the Cape decided to appoint four of the *free burghers* as *heemraden* for the area of Stellenbosch, see Havenga *The Restructuring of Local Government with Specific Reference to the City of Tshwane* 92.

¹²⁸ Cloete *South African Municipal Government and Administration* 2; Havenga *The Restructuring of Local Government with Specific Reference to the City of Tshwane* 90.

¹²⁹ Tsatsire *et al* 2009 *New Contree* 130; and Binza 2005 *Journal for Contemporary History* 72.

¹³⁰ Tsatsire *et al* 2009 *New Contree* 130; Binza 2005 *Journal for Contemporary History* 72.

¹³¹ Fuo *Local government's role* 72.

¹³² Tsatsire *et al* 2009 *New Contree* 130.

¹³³ Tsatsire *et al* 2009 *New Contree* 131.

¹³⁴ The Westminster government created a sovereign parliament under which parliament was supreme and the judiciary had no power to invalidate legislation created by parliament.

jurisdiction of provinces along with education, health and spatial planning.¹³⁵ This meant that municipalities were under the control of provincial governments.¹³⁶

As previously mentioned, the apartheid policy was not the genesis of racial segregation and separation. However, the *Group Areas Act* of 1950 played an instrumental role in ensuring strict geographical segregation by extricating black people to "own group" areas.¹³⁷ The *Group Areas Act* was a tool used by the apartheid government to intervene in the use, occupation, and ownership of land on a racial basis.¹³⁸ The aim of this intervention was to ensure that government developed places it deemed worthy of development and excluded underdeveloped places such as townships and rural areas. As a result, government developed white areas and relegated the predominantly black areas to a state of underdevelopment with the burdens of inequality and economic inefficiency.¹³⁹

The socio-economic chasm between the societal divide was glaring, for example, the difference between rural areas which were divided into underdeveloped homelands and the developed 'white-owned commercial farming areas'.¹⁴⁰ Towns and cities were also divided along racial lines; under-resourced black townships and well-resourced white suburbs.¹⁴¹ Local communities in white areas generally thrived economically, whereas local communities in black areas were beleaguered with severe administrative and financial constraints.¹⁴² These constraints meant that black communities could not govern themselves effectively and would inevitably fall short of meeting any developmental needs of their communities.¹⁴³

¹³⁵ Wittenberg *Decentralisation in South Africa* 10 and Cloete *South African Municipal Government and Administration* 12.

¹³⁶ Fuo *Local government's role* 73; De Visser 2009 *Commonwealth of Local Governance* 8; and Cloete *Public Administration and Management* 27.

¹³⁷ Part A para 1 of the White Paper on Local Government and; *Group Areas Act* 41 of 1950.

¹³⁸ Maharaj 1997 *Urban Geography* 135.

¹³⁹ Reconstruction and Development Programme para 1.2.2 and para 1.2.3.

¹⁴⁰ Reconstruction and Development Programme para 1.2.2.

¹⁴¹ Reconstruction and Development Programme para 1.2.1.

¹⁴² Binza 2005 *Journal for Contemporary History* 76 and; part A para 1 of the White Paper of Local Government.

¹⁴³ Fuo *Local government's role* 74.

The development of white areas and contradictory underdevelopment of rural black areas and townships, coupled with the dissatisfaction of the majority of people in South Africa propelled the agitation for democratic transformation in the 1980s.¹⁴⁴ It is this period that later inspired the constitutional reform process in the 1990s.¹⁴⁵ In fact, it was the "appalling social and economic conditions" prevalent in black townships and rural areas,¹⁴⁶ that precipitated the uprising in local communities during this time. One of the steps taken by the government to calm the situation in these areas included the establishment of ad hoc intergovernmental grants.¹⁴⁷ These grants were aimed at developing local townships and channelling resources into these communities.¹⁴⁸ Unfortunately, the establishment of these acts was already late. This is because local communities, civic and other community-based organisations had already realised the pertinence of a new dispensation and structure of governance, one that would ensure that local government would be an important pillar of democracy and an essential services provider for all.¹⁴⁹

Four phases of transformation preceded the adoptions of the *Constitution* and the *Municipal Systems Act*. These phases included the unbanning of political prisoners and political organisations in 1990;¹⁵⁰ talks between the South African National Civics Organisation (SANCO) and the National Party (NP) Government;¹⁵¹ the establishment of the Local Government Negotiation Forum (LGNF) in 1993; and the enactment of the Local Government Transition Act 209 of 1993 (LGTA) in the same year. The LGNF would also inform the content of the *Constitution of the Republic of South Africa* Act 200 of 1993 (the interim *Constitution*, 1993).¹⁵²

¹⁴⁴ Bekink *The restructuring (systemization) of local government* 49; and Koma 2012 *Journal of US-China Public Administration* 54.

¹⁴⁵ Part A para 1 of the White Paper on Local Government; and Koma 2012 *Journal of US-China Public Administration* 54.

¹⁴⁶ Bekink *The restructuring (systemization) of local government* 48.

¹⁴⁷ Part A para 1 of the White Paper on Local Government.

¹⁴⁸ Part A para 1 of the White Paper on Local Government.

¹⁴⁹ See generally Bekink *The restructuring (systemization) of local government* 3-4.

¹⁵⁰ Bekink *The restructuring (systemization) of local government* 49.

¹⁵¹ See generally Zuern 2002 *African Studies Review*.

¹⁵² Bekink *The restructuring (systemization) of local government* 50.

Primarily, the autonomous status of local government was outlined in the interim *Constitution*, 1993.¹⁵³ It became the point of departure for understanding the powers and functions of local government. According to the interim *Constitution*, 1993, local government was recognised as an autonomous sphere of government that is entitled to regulate its affairs.¹⁵⁴ Chapter 10 of the interim *Constitution*, 1993 guaranteed important principles of local government which were subsequently incorporated into Chapter 7 of the 1996 *Constitution*.

As much as the interim *Constitution*, 1993 solidified the powers, functions, and autonomy of local government in South Africa, a transition into developmental local government still required the making of extensive legal and political choices.¹⁵⁵ The legal and policy framework which includes the *Local Government Transition Act* 209 of 1993; the White Paper on Local Government; the *Local Government: Municipal Structures Act* 117 of 1998 (*Municipal Structures Act*); and the *Municipal Systems Act* and the *Local Government: Municipal Finance Management Act* 56 of 2003 became the core instruments by which developmental local government would be established.¹⁵⁶

Section 151 of the *Constitution* reaffirms the autonomous status of local government delineated in the interim *Constitution*, 1993. Thus, the democratically elected municipal council of every municipality is vested with both the legislative and executive authority of local government.¹⁵⁷ Placing legislative and executive competence in a municipal council denotes the capability of local government to govern its affairs with as minimal intervention as possible.¹⁵⁸

It is impossible to pinpoint a period in which the transition of local government has stopped. In fact, despite having undergone several phases of transformation, the evolution of local government is still ongoing. This means that if the needs of local

¹⁵³ De Visser 2009 *Commonwealth Journal of Local Governance* 9.

¹⁵⁴ S 174(3) of the *Constitution of the Republic of South Africa Act* 200 of 1993 (the interim *Constitution*, 1993); also see Botha 'Local Government Institutional Arrangements: A Historical Perspective with Specific Reference to the Major Cities in South Africa' 8.

¹⁵⁵ Thornhill 2008 *Journal of Public Administration* 493.

¹⁵⁶ Koma 2012 *African Journal of Public Affairs* 108-109.

¹⁵⁷ S 151(2) of the *Constitution*.

¹⁵⁸ See para 4.2.1 below; S 151(3), s 151(4) and s155(6)(b) of the *Constitution*.

communities are ever-evolving, so should the transition of local government whose primary task is to serve the people in these local communities.

2.3.3 Describing developmental local government

Earlier sections of this study have expressed the link between LED and developmental local government without efficiently defining the concept of developmental local government. Therefore, this section defines developmental local government. As previously mentioned, the description of developmental local government is officially found in the White Paper on Local Government.¹⁵⁹ According to the White Paper on Local Government:

Developmental local government is local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.¹⁶⁰

The above definition shows that the central focus of developmental local government transcends the provision of services. It is aligned to the vision in section 153 of the *Constitution* which delineates the duties of developmental local government. According to this provision, developmental local government ought to structure and manage its administration, budgeting and planning processes so that it prioritises the basic needs of its community, and promotes social and economic development.¹⁶¹ Furthermore, the planning of a developmental local government must speak to the strategies and plans of other organs of state in order to give effect the principles of cooperative governance.¹⁶² The *Municipal Systems Act* encourages local government to plan in a developmentally oriented manner.¹⁶³ Its planning must strive to achieve the objectives of local government as enshrined in the *Constitution*.¹⁶⁴ It is also expected to be aligned with the objectives and developmental duties of local government as expressed in the *Constitution*.¹⁶⁵ Finally, in conjunction with other organs of the state, local government's planning

¹⁵⁹ See para 1.1 above.

¹⁶⁰ Part B of the White Paper on Local Government.

¹⁶¹ S 153(a) of the *Constitution*.

¹⁶² S 153(b) of the *Constitution*.

¹⁶³ S 23(1) of the *Municipal Systems Act*.

¹⁶⁴ S 23(1)(a) of the *Municipal Systems Act*.

¹⁶⁵ S 23(1)(a) and (b) of the *Municipal Systems Act*.

must contribute to the progressive realisation of constitutional socio-economic rights.¹⁶⁶

2.3.4 Some critique on the success of developmental local government

As mentioned above, the first description of developmental local government is found in a 1998 White Paper on Local Government.¹⁶⁷ 22 years after the adoption of the White Paper on Local Government, the ideals of this policy including the need to create economic opportunities for people in local communities are still elusive to the grassroots. This is in spite of the fact that policies such as the RDP and the Growth, Employment and Redistribution strategy (GEAR) have respectively demanded for development through the empowerment of marginalised people.¹⁶⁸ For instance, more than 40 percent of South Africans are unemployed.¹⁶⁹ At the local government level, this issue is compounded by two factors. Firstly, one can aver that Local government is still burdened with meeting the demands of the previous era, for example, it has to work through a huge backlog of service infrastructure to ensure adequate and sustained service delivery. This makes it difficult for the government to fulfil its present developmental mandate. Secondly, most municipalities are dysfunctional,¹⁷⁰ and do not have the requisite administrative capacity nor financial resources to effectively execute their developmental duties.¹⁷¹ This is because many municipalities have been crippled by corruption and the mismanagement of public resources.¹⁷² For example, municipalities that cannot clean-up their towns cannot attract businesses as the provision of basic services and

¹⁶⁶ S 23(1)(c) of the *Municipal Systems Act*; also see s 24,25,26,27 and 29 of the *Constitution*.

¹⁶⁷ See para 2.3.3 above.

¹⁶⁸ Part B para 2 of the White Paper on Local Government; para 1.3.6 of the Reconstruction and Development Programme; Department of Finance "Growth, Employment and Redistribution" para 1.1; also see para 2.2.3 above.

¹⁶⁹ Stats SA 2020 <https://bit.ly/373Xvqt>.

¹⁷⁰ South African Government President Cyril Ramaphosa: *2020 State of the Nation Address*; *SA Local Government Briefing* (2018) No 3/2018.

¹⁷¹ South African Government *President Cyril Ramaphosa: 2020 State of the Nation Address*; Mokoena 2019 <https://www.parliament.gov.za/news/salga-concerned-about-high-number-section-139-interventions-municipalities>; Tapscott 2017 *Chinese Political Sciences Review* 69-70.

¹⁷² National Planning Commission "National Development Plan 2030: Our future-make it work" 56; Corruption Watch *Annual Report: Upholding Democracy 2018* 20; Pillay 2017 *African Journal of Public Affairs* 32-34.

ensuring a safe, healthy and clean environment are prerequisites for a conducive LED environment.

Additionally, municipalities do not see job creation as part of their mandate.¹⁷³ While this may be largely true, the argument here is that by successfully executing their powers and functions, municipalities would invariably stimulate the economic environment, this would in turn lead to job creation. Besides, local government must cooperate with national and provincial government to realise the country's economic goals.¹⁷⁴ This means that while local government may not be directly responsible for the creation of jobs, it is obliged together with national and provincial government to take active steps towards the improvement of the social and economic conditions of local communities, thereby making it conducive for the creation of employment opportunities.¹⁷⁵

It is argued that developmental local government encapsulates municipalities that can create inclusive and conducive spaces for social and economic growth, efficiently and sustainably provide adequate services to local communities, and facilitate a complementary relationship between themselves and local communities. These are all facets of life that developmental local government can influence.¹⁷⁶ Therefore, the crux of the argument advanced in this study is that to efficiently achieve most, if not all of its aforementioned objectives, local government must include participants of marginalised informal economies into the processes of local governance especially those processes that advance social and economic development in local communities. The informal economy will be discussed in detail in chapter 3.

2.4 Developmental local government in the pursuit of LED

This study argues that the goals of developmental local government as stipulated by the *Constitution* are directly linked to LED. Firstly, local government is expected

¹⁷³ Department of Provincial and Local Government *National Framework for Local Economic Development (LED) in South Africa (2006-2011)* 9.

¹⁷⁴ S 153(b) of the *Constitution*.

¹⁷⁵ Part B para 1.1 of the White Paper on Local Government.

¹⁷⁶ Part B para 2 of the White Paper on Local Government.

to provide a democratic and accountable government for local communities.¹⁷⁷ In this regard, accountability, responsiveness, and openness are values expected from local government.¹⁷⁸ These values should ideally guide the relationship between local communities and public administration in general.¹⁷⁹ There are also other values that should guide how municipalities govern in the local government sphere.¹⁸⁰

The second objective of local government concerns the need for municipalities to ensure the provision of services to local communities in a sustainable manner.¹⁸¹ The provision of municipal services is the central duty of developmental local government.¹⁸² Local communities are entitled to access at least the minimum level of basic municipal services.¹⁸³ Furthermore, these services must be provided in a manner that is conducive to the economic, effective and prudent use of the available resources of the municipality. Service delivery is a requisite for LED to flourish. Such services may include access to infrastructures such as trading spaces, stalls, and transportation for owners of small businesses and emerging entrepreneurs. In this respect, the resources of municipalities are indispensable to the creation of an enabling economic environment for local businesses and entrepreneurs to operate their business.¹⁸⁴

Thirdly, the *Constitution* obligates local government to promote social and economic development in terms of section 152.¹⁸⁵ This duty is also reemphasised in the White Paper on Local *Government* which encourages municipalities to develop strategies, including LED as a means of responding to the social and economic needs of people.¹⁸⁶ This objective includes the ability of local government to create an enabling economic environment that embraces both formal and informal activities;

¹⁷⁷ S 152(1)(a) of the *Constitution*.

¹⁷⁸ See s 1(d) of the *Constitution*.

¹⁷⁹ See generally s 195 of the *Constitution*.

¹⁸⁰ See para 4.2.3.3 below.

¹⁸¹ S 152(1)(b) of the *Constitution*.

¹⁸² S 73(1)(a) of the *Municipal Systems Act*.

¹⁸³ S 73(1)(c) of the *Municipal Systems Act*.

¹⁸⁴ Department of Provincial and Local Government *National Framework for Local Economic Development (LED) in South Africa (2006-2011)* 9.

¹⁸⁵ S 152 of the *Constitution* state that the objects of local government include-(c) to promote social and economic development.

¹⁸⁶ Executive Summary of the White Paper on Local Government.

promote inclusive growth; and transform city spaces to accommodate a diverse range of economic activities.¹⁸⁷

The fourth objective of local government refers to the need to promote a safe and healthy environment.¹⁸⁸ This objective espouses the provision of a better quality environment for local communities.¹⁸⁹ Municipalities are expected to use resources sparingly to ensure that current and future generations benefit from them.¹⁹⁰ The promotion of LED requires municipalities to use planning and land-use practices in a manner that promotes sustainable development.¹⁹¹ In the context of this study, sustainable development is defined as a means of uplifting the lives of people through the integrated use of social, economic, spatial, environmental and infrastructural resources.¹⁹² Therefore, to effectively facilitate LED, municipalities will need to transform spaces.¹⁹³ Through spatial transformation, they can become important drivers of local development.¹⁹⁴

Lastly, municipalities must encourage the involvement of communities and community organisations in matters of local government.¹⁹⁵ Through processes of public participation, local government can collaborate with local communities to design and implement LED strategies as part of the overall development of IDPs.¹⁹⁶ When formulating and implementing an IDP, local government must promote the participation of local communities. This is espoused in almost all the statutes of local

¹⁸⁷ See South African Cities Network (SACN) *State of South African Cities Report 2016*; and para 2.3.4 above.

¹⁸⁸ S 152(1)(d) of the *Constitution*.

¹⁸⁹ SACN *State of the Cities Report 2016* 189.

¹⁹⁰ S 24(b)(i), (ii), and (iii) of the *Constitution*.

¹⁹¹ SACN *State of the Cities Report 2016* 189.

¹⁹² See para 2.3.3 above.

¹⁹³ Mashamaite and Lethoko 2018 *International Journal of eBusiness and eGovernment Studies* 118.

¹⁹⁴ SACN *State of South African Cities Report 2016* 85; Van Der Berg *Municipal planning law and policy for sustainable cities in South Africa* 101-102.

¹⁹⁵ S 152(1)(e) of the *Constitution*.

¹⁹⁶ Municipalities must draft and implement Integrated Development Plans (IDPs). IDPs are frameworks that guide municipalities in achieving their set goals and objectives as mandated by their respective communities. An LED policy would thus form part of the broader IDP. See Koma 2012 *African Journal of Public Affairs* 132.

government.¹⁹⁷ In fact, local IDPs should inform the LED strategies of municipalities.¹⁹⁸ The IDP must ensure that a municipality identifies all the real needs of its community.¹⁹⁹ The most prevalent needs in South African communities are the needs for local economic growth, the creation of employment, and poverty alleviation.²⁰⁰ Having identified the role of LED to address these, a municipality's IDP must precede the planning of an LED strategy or programme. It follows, therefore, that the failure of a municipality to efficiently design and co-ordinate a detailed and comprehensive IDP will directly affect the successes or failures of their LED strategies.

2.5 Concluding remarks

This chapter sought to clarify the concepts of "local economic development" and "developmental local government." It systematically explained the historical build-up to the contemporary meanings of and rationale for LED and developmental local government. It argued that as the ideals and mandates of local government, LED and developmental local government have corresponding and complementary features. These features include placing municipalities at the forefront of collaborating with local communities to effectively address the socio-economic issues of such communities and ensuring the improvement of the lives of poor communities through mobilisation and sustainable use local resources. More importantly, a cordial and symbiotic relationship must be maintained between all relevant stakeholders to developmental local government and LED.

As the discussion in this chapter have shown, LED strategies come in different forms.²⁰¹ These nuances in LED suggest that municipalities cannot adopt a standard

¹⁹⁷ See generally s16-22 of the *Municipal Systems Act*; s21-23 *Local Government: Municipal Finance Management Act (MFMA)*; s4 of the *Local Government: Municipal Property Rates Act 6 of 2004*; *Municipal Structures Act*.

¹⁹⁸ See generally sections 23-25 of the *Municipal Systems Act*; and Abrahams 2003 *Urban Forum* 184.

¹⁹⁹ See Koma 2012 *African Journal of Public Affairs* 132.

²⁰⁰ See Koma 2012 *African Journal of Public Affairs* 132.

²⁰¹ See para 2.2.1 above.

LED strategy.²⁰² The reason for its implementation could fluctuate based on the circumstances of different local areas. LED is understood as an act of mobilising local resources to stimulate and maintain business activities by local government, the local community, CBOs and the private sector in order to create jobs, reduce poverty and develop the economy.²⁰³ In the African regional context, LED was adopted as a means of developing businesses that were already existing in local communities. In South Africa, LED is enshrined in the *Constitution* and forms an integral part of the goals and functions of developmental local government. This makes the latter the main conduit for LED in the country.

Additionally, the legal and policy framework of local government provides insight into the meanings and objectives of LED through the eyes of the national legislature and executive.²⁰⁴ Through the re-engineering and evolving nature of cities, LED has become a potential means to achieve equality, equity, and cohesion amongst local stakeholders.²⁰⁵ Undoubtedly, several municipalities in South Africa have embraced LED processes with evident success. A good case in point is the City of uMhlatuze's Events Program.²⁰⁶ uMhlatuze Local Municipality has positioned itself as the events capital of the North Coast of KwaZulu-Natal (KZN).²⁰⁷ For example, this Municipality actively develops sports, cultural and music events at the expense of the Municipality.²⁰⁸ The objective of the Municipality is to create an enabling economic environment that attracts investment that produces jobs and generates economic growth.²⁰⁹

Another example is the Stellenbosch Local Municipality's Die Braak and Rhenish complex project. This Municipality provides and maintains premises at its own cost

²⁰² See para 2.2.1 and 2.4 above.

²⁰³ See para 2.2.1 above.

²⁰⁴ See para 2.2.3 above.

²⁰⁵ United Cities and Local Governments (UCLG) 2017 <https://uclg.org/en/media/news/new-impulse-local-economic-development>.

²⁰⁶ City of uMhlatuze *Draft IDP Review* 231.

²⁰⁷ City of uMhlatuze *Draft IDP Review* 231.

²⁰⁸ These events include the National Teacher's Games, Nyus'ivolume form Ukhozi FM and the Tuzi-Gazi Beer Festival and Whiskey and Wine Festival.

²⁰⁹ City of uMhlatuze *Draft IDP Review* 231.

to SMMs in Die Braak and Rhenish complex area of Stellenbosch.²¹⁰ At the core of the LED process in the Stellenbosch Municipality is the need to create employment, reduce poverty and develop local economies, with the secondary aim of creating and maintaining a relationship between the local government and SMMEs in the local community.²¹¹ Similarly, the Lesedi Local Municipality has also implemented a strategy for the development of informal trading as part of its LED programmes.²¹² The areas of Devon and Vischkuil are being prioritised in accordance with the funding made available to the Municipality.²¹³ The objective of this LED programme is to organise informal traders around the Municipality with the aim of understanding and subsequently addressing their issues.²¹⁴ From these examples, and bearing the discussion in this chapter in mind, it is possible to conclude that none of the examples given above is the same. Each example is unique. This shows that in developing the right LED process, the highlighted municipalities were informed by their local context. Therefore, it can be argued that in areas where street trading is persistent, a municipality must use this economic activity to facilitate LED. As already indicated above, the informal economy is a part of LED. Chapter 3 zooms into the informal economy with, specific attention on street trading.

²¹⁰ See Stellenbosch Municipality *LED Strategy and the Action Plan* June 2014; and Madzivhandila and Musara 2020 *Local Economy* 264.

²¹¹ See generally Stellenbosch Municipality *LED Strategy and the Action Plan* June 2014.

²¹² Lesedi Local Municipality *2020/21 Final Integrated Development Plan* 85.

²¹³ Lesedi Local Municipality *2020/21 Final Integrated Development Plan* 85-86.

²¹⁴ Lesedi Local Municipality *2020/21 Final Integrated Development Plan* 85.

CHAPTER 3

STREET TRADING AS A SECTOR OF SOUTH AFRICA'S INFORMAL ECONOMY

3.1 Introduction

The South African informal economy accounts for 18 percent of employed persons with an uneven proportion of men to women at 62 and 38 percent respectively.²¹⁵ Street trading constitutes the largest sector of this economy with approximately 27 percent of persons employed in the informal economy.²¹⁶ Street trading solely ensures that at least 813 000 families in South Africa live above the poverty line.²¹⁷ This sector encompasses diverse traders who sell a unique and vast range of products scattered around the many corners of cities.²¹⁸ While several acts of inclusion and accommodation of street traders can be identified in inner cities, these are often short-lived.²¹⁹ In South Africa, like in other parts of the world, some, local authorities continue to subject street traders to acts of persecution.²²⁰

In view of the foregoing, this study questions how a constitutional law approach to municipal action can help optimise the role of the informal economy in local economic development in South Africa. This chapter focuses on the informal economy, specifically the street trading sector. The goal is to critically explore the features, sectors, and the role-players in South Africa's street trading sector with the view of identifying the vulnerabilities, problems, and regulatory gaps in the sector that are constitutionally relevant.

²¹⁵ Stats SA *Quarterly Labour Force Survey Quarter 19-20*.

²¹⁶ Stats SA *Survey of Employers and Self-employed 2017* 52.

²¹⁷ The total number of informal economy participants is 2 995 000 with 813 000 in street trading. See Stats SA *Quarterly Labour Force Survey Quarter 3: 2019* 1; also see Stats SA *Survey of Employers and Self-employed 2017* 52.

²¹⁸ IOL 2020 <https://bit.ly/3gAmVOg>.

²¹⁹ Bénit-Gbaffou 2016 *Third World Quarterly* 1105; and Bromley 2000 *International Journal of Sociology and Social Policy* 20.

²²⁰ Bénit-Gbaffou 2016 *Third World Quarterly* 1105; and Bromley 2000 *International Journal of Sociology and Social Policy* 20.

This chapter consists of seven parts. The first part discusses the synergies between the formal *vis-à-vis* the informal economy, in general. The second part focuses on international and national perspectives on the features of the informal economy. The third part examines the range of sectors represented in the informal economy. The fourth part evaluates the relationship between local government and street traders with a specific focus on the regulatory powers of, and the competence of local government. The fifth part provides an in-depth overview of the street trading sector, explaining its features, the vulnerabilities experienced by the active participants and possible regulatory gaps. The sixth part interrogates the nexus between LED and the informal economy in the context of the street trading sector. The chapter concludes with some findings and observations.

3.2 Formal vis-à-vis informal

The informal and formal economy co-exist in city environments. There is a mutually reinforcing relationship between the informal and formal economy considering that the two economies are different in many respects. The formal economy is defined as consisting of enterprises that are registered with relevant structures of government,²²¹ pay taxes and levies, and operate according to the formal rules and regulations of the country in which they operate.²²² Whereas the informal economy consists mostly of those enterprises that are not registered, do not pay levies and taxes and often operate in violation of the rules and regulations of a country.²²³ Even though these economies are different, they are undeniably interdependent. This section discusses the features of and role-players in the informal economy, while identifying some of the differences between the formal and informal economy.

²²¹ The registration of enterprises in the formal economy implies that they are regulated in terms of the law of the national, provincial, or local government sphere. See Guha-Khasnobis, Kanbur and Ostrom 'Beyond Formal and Informality' 5.

²²² Guha-Khasnobis, Kanbur and Ostrom 'Beyond Formality and Informality' 4.

²²³ See para 3.3.2 and 3.3.3 below; and Guha-Khasnobis, Kanbur and Ostrom 'Beyond Formality and Informality' 4.

Firstly, employees in the informal economy have extremely low levels of social security.²²⁴ For example, in this economy there are no written contracts that bind employers to their employees,²²⁵ and formal management structures are non-existent.²²⁶ Additionally, the employees in the informal economy do not receive benefits, including Unemployment Insurance Fund (UIF), medical aid and retirement annuity.²²⁷ The laws that regulate labour practices are only applicable to persons that work in the formal economy.²²⁸ This means that the benefits and entitlements stated above are generally applicable to the formal economy. Despite the distinction in the labour practices between the formal and informal economy, employment has seized to be purely formal or informal. For example, many formal enterprises hire wage workers on an informal employment basis.²²⁹ In doing so, these formal entities usually evade legal regulations including income tax.²³⁰ In addition to the legal burden, an income tax increases a firm's labour costs and reduces its profits.²³¹ Consider for instance, designers who hold "piece jobs" in a formal enterprise servicing customers that purchase ready-made garments as opposed to tailor-made ones.²³² Such a firm could easily get away with not registering the designers as permanent employees as they leave whenever their own business is doing well.

Secondly, formal entities typically produce goods at a larger scale using machinery, unlike the informal economy.²³³ The ability of formal enterprises to produce in enormous quantities means that the informal economy often falls back into the role of consumer and the formal economy, the supplier. Considering the strong distribution channels that have been created by some sectors of the formal

²²⁴ Olivier 'Social Security Protection for Informal Economy Workers: Developing World Perspectives' 2; Chen *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment* 11.

²²⁵ Olivier 'Social Security Protection' 2; Chen *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment* 11.

²²⁶ Olivier 'Social Security Protection' 2; Chen *Rethinking the Informal Economy* 11.

²²⁷ Olivier 'Social Security Protection' 2; Chen *Rethinking the Informal Economy* 12.

²²⁸ Olivier 'Social Security Protection' 2.

²²⁹ Chen *Rethinking the Informal Economy* 2; Davies and Thurlow *Formal-Informal Economy Linkages and Unemployment in South Africa* 4.

²³⁰ Portes 'The Informal Economy' 151.

²³¹ Portes 'The Informal Economy' 151.

²³² Chen *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment* 2.

²³³ Gerritse and Moreno-Monroy 2012 *Spatial Economic Analysis* 181.

economy, it can even be argued that formal entities are the producers and suppliers of goods while the informal enterprises are the distributors of these goods. Skinner's comprehensive survey on the production linkages between the formal and informal sectors in South Africa remains one of the most authoritative in this regard.²³⁴ This survey shows trends in the sourcing of material for the informal economy enterprises in Durban.²³⁵ According to the survey, informal enterprises source most of their raw material from formal (medium to large) enterprises,²³⁶ which account for almost 60 percent of the raw material sourced by the informal economy in the Durban area.²³⁷

Thirdly, the strength of the formal economy is not only determined by the production of goods, but also by their distribution from the formal sector into the informal sector (and *vice versa*).²³⁸ The distribution channels in the formal economy are more clearly defined than those in the informal economy.²³⁹ This means that formal entities are capacitated to reach places and people that participants of the informal economy cannot reach.²⁴⁰ From this perspective, it can be argued that participants of the informal economy are more dependent on the formal economy as opposed to the formal economy depending on the informal economy. The target market of informal entities is usually people in local communities and not formal entities. For instance, a local *spaza* shop in a particular community is likely to target and cater to its surrounding households and people in that local community. Contrarily, formal enterprises are likely to target informal entities. For instance, Alcock observes that Coca-Cola (a brand belonging to a formal enterprise) delivers a much more sizeable proportion of its products to the informal economy than it

²³⁴ Valodia and Devey 2010 *Law, Democracy and Development* 7; Altman Formal-Informal Economy Linkages 32.

²³⁵ Skinner *Constraints to Growth and Employment in Durban: Evidence from the Informal Economy* 32.

²³⁶ Skinner *Constraints to Growth and Employment in Durban: Evidence from the Informal Economy* 32.

²³⁷ Out of a total of 503 informal enterprise owners, 292 of them source their raw material from formal (medium and large enterprises).

²³⁸ Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 148-150.

²³⁹ See generally Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 148-150.

²⁴⁰ See generally Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 148-150.

does to other formal enterprises.²⁴¹ An informal distribution channel is created when a Coca-Cola truck moves through local *spaza* shops delivering orders made by the *spaza* shop owners.²⁴² Similarly, Parmalat's largest consumer base in South Africa comprises the Kota²⁴³ and fat cake²⁴⁴ outlets situated around numerous corner of cities.²⁴⁵ Considering the interdependencies between the formal and informal economies, many South African consumers are hybrid consumers because they purchase from both the formal and informal economies.²⁴⁶

Obviously, some tension exists between the two economies. For example, about 45.3 percent of formal firms consider themselves as being in direct competition with the informal economy,²⁴⁷ while only 13 percent of those in the formal economy view this competition as a major threat to their enterprises.²⁴⁸ They argue that the informal economy stifles the "natural" competitiveness of markets.²⁴⁹ This is because the informal economy operates on an unequal footing with the formal enterprises, benefitting immensely from, amongst other things, not paying for levies, taxes and rental spaces and thus (in principle) recovering more profits in comparison to formal entities.²⁵⁰

²⁴¹ Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 148-150.

²⁴² Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 149.

²⁴³ A hollowed-out quarter bread with fillings.

²⁴⁴ Round kneaded dough deep-fried until crispy and brown served with fillings.

²⁴⁵ Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 20-25.

²⁴⁶ Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 148. According to the author, "hybrid" describes a consumer who not only buy from fancy retail outlets but mixes and matches their shopping choices with fresh vegetables and fruits from the hawker and grocery stores.

²⁴⁷ Williams *The Informal Economy as a Path to Expanding Opportunities* 6.

²⁴⁸ Williams *The Informal Economy as a Path to Expanding Opportunities* 6.

²⁴⁹ Williams *The Informal Economy as a Path to Expanding Opportunities* 6.

²⁵⁰ Williams *The Informal Economy as a Path to Expanding Opportunities* 6.

3.3 Features of the informal economy

Since the term was first introduced in 1973,²⁵¹ a great body of literature on the informal economy has emerged.²⁵² The literature also introduced the three schools of thought that provide contrasting views on the nature, causes, and relations of the informal economy to the formal economy namely dualism, legalism and structuralism.²⁵³ The dualist school of thought, for example, argues that the formal and informal economy are distinct and operate in different environments.²⁵⁴ However, the structuralist school of thought argues that the two economies are intrinsically linked to each other.²⁵⁵ The contrast in views does not make one school of thought more accurate than the other. If anything, authors continue to advocate for the need to integrate the theories in a complementary manner for a better understanding of the dynamics of the informal economy.²⁵⁶

3.3.1 Different schools of thought

The first school of thought known as dualism is also referred to as modernisation.²⁵⁷ Proponents of this school of thought include the International Labour Organization (ILO) and Williams.²⁵⁸ According to this theory, the informal economy consists of participants that possess enormous potential of being top-achievers.²⁵⁹ However, they are constrained by the absence of financial support, skills development

²⁵¹ The proponent of informality, Hart, conducted the first inquiry into the informal economy in his study of the surplus labour force of Ghana made up of the rural migrants of Frafra into the city of Accra, Ghana. See Hart 1973 *The Journal of Modern African Studies* 61-89; Wilson 2011 *Urban Anthropology* 206; Portes 1996 'The Informal Economy' 149; Feige 1990 *World Development*; Chen and Skinner 'The Urban Informal Economy: Enhanced Knowledge, Appropriate Policies and Effective Organization' 219.

²⁵² Huang, Xue and Wang 2020 *Sustainability* 2.

²⁵³ Huang, Xue and Wang 2020 *Sustainability* 2; and Chen *Rethinking the Informal Economy* 6.

²⁵⁴ Chen *Rethinking the Informal Economy* 16.

²⁵⁵ Chen *Rethinking the Informal Economy* 16.

²⁵⁶ Huang, Xue and Wang 2020 *Sustainability* 2; and Chen *Rethinking the Informal Economy* 6-7.

²⁵⁷ See generally Yussuf 2011 *European Journal of Social Sciences*; Huang, Xue and Wang 2020 *Sustainability*.

²⁵⁸ See International Labour Organization (ILO) *Employment, Income and Equality: A Strategy for Increasing Productive Employment in Kenya*; and Williams 2015 *Industrial Relations/ Relations Industrielles*.

²⁵⁹ Grimm, Knorringa and Lay *Constrained Gazelles: High Potentials in West Africa's Informal Economy* 12 and Skinner 'Informal-Sector Policy and Legislation in South Africa' 414.

mechanisms and productive infrastructure.²⁶⁰ Dualism hypothesises that the informal economy is separate and distinct from the formal economy with a considerable part of its participants being self-employed.²⁶¹ For dualists, the economic activities that take place in the informal economy are not linked to the formal economy.²⁶² For the second half of the 20th century, the informal economy was regarded as a temporary phenomenon that would disappear with the development of the formal economy.²⁶³ This hypothesis stems from the belief that "development, modernity and advancement" are symbols of formality.²⁶⁴ Therefore, economies develop as their countries develop. Based on this premise, dualists argue that the process of development gradually eliminates all forms of informality including the informal economy.²⁶⁵

On the flipside of the coin, the legalist school of thought propounded by scholars such as Hernando De Soto and Alina Marquez²⁶⁶ is not concerned with the extent of a country's economic development. They argue instead that although the informal economy is prevalent and more prominent in less developed modern economies,²⁶⁷ its persistence is not a consequence of underdevelopment.²⁶⁸ According to the legalists, the informal economy exists as a result of excessive state regulation.²⁶⁹ They argue that who participate in the informal economy do so out of their free will.²⁷⁰ This implies that entrepreneurs choose to operate businesses informally as a way of reacting to either the imposition of high taxes by government, the inherent corruption in the economic system, or the burdensome hurdles that a person must

²⁶⁰ Grimm, Knorringa and Lay *Constrained Gazelles: High Potentials in West Africa's Informal Economy* 12; also see Skinner 'Informal-Sector Policy and Legislation in South Africa' 414.

²⁶¹ Skinner 'Informal-Sector Policy and Legislation in South Africa' 413-414; Chen 'The South African Informal Sector in International Comparative Perspective: Theories, Data and Policies' 4 and ILO *Employment, Income and Equality: A Strategy for Increasing Productive Employment in Kenya* 224.

²⁶² Skinner 'Informal-Sector Policy and Legislation in South Africa' 413-414.

²⁶³ Huang, Xue and Wang 2020 *Sustainability* 2; Biles 2008 *The Professional Geographer* 541-555.

²⁶⁴ Huang, Xue and Wang 2020 *Sustainability* 2.

²⁶⁵ Williams 2015 *Industrial Relations/ Relations Industrielles* 743.

²⁶⁶ See generally De Soto *The Other Path*; and Marquez 1990 *Boston College Third World Law Journal*.

²⁶⁷ Williams 2015 *Industrial Relations/ Relations Industrielles* 743.

²⁶⁸ Huang, Xue and Wang 2020 *Sustainability* 4.

²⁶⁹ Huang, Xue and Wang 2020 *Sustainability* 4.

²⁷⁰ Huang, Xue and Wang 2020 *Sustainability* 4.

go through to register a formal entity.²⁷¹ Within the legalist theory, little attention is paid to the nexuses between the informal economy and formal economy.²⁷² The focus is rather on how informal enterprises choose to evade formal regulations, taxes and other costs that come with formality.²⁷³ For legalists, nothing should link the two economies other than the informal economy's conformance to formality.²⁷⁴ They suggest that informality should be submerged under the formal regulatory system to increase the tax base and decrease its unfair competition with formal enterprises.²⁷⁵

Structuralism which is also known as Neo-Marxism with scholars such as Portes, Castells and Benton,²⁷⁶ is in stark contrast to neoliberalism. Neo-Marxists argue that the informal economy is more prevalent in countries that lack social protection and labour market interventions by government.²⁷⁷ From their point of view, the economy represents a remarkable component of capitalist practices of downsizing, subcontracting and outsourcing labour.²⁷⁸ In addition, they argue that the informal economy is a vulnerable sector that can easily be exploited by capitalists in need of cheap and flexible labour.²⁷⁹ This is because the paucity of state intervention in work and welfare arrangements, leaves those in the informal economy with little choice but to fend for themselves however possible. For many, this economy provides the only opportunity of income and a safety net from poverty.²⁸⁰ Structuralists also delineate the existence of a relationship between the formal and informal economy albeit an unequal one. In this regard, the formal economy is the 'big business', and

²⁷¹ Williams 2015 *Industrial Relations/ Relations Industrielles* 743-744.

²⁷² Chen *The Informal Economy: Definitions, Theories and Policies* 6; and Skinner 'Informal-Sector Policy and Legislation in South Africa' 415.

²⁷³ Chen *The Informal Economy: Definitions, Theories and Policies* 5 and Skinner 'Informal-Sector Policy and Legislation in South Africa' 415.

²⁷⁴ Chen *The Informal Economy: Definitions, Theories and Policies* 6 and Skinner 'Informal-Sector Policy and Legislation in South Africa' 415.

²⁷⁵ Chen *The Informal Economy: Definitions, Theories and Policies* 6 and Skinner 'Informal-Sector Policy and Legislation in South Africa' 415.

²⁷⁶ Portes, Castells and Benton *The Informal Economy: Studies in Advance and Less Developed Countries*.

²⁷⁷ Williams 2015 *Industrial Relations/ Relations Industrielles* 745.

²⁷⁸ Williams 2015 *Industrial Relations/ Relations Industrielles* 744 and Chen 'The South African Informal Sector in International Comparative Perspective: Theories, Data and Policies' 28.

²⁷⁹ Williams 2015 *Industrial Relations/ Relations Industrielles* 744.

²⁸⁰ ILO *Employment, Income and Equality: A Strategy for Increasing Productive Employment in Kenya* 225.

the informal is the 'subordinate producer and worker' who is often exploited by the former.²⁸¹ Therefore, structuralists suggest that the government must intervene and conscientiously address the unequal relationship between the two economies.²⁸²

3.3.2 International and foreign interpretations

There is no concise definition of, and reason for the existence of the informal economy.²⁸³ Several terms such as secondary economy, unreported economy, grey economy, shadow economy, and the informal sector are often used interchangeably with the term.²⁸⁴ The term 'informal economy' was first coined by Hart. The scholar described this economy as consisting of those economic activities that exist outside of and run concurrently with organised labour.²⁸⁵ However, the most cited description of the informal sector is found in the ILO Kenyan Report of 1972.²⁸⁶ According to this report, this sector is characterised by the following:

- Ease of entry into the sector;
- Reliance on indigenous resources;
- Family ownership of enterprises;
- Small scale operations;
- Labour-intensive methods of production and adapted technology;
- Skills acquired outside of the formal school system; and
- Unregulated and competitive markets.²⁸⁷

²⁸¹ Skinner 'Informal-Sector Policy and Legislation in South Africa' 415.

²⁸² Skinner 'Informal-Sector Policy and Legislation in South Africa' 415; Chen 'The South African Informal Sector in International Comparative Perspective: Theories, Data and Policies' 5.

²⁸³ Maloney 2004 *World Development* 1159. Also see Bhattacharya 2019 *Electronic Journal of Information Systems in Developing Countries* 1.

²⁸⁴ Feige 1990 *World Development*; Hussmanns *Measuring the Informal Economy: From Employment in the Informal Sector to Informal Employment* 10.

²⁸⁵ Hart 1973 *The Journal of Modern African Studies* 68. Also see Filho *An Estimation of the Underground Economy in Brazil* 2.

²⁸⁶ ILO *Employment, Income and Equality: A Strategy for Increasing Productive Employment in Kenya* 6.

²⁸⁷ ILO *Employment, Income and Equality: A Strategy for Increasing Productive Employment in Kenya* 6 and Amis 'Regulating the Informal Sector: Voice and Bad Governance' 148.

Presently, several researchers rely on descriptions of the informal economy as provided by the International Conference of Labour Statisticians (ICLS).²⁸⁸ These descriptions stem from deliberations and documents of the ICLS that date back to 1993.²⁸⁹ The 1993 descriptions of the informal economy relied on the characteristics of unregistered enterprises and production units.²⁹⁰ According to these descriptions, both production and employment in the informal economy occur in small, unincorporated and unregistered entities.²⁹¹ But these descriptions overlooks the idea of informal employment within formal enterprises.²⁹² Ten years later, the 17th ICLS adopted a broader and more prominent definition of informal employment.²⁹³ This expanded definition of informal employment is inclusive of the active participants of the informal economy, the various units that exist within this economy, as well as its activities.²⁹⁴ It also highlights three terms that are often used interchangeably namely the informal sector, informal employment, and the informal economy. Here, the informal sector refers to production and employment in the informal sector, while informal employment refers to employment in both the formal and the informal economy that lacks employment-based social protection.²⁹⁵ The

²⁸⁸ Dibben, Wood and Williams 2015 *International Labour Review* 374; Davie, Skinner and Valodia *Informal Economy Employment Data in South Africa: A Critical Analysis* 9; Maloney and Saavedra-Chanduvi 'The Informal Sector: What is it, Why do we Care, and How do we Measure it?' 27; ILO *Decent Work and the Informal Economy* 3.

²⁸⁹ In 1993 the 15th ICLS adopted its first resolution on statistics of employment in the informal economy. See the ILO *Revision of the 15th ICLS Resolution concerning statistics of employment*.

²⁹⁰ It must be noted that the first attempt at defining the term informal economy was in 1990 through the efforts of the ILO, International Expert Group on Informal Sector Statistics (the Delhi Group) and the Women in Informal Employment: Globalizing and Organizing (WIEGO). See Roger and Skinner 'The Size and Structure of the South African Informal Sector 2008-2014: A Labour-Force Analysis' 79.

²⁹¹ See Roger and Skinner 'The Size and Structure of the South African Informal Sector 2008-2014: A Labour-Force Analysis' 79.

²⁹² There is a difference between informal employment and employment in the informal sector with the former being much broader and quite distinct, see Rogan and Skinner 'The Size and Structure of the South African Informal Sector 2008-2014: A Labour Force Analysis' 79.

²⁹³ Chen and Skinner 'The Urban Informal Economy: Enhanced Knowledge, Appropriate Policies and Effective Organization' 220; Hussmanns *Measuring the Informal Economy: From Employment in the Informal Sector to Informal Employment* 2; and ILO *Seventeenth International Conference of Labour Statisticians* 10.

²⁹⁴ There has been a move from an enterprise-based definition towards an employment-based definition. This way, the focus is on the employment characteristics of an individual.

²⁹⁵ ILO Seventeenth International Conference of Labour Statisticians 12.

informal economy is all-encompassing of all the units, activities, and workers so defined, including the output thereof.²⁹⁶

The Organisation for Economic Corporation (OECD), and the duo, Williams and Feige, offer an economic activity based description of the informal economy.²⁹⁷ Although this description is not strictly observed, it provides a particular perspective on the different users of the informal economy.²⁹⁸ According to this description, the informal economy consists of legal production activities that are concealed from public authorities for diverse reasons including:

to avoid payment of income, value-added and other taxes; to avoid payment of social security contributions; to avoid having to meet certain legal standards such as minimum wages, maximum hours, safety or health standards, etc.²⁹⁹

What this implies is that the primary reason for operating any business in this economy is to generate an income, the absence of this element automatically render that activity null to the informal economy.³⁰⁰ Additionally, because the activities of the informal economy are sometimes concealed from public authority does not mean that the economic activities that take place in this economy are illegal.³⁰¹ In fact, if an activity is illegal it cannot be recognised as part of the informal economy.

Other national jurisdictions such as Brazil and India also offer descriptions of the informal economy. For example, scholars in India use the terms unorganised sector and the informal sector interchangeably.³⁰² The unorganised sector or the informal sector consists of unincorporated enterprises that are operated by own-account workers or hired workers.³⁰³ Although not expressly mentioned, it seems that no distinction is made between employment in the informal economy and formal

²⁹⁶ ILO Seventeenth International Conference of Labour Statisticians 13.

²⁹⁷ Organisation for Economic Co-Operation and Development (OECD) *Measuring the Non-Observed Economy: A Handbook* 140; Williams 2015 *Industrial Relations/ Relations Industrielles* 742; Feige 1990 *World Development* 990.

²⁹⁸ OECD *Measuring the Non-Observed Economy: A Handbook* 140.

²⁹⁹ OECD *Measuring the Non-Observed Economy: A Handbook* 139; Williams 2015 *Industrial Relations/ Relations Industrielles* 742; Feige 1990 *World Development* 990.

³⁰⁰ Williams 2015 *Industrial Relations/ Relations Industrielles* 742.

³⁰¹ Williams 2015 *Industrial Relations/ Relations Industrielles* 742.

³⁰² Murthy *Measuring Informal Economy in India* 2; see Sakthivel and Jodder 2006 *Economic and Political Weekly*; Mazumdar 2008 *Economic and Political Weekly*.

³⁰³ Murthy *Measuring Informal Economy in India* 2.

employment. All that is required for a worker to be recognised as an informal worker is the absence of a written contract, benefits, and social security in any given setting.³⁰⁴ In Brazil, all economic activities that fall outside of the formal economy are automatically identified as part of the informal economy.³⁰⁵ Like is the case in many countries including South Africa, those who work in the formal economy in Brazil often have a written employment contract that typically contains rules about the minimum working hours and minimum wages.³⁰⁶ Therefore, where a person does not have minimum allocated working hours, a written contract of employment and minimum wages, they are considered informally employed. Brazil also uses the term underground economy interchangeably with the informal economy.³⁰⁷ Underground economies specifically refer to activities that contribute to the GDP even though they are not properly registered.³⁰⁸

3.3.3 South African interpretations

The informal economy in South Africa is somewhat unique in that it owes its existence to the policies of apartheid.³⁰⁹ This means that an understanding of the informal economy cannot be divorced from the historic and cultural factors that shaped its emergence and evolution.³¹⁰ In South Africa, the term "informal economy" is often mistaken with the term "township economy".³¹¹ This mistake has led some to think that all businesses that are operated in black townships are not registered in terms of applicable laws and do not pay taxes.³¹² Other terms that are

³⁰⁴ Murthy *Measuring Informal Economy in India* 2.

³⁰⁵ Sajel *Informal Economy Budget Analysis in Brazil and Belo Horizonte* 10.

³⁰⁶ Sajel *Informal Economy Budget Analysis in Brazil and Belo Horizonte* 10.

³⁰⁷ The term "underground" has always spoken to two characteristics: Firstly, tax evasion and, secondly, government regulation avoidance. See Filho *An Estimation of the Underground Economy in Brazil* 2.

³⁰⁸ Filho *An Estimation of the Underground Economy in Brazil* 2.

³⁰⁹ Goldman *Organizing in South Africa's Informal Economy: An Overview of Four Sectoral Case Studies* 22.

³¹⁰ Goldman *Organizing in South Africa's Informal Economy: An Overview of Four Sectoral Case Studies* 22.

³¹¹ Township economies refer to businesses that are located and operational in black townships. These businesses include both formal and informal enterprises. While township economies can be informal, not all business in the township form part of the informal economy. See Goldman *Organizing in South Africa's Informal Economy: An Overview of Four Sectoral Case Studies* 22.

³¹² Goldman *Organizing in South Africa's Informal Economy: An Overview of Four Sectoral Case Studies* 22; Charman and Petersen *Informal micro-enterprises in a township context* 4-5.

used in reference to the informal economy include "informal-sector employment"; "informal employment"; "informal sector"; and "informal economy".³¹³ Arguably, the interchangeable use of the above terms has not made it difficult for the government and scholars to develop a precise definition for the formal economy in South Africa.

Due to the difficulty in describing the informal economy, Statistics South Africa (Stats SA) uses the description provided by the ICLS as a point of reference.³¹⁴ Stats SA has also adopted the international standards of the ICLS, which was introduced in 2000 into its Quarterly Labour Force Surveys (QLFS).³¹⁵ Stats SA distinguishes between informal employment and the informal sector. On the one hand, informal employment (exclusive of domestic workers):

identifies persons who are in precarious employment situations, irrespective of whether or not the entity for which they work is in the formal or informal sector. Persons in informal employment, therefore, comprise all persons in the informal sector, employees in the formal sector and persons working in private households who are not entitled to basic benefits such as pension or medical aid contributions from their employer, and who do not have a written contract of employment.³¹⁶

On the other hand, the informal sector has two sides to it:

(i) employees working in establishments that employ fewer than five employees, who do not deduct income tax from their salaries/wages; and (ii) employers, own-account workers and persons helping unpaid in their household business who are not registered for either income tax or value-added tax.³¹⁷

Stats SA uses a slightly different definition of the informal economy in its Survey of Employers and the Self-employed (SESI). Based on the characteristics of most businesses in the informal economy, SESI describes this economy as inclusive of small enterprises that:

³¹³ Fourie 'Analysing the Informal Sector in South Africa' 10.

³¹⁴ See para 3.3.1 above.

³¹⁵ Fourie 'Analysing the Informal Sector in South Africa' 10; and Goldman *Organizing in South Africa's Informal Economy: An Overview of Four Sectoral Case Studies* 20.

³¹⁶ Stats SA 2019 *Quarterly Labour Force Survey* 17; Stats SA 2017 *Survey of Employers and the Self-Employed* 11; Roger and Skinner 'The Size and Structure of the South African Informal Sector 2008-2014: A Labour-Force Analysis' 79.

³¹⁷ Stats SA 2019 *Quarterly Labour Force Survey* 17; Stats SA 2017 *Survey of Employers and the Self-Employed* 11; Roger and Skinner 'The Size and Structure of the South African Informal Sector 2008-2014: A Labour-Force Analysis' 79.

often do not have links with businesses in the formal sector, as they operate in different markets with different customers. An example is somebody selling food on the side of the street, or out of his or her household premises. Even in situations where these firms may be connected to formal firms, their low bargaining power and fierce cost-cutting competition render them unable to operate like formal sector entities.³¹⁸

Similarly, the White Paper on the National Strategy for the Development and Promotion of Small Business in South Africa of 1995 (National Strategy for the Development and Promotion of Small Business) and the *Businesses Act* 71 of 1991 (*Business Act*),³¹⁹ also do not offer a precise definition for the informal economy. This study highlights the latter legislation and policy because both instruments provide an important source for the removal of barriers that hinder the operation of both formal and informal businesses. Therefore, they are instrumental to the reversal of the apartheid approach to economic development that excluded the majority of South Africans.³²⁰ For instance, the National Strategy for the Development and Promotion of Small Business recognises the significant role of the small business sector including that of survival enterprises.³²¹ According to the Strategy, survival enterprises are highly diverse and demonstrate enormous potential for growth.³²² So, if government wants to support and develop survival enterprises, it must not follow a concerted approach. Rather, government must tailor its intended support to specifically suit the needs of each category of survival enterprises. However, while both the Act and Policy recognise the role of small enterprises or survival enterprises in economic development, they neither define nor refer to the informal economy.

Based on the foregoing, it is evident that scholars around the world understand the informal economy differently. The general consensus amongst them is that the informal economy consists of activities that take place in an unregulated

³¹⁸ Stats SA 2017 *Survey of Employers and the Self-Employed* 9.

³¹⁹ Gen Not 213 in GG 16317 of 28 March 1995.

³²⁰ Skinner 'Informal-Sector Policy and Legislation in South Africa' 417.

³²¹ Para 2.1.1 of the *White Paper on National Strategy for the Development and Promotion of Small Business in South Africa*.

³²² See para 3.3.1 above.

environment.³²³ It is also clear that the informal enterprises in the economy often do not enjoy legal protection as they are unregistered, and their employees do not enjoy legal protection from labour laws.³²⁴ Nonetheless, the informal economy is extremely important, especially for the urban poor who have been excluded from the formal economy.³²⁵ The conclusion that can be drawn at this point is that, although not all participants of the informal economy are poor, a significant number of them are motivated by poverty alleviation and survival as opposed to the intentional circumvention of the law.

3.4 Typical sectors forming part of the informal economy

As indicated earlier, the South African informal economy comprises several sectors such as car wash facilities, waste picking sector, backyard dwelling, brickmaking, motor vehicle repair enterprises and hair salon services.³²⁶ This study classifies these sectors into home-based and street-based sectors and services, and non-service-based enterprises.

The waste picking sector plays a significant role in minimising waste pollution through the recycling of waste in cities.³²⁷ This sector recycles around 90 percent of the recyclables collected from households, possibly saving municipalities about R750 million in landfill space annually.³²⁸ Statistics indicate that the sector employs about 60 000 to 90 000 South Africans.³²⁹ This study can argue based on the number of South Africans employed in the waste picking sector, that these statistics do not account for many foreign waste pickers who work on mainline recycling either on landfill sites or in city streets.

³²³ Feige 1990 *World Development* 990; Portes, Castells and Benton *The Informal Economy: Studies in Advanced and Less Developed Countries* 12 and Skinner 2008 *Development Southern Africa* 228.

³²⁴ ILO "Final Report of the Conference" 1-16.

³²⁵ Amis 'Regulating the Informal Sector: Voice and Bad Governance' 146.

³²⁶ See generally Sustainable Livelihood Foundation *South Africa's Informal Economy: Research Findings from Nine Townships*; Turok and Scheba 2019 *Urban Forum* 81; Matli and Jordaan 2016 *Review of Contemporary Business Research* 128; Pieterse 2017 *PELJ* 4.

³²⁷ Schenck et al 2019 *Development Southern Africa* 81.

³²⁸ Harrisberg 2019 <https://bit.ly/37Wfb07>.

³²⁹ Stats SA *Quarterly Labour Force Survey October* 2019 1; and Schenck et al 2019 *Development Southern Africa* 81.

Backyard dwellings also play a significant role in providing people in local communities with temporary accommodation. Without backyard dwellings, many people would not have a place to stay.³³⁰ This means that even though the intention of homeowners (landlords) is to make profits from backyard dwellings, the sector indirectly assists the government in its constitutional duty to provide adequate housing in South Africa.³³¹ This is because the sector caters for the accommodation needs of about 18.9 percent of South Africans who are either unable or unwilling to receive formal housing.³³²

The service-based enterprises in South Africa include hair salon businesses, car wash services and shoe repairs.³³³ These types of enterprises constitute 34 percent of the informal economic sectors existing in townships.³³⁴ However, some service-based enterprise such as car wash services and hair salons heavily depend on water and electricity and shaded structures to operate.³³⁵ Oftentimes, these structures are erected on pavements and revert to the illegal use of municipal water and electricity.³³⁶ Non-service enterprises include manufacturing enterprises such as brickmaking, fashion designing of traditional garments and beadwork.³³⁷

Some sectors of the informal economy are not easy to categorise as they provide simultaneously both services and trade, these include the shebeens and taverns sector. Researchers primarily categorise this sector as part of home-based trading enterprises (see section 3.6 below)³³⁸ due to the fact that they mostly operate from

³³⁰ Socio-Economic Rights Institute (SERI) *Informal Settlements and Human Rights in South Africa* 6.

³³¹ SERI *Informal Settlements and Human Rights in South Africa* 6.

³³² Stats SA *General Household Survey* ix; Socio-Economic Rights Institute (SERI) *Informal Settlements and Human Rights in South Africa* 6. Informal dwellers unwilling to receive formal houses are those who are often on a waiting list to receive subsidised housing from government or those residents that do not to get bonded housing. See South African Local Government Association *Local Government Position on Municipal Responses to Backyarders and Backyard Dwellings* 5.

³³³ Wills *South Africa's Informal Economy: A Statistical Profile* 20.

³³⁴ Sustainable Livelihood Foundation *South Africa's Informal Economy: Research Findings from Nine Townships* 22.

³³⁵ Phungula *An Evaluation of the Water Quality and Toxicity of Wastewater* 10.

³³⁶ Phungula *An Evaluation of the Water Quality and Toxicity of Wastewater* 10.

³³⁷ Grant 2013 *Urban Geography* 95.

³³⁸ Charman, Petersen and Govender 2014 *South African Geographical Journal* 32; and Sustainable Livelihood Foundation *South Africa's Informal Economy: Research Findings from Nine Townships*.

homes.³³⁹ However, shebeens and tavern spaces also provide a service that dates back to the apartheid era.³⁴⁰ These places provide useful venues for "social interaction and recreation in townships".³⁴¹

3.5 A focus on the street trading sector

Throughout the world, most activities contributing to the informal economy are in the informal trading sector.³⁴² South Africa's NDP envisages that this sector alone can produce between 1.2 million to 2 million jobs by 2030.³⁴³ This sector can be further divided into home-based and street trading. Home-based trading includes businesses such as shebeens, taverns and spaza shops, these enterprises serve the immediate communities that surround them.³⁴⁴ Whereas the street trading sector which forms the focus of this study is the busiest of these trades as it caters to individuals who commute daily moving from their homes to work often in minibus taxis.³⁴⁵ The sector offers products such as fat cakes,³⁴⁶ fast-food, and fresh produce.³⁴⁷

The street trading sector is a visible, often colourful and everyday site in several African countries.³⁴⁸ For instance, in Nigeria the sector continues to boom in cities such as Lagos and Abuja despite the attempts by government to restrict the access of traders to public spaces.³⁴⁹ In the face of restrictive measures, traders in Nigeria desert trading stands and operate their businesses on wheelbarrows instead.³⁵⁰

Charman, Petersen and Govender 2014 *South African Geographical Journal* 32; and Sustainable Livelihood Foundation *South Africa's Informal Economy: Research Findings from Nine Townships*.

<http://livelihoodnt/uploads/2018/05/South-Africas-Informal-Economy.pdf> 32.

³⁴¹ Charman, Petersen and Govender 2014 *South African Geographical Journal* 32

³⁴² Inolia *The impact of street trading* 9.

³⁴³ National Planning Commission "National Development Plan 2030: Our future-make it work" 121.

³⁴⁴ Sustainable Livelihood Foundation *South Africa's Informal Economy: Research Findings from Nine Townships* 38.

³⁴⁵ See para 3.5.1 above.

³⁴⁶ Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 22.

³⁴⁷ Alcock *KasiNomics African Informal Economies and the People Who Inhabit Them* 35.

³⁴⁸ Olugbenga and Femi 2017 *IOSR Journal of Humanities and Social Science* 93.

³⁴⁹ Olugbenga and Femi 2017 *IOSR Journal of Humanities and Social Science* 98.

³⁵⁰ Olugbenga and Femi 2017 *IOSR Journal of Humanities and Social Science* 98.

These traders push their wheelbarrows to a certain place where they display their goods for about thirty minutes after which they move to a different location.³⁵¹

The street trading sector exists on the busy corners and pavements of cities.³⁵² While some hawkers and paddlers migrate from one point to the other without an official allocation, some strategically position themselves in street corners characterised by heavy human traffic and visibility to pedestrians and motorists alike.³⁵³ Those operating in "permanent" structures position themselves in dilapidated infrastructures that lack basic facilities such as water and sanitation.³⁵⁴ As previously highlighted, street traders operate from a variety of structures ranging from well-equipped stalls to umbrellas and boxes on sidewalks.³⁵⁵

An example of a street trading hub is the Kwa Mai Mai Market (also known as the Faraday *muti* market) located in the Johannesburg's Central Business District.³⁵⁶ The market stretches from pillar to pillar under the Johannesburg M2.³⁵⁷ It is known for its various stalls where informal traders offer a variety of traditional African clothing and medicines to international and local tourists. Traditional medicine is the biggest trade item in this market, a trade that it is worth more than three billion Rands annually.³⁵⁸ Another example of informal street trading is the Warwick Junction Market (also known as the Warwick Triangle) in Durban. This market is located just on the border of the Durban city centre.³⁵⁹ The market accommodates between five thousand to eight thousand informal traders whose economic activities include beading, the serving of traditional cuisine, and selling of arts and crafts.³⁶⁰

³⁵¹ Olugbenga and Femi 2017 IOSR *Journal of Humanities and Social Science* 98.

³⁵² Mitullah *Street Vending in African Cities* 7.

³⁵³ Mitullah *Street Vending in African Cities* 7.

³⁵⁴ Socio-Economic Rights Institute of South Africa 2018 https://www.serisa.org/images/SERI_SALGA_Informal_Trade_Discussion_Doc_WEB.pdf.

³⁵⁵ Skinner 2008 *Development Southern Africa* 227 and Holness, Nel and Binns 1999 *Urban Forum* 290.

³⁵⁶ Gauteng.net date unknown https://www.gauteng.net/attractions/kwa_mai_mai/.

³⁵⁷ Alcock *KasiNomics: African Informal Economies and the People Who Inhabit Them* 25.

³⁵⁸ Alcock *KasiNomics: African Informal Economies and the People Who Inhabit Them* 25.

³⁵⁹ Stipo 2020 <https://thecityateyelevel.com/stories/street-trade-at-warwick-junction/>.

³⁶⁰ Trip Advisor South Africa date unknown https://www.tripadvisor.co.za/Attraction_Review-g312595-d4353771-Reviews-Markets_of_Warwick_Tour-Durban_KwaZulu_Natal.html.

From the brief visual analysis presented above, it is evident that a detailed analysis of all the aspects of the street trading sector is not possible within the scope of this study. For this reason, the study limits its focus on the street trading sector to the legally entrenched relationship between the sector and the sphere of local government. The term "street trading" does not fully explain the intricate relationship that exists between its participants and other role-players, the most important of these being the immediate private sector and local authorities.³⁶¹ Street traders operate in diverse ways, thus providing different goods and services to customers. While local authorities across the globe agree that the sector provides a livelihood to many households who would otherwise be left destitute, several countries face comparable challenges relating to the sector. One of the most significant of these challenges remains the hostility between the sector and local authorities.³⁶² This point will further be discussed in the section that follows.

3.6 Role-players and relationships in the street trading sector

A street trader is likely to have several interactions with diverse kinds of role-players in a single day. The first interaction begins with a supplier of raw materials needed by the street trader in the preparation of their goods. This relationship switches the roles and allows the street trader to become a consumer of goods in the formal economy.³⁶³ In the course of this interaction, the street trader might try to negotiate lower prices with the supplier bearing in mind that they need to return to their consumers and re-sell the goods at a higher price. The second interaction is with the consumer. These consumers are usually shopping for a bargain.³⁶⁴ In fact, what drives the consumers to the informal economy includes amongst other things, the flexibility of negotiating a lower price with an informal enterprise, something that is impossible with formal enterprises.³⁶⁵

³⁶¹ Motala *Organizing in the Informal Economy: A Case Study of Street Trading in South Africa* 7.

³⁶² See para 3.5.1 above.

³⁶³ Suppliers of street traders are generally found in the formal sector. This does not invalidate the fact that a supplier of a formal entities can be a sister informal enterprise.

³⁶⁴ See para 3.2 above.

³⁶⁵ Van Heerden *Street Trading in Cape Town CBD* 75.

From these interactions, it becomes evident that street traders find themselves in an intricate relationship with various actors. These relationships can yield both positive and negative outcomes. For example, the good outcomes may include the creation of strong and long-lasting value chain relations that run from the suppliers that operate in formal enterprises to the participants of the informal economy, and finally to the consumer of products and services. The negative outcomes may include undesired hostility from the people who own businesses within the immediate private sector amongst others. This is because those who operate their businesses within the immediate private sector often view the informal economy as competition.³⁶⁶ This kind of perspective is likely to block the prospects of establishing joint business ventures between the formal and informal enterprises.

This study focuses on the relationship between the street trading sector and local government. In South Africa, this relationship is principally recognised in the *Constitution*. Local government serves as both the regulator of the street trading sector and the provider of basic municipal services in local communities where the street trading occurs. It can be argued that this relationship has not always been cordial. For the longest time, the street trading sector has either been restrained or tolerated by government.³⁶⁷ Although traders are left to trade peacefully sometimes, the peace is often short-lived and intercepted by acts of persecution.³⁶⁸ A perfect example is this case is Operation Clean Sweep.

In Operation Clean Sweep, the Constitutional Court heard as a matter of urgency a case between approximately 2162 street traders and the City of Johannesburg.³⁶⁹ The case concerned the unlawful eviction of these traders from their places of trade following an order by the Mayor of the City.³⁷⁰ According to the mayor, the City's reason for evicting the street traders from their usual places of trade was to restore order in the City, to reduce acts of criminality in and around the City, and get rid of

³⁶⁶ Charman, Petersen and Govender 2014 *South African Geographical Journal* 32.

³⁶⁷ Bromley 2000 *International Journal of Sociology and Social Policy* 20.

³⁶⁸ See para 3.1 above.

³⁶⁹ Approximately 1210 lawfully documented street traders were represented by The SAITF and 952 by the National Retail Association (Retail Association).

³⁷⁰ The *SAITF* case para 6 and 7.

unsightly trading areas.³⁷¹ The applicants held that while the objective of the City might have been commendable because the City sought to ensure that all citizens enjoyed the use of facilities in and around the trading areas without fear of crime and obstruction.³⁷² However, they argued that the manner in which the City went about the eviction of the street traders completely disregarded the rights held by the street traders.³⁷³ These rights are further unpacked in sections 4.4 and 4.5 below.

Arguably, the occasional crackdowns that occur in this sector are often triggered by the imposing visual images of the sector.³⁷⁴ It is easier for a municipal official to spot a street trader who operates his or her business from a street corner than a carpenter who works from home, or the tailor whose place of work is unmarked, or the taxi driver who moves from one place to the other in his or her minibus.³⁷⁵ Based on the foregoing, it is proposed that a constitutional law approach to the relationship between local government and the street trading sector should be centred around two aspects namely the provision of basic municipal services to street traders and the regulation of street trading from an environmental health and public order perspective.³⁷⁶

Firstly, the provision of basic services including water, electricity and sanitation is an essential function of local government.³⁷⁷ The lack of the provision of quality services such as well-equipped trading stalls, and solid waste removal, as well as the lack of providing basic municipal services such as water, electricity and ablution facilities to participants of the informal economy severely affects the relationship between street traders and local authorities.³⁷⁸ Stats SA 2017 indicated that more

³⁷¹ The *SAITF* case para 7.

³⁷² The *SAITF* case para 7.

³⁷³ The *SAITF* case para 7.

³⁷⁴ Amis 'Regulating the Informal Sector: Voice and Bad Governance' 145; Bromley 2000 *International Journal of Sociology and Social Policy* 20; also see Bob-Miller and Obeng-Odoom 2011 *Urban Anthropology and Studies of Cultural Systems and World Economic Development* 264.

³⁷⁵ ILO *Employment, Income and Equality: A Strategy for Increasing Productive Employment in Kenya* 225.

³⁷⁶ See para 4.6 below.

³⁷⁷ *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) para 34.

³⁷⁸ See para 3.6.1 below.

than one out of five participants of the informal economy operate without electricity. Similarly, over 15.6 percent have no toilet facilities available for, and close to their places of business, and as many as 17.4 percent use water from public taps while less than 30 percent have pipe-borne water on site.³⁷⁹ In the absence of these services, some traders resort to the illegal connection of water and electricity.³⁸⁰ These illegal actions typically result in the violation of local by-laws and matters such as the unlawful dumping of solid waste and trading in restricted areas.³⁸¹

Where the services of electricity, water and sanitation facilities are provided, these are often too far from where the traders operate.³⁸² These services are typically found in places such as city markets and business hubs, thus leading to the argument that an overt objective of local government is to push street traders into markets.³⁸³ City markets and hubs include the Neighbourhoods Market in Cape Town and its sister market in Johannesburg.³⁸⁴ Both markets operate from old historic buildings in prime spaces of their cities. Launched in 2011, the markets house a variety of food, beverage, art, and urban clothing stalls and mostly cater to both local and foreign tourists.³⁸⁵

A cursory view of these markets shows that most stalls that operate there are food and beverage stalls.³⁸⁶ Based on this information, this study argues that people who provide the services such as hair and nail salons, shoe repairs, and other things will not be able to operate at close proximity with food and beverage traders. Furthermore, street trading activities thrive on foot and vehicle traffic, so traders

³⁷⁹ Stats SA *Survey of Employers and the Self Employed 2017/18*.

³⁸⁰ City of Johannesburg *Integrated Development Plan 2018/19 Review* 141.

³⁸¹ Incidental matters also include illegal dumping and advertising, see City of Johannesburg *Integrated Development Plan 2018/19 Review* 141.

³⁸² Bénit-Gbaffou 2018 *Urban Research and Practice* 399; and Mitullah *Street Vending in African Cities* 8.

³⁸³ Bénit-Gbaffou 2018 *Urban Research and Practice* 399; and Mitullah *Street Vending in African Cities* 8.

³⁸⁴ The Old Biscuit Mill 2019 <https://theoldbiscuitmill.co.za/neighbourgoods-market/>; and SA-Venues <https://www.sa-venues.com/things-to-do/Gauteng/neighbourgoods-market-johannesburg>.

³⁸⁵ The Old Biscuit Mill 2019 <https://theoldbiscuitmill.co.za/neighbourgoods-market/>; and SA-Venues <https://www.sa-venues.com/things-to-do/Gauteng/neighbourgoods-market-johannesburg>.

³⁸⁶ See generally Lephadi *Analysis of the Brand Experiences of Customers at the Johannesburg Neighbourgoods Food Markets*.

utilise the public spaces that are around major transportation nodes.³⁸⁷ In Johannesburg, these transportation nodes include, the Bree Taxi Rank, Faraday Park Station and Wanderers Taxi Rank, for example.³⁸⁸ An ideal trader in such spaces would include a fruit and vegetable trader who is located inside a taxi rank and serves the commuters of minibuses as they make their way to and from work on a daily basis.³⁸⁹ Therefore, the manner of the location and manner in which markets operate are not well suited for the businesses that operate in the street trading sector.

Secondly, in balancing interests, municipalities should regulate street trading in relation to ensuring environmental health and public order.³⁹⁰ However, the nature of street trading is such that it is difficult to regulate, especially from an environmental health and public order perspective. To ensure public order and environmental health often requires uniformity within a business environment. For instance, despite the fact that organisations such as SAITF and Self-Employed Women's Union (SEWU) have been established in several cities in South Africa,³⁹¹ the majority of street traders do not belong to these trade organisations. This makes it practically impossible for local government to enforce any regulations in this environment. The absence of trade organisations also means that street traders restrict their own possibility to engage in "collective actions to achieve legal protection, enhance business and secure better operating environment".³⁹² This further worsens their strained relationship with local government and municipal officials.

As the discussions in this chapter have shown, the implementation of bureaucratic laws in the street trading sector is hampered by several challenges. These include for instance, acts of underhanded dealings between street traders and police

³⁸⁷ See generally Manoko *Understanding the micro spatial practices of street traders*.

³⁸⁸ Moyo, Noicolau and Gumbo 2016 *Urban Forum* 335; Urban Age Johannesburg: A World Class African City 1.

³⁸⁹ Sustainable Livelihood Foundation *South Africa's Informal Economy: Research Findings from Nine Townships* 38.

³⁹⁰ Later in the study, the need for local government to regulate environmental health and public order is discussed in greater detail. See para 4.2.3 below.

³⁹¹ Motala *Organizing in the Informal Economy* ix.

³⁹² WIEGO *Street Vendor's Laws and Legal Issues in South Africa* 10.

officials.³⁹³ A common situation in cities whereby metropolitan police officials illicitly demand bribes from street traders in exchange for permitting them to operate without a permit or in restricted areas.³⁹⁴ Street traders are not entirely blameless in this instance, as some traders pay the bribes.³⁹⁵ Therefore, it is important for municipalities to re-examine their relationship with the street trading sector from a constitutional law approach.

3.7 Convergence of LED and the informal economy in the street trading sector

Chapter 2 of this study provided a number of definitions of LED. In summary, LED was defined as a process jointly adopted by local government, CBOs, the local community and the private sector where local resources are mobilised, and business is stimulated in order to reduce poverty, create employment, and develop the local economy of their community.³⁹⁶ The crux of the argument in this section is that the definition of LED creates a link between LED and the informal economy, specifically street trading. This link makes street trading an integral process of LED in South Africa.

The above definition of LED can be broken down into three components. The first component seeks to create and maintain relationships between the local stakeholders.³⁹⁷ Arguably, the stakeholders in LED reflect the role-players that are found in the street trading sector, excluding the fact that in this sector, local government and the local community do not often have a cordial relationship.³⁹⁸ This means that while the local community and municipalities might work together in LED processes, they are often at loggerheads in the regulation of the street trading sector.³⁹⁹ The second component in the definition of LED pertains to the

³⁹³ Grant 'Economic Growth, Urban Poverty and City Governance' 47.

³⁹⁴ Grant 'Economic Growth, Urban Poverty and City Governance' 47; Barthelmes 'Dealing with Uncertainty' 137; and Rakodi 2000 *Environment and Urbanization* 156.

³⁹⁵ Lugalla 'Where Do the Majority Live in Urban Tanzania: Why and How?' 78.

³⁹⁶ See para 2.2.1 and 2.5 above.

³⁹⁷ See para 2.2.1 above.

³⁹⁸ See para 3.5 above.

³⁹⁹ see para 3.5 above.

need to create employment, reduce poverty, and develop local economies.⁴⁰⁰ Street trading continues to make significant contributions to job creation, poverty reduction, and in the growth of local economies.⁴⁰¹ Some of the features of this sector show that there is a relatively low level of entry into the street trading sector, this makes it an attractive alternative for many households around the world.⁴⁰² A third component embodied in the definition of LED addresses the need for the mobilisation of local resources and the stimulation of businesses that exist within local communities. It is argued that street trading is both a local resource and a business sector that belongs to and operates within local communities. As a resource, local government must care for the street trading sector in the same way it would for any other resource of a local community. This means that local government must provide municipal services to the sector. It also implies that local government must listen and respond to the needs of street traders. These efforts are likely to propel an integrated and mutual relationship between local government, participants of the street trading sector, and the immediate private sector.

This chapter illuminated that there are nuances to the processes of LED. Therefore, while some could argue that the hostility between local government and street trading makes the sector unattractive to LED processes, a counter argument could equally be made that the flexibility of LED is accommodative of sectors such as street trading. The crux of the matter however, is that changing the narrative regarding the relationship between local government and the street trading sector is just as pertinent as adopting a constitutional law approach to the regulation of the sector.

3.8 Concluding remarks

This chapter set out to critically explore the features, sectors, and the role-players in South Africa's street trading sector with the view of identifying the vulnerabilities, problems, and regulatory gaps in the sector that are constitutionally relevant. The chapter found that the worst problem facing the street trading sector is the non-

⁴⁰⁰ See para 2.2.1 above.

⁴⁰¹ See para 3.5 above.

⁴⁰² See para 3.3.2 above.

existence of a meaningful relationship between itself and local government. All other challenges that plague this sector flow directly or indirectly from the primary problem identified above. These challenges include establishing and sustaining a business in the street trading sector on a finite supply of resources and creating and maintaining mutually beneficial relationships between the formal and informal economy.⁴⁰³

The lack of a relationship between local government and street traders has deprived this sector of municipal services that, if provided, could optimise the growth of the sector. The lack of adequate, well-maintained infrastructure, for instance, is a commonly shared challenge of street traders.⁴⁰⁴ The required infrastructure include storage facilities, water, electricity and sanitation, site enhancements, tables, and chairs, for example. The absence of adequate and safe infrastructure paints an image of traders who operate from areas, spaces or places that pose a risk to their health and safety of the community.⁴⁰⁵ Street traders are often subjected to colds, coughs, dizziness and tightness of the chest because of the density of people in cities.⁴⁰⁶ These illnesses exacerbate pre-existing conditions including asthma, tuberculosis and allergies.⁴⁰⁷ The stalls in which street traders operate from do not provide any form of shield against harsh weather conditions including hail, storms and strong winds.⁴⁰⁸ Furthermore, operating from dilapidated buildings could result in their collapse, the improper storage of goods could result in items getting spoilt or stolen.⁴⁰⁹ The existence of these challenges reflects negatively on the government and paints a picture of a government which does not care for one of the vulnerable groups of its society, the street trading sector.

⁴⁰³ See para 3.2 and 3.5 above.

⁴⁰⁴ Sello *Former Street Traders Tell their Stories* 10; Mkhize, Dube and Skinner *Vendors in Durban, South Africa* 1; Ligthem and van Wyk *Informal Trading in Tshwane*; Grant 'Economic Growth, Urban Poverty and City Governance' 5.

⁴⁰⁵ Motala 2003 as cited by Khumalo *The Role of Informal Trading in Economic Development* 14.

⁴⁰⁶ Gamielien and Van Niekerk 2017 *South African Journal of Occupational Therapy* 25.

⁴⁰⁷ Gamielien and Van Niekerk 2017 *South African Journal of Occupational Therapy* 25.

⁴⁰⁸ Mkhize, Dube and Skinner *Street Vendors in Durban, South Africa* 1.

⁴⁰⁹ Mkhize, Dube and Skinner *Street Vendors in Durban, South Africa* 1; also see Motala 2003 as cited by Khumalo *The Role of Informal Trading in Economic Development* 14.

CHAPTER 4

A CONSTITUTIONAL LAW PERSPECTIVE ON STREET TRADING AS A SECTOR OF THE INFORMAL ECONOMY

4.1 Introduction

The *Constitution* has been described as a social and economic revolutionary tool.⁴¹⁰ Its text has a transformative vision that aims to correct the injustices of the past and to establish a society that is based on democratic values, social justice and fundamental human rights.⁴¹¹ The transformation of South Africa into a constitutional democracy in 1994 meant that the *Constitution* became the supreme law of the land.⁴¹² This resulted in the overhaul of the legal system and structures of government.⁴¹³ Every organ of state including local government is obligated to conform to this *Constitution*. Its values and principles guide the behaviour and actions of all organs of the state. For instance, section 195 of the *Constitution* states that public administration must be governed by the democratic values and principles enshrined in the *Constitution*, including, transparency, accountability, and fairness to the people of South Africa.⁴¹⁴

The legislative and executive authority in South Africa has put in place a legal and policy framework which requires municipalities to treat people in a dignified manner, comply with human rights obligations and respect the rule of law. According to Bilchitz, an analysis of the rights in the Bill of Rights as mere individual entitlements is never enough to conceptualise the relationship between the government and its people.⁴¹⁵ The fundamental rights of citizens in relation to public administration must

⁴¹⁰ Langa 2006 *Stel LR* 352.

⁴¹¹ S 1(a) of the *Constitution*; Klare 1998 *South African Journal of Human Rights* 149; Fuo 2015 *African Human Rights Law Journal* 170.

⁴¹² Venter 2012 *McGill Law Journal* 723.

⁴¹³ Venter 2012 *McGill Law Journal* 723; Venter 2018 *South African Journal on Human Rights* 144.

⁴¹⁴ S 195(1) of the *Constitution*; *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) para 46; Bilchitz 2010 *Constitutional Court Review* 48.

⁴¹⁵ Bilchitz 2010 *Constitutional Court Review* 56.

be understood against the national policy principles of *Batho Pele*.⁴¹⁶ In *Joseph v City of Johannesburg*, the Constitutional Court even went further to state that the implicit constitutional value of *ubuntu* should inform this relationship.⁴¹⁷

Against this background, this chapter explores how a constitutional law approach⁴¹⁸ should inform municipal regulation of street trading in the South African context. The structure of this chapter consists of six parts. The first part of the chapter examines the self-governing powers of local government with the view of deciphering the scope of authority that municipalities have over street trading. This part also explores the relevance of the constitutional values and principles for how municipalities conduct the regulation of street trading. The third part identifies the substantive rights of street traders and the concomitant constitutional duties of municipalities. These rights include the right to freedom of trade, occupation and profession, the right to an environment that is not harmful to a person's health and well-being, and property rights. The fourth part explores the constitutional procedural rights of street traders and the relevant duties of municipalities. These rights include the right to access to information, the right to just administrative action, and the right to access to court. Considering that the constitutional rights mentioned are not absolute, the fourth part of the chapter analyses how and when the rights of street traders could be limited. In the fifth part of the Chapter addresses how the *Constitution* and a constitutional law approach should inform the municipal regulation of street trading in the South African context. The chapter concludes in part six.

4.2 Self-governing within the ambit of the Constitution

The *Constitution* transcends its provisions, the mechanisms, and processes it sets out and the structures of government that it establishes.⁴¹⁹ Its values and principles

⁴¹⁶ Bilchitz 2010 *Constitutional Court Review* 56. *Batho Pele* means "People First". The principles of *Batho Pele* speak to the need to give good customer service to users of the services of government.

⁴¹⁷ *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) (footnote 39); Bilchitz 2010 *Constitutional Court Review* 56-57.

⁴¹⁸ See para 4.6 below.

⁴¹⁹ De Vos and Freedman 'Basic Concepts of Constitutional Law' 59.

give expression to the ideals and characteristics of what shapes South Africa's constitutional democracy.⁴²⁰ The values and principles include the supremacy of the *Constitution*, the rule of law, the principle of legality, human dignity and equality, as well as the principles of cooperative government amongst others. The powers of municipalities to govern is derived from and limited by the *Constitution*.⁴²¹ Similarly, the powers of municipalities to regulate street trading stems from and is equally limited by the *Constitution*. Therefore, the constitutional values and principles must, in all instances, be incorporated into the powers and functions of local government in relation to street trading and, regarding the rights and duties of street traders.

4.2.1 Power to self-govern and regulate street trading

Municipalities have a right to govern the affairs of their local communities according to their own initiative.⁴²² In governing their affairs, municipalities must exercise powers and perform municipal functions. They must do so without being compromised or impeded by provincial and national government.⁴²³ The exercise of powers includes the right to make and administer by-laws for the effective administration of those matters that fall within the original powers and functions of local government and those assigned to municipalities.⁴²⁴ Section 156 of the *Constitution* states that municipalities have the executive authority in respect of, and have a right to administer matters listed in Schedules 4B and 5B of the *Constitution*.⁴²⁵ This section read together with the functions listed in Schedule 4B indicates that street trading is an area of legislative and executive competence of municipalities.⁴²⁶ Furthermore, section 156(5) stipulates that municipalities have the right to "exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions".⁴²⁷ The powers assigned by

⁴²⁰ De Vos and Freedman 'Basic Concepts of Constitutional Law' 59.

⁴²¹ *City of Cape Town and Other v Robertson* paras 60 and 61.

⁴²² S 151(3) of the *Constitution*.

⁴²³ S 151(4) of the *Constitution*.

⁴²⁴ Ss 156(1)(a)(b) and 229(1)(a) of the *Constitution*.

⁴²⁵ Fuo 'The courts and local governments' 105.

⁴²⁶ See generally *Nel v Hessequa Local Municipality* 2015 12576/2013 para 13; and Du Plessis and Fuo 2017 *Commonwealth Journal of Local Governance* 4.

⁴²⁷ See Freedman 2014 *PELJ* 581.

this latter provision are known as "incidental powers" of local government.⁴²⁸ Although section 156(5) does not confer on municipalities new or additional powers, it enhances their ability to effectively administer their existing functional areas.⁴²⁹

It is logical then, that municipalities exercise "original powers"⁴³⁰ in terms of the functions in Schedules 4B and 5B of the *Constitution*.⁴³¹ In addition, municipalities may administer by-laws on matters incidental to the effective administration of street trading. This is regardless of whether such matters fall outside the original powers of local government provided that the by-laws (or actions of local government) do not conflict with national and provincial legislation or policies.⁴³² However, to avoid conflict in such an instance, section 156 must be read with Chapter 3 of the *Constitution*, which outlines the principles of cooperative government.⁴³³ The fact that each sphere of government generally holds a degree of autonomy does not hinder them from coordinating and integrating their objectives to secure the well-being of the people of the Republic.⁴³⁴ Bearing this in mind, the following section explores the governing instruments that have and can be used in regulating street trading and incidental functions.

4.2.2 Governance instrumentation

The development and implementation of local governance instruments are an extension of the legislative and executive powers of municipalities. Various local governance instruments are prescribed by legislation.⁴³⁵ For instance, the *Municipal Systems Act* states that the exercise of legislative and executive powers of

⁴²⁸ Freedman 2014 *PELJ* 569.

⁴²⁹ See generally Fuo 'The courts and local governments' 107; Freedman 2014 *PELJ* 582; and Du Plessis and Fuo 2017 *Commonwealth Journal of Local Governance* 7.

⁴³⁰ S 156(1) of the *Constitution*; and *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* para 44.

⁴³¹ S 156(1) of the *Constitution*; and *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* para 44.

⁴³² See generally *Le Sueur v Ethekewini Municipality* 9714/11 2013 ZAKZPHC 6 para 20 and 29; Fuo 2015 *Commonwealth Journal on Local Governance* 32.

⁴³³ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 BCLR 150 (CC) para 23.

⁴³⁴ S 41(1)(b) of the *Constitution*; *Premier, Western Cape v President of the Republic of South Africa* para 50; and Bekink *The restructuring (systematization) of local government* 32.

⁴³⁵ S 11(3) of the *Constitution*; Fuo *Local government's role* 303; Nel, Du Plessis and Du Plessis 'Instrumentation for local environmental governance' 91-166

municipalities include developing and adopting policies, programmes, plans and strategies; implementing applicable by-laws within their areas, and doing anything else that municipalities may deem necessary within the legislative and executive competence of local government.⁴³⁶ This section examines two specific instruments commonly used to regulate street trading and stimulate its development namely by-laws and municipal policies.

Like many instruments of local government such as IDPs and by-laws, the right of municipalities to develop and implement policies stems from the constitutionally entrenched right of local government to use its initiative together with its executive and legislative powers to govern local communities.⁴³⁷ As prescribed by the *Constitution*, municipal policies are meant to "complement but not override, amend or conflict" with the legal framework of local government.⁴³⁸ In the local government sphere, two types of municipal policies can be adopted. These include "executive policies", which are meant for the governance of community affairs, and "administrative policies"⁴³⁹ that are used in governing the internal affairs of a municipality.⁴⁴⁰

Executive policies are likely to emanate from negotiations between a municipal council and the local community.⁴⁴¹ Its content can include socio-economic aspects of the local community and the continued prudent use and enjoyment of local resources.⁴⁴² An example of such an executive policy is the *Msunduzi Informal Economy and Street Trading Policy Review* (2020) which identifies poverty, unemployment, and local economic growth as aspects that can be best addressed by focusing on the principles of social, economic and spatial development of local communities.⁴⁴³ The policy recognises the need to provide street traders with stalls,

⁴³⁶ S 11(3)(a)(e)(m) and (n) of the *Municipal Systems Act*.

⁴³⁷ Fuo *Local government's role* 302.

⁴³⁸ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 252/99 2001 ZASCA 59 para 7; and Fuo *Local Government's role* 308.

⁴³⁹ Fuo *Local government's role* 307.

⁴⁴⁰ A popular type of policy that often falls outside the scope of the legislative and executive powers of municipalities is the so-called "political policy". See Fuo *Local government's role* 305-309.

⁴⁴¹ Fuo *Local government's role* 308.

⁴⁴² See generally s 11(3) of the *Municipal Systems Act*.

⁴⁴³ Msunduzi Local Municipality *Informal Economy and Street Trading Policy Review* 7.

ablution facilities, water and electricity, amongst other things.⁴⁴⁴ Arguably, some aspects of a policy of this nature can be enforced in a court of law on the constitutional basis that the issues raised are likely to manifest into socio-economic rights.⁴⁴⁵ Thus, giving effect to the duty of the state to take reasonable legislative and other measures to realise the rights.⁴⁴⁶ The Court reiterates this statement in *Government of the Republic of South Africa v Grootboom* by stating that if the government introduces programmes that aim to provide adequate social assistance in terms of section 27 of the *Constitution*, the provisions therein essentially links government to the obligation of respecting the right of everyone to have access to appropriate social assistance and other socio-economic rights such as the right of children to receive basic nutrition and social services.⁴⁴⁷ Arguably, the failure to provide clean water and ablution facilities on or near places of trade where a policy expressly states the commitment of local government in this regard can be viewed as a violation of the rights of street traders.

The second instrument is a by-law. More often than not, by-laws are derived from the development and adoption of a policy.⁴⁴⁸ The by-law gives effect to, and ensures the enforcement of some of the ideals of a municipal policy.⁴⁴⁹ This is because policy determinations are generally not considered as law.⁴⁵⁰ To give effect to their determination and to bind the public to their dictates, policies should ideally be converted into legislative instruments such as by-laws.⁴⁵¹ According to the *Constitution*, municipalities may make and administer by-laws for the effective administration of matters of local government including those listed in Schedules 4B and 5B.⁴⁵² The provisions of the by-laws on street trading (and other related

⁴⁴⁴ Msunduzi Local Municipality *Informal Economy and Street Trading Policy Review* 41.

⁴⁴⁵ Fuo 2013 *PELJ* 1-44; Msunduzi Local Municipality *Informal Economy and Street Trading Policy Review* 41.

⁴⁴⁶ Fuo 2013 *PELJ* 4.

⁴⁴⁷ *Grootboom v Government of the Republic of South Africa* 2000 11 BCLR 1169 (CC) para 36.

⁴⁴⁸ See sections 75 and 98 of the *Municipal Systems Act*. Both provisions compel municipalities to adopt by-laws on municipal tariffs and credit control and debt collection respectively following the implementation of policies on these matters.

⁴⁴⁹ See sections 75 and 98 of the *Municipal Systems Act*.

⁴⁵⁰ See Fuo 2013 *PELJ* 3; Bilchitz 2010 *South African Law Journal* (SALJ) 598; *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 252/99 2001 ZASCA 59 para 7.

⁴⁵¹ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 252/99 2001 ZASCA 59 para 7.

⁴⁵² S 156(2) of the *Constitution*.

matters) must not conflict with the dictates of the legislation such as the *Businesses Act* as far as such legislation is constitutionally compliant.⁴⁵³ Apart from ensuring that by-laws are aligned with national and provincial legislation, they must also avoid violating the fundamental rights provided for in the Bill of Rights.⁴⁵⁴

What has been observed is that several municipalities have used their powers to administer by-laws on street trading in a limited manner, meaning that they have adopted restrictive and prohibitive rules relating to this sector.⁴⁵⁵ For instance, the challenge of municipalities to cope with the congestion of street trading in public spaces has seen many cities adopting by-laws that are a "near-mirror-image of each other".⁴⁵⁶ These by-laws practically provide the same sanction. The sanctions imposed for violation of their by-laws are also similar.⁴⁵⁷ For instance, the by-laws of the City of Cape Town and Mangaung Metropolitan Municipality on street trading state that where a person fails to comply with provisions of the by-laws, he or she shall be guilty of an offence and upon conviction will be liable for a fine not exceeding R5000 and R10000 respectively.⁴⁵⁸ In this regard, Skinner observes that the provisions of these by-laws suggest that the activities of street trading are viewed as a challenge for urban management as opposed to an opportunity for the development of local economies.⁴⁵⁹

4.2.3 Governing within the limits of the Constitution

The divisions of powers and functions are primarily found in Schedules 4 and 5 of the *Constitution*. Schedule 4 holds a list of functional areas of current national and provincial legislative competence. Both national and provincial legislatures have the right to pass legislation on any of the functional areas listed under this Schedule.

⁴⁵³ S 6A(1) of the *Businesses Act*; De Visser and Poswa 2019 *PELJ* 10; See para 5.4.2.2 below.

⁴⁵⁴ S 6A(1) of the *Businesses Act*; De Visser and Poswa 2019 *PELJ* 10; See para 5.4.2.2 below

⁴⁵⁵ Gbaffou 2016 *Third World Quarterly* 1104.

⁴⁵⁶ Skinner 'Informal-sector policy and legislation in South Africa' 418; and para 5.4.2.2 below.

⁴⁵⁷ See para 5.3.2.2 above. Apart from s 38 of the eThekweni Metropolitan Municipality being declared as invalid in the decision of the *Makwickana v eThekweni Municipality*, all other penalties imposed are the same as those of the City of Johannesburg By-law.

⁴⁵⁸ s19(1)(f) of the Mangaung Metropolitan Municipality *By-laws Relating to Street Trading* (2006) and 19.3 of the City of Cape Town *Informal Trading By-law*.

⁴⁵⁹ Skinner 'Informal-sector policy and legislation in South Africa' 418.

Schedule 5 contains functional areas of exclusive provincial legislative competence. Under schedule 5, only provincial legislatures may pass legislation on the functional areas listed in these schedules. Where national legislature attempts to legislate on the functional areas in schedule 5, this will generally be unconstitutional.⁴⁶⁰ It is only in exceptional circumstances where national legislature will be allowed to intervene and pass national legislation on matters listed in schedule 5.⁴⁶¹ For instance, section 44(2) of the *Constitution* allows for Parliament to intervene, by passing legislation on any functional area listed in the Schedule. Especially if doing so is likely to maintain national security, preserve economic unity, or prevent provincial government from acting in a manner that is likely to be prejudicial on other provinces or the entire country.⁴⁶²

Schedules 4 and 5 are further subdivided into parts A and B with parts B of each of the Schedules regarded as matters under the functional competencies of local government.⁴⁶³ Municipalities have legislative and executive authorities in respect of the functional areas listed in these parts of the Schedules. This means that municipalities may adopt and administer by-laws on these functions, especially if doing so will ensure the effective administration of the matters under their competence.⁴⁶⁴ Local government is not limited to the passing of by-laws for the effective administration of its matters. Where by-laws are irrelevant, this government can make use of its other instruments or tools to achieve a broader mandate in respect of its functional areas. The broader mandate employs municipalities to assume a governing role in the substantive aspects of their functional areas.⁴⁶⁵ This mandate corresponds with the objectives of local government as specified in the *Constitution*.⁴⁶⁶ In fact, it is this mandate that makes local government developmental. This means that municipalities must find

⁴⁶⁰ See generally *Ex parte the President of the Republic of South Africa in re: Constitutionality of the Liquor Bill* 2000 1 BCLR 1.

⁴⁶¹ S 44(2) read with 147(1)(b) of the *Constitution*.

⁴⁶² S 44(2)(a), (b) and (e) of the *Constitution*.

⁴⁶³ S 156(1)(a) of the *Constitution*.

⁴⁶⁴ See para 4.2.1 above.

⁴⁶⁵ See para 4.2.1 above.

⁴⁶⁶ S 152 of the *Constitution*.

innovative ways of dealing with matters affecting their local communities as far as it can be found in schedules 4B and 5B of the *Constitution*.

A few functional areas listed in Schedules 4B and 5B of the *Constitution* are relevant to street trading in South Africa. In this respect, municipalities have the right to administer by-laws and adopt other local government instruments for these matters. These include markets, trading regulations, and the street trading sector itself. Notably, these functional areas correspond with the objective of local government to promote social and economic development in local communities, thereby employing municipalities to realise the growth and development of these areas of competence.⁴⁶⁷

Building regulations and municipal planning are also functional areas that relate to street trading. The widespread practice is for street traders to locate themselves in public spaces where there is remarkable human and vehicle traffic.⁴⁶⁸ Traders do so with the understanding that their businesses thrive in highly congested areas. These congested areas include both designated areas for street trading and restricted areas. This has great implications for urban planning and building regulations⁴⁶⁹ because when street traders are allocated trading areas in terms of the by-laws of the particular city, an obligation is created on the part of municipalities to provide basic services in these spaces.⁴⁷⁰

Several other functional areas of local government are affected when street traders place themselves in restricted or prohibited places. These include the control of public nuisance, traffic and parking, public places, and noise pollution. Noise pollution is an environmental problem that is often created by the congestion of pedestrians, cars, and street traders in small spaces. Other types of pollution caused by street trading include air and water pollution resulting from smoke emissions of open fires and illegal waste dumping as earlier alluded to.⁴⁷¹ Air pollution is typically

⁴⁶⁷ See para 4.2.2 above.

⁴⁶⁸ See para 3.6.1 above.

⁴⁶⁹ Omon-Aven, King and Decardi-Nelson 2011 *The Ghana Surveyor* 22.

⁴⁷⁰ See generally SACN *State of the Cities Report* 2016 195.

⁴⁷¹ Khuluse *Food Hygiene and Safety Practices* iv; see generally Bakshi and Bose *Environmental Regulation in the Presence of an Informal Sector*.

caused by street-side food preparation.⁴⁷² There are two types of food and beverages that are sold in the street trading sector. These include items that are purchased and further prepared at home and those that are cooked by the trader and are ready to be consumed without further preparation.⁴⁷³ To ensure that customers are served with freshly prepared food, traders often have to cook the food in the presence of their customers. This means that a trader will either have access to an electric or gas stove, where none of these is available, the trader will resort to the use of open fire.⁴⁷⁴ Cooking on an open fire is a significant cause of air pollution in cities.⁴⁷⁵

As an area of competence, environmental pollution falls within the ambit of municipal health services. Schedule 4B of the *Constitution* lists municipal health service as a function of local government.⁴⁷⁶ Also included in municipal health services is waste management and the prevention of communicable diseases.⁴⁷⁷ The biggest challenge presented to administrators of this functionary is the perceived public health risk that comes with the cooking and selling of prepared food. Most street traders are poor, uneducated persons who lack the necessary knowledge in the practice of safe food handling, sanitation, and hygiene standards and the proper displaying and storage of food items.⁴⁷⁸ This challenge also speaks to the concern about whether the food prepared and sold by street traders add to the nutritional status of the people in local communities.⁴⁷⁹

It should also be noted that while national and provincial government may not "regulate" street trading as a municipal function, these spheres may adopt

⁴⁷² See generally Baksi and Bose *Environmental Regulation in the Presence of an Informal Sector*.

⁴⁷³ Khairuzzaman 2014 *International Journal of Food Science* 1.

⁴⁷⁴ Khuluse *Food Hygiene and Safety Practices* 131.

⁴⁷⁵ Khuluse *Food Hygiene and Safety Practices* iv.

⁴⁷⁶ Schedules 4 and 5 in the *Constitution* list the functional areas where municipalities have executive and legislative authority (concurrently or exclusively with provincial and national government). Although primary health care is a competence of provincial government, municipal health services remain a function of local government. In this context, municipal health services are synonymous to environmental health management. See May 'Environmental Health and Public Health Services' 482.

⁴⁷⁷ S 1 of the *National Health Act* 61 of 2003.

⁴⁷⁸ Khairuzzaman 2014 *International Journal of Food Science* 1.

⁴⁷⁹ Khairuzzaman 2014 *International Journal of Food Science* 1.

guidelines on how municipalities should regulate the sector. An example of such guideline is the *Gauteng Township Economy Revitalisation Strategy* (2014).⁴⁸⁰ The Strategy acknowledges the vital role of informal enterprises, especially street trading in local communities.⁴⁸¹ According to this Strategy, government must prioritise the development of infrastructure in the street trading nodes. The development of these nodes will make it easy for local government to provide services such as water and electricity to the street trading sector.⁴⁸²

The discussion that follows highlights how the powers of municipalities to administer street trading should be exercised within the ambit of the *Constitution*. This discussion embraces the values and principles found in the *Constitution*. It also demonstrates how the rights of street traders as well as the powers, functions and duties of local government are interpreted against these values and principles.

4.2.3.1 Human rights duties

As an organ of state, the powers of local government to administer street trading must be exercised through the prism of the Bill of Rights.⁴⁸³ Local government must respect, protect, promote and fulfil the rights in the Bill of Rights.⁴⁸⁴ An obligation to respect the rights in the Bill of Rights negatively counteracts the duty of local government by causing it to refrain from performing any act that is likely to interfere with a person's enjoyment of the rights in the *Constitution*.⁴⁸⁵ Therefore, where a street trader is enjoying the right to choose his or her trade, occupation or profession, local government must respect this and not interfere with this right.⁴⁸⁶ Additionally, local government must implement positive measures aimed at protecting the rights of a street trader from third parties including the immediate

⁴⁸⁰ Gauteng Province *Gauteng Township Economy Revitalisation Strategy* (2014).

⁴⁸¹ Gauteng Province *Gauteng Township Economy Revitalisation Strategy* (2014) para 6.3.2.

⁴⁸² Gauteng Province *Gauteng Township Economy Revitalisation Strategy* (2014) para 6.3.2.

⁴⁸³ Sections 7(2) and 8(1) of the *Constitution*.

⁴⁸⁴ S 7(2) of the *Constitution*.

⁴⁸⁵ Udombana 2004 *Stanford Journal of International Law* 12; and Fuo *Local government's role* 205.

⁴⁸⁶ See para 4.3.1 below.

private sector.⁴⁸⁷ Within its administrative and financial capacity, local government must take appropriate and positive steps to promote and fulfil the rights in the Bill of Rights.⁴⁸⁸ Promoting rights creates a positive obligation for local government to educate people and create public awareness programmes that publicise the existence of human rights and how to access them.⁴⁸⁹

4.2.3.2 Rule of law and legality

It has been argued that enshrining the rule of law alongside the Bill of Rights in the *Constitution* is a duplication of its dictates.⁴⁹⁰ This is because the rights in the Bill of Rights provide for greater protection of rights-holders against the abuse of power by organs of state.⁴⁹¹ In the *Constitution*, the rule of law as a value is enshrined in section 1(c) alongside supremacy of the *Constitution*.⁴⁹² The rule of law seeks to ensure that government officials act within the scope of the law, primarily through the prescripts of the Bill of Rights. For instance, where a local official removes or impounds the goods of a street trader, they must follow the prescribed procedure in the applicable by-law. In the absence of such a by-law, the official must at most adhere to the dictates of the *Constitution*. In this instance, the conduct of the official must align to the right of street traders to their property, and the right to just administrative action.⁴⁹³ This rule has been invoked in many cases as a constitutional principle, especially where it is raised as a basis for challenging the actions of an executive or legislative authority.⁴⁹⁴ In *Makwickana v eThekweni Municipality*, the court found that although the conduct of local authorities exercised in terms of an

⁴⁸⁷ Udombana 2004 *Stanford Journal of International Law* 11 and 13; and Fuo Local government's role 205.

⁴⁸⁸ Udombana 2004 *Stanford Journal of International Law* 14; and Fuo Local government's role 206.

⁴⁸⁹ Udombana 2004 *Stanford Journal of International Law* 13; article 25 of the *African Charter on Human and Peoples Rights*; and Fuo *Local government's role* 207.

⁴⁹⁰ De Vos and Freedman 'Basic Concepts of Constitutional Law' 81.

⁴⁹¹ De Vos and Freedman 'Basic Concepts of Constitutional Law' 81.

⁴⁹² See para 4.2.3.3 below.

⁴⁹³ The application of these rights is further discussed in para 4.3 and 4.4 below.

⁴⁹⁴ De Vos and Freedman 'Basic Concepts of Constitutional Law' 81-82.

enacted by-law does not constitute administrative action,⁴⁹⁵ it must nevertheless align itself to the constitutional principle of legality.⁴⁹⁶

The principle of legality is derived from the rule of law.⁴⁹⁷ It stipulates that "the exercise of public power or performance of a public function is only legitimate when lawful".⁴⁹⁸ According to this principle, organs of state cannot exercise more powers or perform more functions other than those conferred upon them by the *Constitution*.⁴⁹⁹ These organs include the executive and legislative authorities of local government. While these spheres of government can typically be excluded from a constitutional challenge based on just administrative action, the principle of legality may readily be invoked.⁵⁰⁰ The principle further ensures that even where an enabling law exists, the powers emanating from it are not exercised arbitrarily.⁵⁰¹ This means that the government officials acting according to those laws do not go beyond that which is prescribed by the legal instruments. In the local government sphere, the limits on the exercise of power are also found in national legislation. This was the case in *Makwickana v eThekweni Municipality* where section 35(1) of the eThekweni Municipality: *Informal Trading By-law*, 2014 was found to exceed the scope of mandate imposed by the authorising Act namely the *Businesses Act*.⁵⁰² The provision was *ultra vires* section 6A(1)(d)(ii) of the Act.⁵⁰³ Thus automatically placing the provision in conflict with the principle of legality.

Based on the aforementioned, it is clear that nothing precludes a street trader whose right has been infringed by the conduct of a municipal official from basing their constitutional challenge on the principle of legality,⁵⁰⁴ especially in instances where

⁴⁹⁵ The legislative and executive powers or functions of a municipal council are excluded from the definition of an administrative action. See s 1 (cc)(dd) of the *Promotion of Administrative Justice Act* (PAJA) 32 of 2000.

⁴⁹⁶ *Makwickana v eThekweni Municipality and Others* (11662/13) [2015] ZAKZDHC (*Makwickana v eThekweni Municipality*) para 60; and *Fedsure Life* para 59.

⁴⁹⁷ De Vos and Freedman 'Basic Concepts of Constitutional Law' 83.

⁴⁹⁸ *Fedsure* para 56; and De Vos and Freedman (eds) 'Administrative justice, access to information, access to courts and labour rights' 589.

⁴⁹⁹ *Fedsure Life* para 56.

⁵⁰⁰ De Vos and Freedman 'Basic Concepts of Constitutional Law' 83.

⁵⁰¹ De Vos and Freedman 'Basic Concepts of Constitutional Law' 83.

⁵⁰² See para 5.3.3 below; s 35(1) eThekweni Municipality: *Informal Trading By-law*, 2014.

⁵⁰³ See para 5.3.3 below.

⁵⁰⁴ De Vos and Freedman 'Basic Concepts of Constitutional Law' 83.

a right or any other provision in the *Constitution* could prove to be insufficient.⁵⁰⁵ While section 35(1) might have been challenged on the constitutional basis of legality, the application of the provision can disturb the right of street traders not to be unlawfully deprived of their property. Therefore, no matter the bases of the challenge, whether on a constitutional principle or a right, the outcome must ensure that officials of local government do not infringe on the rights of street traders purely because by-laws permit such conduct.

4.2.3.3 Constitutional values

Section 1 of the *Constitution* affirms that South Africa's constitutional system is laden with values. Some of these values include "human dignity, the achievement of equality, advancement of human rights and freedoms".⁵⁰⁶ Together, the values of equality and freedom ensure that all human beings are treated with equal dignity and respect.⁵⁰⁷ The advancement of human rights and freedom recognises that people have the potential to achieve what they set themselves out to achieve. Therefore, resources and opportunities must be established and disseminated in a non-discriminatory fashion, allowing people the freedom to take advantage of the opportunity to advance their lives.

These values should inform the relationship between officials of government and local communities as far as public administration must be governed in terms of the values and principles in the *Constitution*. In terms of section 195 of the *Constitution*, a high standard of professional ethics that are informed by the values of the *Constitution* must be maintained throughout all public administration in every sphere of government. This means that local government public administration must provide services such as water, electricity, and waste disposal facilities to street traders in an impartial, fair and equitable manner without any bias.⁵⁰⁸ Furthermore,

⁵⁰⁵ De Vos and Freedman 'Basic Concepts of Constitutional Law' 83.

⁵⁰⁶ S 1(c) of the *Constitution*.

⁵⁰⁷ *President of South Africa v Hugo* 1997 6 BCLR 708 para 41; and see generally O'Connell 2008 *International Journal of Constitutional Law* 276.

⁵⁰⁸ S 195(d) of the *Constitution*.

local government must ensure that it promotes the efficient, economic, and effective use of local resources.⁵⁰⁹

In addition to the above values, an important and definitive feature of the *Constitution* on which the country's constitutional democracy hinges is the principle of constitutional supremacy.⁵¹⁰ In terms of this principle, the *Constitution* is "the supreme law of the Republic".⁵¹¹ Constitutional supremacy encompasses both a founding value and a binding and enforceable rule. As an enforceable rule, any statute and conduct tested against the *Constitution* shall be deemed invalid and unconstitutional in so far as it is inconsistent with its provisions.⁵¹² Similarly, a by-law on street trading that is inconsistent with the provisions of the *Constitution* shall be expressly deemed invalid.⁵¹³

Evidently, nothing prevents municipalities from developing and adopting by-laws (or any other municipal instrument) that they may deem necessary for the regulation of street trading within their areas. As soon as these instruments are adopted, local government officials are bound to the dictates of these instruments. Thus, local officials must comply with these dictates provided that the instruments are constitutional. However, this does not mean that a municipal official can exercise unreasonably power where a by-law has not been enacted to regulate street trading. This is exactly what the values discussed above seek to pre-empt. These instruments merely serve to, amongst other things, outline processes and procedures that must be followed when local officials exercise public power in relation to regulating the street trading sector.

4.3 Substantive rights of street traders

Thus far, this chapter has discussed the values and principles enshrined in the *Constitution* and how these values relate to the regulation of street trading.

⁵⁰⁹ S 73(2)(b)(1) of the *Municipal Systems Act*.

⁵¹⁰ De Vos and Freedman 'Basic Concepts of Constitutional Law' 54.

⁵¹¹ S2 of the *Constitution*.

⁵¹² S2 of the *Constitution*; and *S v Makwanyane* 1995 6 BCLR 665.

⁵¹³ *Joseph v City of Johannesburg* 2010 3 BCLR 212 CC para 70-71; Bilchitz 2010 *Constitutional Court Review* 49.

However, the rights of street traders have not been explored. Therefore, this section analyses the substantive rights of street traders and discusses the concomitant duties of local government in relation to each right to be analysed. In doing so, it seeks to clarify that even though each value and principle of the *Constitution* can exist as a stand-alone provision, these values can also enhance how courts interpret the rights of street traders.

4.3.1 *Right to freedom of trade and occupation*

A typical day in urban South Africa begins around four o'clock in the morning with millions of people leaving their homes and making their way to their places of work using private vehicles, lift clubs, municipal buses, and minibus taxis. Also visible around this hour are the thousands of street traders setting up their stalls for the day. Among this multitude is the newspaper trader. This trader places a brick on top of the stack of newspapers fearing that the morning breeze will blow them away. Also placed on the top of the newspaper stack are packets of cigarettes, his *side hustle*.⁵¹⁴ Trading beside him is the fat cake lady whose first batch of fat cakes are ready to be sold to the morning travellers. If she has an assistant, the line of queueing customers moves faster as one person tends to customers while the other scoops out batches and batches of ready-made fat cakes from the boiling oil.

Although these two traders might be different in terms of age and gender, what they (just like thousands of others like them) have in common is that they are bearers of constitutional rights, one of which is the right of citizens to choose their trade, occupation or profession.⁵¹⁵ The practice of trade, occupation or profession may be regulated by law.⁵¹⁶ The principal Act for the regulation of businesses, including informal enterprises is the *Businesses Act*.⁵¹⁷

⁵¹⁴ Side hustle is defined as employment that one undertakes in addition to their fulltime job. A side hustle often assists the person to supplement their income. Dictionary.com 2009 <https://dictionary.com/e/slang/side-hustle/>.

⁵¹⁵ S 22 of the *Constitution*.

⁵¹⁶ S 22 of the *Constitution*.

⁵¹⁷ SERI/SALGA *Towards Recommendations on the Regulation of Informal Trade at Local Government Level Discussion Document* 7.

The regulation of a trade, occupation, or profession is arguably not aimed at denying a person the choice or the access to a vocation, neither does it mean that the trade or profession can simply be closed down.⁵¹⁸ Instead, where trade is regulated, the purpose must be for the protection of the general public. In the context of street trading, the protection of the general public includes the monitoring of the quality of food items sold to, and consumed by the public.⁵¹⁹ In *S v Lawrence, S v Negal, S v Solberg*,⁵²⁰ the court adjudicated on section 26 of the interim *Constitution*, 1993, which afforded every person the right to engage in economic activities anywhere in the national territory freely.⁵²¹ The Court found that the right of the state to regulate does not mean that government can enact arbitrary laws.⁵²² The measures employed to regulate the economic activities of the country should therefore not be arbitrary. They must be consistent with the "values and principles that underpin an open and democratic society based on freedom and equality".⁵²³ Arbitrary laws would not pass the scrutiny of the *Constitution*.⁵²⁴ Similarly, the current section in the *Constitution* that allows people to freely engage in economic activities namely section 22, requires that by-laws and other measures employed by local government in the regulation of the street trading sector must not be arbitrary, and must broadly reflect the principles and values enshrined in the *Constitution*.

The right to freedom of trade corresponds with the right to human dignity.⁵²⁵ Most street traders are breadwinners in their families, so the ability to provide for their families has a direct bearing on other aspects of theirs, and their families' lives. For

⁵¹⁸ Currie and De Waal 'Freedom of Trade, Occupation and Profession' 468.

⁵¹⁹ See para 4.2.3 above.

⁵²⁰ *S v Lawrence, S v Negal, S v Solberg* 1997 10 BCLR 1348.

⁵²¹ S 26 reads: "(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory. (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality".

⁵²² *S v Lawrence, S v Negal, S v Solberg* 1997 10 BCLR 1348 para 33.

⁵²³ *S v Lawrence, S v Negal, S v Solberg* 1997 10 BCLR 1348 para 33.

⁵²⁴ *S v Lawrence, S v Negal, S v Solberg* 1997 10 BCLR 1348 para 33.

⁵²⁵ *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* (CCT 173/13; CCT 174/14) [2014] ZACC 8 (the *SAITF* case) para 31.

example, their children's right to basic nutrition, shelter, and health care.⁵²⁶ In this context, the court in *Somali Association of South Africa v Limpopo Department of Economic Development and Tourism (Somali Association of South Africa case)*⁵²⁷ warned that the discriminatory actions perpetuated by municipal officials could easily fuel xenophobia against foreign nationals who engage in street trading.⁵²⁸ In this case, the South African Police Services (SAPS) embarked on an 'Operation Yardstick' whereby about 600 businesses of traders were shut down, their properties confiscated, and employers and employees alike arrested.⁵²⁹ Amongst these traders were asylum seekers and refugees who were told that their permits did not entitle them to operate businesses in the country.⁵³⁰ The court condemned the conduct and utterances of local authorities stating that where a person is on the brink of starvation, the kind of starvation that would breed humiliation and degradation, then they must be able to sustain themselves through informal trading relying on the right to human dignity.⁵³¹ This means that the joint reading of sections 22 and 10 of the *Constitution* affords everyone (South African citizens and foreign nationals legally residing in the country) the right to trade.⁵³² This includes engaging in street trading.

4.3.2 *The environmental right*

Shame and humiliation are inescapable in situations where traders, regardless of their nationality operate from places that are unfit for trading purposes. Trading sites that are typically not included in the spatial plans of municipalities often lack adequate infrastructure and amenities.⁵³³ These include safe, well-equipped trading stalls, storage facilities, clean drinking water, toilets, and solid waste removal as

⁵²⁶ *SAITF* case para 31.

⁵²⁷ *Somali Association of South Africa v Limpopo Department of Economic Development and Tourism* 2015 1 SA 151 (SCA) (*Somali Association of South Africa case*).

⁵²⁸ *Somali Association of South Africa case* para 70.

⁵²⁹ *Somali Association of South Africa case* para 4.

⁵³⁰ *Somali Association of South Africa case* para 4.

⁵³¹ *Somali Association of South Africa case* para 43.

⁵³² SERI/SALGA *Towards Recommendations on the Regulation of Informal Trade at Local Government Level Discussion Document* 10.

⁵³³ Khairuzzaman et al' 2014 *International Journal of Food Science* 7.

pointed out earlier.⁵³⁴ The absence of the above typically infringes on the right of a person to an environment that is not harmful to their health or wellbeing.⁵³⁵

Section 24 of the *Constitution* affords everyone the right to an environment that is not harmful to their health or wellbeing.⁵³⁶ The provision further obligates that the environment must be protected for current and future generations.⁵³⁷ Section 24 can be viewed from a twofold perspective. The first part is anthropocentric in that it seeks to protect humans by providing a healthy and safe environment, the second part is biocentric because it advocates for the protection of the environment for "the environment's sake".⁵³⁸ The nature of this right mandates local government to do more than respect, protect, and promote the right in section 24.⁵³⁹ Instead, local government is compelled by legislation to meet the standard set by the right using its administrative and financial resources.⁵⁴⁰ This means that municipalities must take active steps towards fulfilling this right.

The legislative measures exercised by government to give effect to the constitutional environmental right include the *National Environment Management Act* 107 of 1998 (NEMA). Amongst other things, this Act provides a cooperative approach to environmental management in South Africa and the enhancement of internationally established principles on environmental protection and management. This Act has become an overarching Act that establishes generic principles for further establishment of sector-specific legislation such as the *National Environmental Management: Protected Areas Act* 57 of 2003 (NEM:PAA),⁵⁴¹ the *National Environmental Waste Management Act* 59 of 2008 (NEM:WA) and the *National Environmental Management: Biodiversity Act* 10 of 2004 (NEM:BA).⁵⁴² This framework legislation has placed greater emphasis on the role of local government in ensuring the protection of the environment. For example, NEM:WA mandates

⁵³⁴ Khairuzzaman et al' 2014 *International Journal of Food Science* 7.

⁵³⁵ See s24(a) of the *Constitution*.

⁵³⁶ See s24(a) of the *Constitution*.

⁵³⁷ See s24(b) of the *Constitution*.

⁵³⁸ Kidd 'Environment' 516; and Feris 2008 *South African Journal on Human Rights* 30-32.

⁵³⁹ See s24(b)(i), (ii) and (iii) of the *Constitution*.

⁵⁴⁰ Feris 2008 *South African Journal on Human Rights* 35.

⁵⁴¹ Feris 2008 *South African Journal on Human Rights* 36.

⁵⁴² Feris 2008 *South African Journal on Human Rights* 36.

local government to adopt strategies, plans and programmes to reduce the amount of waste generated in the country.⁵⁴³

The courts in South Africa have, to date, missed the opportunity to adjudicate on the substantive aspects of the right to an environment that is not harmful to people's health or wellbeing.⁵⁴⁴ Feris suggests three possible reasons for this shortfall, stating that section 24 is firstly a novel provision that addresses matters that have never been adjudicated on. Secondly, litigants avoid raising section 24, and thirdly, the courts in South Africa lack familiarity in issues of environmental law.⁵⁴⁵ Even though there is an absence of judicial pronouncements on the substantive nature of section 24, it has been argued that this provision typically has "a wide scope of application".⁵⁴⁶ The anthropocentric approach to the right focuses on three critical aspects of human existence including health, well-being, and the need for the sustainable development of the environment for current and future generations.⁵⁴⁷ For street traders, these aspects represent their right to operate their businesses in places that will not subject them to pollution and environmental harm.⁵⁴⁸ This is important because street traders are exposed to harsh levels of air pollution and inclement weather daily.⁵⁴⁹ Traders operate from places such as stalls that are not well-equipped and exposed to harsh weather conditions including rain, hail, and storms. Others trade from dilapidated buildings that lack facilities such as portable clean water, toilets, and fire safety equipment.⁵⁵⁰

⁵⁴³ S 3 of the *National Environmental Waste Management Act* 59 of 2008 (NEM: WA).

⁵⁴⁴ See generally *Du Plessis Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 346.

⁵⁴⁵ Feris 2008 *South African Journal on Human Rights* 38; and *Du Plessis Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 345; see generally Kidd 2006 *PELJ*.

⁵⁴⁶ *Du Plessis Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 346.

⁵⁴⁷ *Du Plessis Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 346.

⁵⁴⁸ See generally *Du Plessis Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 347.

⁵⁴⁹ Khairuzzaman 2014 *International Journal of Food Sciences* 3.

⁵⁵⁰ Manoko *Understanding the micro spatial practices of street traders* 47.

4.3.3 *The right to property*

The right to property affords everyone with the protection not to be arbitrarily deprived of their possessions.⁵⁵¹ This demands that the state desists from interfering with private property unless if such interference is authorised by law and meets all the basic standards of justification.⁵⁵² Where the state is expropriating property, it must do so by applying the prescripts of the law of general application.⁵⁵³ Furthermore, the deprivation must be for public purpose or interest,⁵⁵⁴ and the state must compensate the former holder of the property.⁵⁵⁵

For a street trader, property includes trading stock.⁵⁵⁶ The right to property for a street trader may also include the temporary structure that they built for the purposes of trading whether from a pavement or on a street corner.⁵⁵⁷ As stated above, the right to property may be limited. This means that a street trader may be deprived of his property including trading stock and the temporary structure where a law of general application (which is justifiable in an open and democratic society) authorises such conduct.⁵⁵⁸ The requirement to deprive property only in terms of the law of general application should be understood as a "measure of disciplining the deprivation powers of the state."⁵⁵⁹ This means that the deprivation process must be in accordance with the law.⁵⁶⁰

The deprivation of property that contravenes the law will result in unlawful interference with the right of a street trader.⁵⁶¹ Acts that constitute an unlawful

⁵⁵¹ S 25(1) of the *Constitution*.

⁵⁵² Iles 'Property' 534.

⁵⁵³ S 25(1) of the *Constitution*.

⁵⁵⁴ S 25(2)(a) of the *Constitution*. In terms of the *Constitution*, public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources, see s 25(4)(a) of the *Constitution*.

⁵⁵⁵ S 25(2)(b) of the *Constitution*.

⁵⁵⁶ See *First National Bank of South Africa Limited t/a Wesbank v The Commissioner for the South African Revenue Services* 2002 7 BCLR 702 para 51.

⁵⁵⁷ In terms of s 6A(d)(ii) of the *Businesses Act*, a municipal by-law may provide for the removal and impoundment of the following: any goods; receptible; vehicle or movable structure.

⁵⁵⁸ S 21(1) of the *Constitution*.

⁵⁵⁹ Iles 'Property' 539.

⁵⁶⁰ Iles 'Property' 539; and see para 4.5 below.

⁵⁶¹ *First National Bank of SA Limited t/a Wesbank v Commission for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC) para 57.

impounding and deprivation of a 'traders' property includes impounding the goods of a permit holding trader, impounding goods without issuing a valid receipt to the trader with reasons for impounding the goods, and a failure to inform the trader where the goods will be held including how the trader could get them back.⁵⁶² The failure to account for the whereabouts of impounded stock may give rise to allegations of theft and corruption on the part of police officials.⁵⁶³ Often, when goods are impounded the fine attached for the return of such goods outweighs their monetary value.⁵⁶⁴ For example, if a municipal official has confiscated ten bags of oranges with the market value of a total of 250 Rands and the trader is issued with a fine of 400 Rands coupled with the option of appearing in court in about two months times. If the choice of appearing in court outlives the shelf life of these goods, it becomes a futile exercise for a trader to oppose the confiscation of rotten goods.⁵⁶⁵

4.4 Procedural rights of street traders

Procedural rights would arguably not be necessary if substantive rights were observed by persons who are non-fallible human beings.⁵⁶⁶ This means that procedural rights would not serve any purpose if everyone, especially those in local authority, respected and protected the rights of street traders.⁵⁶⁷ Procedural rights as their wording suggests, create processes and mechanisms within which substantive rights can be enforced. These include the right to access to information, just administrative action, and access to court. These rights are discussed in the following paragraphs within the context of street trading.

4.4.1 Right to access information

In terms of the *Constitution*, everyone has the right to access information.⁵⁶⁸ The basis of this right stems from the idea that people are entitled to information held

⁵⁶² *Makwickana v eThekweni Municipality* para 13.

⁵⁶³ *Makwickana v eThekweni Municipality* para 17.

⁵⁶⁴ *Makwickana v eThekweni Municipality* para 18.

⁵⁶⁵ *Makwickana v eThekweni Municipality* para 16.

⁵⁶⁶ Alexander 1998 *Law and Philosophy* 19.

⁵⁶⁷ Alexander 1998 *Law and Philosophy* 19.

⁵⁶⁸ S 32(1) of the *Constitution*.

by the state or other persons where such information has an impact on their lives or legal claims.⁵⁶⁹ Included in this right is information that is used by an organ of state or any other person to make a decision that has adversely affected the requester of the information.⁵⁷⁰ The *Promotion of Access to Information Act* (PAIA) gives effect to section 32 of the *Constitution*. The Act elaborates on the right to access to information, and provides limits, as well as mechanisms for the protection and enforcement of the right.⁵⁷¹ Through PAIA, both public and private persons have the right to request information from municipalities, including their IDPs, spatial plans, municipal budgets, and by-laws.⁵⁷²

The operational element of this right is the word "access". For street traders, accessibility depends heavily on their ability to comprehend the latter documents.⁵⁷³ This is because most street traders have low levels of education.⁵⁷⁴ In addition, accessibility may refer to comprehension during an interaction between a municipal official and a street trader. For example, where a street trader's property is confiscated, the trader has a right to be furnished with information explaining the reason for the confiscation, where the property would be stored, and the procedure to be followed for the street trader to regain access to their property should they wish to get it back.⁵⁷⁵ The failure to provide this information practically constitutes a violation of the trader's right to access information.⁵⁷⁶

In *Brümmer v Minister of Social Development*,⁵⁷⁷ the right of access to information was recognised as being important to a state that is founded on the values of accountability, responsiveness, and openness.⁵⁷⁸ To give effect to this right, the

⁵⁶⁹ Currie and De Waal *The Bill of Rights Handbook* 692.

⁵⁷⁰ Currie and De Waal *The Bill of Rights Handbook* 692.

⁵⁷¹ Currie and De Waal *The Bill of Rights Handbook* 694.

⁵⁷² WIEGO and Informality Project *Street Vendors' Laws and Legal Issues in South Africa* 11.

⁵⁷³ WIEGO and Informality Project *Street Vendors' Laws and Legal Issues in South Africa* 11; and Rogerson 2000 *Journal of International Affairs Editorial Board* 675.

⁵⁷⁴ Rogerson 2000 *Journal of International Affairs Editorial Board* 675.

⁵⁷⁵ See generally *Makwickana v eThekweni Municipality* para 13.

⁵⁷⁶ See generally *Makwickana v eThekweni Municipality* para 13.

⁵⁷⁷ *Brümmer v Minister of Social Development* 2009 11 BCLR 1075 (CC).

⁵⁷⁸ *Brümmer v Minister of Social Development* 2009 11 BCLR 1075 (CC) para 62; and s 1(d) of the *Constitution*.

public must be able to access information that is held by the state.⁵⁷⁹ Furthermore, section 195 of the *Constitution* lists transparency as one of the values that govern public administrations. Transparency is recognised as a means of ensuring "timely, accessible, and accurate information."⁵⁸⁰

It follows from the above that the right of access to information is aimed at promoting a culture of transparency between street traders and local authorities.⁵⁸¹ The right also seeks to ensure that traders have access to information that will enable them to effectively exercise and protect their rights. This means that the right of access to information is fundamental to realising the other rights in the Bill of Rights.⁵⁸² For instance, where the right to property has been infringed through an arbitrary deprivation, a trader can address their grievance to the correct channels using the information at their disposal. The right to just administrative action corresponds with the right to information as it requires that a street trader should be provided with written reasons by municipal officials for any administrative action taken against them.⁵⁸³

4.4.2 *Right to administrative justice*

The right to just administrative action is guaranteed in the *Constitution*. In terms of section 33, everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.⁵⁸⁴ Everyone whose rights has been adversely affected by administrative actions has a right to be furnished with written reasons.⁵⁸⁵ PAJA has been enacted to give effect to the right to just administrative action. PAJA defines administrative action as:

any decision taken, or any failure to take a decision, by (a) an organ of state, when – (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing

⁵⁷⁹ *Brümmer v Minister of Social Development* 2009 11 BCLR 1075 (CC) para 62.

⁵⁸⁰ *Brümmer v Minister of Social Development* 2009 11 BCLR 1075 (CC) para 62.

⁵⁸¹ *Fuo Local government's role* 199 - 200.

⁵⁸² *Brümmer v Minister of Social Development* 2009 11 BCLR 1075 (CC) para 63.

⁵⁸³ *SERI/SALGA Informal Traders in South Africa: Legislation, Case Law and Recommendations for Local Government* 10.

⁵⁸⁴ S 33(1) of the *Constitution*.

⁵⁸⁵ S 33(2) of the *Constitution*.

a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include, (aa) executive powers or functions referred to in sections [...] of the Constitution; [...] (cc) the executive powers and functions of a municipal council.⁵⁸⁶

PAJA delineates state functionaries whose legislative and executive powers or functions are excluded from this definition.⁵⁸⁷ This means that even though the actions of the excluded organs of state might adversely affect the right of persons, or have a direct, external legal effect on persons, they will not amount to administrative action.⁵⁸⁸ These include the actions of the legislative functions of Parliament, a provincial legislature or a municipal council, and the executive powers of a municipal council.⁵⁸⁹ Conduct that is not included in this category and thus can amount to administrative actions comprise the actions of a municipality in the daily exercise of its administrative duties.⁵⁹⁰

The administrative duties of municipalities typically include making decisions to grant or refuse a trading permit, confiscating goods of the traders, and where necessary evicting informal traders from their stalls.⁵⁹¹ PAJA does not prohibit the undertaking of the above acts; for instance, a street trader may be deprived of his or her property by an organ of the state (such as a municipal official), if such deprivation is carried out in a lawful, reasonable, and procedurally fair manner.⁵⁹² What this implies is that these administrative actions must meet the standards of lawfulness, reasonableness, and procedural fairness.⁵⁹³

⁵⁸⁶ S1 of PAJA.

⁵⁸⁷ S1 of PAJA.

⁵⁸⁸ S1 of PAJA.

⁵⁸⁹ S1 (cc) and (dd) of PAJA.

⁵⁹⁰ Fuo *Local government's role* 195.

⁵⁹¹ *Somali Association of South Africa* case para 143; SERI *Informal Trade in South Africa: Legislation, Case Law and Recommendations for Local Government* 9; *Makwickana v eThekweni Municipality* para 7; SAITF case para 8; SERI/SALGA *Informal Traders in South Africa: Legislation, Case Law and Recommendations for Local Government* 9; also see 3.4.1.

⁵⁹² SERI/SALGA *Informal Traders in South Africa: Legislation, Case Law and Recommendations for Local Government* 9.

⁵⁹³ Fuo *Local government's role* 195.

It is in this context that the conduct of municipal officials in evicting street traders from their stalls in the City of Johannesburg became the point of contestation in the landmark judgement of the *SAITF* case.⁵⁹⁴ Although the court did not directly mention just administrative action, it outrightly condemned the manner in which the City carried out the evictions.⁵⁹⁵ The Court identified acts including forceful eviction of traders, the dismantling and destroying of trading stalls, the failure to distinguish permit holding traders (some of which have been trading in the City for over 20 years) from those that did not hold a permit; and the complete disregard for trader's rights including the inherent right to human dignity.⁵⁹⁶

Human dignity, freedom, and equality are fundamental rights especially to those who have been denied these values because they have no food, clothing, or shelter.⁵⁹⁷ In *Soobramoney v Minister of Health*, the court reiterated the need to interpret all the rights in the Bill of Rights within the context of the fundamental values of the *Constitution*.⁵⁹⁸ This kind of interpretation is what "lies in the heart of the new constitutional order."⁵⁹⁹ This means that the human dignity, freedom, and equality of street traders is the same as those of other residents of a local community. Municipalities must therefore ensure that they treat street traders with the level of respect and dignity they would treat a rates-payers within their jurisdictions.

4.4.3 Right to access courts

The right to just administrative action is connected to the right to access to court. PAJA makes it possible for persons aggrieved by administrative decisions to approach a court of law for a judicial review.⁶⁰⁰ The Act outlines the grounds upon which a street trader who has been aggrieved by the actions of a municipal official can approach a court of law or a tribunal for the judicial review on that

⁵⁹⁴ See para 1.1 above.

⁵⁹⁵ The *SAITF case* para 7.

⁵⁹⁶ The *SAITF case* para 6-8.

⁵⁹⁷ *Grootboom v Government of the Republic of South Africa* 2000 11 BCLR 1169 (CC) para 23.

⁵⁹⁸ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 12 BCLR 1696 (CC) para 8.

⁵⁹⁹ *Soobramoney v Minister of Health* 1997 12 BCLR 1696 (CC) para 8.

⁶⁰⁰ S 6(1) of PAJA.

administrative action.⁶⁰¹ It further identifies a timeframe within which judicial proceedings may be instituted.⁶⁰² The right to access to court is, however, broader than what PAJA would ordinarily permit in judicial reviews.

In terms of section 34 of the *Constitution*, where a right has been or might be infringed, a person has the right to access a court of law or another tribunal or forum.⁶⁰³ Similarly, a street trader has the right to access a court when a dispute arises between them and a municipal official, for example.⁶⁰⁴ The right to access to court is essential in a constitutional state that thrives on affording all persons with dispute resolution forums that are both independent and impartial.⁶⁰⁵ Courts provide even the most impoverished people with a right to challenge the authority of any spheres of government.⁶⁰⁶ However, the greatest impediment to attaining this right is litigation costs.⁶⁰⁷ Nonetheless, several cases can be cited where street traders successfully challenged the authority of local government through the support of civil organisations such as Socio-Economic Rights Institute South Africa (SERI) and the Legal Resources Centre (LRC).⁶⁰⁸ The right of civil organisations to access a court of law on behalf of street traders and other vulnerable groups is reinforced by section 38 of the *Constitution*. These provisions allow organisations such as those listed above to represent the interests of vulnerable groups who on their own would not be able to approach a court of law.⁶⁰⁹

Apart from the actions of local government being a subject of judicial scrutiny on several accounts, the role of municipalities with regard to section 34 is broad. It includes a counter obligation on the part of local government not to interfere with

⁶⁰¹ S 6(2) of PAJA. The grounds for judicial review of administrative actions include amongst others: if the administrator who took the action- (i) was not authorised to take the action by an empowering provision; (ii) if he/she acted under a delegation of power which was not authorised by the empowering provision; or (iii) was biased or was suspected of bias.

⁶⁰² S 7(1) PAJA.

⁶⁰³ S 34 of the *Constitution*.

⁶⁰⁴ S 34 of the *Constitution*.

⁶⁰⁵ *Road Accident Fund v Mdeyide* 2011 1 BCLR 1 (CC) para 1 and 64; and *De Beer NO v North-Central Local Council and South-Central Local Council* 2001 11 BCLR 1109 para 11.

⁶⁰⁶ *Fuo Local government's role* 191-192.

⁶⁰⁷ See *Thusi v Minister of Home Affairs* 2011 2 SA 561 KZP para 104.

⁶⁰⁸ See generally Bénit-Gbaffo 2016 *Third World Quarterly* 1102; and *Fuo Local government's role* 191.

⁶⁰⁹ S 38(b) of the *Constitution*.

the right of persons as guaranteed in the *Constitution*. For instance, municipal officials must not interfere with a street trader's right to access courts.⁶¹⁰ This extends to by-laws which may also not obstruct the right of anyone to access a court. On the contrary, by-laws may be expected to outline the formal mechanisms available to a trader which they may use to oppose the action of a municipal official.⁶¹¹

In *Zondi v MEC for Traditional and Local Government Affairs*,⁶¹² the court found that several provisions of the *Pound Ordinance (KwaZulu Natal)* of 1974,⁶¹³ which dealt with the impoundment of livestock were unconstitutional in that they permitted a chain of events to occur from beginning to end without much needed judicial intervention.⁶¹⁴ The series of events included the immediate seizure and impoundment of trespassing animals, assessment of damages possibly caused by such trespassing animals, the payment of damages by the owner of the livestock, or the attachment of execution of sale in instances where the owner is unable to pay damages. Similar to this is the disposal of livestock that is unable to sell at auction.⁶¹⁵ These acts created a situation where people become "judges in their own cause".⁶¹⁶ The provisions of this ordinance threatened the importance of section 34 of the *Constitution* as it provides an express constitutional recognition for the importance of creating and maintaining impartial and independent institutions whose task is to provide fair resolutions to social conflicts.⁶¹⁷

It is in this context that the court in *Makwickana v eThekweni Municipality* found that the provisions dealing with the impoundment of goods in the eThekweni Informal Trading By-law prevented traders from accessing courts.⁶¹⁸ The court found that the

⁶¹⁰ S 34 read with sections 7(2) and 8(1) of the *Constitution*; and *Makwickana v eThekweni Municipality* 2015 3 SA 165 (KZD) para 80.

⁶¹¹ Women in Informal Employment Globalizing and Organizing Law and Informality Project *Street Vendors' Laws and Legal Issues in South Africa* 14.

⁶¹² *Zondi v MEC for Traditional and Local Government Affairs* 2005 4 BCLR 347 (CC).

⁶¹³ *Pound Ordinance (KwaZulu Natal)* 32 of 1974.

⁶¹⁴ *Zondi v MEC for Traditional and Local Government Affairs* para 58-78.

⁶¹⁵ *Zondi v MEC for Traditional and Local Government Affairs* para 2.

⁶¹⁶ *Zondi v MEC for Traditional and Local Government Affairs* para 60.

⁶¹⁷ *Zondi v MEC for Traditional and Local Government Affairs* para 61.

⁶¹⁸ *Makwickana v eThekweni Municipality* para 80.

provisions in this By-law had the effect of preventing disputes from reaching the court of law as section 35(1) of the By-law gave municipal officials the right to impound property belonging to street traders on the mere suspicion that a trader had contravened a provision of the By-law.⁶¹⁹ The Court held that the section was too harsh because it allowed street traders to be severely punished for minor violations of the By-law.⁶²⁰

The argument thus far has been that the formulation and implementation of municipal governance instruments, whether voluntary or not, should start with the general appreciation of the substantive and procedural rights of street traders. From the foregoing, it is important to preserve the essential rights, values, and principles of South Africa's constitutional democracy. These include *inter alia*, the inherent right to human dignity, equality, freedom, and procedural fairness. In addition the right to just administrative action, access to information and court should be effectively administered.

4.5 Framework for limiting rights of street traders

The rights in the Bill of Rights are not absolute. They may be limited in term of section 36 of the *Constitution*. According to this section, the rights in the Bill of Rights may be limited only in accordance with the law of general interpretation and to the extent that such a limitation is reasonable and justifiable in an open and democratic society, taking into account the values of human dignity, equality, and freedom.⁶²¹ Several factors must be considered where a right is infringed/limited including the nature of the right; the importance or purpose of the infringement; the nature and extent of the limitation; the relation between the limitation and the purposes it wishes to serve; and if there is a less restrictive means to achieve the same outcome without infringing the right.⁶²² The factors listed above are not exhaustive, they are the key factors that a court must consider along with other compelling reasons when adjudicating on a matter involving the limitation of

⁶¹⁹ *Makwickana v eThekweni Municipality* para 79 and 80.

⁶²⁰ *Makwickana v eThekweni Municipality* para 80.

⁶²¹ S 36(1) of the *Constitution*.

⁶²² See s 36(1)(a)(b)(c)(d) and(e) of the *Constitution*.

rights.⁶²³ Chaskalson asserts that the factors listed under section 36 are not absolute and their application will differ on a case to case basis.⁶²⁴ The limitation clause is a unique feature of the South African *Constitution* and cannot be found anywhere else in the world.⁶²⁵ This clause is a stand-alone provision that applies to all the rights in the Bill of Rights. This means that all the rights of street traders discussed in this study may be limited in terms of a law of general application.

4.6 A constitutional law approach to regulating street trading

As alluded to in chapter 1 of this study there is a myriad of literature available on the street trading sector in cities around the world.⁶²⁶ There is also a great deal of literature that proposes diverse kinds of interventions that could be followed with regard to the relationship between the street trading sector and local governments.⁶²⁷ The most favoured intervention is the desire to formalise the informal economy.⁶²⁸ This implies that even the enterprises in the street trading sector will be transformed into formal entities. Subsequently, these enterprises will pay levies and taxes just like all other sectors of the formal economy.⁶²⁹

One aspect that has been undermined in the discourse surrounding street trading is the constitutional law perspective on the regulation of the street trading sector. This perspective focuses on two aspects that should guide the reaction of municipalities to the street trading sector. Firstly, the responsibilities of local government towards the street trading sector should be informed by the need to develop the sector to achieve LED. Secondly, the conduct of municipal officials towards street traders in their daily encounters with them. From this perspective,

⁶²³ *S v Manamela* 2000 5 BCLR 491 para 32.

⁶²⁴ *S v Makwanyane* 1995 6 BCLR 665 para 104.

⁶²⁵ In Germany, a general limitation clause does not exist, specific limitations are attached to certain rights in their Constitution. The United States of America (USA) does not have a limitation clause. See Currie and De Waal 'Limitation of Rights' 152.

⁶²⁶ Bénit-Gbaffou 2018 *Urban Research and Practice* 397.

⁶²⁷ See generally Lloyd and Leibbrandt 'Entry into and exit from Informal Enterprise Ownership in South Africa' 149-175.

⁶²⁸ Chen 'The South African Informal Sector in International Comparative Perspective: Theories, Data and Policies' 42.

⁶²⁹ Chen 'The South African Informal Sector in International Comparative Perspective: Theories, Data and Policies' 42.

the reaction of local government towards street traders can be best informed by the dictates of the *Constitution*.⁶³⁰

The *Constitution* should be the starting point for the development of municipal instruments such as by-laws, policies and the IDP as they regulate street trading. Firstly, the *Constitution* is laden with values and principles. These values and principles are used to interpret all its other provisions including the Bill of Rights.⁶³¹ For instance, the courts have on two occasions connected the right to choose a trade, occupation or profession, to the value of human dignity stating that this value is integral to the need for a street trader to earn a decent living.⁶³² Secondly, it clearly states the role of local government in cooperative government and its task in relation to the rights in the Bill of Rights. Thirdly, the *Constitution* has generously outlined the objects of local government in Chapter 7. This study has discussed how the objects of local government apply to the regulation of street trading.⁶³³ Lastly, it has listed the functional areas of local government in Schedules 4B and 5B of the *Constitution*, and it has explained how this gives local government the right to administer by-laws and other relevant governance instruments for the effective administration of these functional areas.⁶³⁴

Therefore, the *Constitution* serves as a good yardstick on which the legal soundness of current instruments of local government regarding the regulation of street trading can be assessed. Culminating from the above is a set of specific markers that will be used to assess the constitutional soundness of the by-laws, policies, and IDPs of the City of Johannesburg and eThekweni Metropolitan Municipality as they regulate street trading in their respective cities.⁶³⁵ These markers are presented in a question format below:

- Against the need to develop the street trading sector as a mainstay of LED, does each of the by-law, policy and IDP of the City of Johannesburg and

⁶³⁰ See para 1.2 above.

⁶³¹ See para 4.2 above.

⁶³² The *SAITF case* para 6-8; *Somali Association of South Africa case* para 43.

⁶³³ See para 2.4 above.

⁶³⁴ See para 4.2.1 above.

⁶³⁵ See para 5.3 below.

eThekwini Metropolitan Municipality identify the constitutional-based duties of local government towards the street trading sector?

- Since the provision of municipal services is a cardinal function of local government, which services are deemed essential to the development of the street trading sector by each by-law, policy, and IDP of the City of Johannesburg and eThekwini Metropolitan Municipality?
- Do the general texts of each by-law, policy, and IDP of the City of Johannesburg and eThekwini Metropolitan Municipality reflect on the values and principles of the *Constitution*?
- To what extent does the text of each by-law, policy, and IDP of the City of Johannesburg and eThekwini Metropolitan Municipality give the impression that municipalities are committed to upholding the rights of street traders identified in 4.3 and 4.4?
- Although the behaviour of local authorities cannot be solicited directly from the provisions of the by-laws, policies, and IDPs of the City of Johannesburg and eThekwini Metropolitan Municipality, to what extent, if any, does the above instruments promote the inclusion of street traders in these areas informed by the values and principles of the *Constitution*?

4.7 Concluding remarks

The objective of this chapter was to investigate how a constitutional law approach can be used by municipalities to steer how they regulate street trading to the extent that a harmonious relationship exists between both actors. The chapter examined the self-governing powers and the instruments available to local government in relation to the regulation of street trading. The chapter also discussed several values and principles of the *Constitution* concerning the powers, duties and functions of local government in the street trading sector. Finally, the chapter explored the substantive and procedural rights of street traders applicable to the operation of businesses in the street trading sector. The values, principles and other provisions

of the *Constitution* have been scrutinised in several decisions in the courts in South Africa. Therefore, this chapter has found that the *Constitution* provides a useful framework by which the legislative, executive, and administrative powers of local government can be analysed. This can help optimise the development of street trading within municipalities.

The discussion about the adoption of a constitutional approach to the development of street trading is anchored on constitutionalism. This means that the powers of municipalities to govern are derived from the *Constitution*.⁶³⁶ In this sense, all their governing instruments, including policies, by-laws, strategies, and plans, must be aligned to the dictates of the *Constitution*.⁶³⁷ The same powers accorded to local government are not absolute, but are limited by important constitutional principles including the supremacy of the *Constitution*, the human rights duties of local government, respect for the rule of law which includes the principle of legality and the values in the *Constitution*.⁶³⁸ All of the above values and principles ensure that local government governs within the ambits of the *Constitution*.

Further acknowledged by the constitutional law approach in governing the street trading sector was the role of local government to respect, promote, protect and fulfil the rights of street traders enshrined in the Bill of Rights.⁶³⁹ What municipalities have to offer to local communities has a profound impact on the lives of the poor and marginalised.⁶⁴⁰ For instance, the absence of basic municipal services for street traders is likely to have severe consequences on their rights, including the freedom to trade, the right to conduct businesses in environments that are not harmful to them, as well as their right to property. In the same breath, "access" in the context of the right to access to courts and information becomes an important aspect that is likely to face oppression through the unwarranted or unconstitutional conducts perpetrated by officials of local government. These rights are important as they ensure sustainable access to municipal services and enable municipalities to

⁶³⁶ See para 4.2.3.4 above.

⁶³⁷ See para 4.2.3.4 above.

⁶³⁸ See para 4.2.3.1 to 4.2.3.3 above.

⁶³⁹ See para 4.2.3.1 above.

⁶⁴⁰ See generally Coggins and Pieterse 2012 *Urban Forum*.

understand their scope of duty in the realisation of the socio-economic rights of street traders.⁶⁴¹ In conclusion, the discussions herein about the provisions of the *Constitution* as they relate to local government, street trading, and the regulation of the sector has developed an appropriate yardstick that will be expatiated in the next chapter.

⁶⁴¹ Fuo *Local government's role* 425.

CHAPTER 5

AN EVALUATION OF STREET TRADING GOVERNANCE INSTRUMENTS OF THE CITIES OF ETHEKWINI AND JOHANNESBURG

5.1 Introduction

Since 1996, national local government legislation and legislation in other sectors have systematically rolled out a number of local governance instruments. These range from municipal plans, policies, by-laws and budgets to public participation processes, public-private partnerships and instruments aimed at the sharing of information.⁶⁴² Apart from by-laws and policies discussed in 4.2.2 above there are also other instruments of relevance to the regulation of street trading as explained in paragraph 5.2 below.

This chapter expands on the discussion initiated in chapter 4 on the use of the constitutional law approach to assessing the content and implementation of a select number of instruments that municipalities currently use to regulate street trading. The IDPs, policies on the informal economy, and by-laws on informal trading of the City of Johannesburg and eThekwini Metropolitan Municipality are considered. The objective is to be able to make recommendations stating amongst other things, that municipalities must align their current instruments for regulating the street trading sector to the dictates of the *Constitution*.

The first part of the chapter introduces the reader to the local governance instruments that are used for the regulation of street trading as provided for in national legislation and the *Constitution*. The second part focuses on the two municipalities, and to three very specific local governance instruments namely IDPs, policies, and by-laws introduced in the previous chapter. The yardstick developed in chapter 4 is adopted in this chapter to assess these instruments, with the aim of deciphering whether they conform with the dictates of the *Constitution*. Coupled with this assessment is a critical evaluation of the situations in the City of

⁶⁴² Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 101-124.

Johannesburg and eThekweni Metropolitan Municipality concerning their governance instruments directed at street trading. The fourth part of this chapter concludes the discussion here.

5.2 Local governance instrumentation relevant to street trading regulation

5.2.1 What are local governance instruments?

Municipalities have the authority and instruments through which they can govern in their areas of jurisdiction. The authority of municipalities to govern has already been discussed extensively.⁶⁴³ As the name suggests, local governance instruments are the tools that are used in the governance of local communities. Diverse types of local governance instruments exist ranging from strategic plans, budgets, taxes, levies, incentives, public participation, methods for dispute resolution and projects, to by-laws, policies, and information tools.⁶⁴⁴ A number of these may find application to the regulation of street trading as will be further discussed in the sections to follow. It is important to mention at this point that various categories of instruments exist. For example, Nel, Du Plessis and Du Plessis adopted a categorisation of instruments that distinguishes between compliance-based, governance-based, and governing-based instruments.⁶⁴⁵

5.2.2 Governance instruments available to municipalities as 'governors'

From the above categories of local governance instruments, at least two categories may find application to how municipalities regulate the street trading sector. These include the governance-based and governing-based instruments.⁶⁴⁶ Within these

⁶⁴³ See para 4.2 above.

⁶⁴⁴ See Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 101-124.

⁶⁴⁵ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 101-124.

⁶⁴⁶ Governance-based instruments assist municipalities in controlling their internal processes and activities. These include IDPs, budgeting and sourcing of funding and human resource management. Governing-based instruments are used by municipalities to regulate functions assigned to local government within local communities. See Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 110-117.

categories, there are specific instruments that municipalities tend to adopt to regulate different aspects of street trading namely municipal by-laws and municipal policies. These two instrument types will be further explored in this chapter, with reference to the municipalities of the City of Johannesburg and eThekweni Metropolitan Municipality (see 5.3 below).

5.2.2.1 Municipal by-laws

By-laws are tools that are adopted by municipalities to regulate behaviour relating to functional areas within municipality's competence.⁶⁴⁷ Simply put, these by-laws regulate the behaviour of people in society in relation to the functional competences of a particular municipality. While a municipality may possess the discretion about whether to adopt a by-law, some functional areas require the adoption of a by-law. For example, the *Municipal Systems Act* compels municipalities to enact by-laws on matters such as municipal tariffs, credit control, and debt collection.⁶⁴⁸

Matters that deal with the regulation of street trading can be scattered across different by-laws.⁶⁴⁹ These include by-laws specifically focused on street trading, and by-laws that have implications for street trading, for example, those that deal with waste management and noise pollution as matters that are often associated with street trading.⁶⁵⁰ One of the principal objectives of the Bitou Municipality *Street Trading By-law*, for instance, is to "manage" street trading taking into consideration the need of the Municipality to maintain a clean, healthy and safe environment.⁶⁵¹ This means that if a municipality intends to promote street trading, its by-law dedicated to street trading must expressly state and address this intention. Put differently, to stimulate the economy around street trading, a dedicated by-law may be needed that stipulates actions, steps, and programmes that counter some of the

⁶⁴⁷ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 117.

⁶⁴⁸ See sections 75 and 98 of the *Municipal Systems Act*.

⁶⁴⁹ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 118.

⁶⁵⁰ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 118.

⁶⁵¹ S 2(1)(c) of the Bitou Municipality *Street Trading By-laws* (year unknown). See also the Lephalele Local Municipality *Street Trading By-law* (2011) that states in not many words that the purpose of the by-law is to "regulate" street trading. See s2 of the the Lephalele Local Municipality *Street Trading By-law* (2011).

negative impacts of other sector regulations. For instance, a prohibition on trading on sidewalks after five pm in the afternoon.

5.2.2.2 Integrated development plans

IDPs are inclusive and strategic plans that are adopted as a means of meeting the developmental outcomes of municipalities.⁶⁵² IDPs inform all other plans that a municipality may have including spatial development frameworks and LED processes.⁶⁵³ IDPs also guide municipalities in achieving their set goals and objectives.⁶⁵⁴ Every municipality is required to draft and implement an IDP.⁶⁵⁵ In order for an IDP to serve its purpose, it must identify and adequately respond to the needs of communities. This *inter alia* means that the objects of an IDP must be realistic.⁶⁵⁶ For example, the most prevalent need for many communities is local economic growth, the creation of employment, and poverty alleviation.⁶⁵⁷ As such, the provisions of the IDP must clearly outline how the municipality intends to create a conducive economic environment where local businesses can thrive and employment can be generated for local residents.

As previously stated, an IDP must identify and respond to the needs of local residents including those who use the services of, purchase the goods of street traders, and people who operate the business of street trading. These needs include conducting the business of street trade in a safe and clean environment, ensuring that the goods and services of street traders are safe and healthy and alleviating poverty and creating employment through street trading.⁶⁵⁸ In addressing the needs of the identified groups of people, in this case street traders, the consumers of the goods and services of street traders and local residents, an IDP will have to clearly

⁶⁵² S 25(1) of the *Municipal Systems Act*; and Retief and Cilliers 'Municipal Integrated Development Planning' 167.

⁶⁵³ S 26(e) of the *Municipal Systems Act*.

⁶⁵⁴ Koma 2012 *African Journal of Public Affairs* 132.

⁶⁵⁵ S 25(1) of the *Municipal Systems Act*; and Retief and Cilliers 'Municipal Integrated Development Planning' 167.

⁶⁵⁶ See Koma 2012 *African Journal of Public Affairs* 132.

⁶⁵⁷ See Koma 2012 *African Journal of Public Affairs* 132.

⁶⁵⁸ Newcastle Local Municipality *4th Generation Integrated Development Plan (2017/18-2021/22)* 3.14.5.

outline the measures that will be developed and implemented by the municipality. For example, the IDP of Newcastle Local Municipality states that the solution to addressing the needs of every person who is either directly or indirectly affected by street trading in the City must begin with the development of an informal trade by-law.⁶⁵⁹ This Municipality believes that the By-law will be able to coordinate healthy relationships between street traders, the private sector, and the Municipality.⁶⁶⁰

5.2.3 *Municipal policies*

As previously indicated, at least two types of policies are applicable to local government in South Africa namely the executive and administrative policies.⁶⁶¹ Policies refer to various critical decisions and long-term strategies that municipalities thrive to achieve.⁶⁶² They have a significant effect on the future of a municipality.⁶⁶³ Some policies are legally prescribed governance instruments such as credit control and debt collection policies of municipalities.⁶⁶⁴ In terms of the *Municipal Systems Act*, municipalities must develop and adopt policies that will assist them in promoting and undertaking development.⁶⁶⁵

In South Africa, politics and policies are intrinsically linked.⁶⁶⁶ This is because, depending on whether it is an executive or administrative policy, the design and adoption of a policy are often authorised by a political party or executive authority of a particular municipality.⁶⁶⁷ Where a policy is authorised by a political party, the ideals of that specific party will influence the objects of the policy.⁶⁶⁸ In the context of this study, this means that the lack of political support towards the development of street trading as a mainstay of LED can adversely influence the growth or decline

⁶⁵⁹ Newcastle Local Municipality *4th Generation Integrated Development Plan (2017/18-2021/22)* 3.14.5.

⁶⁶⁰ Newcastle Local Municipality *4th Generation Integrated Development Plan (2017/18-2021/22)* 3.14.5.

⁶⁶¹ See para 4.2.2 above.

⁶⁶² Dror 'Training for Policy Makers' 79.

⁶⁶³ Dror 'Training for Policy Makers' 79.

⁶⁶⁴ S 11(3)(a) of the *Municipal Systems Act*; and 97(b) of the *Municipal Systems Act*.

⁶⁶⁵ S 11(3)(b) of the *Municipal Systems Act*.

⁶⁶⁶ Dror 'Training for Policy Makers' 79-80.

⁶⁶⁷ Cloete *Public Administration and Management* 138; and Fuo *local government's role* 380.

⁶⁶⁸ See generally Gumede 'Public policy making in a post-apartheid South Africa: A preliminary perspective' 8.

of this sector in a specific municipal area.⁶⁶⁹ The lack of political support also means that a municipality is not likely to invest critical resources in the development of street trading.⁶⁷⁰

5.2.4 Other tools

Municipalities that are bold and innovative adopt voluntary instruments as a means of surpassing what is legally required of them to achieve. Some of the fundamental governance-based instruments that can enable local government to effectively regulate street trading include municipal budget processes and accessing funding to fulfil IDP commitments.⁶⁷¹ The budget process includes structuring, managing, controlling access to, using and reporting on the financial resources of the municipality.⁶⁷² This process is heavily linked to the sourcing of the funds of a municipality.⁶⁷³ An important source and enabler for effective governance of municipalities is the equitable division of revenue that is raised nationally amongst all the spheres of government.⁶⁷⁴ The primary source of funding and instrument of local government involves municipal taxes, rates, and duties.⁶⁷⁵ These are payable to the municipality by those who hold property within the jurisdiction of the municipality, and those who use services provided by the municipality.⁶⁷⁶ Other tools include the budget process and sourcing of funding instrument. Through these instruments, municipalities can strive to acquire financial resources aimed at developing the street trading sector. Similarly, street traders will also be able to engage in the budget processes of municipalities through participatory processes.⁶⁷⁷

Incentives and disincentives as instruments represent another type of tool available to local government that can be used to regulate the street trading sector. These

⁶⁶⁹ See generally Dror 'Training for Policy Makers' 80.

⁶⁷⁰ See generally Dror 'Training for Policy Makers' 80.

⁶⁷¹ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 113.

⁶⁷² Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 113.

⁶⁷³ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 113.

⁶⁷⁴ S 214(1)(a) of the *Constitution*.

⁶⁷⁵ S 229(1) of the *Constitution*.

⁶⁷⁶ S 229(1) of the *Constitution*. Also see the *Municipal Property Rates Act* and *Local Government: Municipal Fiscal Powers and Functions Act* 12 of 2007.

⁶⁷⁷ See s16(1)(a)(iv) of the *Municipal Systems Act*.

instruments are primarily "aimed at changing the behaviour" of local community members, municipal officials, and the industry or private sector.⁶⁷⁸ In the regulation of the street trading sector, incentives and disincentives can be used to change the behaviour of street traders, local government officials, or the immediate private sector. These instruments often carry a financial benefit or loss for the tool to be effective. This is because street traders are often motivated to act according to their own self-interest.⁶⁷⁹ Subsidies and rebates are examples of such incentives, and heavier taxes or fees are an example of disincentives. An example of a disincentive may include a situation whereby a street trader does not keep their workspace clean, and as a result must pay a higher permit fee upon re-registering or renewal of their trading permit.

Non-financial instruments further include dispute resolutions mechanisms. Dispute resolution is an important tool that can mitigate conflicts that are likely to develop within the street trading sector.⁶⁸⁰ Conflicts can arise between street traders and the immediate private sector or even people who do not purchase the goods or use the services of street traders.⁶⁸¹ For example, conflict has ensued whereby residents in Johannesburg insisted on better enforcement of by-laws and non-demarcation of trading spaces "in front of flats dues to littering, unsanitary conditions and criminal elements."⁶⁸² Conflicts can also occur between different street traders. These disputes could be fuelled by street traders who disagree on a standard selling price especially where they operate at close proximity to each other. As stated before, some municipalities have adopted restrictive rules in regulating street trading.⁶⁸³ Similarly, municipalities have generally only adopted by-laws and policies as instruments for the regulation of the street trading sector.⁶⁸⁴ The list of instruments

⁶⁷⁸ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 125.

⁶⁷⁹ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 125.

⁶⁸⁰ Nel, Du Plessis and Du Plessis 'Instrumentation for Local Environmental Governance' 136.

⁶⁸¹ See para 3.6 above.

⁶⁸² Cox 2014 <https://www.iol.co.za/news/south-africa/gauteng/street-traders-city-still-at-logger-heads-1740406> accessed 4 December 2020.

⁶⁸³ See para 4.2.2 above.

⁶⁸⁴ See para 4.2.2 above.

that can be adopted by municipalities to regulate street trading is extensive and will not be further explored in detail in the following paragraphs.

5.3 The status quo in the City of Johannesburg and the eThekweni Metropolitan Municipality

5.3.1 Introduction

This section assesses the by-laws and policies that currently regulate street trading in the City of Durban and Johannesburg. It also examines the latest IDPs of both cities. The assessment is based on the constitutional law approach earlier described in chapter 4.⁶⁸⁵ In this section, the yardstick established in chapter 4 will be used to assess the extent to which the by-laws, policies, and IPDs of the City of Johannesburg and the eThekweni Metropolitan Municipality conform with the dictates of the *Constitution*.

5.3.2 eThekweni Metropolitan Municipality

5.3.2.1 Background: the street trading sector and its regulation

It can be argued that the regulation of street trading in eThekweni Metropolitan Municipality began in 2001 with the adoption of the Durban Informal Economy Policy.⁶⁸⁶ This policy gave recognition to the contribution made by the informal economy in the creation of jobs.⁶⁸⁷ The policy also led to the adoption of the City's Informal Trading By-law of 2014.⁶⁸⁸ This by-law encourages the adoption of future policies in the City that will facilitate the socio-economic development of informal trading in the municipal area.⁶⁸⁹ The eThekweni Municipality: 2020/2021 Integrated Development Plan (IDP) plays a significant role in the regulation of street trading in the area. This IDP acknowledges that Inner-city Durban is an important connector

⁶⁸⁵ See para 4.6 above.

⁶⁸⁶ S 1.2 of *Durban's Informal Economy Policy*, 2001.

⁶⁸⁷ S 3 of *Durban's Informal Economy Policy*, 2001.

⁶⁸⁸ eThekweni Municipality *Informal Trading By-law*, 2014.

⁶⁸⁹ S 6(4)(b) eThekweni Metropolitan Municipality *Informal Trading By-law* 2014.

area that offers valuable land, building assets, and amenities for more than 70 000 people that live and work in the area.⁶⁹⁰

5.3.2.2 eThekweni Municipality: Informal Trading By-law, 2014

The municipal council holds extensive powers in deciding places/ areas of trade in the eThekweni Metropolitan Municipality. Street traders are prohibited from trading in places other than those designated by the municipal council.⁶⁹¹ Traders are required to possess a valid permit in order for them to conduct the business of trading within the Municipality.⁶⁹² The powers of the Municipal Council also include the right to extend, reduce, and to disestablish informal trading areas.⁶⁹³ Furthermore, the council reserves the right to impose trading hours and days within which a trader is allowed to trade.⁶⁹⁴ It can be argued that one of the reasons a municipality would restrict trading includes the need to conduct municipal repairs in/on and around trading spaces, or to clean the trading areas. Such cleaning exercises must, however, be done as quickly as possible so that traders can resume trading. The Court in *Federation for Sustainable Environment v Minister of Water Affairs* has emphasised the need for speedy resolutions of matters that may adversely affect the rights of local communities by local governments.⁶⁹⁵ According to the Court, municipalities must strive to resolve the problems of local communities as quickly as possible if doing so will ensure that the local government realises its constitutional mandates.⁶⁹⁶ In this context, the objectives of local government to promote social and economic development compels municipalities to resolve the matters of their local communities speedily. This means that if the repairing or cleaning of municipal property is not performed quickly, street traders cannot run their businesses as usual. This is especially because this By-law does not indicate

⁶⁹⁰ eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 426.

⁶⁹¹ Sections 9 and 18 eThekweni Municipality: *Informal Trading By-law*, 2014.

⁶⁹² S 11 eThekweni Municipality: *Informal Trading By-law*, 2014.

⁶⁹³ S 9(2) eThekweni Municipality: *Informal Trading By-law*, 2014.

⁶⁹⁴ S 10 eThekweni Municipality: *Informal Trading By-law*, 2014.

⁶⁹⁵ *Federation for Sustainable Environment v Minister of Water Affairs* 35672/12 2012 ZAGPPHC 128 para 24.

⁶⁹⁶ Although the case considered issues of water supply in the areas of Silobela and Caroline, the principle of speedy resolutions finds application in the current context. See *Federation for Sustainable Environment v Minister of Water Affairs* 35672/12 2012 ZAGPPHC 128 para 24.

the minimum and maximum hours/days and months that a municipality can suspend street trading.⁶⁹⁷

In terms of this By-law, an authorised official may remove and impound the goods of a trader on the grounds of a mere suspicion by the official that such goods are used or are intended to be used in contravention of this By-law.⁶⁹⁸ The removal or impoundment of a street trader's property is likely to have a negative outcome on the ability of a street trader to earn wages. The court declared that the effect of removal and impoundment of goods effectively disempowers a trader leaving them to suffer punishment and deprivation.⁶⁹⁹ Despite the possibility of an impoundment negatively affecting a street trader, where the procedure to remove and impound the goods is followed by a municipal official, the impoundment will be compliant with the dictates of the *Constitution*. This procedure also implies that a street trader has the right to access crucial information. This is because an authorised official is obliged to issue a receipt to the trader upon impounding their goods.⁷⁰⁰ The receipt issued must indicate the address where the impounded goods will be kept; the terms and conditions which will need to be met for the trader to secure the release of the goods; and the period of impoundment of the goods.⁷⁰¹ This By-law also affords street traders the right to just administrative actions. In this regard, a street trader whose rights have been affected by a decision of the Municipality in terms of this by-law may appeal against the actions of the Municipality in terms of the Appeals provision in the By-law.⁷⁰²

It follows from the above, that the rights of street traders are, to an extent, observed in this By-law. However, one of the least observed rights remains the right to access to court. According to this By-law, a trader whose goods have been impounded can only appeal to the Municipality after one of two actions.⁷⁰³ These are that the goods impounded are either released as soon as the trader furnishes proof of ownership,

⁶⁹⁷ S 16(1) of eThekweni Municipality: *Informal Trading By-Law*, 2014.

⁶⁹⁸ S 35(1) of eThekweni Municipality: *Informal Trading By-Law*, 2014.

⁶⁹⁹ Makwickana v eThekweni Municipality para 80.

⁷⁰⁰ S 35(3) of eThekweni Municipality: *Informal Trading By-Law*, 2014.

⁷⁰¹ S 35(3) of eThekweni Municipality: *Informal Trading By-Law*, 2014.

⁷⁰² S 41(1) and (3) of eThekweni Municipality: *Informal Trading By-Law*, 2014.

⁷⁰³ S 35(5) of eThekweni Municipality: *Informal Trading By-Law*, 2014.

together with the payment of an impoundment fee, or after the goods have been sold, disposed of, or destroyed by the Municipality.⁷⁰⁴ What is missing from the options given to the trader is the opportunity to be granted a hearing on the matter prior to either of the two acts.⁷⁰⁵ It is with good reason that a by-law allows street traders to appeal internally. Internal appeals are cost and time effective.⁷⁰⁶ They can also provide an aggrieved party with immediate relief to their problem before they could think of approaching a court of law.⁷⁰⁷ However, as the court stated in *Makwickana v eThekwini Municipality*, the impoundment of goods of a street trader without a hearing has the effect of infringing on the right of a trader to have a matter resolved in a court of law or any other appropriate tribunal or forum.⁷⁰⁸

5.3.2.3 eThekwini Unicity Municipality Durban's Informal Economy Policy, 2001

A statement made by eThekwini Metropolitan Municipality at the beginning of the eThekwini Unicity Municipality Durban's Informal Economy Policy, 2001, is that it is difficult for local government to play a meaningful role in economic development.⁷⁰⁹ In this regard, the City acknowledges that its greatest challenge in supporting street trading as a means of achieving LED lies in finding a balance between the sector's potential to create as many job opportunities as possible, and the need for the City to ensure "health and safety, orderly municipal planning and management."⁷¹⁰ This implies that the informal economy is not a silo sector, its health depends on the effective management of other aspects of the City including municipal planning and environmental health.⁷¹¹ Due to the sector's potential to create employment, the City is not oblivious of the need for regulating and controlling the street trading sector, and also enforcing by-laws in a fair manner.⁷¹² The enforcement of by-laws

⁷⁰⁴ S 35(5) of eThekwini Municipality: *Informal Trading By-Law*, 2014.

⁷⁰⁵ S 35(6) of eThekwini Municipality: *Informal Trading By-Law*, 2014.

⁷⁰⁶ *Koyabe v Minister for Home Affairs* 2009 12 BCLR 1192 (CC) para 35; and Raboshakga and Fuo 2020 *PELJ* 13-14.

⁷⁰⁷ *Koyabe v Minister for Home Affairs* 2009 12 BCLR 1192 (CC) para 35; and Raboshakga and Fuo 2020 *PELJ* 13-14.

⁷⁰⁸ *Makwickana v eThekwini Municipality* para 81.

⁷⁰⁹ eThekwini Unicity Municipality Durban's *Informal Economy Policy*, 2001 2.

⁷¹⁰ eThekwini Unicity Municipality Durban's *Informal Economy Policy*, 2001 2.

⁷¹¹ eThekwini Unicity Municipality Durban's *Informal Economy Policy*, 2001 2.

⁷¹² eThekwini Unicity Municipality Durban's *Informal Economy Policy*, 2001 15.

must, however, be complemented by effective management and support for street traders by the Municipality.⁷¹³

In its provision of support to street traders, the City's immediate response is to build new markets and develop trading sites.⁷¹⁴ The City acknowledges that when building markets and trading sites, it must bear in mind the economic needs of the traders, the need to maintain order, spatial and transport needs, and the health and safety of everyone in the City, especially the street traders themselves.⁷¹⁵

There are some implicit signs of the constitutional law approach in the eThekweni Metropolitan Municipality *Durban's Informal Economy Policy*, 2001. Firstly, the policy identifies the following constitutional duties of the eThekweni Metropolitan Municipality: the need to promote social and economic development and a safe and healthy environment.⁷¹⁶ The policy expressly identifies the development of the street trading sector as a crucial part of the mandate of eThekweni Metropolitan Municipality.⁷¹⁷ It also recognises that the development of street trading rests on the overall development of a healthy and safe environment,⁷¹⁸ the kind of environment envisaged in sections 24 and 152(1)(d) of the *Constitution*.⁷¹⁹ Secondly, the policy gives the impression of observing the substantive and procedural rights of street traders in the Municipality. These rights include the freedom of everyone to freely choose their trade, occupation, or profession. In this regard, the policy expressly states that it would be unconstitutional to deny street traders the right to a place in which they can operate their businesses.⁷²⁰ The policy further acknowledges the rights of street traders to just administrative action as it seeks to create internal

⁷¹³ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 15 and 19.

⁷¹⁴ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 7.

⁷¹⁵ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 7; also see *Makwickana v eThekweni Municipality* para 32.

⁷¹⁶ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 2.

⁷¹⁷ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 2.

⁷¹⁸ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 25.

⁷¹⁹ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 2.

⁷²⁰ eThekweni Unicity Municipality *Durban's Informal Economy Policy*, 2001 9.

adjudication and appeals processes that resemble an institution such as the Commission for Conciliation, Mediation and Arbitration (CCMA).⁷²¹

5.3.2.4 eThekweni Municipality: 2020/2021 Integrated Development Plan

In the past two decades, the population growth in inner-city Durban has not been matched with "public and private sector services and investment", especially in areas such as Verulam, Pinetown, and other Central Business Districts (CBDs).⁷²² Some of the programmes of the City in re-developing the inner-city (and the other CBDs) include accommodation, celebration and mainstreaming informality, especially street trading and markets.⁷²³ The City affirms that street trading presents various challenges including the need to demarcate trading spaces, collecting rent for spaces on an ongoing-basis and issuing trading permits.⁷²⁴ However, it also perceives the potential for developing the sector through initiatives such as infrastructure development, advisory and information services initiatives.⁷²⁵ This IDP is confident in its intention to "regulate" street trading and hawking, by primarily prioritising the enforcement of by-law.⁷²⁶ It expressly states that the informal economy, specifically street trading, must be "managed".⁷²⁷ According to the City, the management of the street trading sector requires the municipality to issue permits, demarcate trading areas, and enforce regulations and by-laws with the assistance of the Metropolitan Police.⁷²⁸ Very little support is provided to street traders in this IDP. This almost implies that matters relating to street trading are left to the eThekweni Metropolitan Municipality *Durban's Informal Economy Policy* and by-law on street trading.

⁷²¹ S 7(2)(a) of PAJA states that "no court or tribunal shall review an administrative action in terms of this Act unless any internal remedies provided for in any other law has been exhausted".

⁷²² eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 426.

⁷²³ eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 427.

⁷²⁴ eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 437.

⁷²⁵ eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 437.

⁷²⁶ eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 233.

⁷²⁷ eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 437.

⁷²⁸ eThekweni Metropolitan Municipality *Integrated Development Plan 2020/2021 Review* 437.

5.3.3 City of Johannesburg

5.3.3.1 Background: the street trading sector and its regulation

The City of Johannesburg describes itself as a place where the "retail and ethnic enclaves overlap".⁷²⁹ It is an exemplar of a city in which the formal and informal economy meld in a symbiotic relationship, one in which the life of one sector depends on the health of the other.⁷³⁰ The term "ethnic enclave" implies that there are different nationalities of street traders that operate within the City of Johannesburg including traders from Zimbabwe, Lesotho, Mozambique and Nigeria.⁷³¹ Some of the largest and most favourite trades of this City include second-hand clothing, colloquially known as *emadunusa*.⁷³² The numerous stalls and tables of second-hand clothing are found in several corners of the City, including De Villiers, Wanderers, Small, and Prichard streets with prices of clothing ranging from as low as 10 to 150 Rands an item.⁷³³ The trade of second-hand clothing first attracted older women who could not afford to clothe their children with new items found in the big retail stores.⁷³⁴ Currently, the trade enjoys patronage from a teeming range of customers comprising mainly of young people who prefer this unique style of clothing that cannot be replicated by the large retail clothing stores.⁷³⁵ Another favourite is the lunchtime cow/sheep head known as *iskhobo or smiley*. There are numerous stalls selling the street delicacy within the City with many found at the Bree Taxi Rank. The target market for traders of *iskobho* is the taxi drivers, queue marshals and persons who work in and around the taxi ranks and often have no choice but to spend their hours of work within the taxi rank.

⁷²⁹ Penn Institute for Urban Research *Informal Vendors in Johannesburg, South Africa* 3.

⁷³⁰ See para 3.2 above.

⁷³¹ Penn Institute for Urban Research *Informal Vendors in Johannesburg, South Africa* 3; Charman and Petersen 'A Transnational Space of Business' 78-79.

⁷³² *Emadunusa* is derived from a Zulu term that means to push your bums out-this is the act people do as they search for their favourites in the piles of clothing being sold. See TrendER 2020 <https://bit.ly/3iyqxSd>.

⁷³³ TrendER 2020 <https://bit.ly/3iyqxSd>.

⁷³⁴ TrendER 2020 <https://bit.ly/3iyqxSd>.

⁷³⁵ TrendER 2020 <https://bit.ly/3iyqxSd>.

The City of Johannesburg acknowledges the contribution that the informal economy makes within its boundaries.⁷³⁶ It assists in the creation of employment opportunities and with the eradication of poverty.⁷³⁷ The City's Informal Trading By-law of 2012 envisages that through a developmental approach, the informal economy can be transitioned into the formal economy.⁷³⁸ The development of the informal economy is seen as hinging on infrastructure development within the City.⁷³⁹ The latter means that the City recognises the need to erect more trading stalls for informal traders.⁷⁴⁰

5.3.3.2 City of Johannesburg Informal Trading By-law, 2012

The City of Johannesburg *Informal Trading By-law, 2012* (*City of Johannesburg By-law, 2012*) shows that the municipal council in the City of Johannesburg is given extensive powers to determine the allocation and revocation of trading areas,⁷⁴¹ the refusal and granting of trading permits, and the criteria used to determine eligible applicants to be granted a trading permit.⁷⁴² The procedure for the removal and impoundment of a trader's property is also the same in both by-laws.⁷⁴³ For example, the *City of Johannesburg By-law, 2012* allows local authorities to remove and impound goods belonging to traders on reasonable suspicion that the items are being used in connection with unauthorised trading.⁷⁴⁴ The provision in this By-law has not been subjected to judicial scrutiny. If the constitutional validity of the By-law were to be challenged based on it violating the right of street traders to access to court, it would be likely declared unconstitutional.⁷⁴⁵ This is because the removal and impoundment of the goods of street traders based on mere suspicion of a

⁷³⁶ Part A para 1.2 of the City of Johannesburg *Informal Trading Policy*.

⁷³⁷ Part A para 1.2 of the City of Johannesburg *Informal Trading Policy*.

⁷³⁸ Part B of the City of Johannesburg Metropolitan Municipality *Informal Trading By-law, 2012*.

⁷³⁹ Part C para 7.1 of the City of Johannesburg *Informal Trading Policy*.

⁷⁴⁰ Part C para 7.1 of the City of *Johannesburg Informal Trading Policy*.

⁷⁴¹ S 5 of the City of Johannesburg Metropolitan Municipality *Informal Trading By-law, 2012*; and See para 5.3.2.2 above.

⁷⁴² S 6 of the City of Johannesburg Metropolitan Municipality *Informal Trading By-law, 2012*; and See para 5.3.2.2 above.

⁷⁴³ S 11 of the City of Johannesburg Metropolitan Municipality *Informal Trading By-laws 2012*; and See para 5.3.2.2 above.

⁷⁴⁴ S 11(1)(a) of the City of Johannesburg Metropolitan Municipality *Informal Trading By-law, 2012*; and s 35(1) of the *eThekweni By-law*.

⁷⁴⁵ This argument is based on a decision of the Court in *Makwickana v eThekweni Metropolitan Municipality* that found s 35(1) of the *eThekweni By-law* to be unconstitutional. See para 4.4.3 above.

violation of the By-law is drastic. Relatively, the penalty imposed for this "mere suspected violation" before a street trader can even receive a property inquiry for the matter can also be said to be overly harsh.⁷⁴⁶

Not all sections of this By-law can be unconstitutional or too harsh on the plight of street traders. For example, the general penalty imposed for the violation of this By-law seems to have factored in the financial circumstances of street traders. According to the *City of Johannesburg By-law, 2012*, where a street trader does not have a reasonable explanation for their failure to produce a valid trading permit or a lease agreement, that trader is guilty of an offence.⁷⁴⁷ The general penalty applicable to every contravention of this By-law is a fine of not more than 500 Rands or in defaulting payment, imprisonment for a period not exceeding three months. This provision of the By-law is also consistent with the authorising Act, the *Businesses Act*.

As previously alluded to and evident from the case of *Makwickana v eThekweni Municipality*, several provisions of the *eThekweni By-Law* have been successfully challenged in court on the grounds of constitutional validity including sections 16(1) and 35(1).⁷⁴⁸ The City of Johannesburg has similar provisions including section 16(1)(a). It is argued, therefore that until these provisions are remedied, By-law falls short of complying with the prescripts of the *Constitution*. These provisions are thus implying that the *City of Johannesburg By-law* contravenes the constitutional law approach to the development of street trading.

5.3.3.3 Informal Trading Policy for the City of Johannesburg (undated)

According to the City of Johannesburg *Informal Trading Policy (Informal Trading Policy)*, street trading is a positive form of development that will ensure job creation, and poverty alleviation while simultaneously expanding the economic base of the City.⁷⁴⁹ The vision of the City is to ensure that informal trading is well managed and

⁷⁴⁶ See para 4.4.3 above.

⁷⁴⁷ S 6(4) of the City of Johannesburg Metropolitan Municipality *Informal Trading By-laws, 2012*.

⁷⁴⁸ See para 5.3.3 above.

⁷⁴⁹ Preamble of the City of Johannesburg *Informal Trading Policy*.

that it adequately responds to the needs of all stakeholders.⁷⁵⁰ Informal trading must be "effectively integrated into the economic, spatial and social development goals of the City".⁷⁵¹ In terms of the *Informal Trading Policy*, the ultimate goal of integrating informal trading into the City's development plans is to facilitate a transition of this sector from the informal into the formal economy. This immediately suggests that the informal economy is inferior to the formal economy.⁷⁵² Furthermore, the City seeks to "regulate and manage" informal trading as a means of fostering positive relations between the formal and informal economy.⁷⁵³ Arguably, the overt objective of the City is to silence participants of the formal economy by putting in place means to regulate and manage informal trading.

Some of the measures that the City undertakes in developing informal trading include spatial development of informal trading spaces that are currently aesthetically inferior and poorly serviced,⁷⁵⁴ and infrastructure development.⁷⁵⁵ Other measures include demarcating more designated areas for purposes of trading and providing training and mentorship to informal traders,⁷⁵⁶ and the establishment of the informal trading incubator and chambers.⁷⁵⁷ Incubators are a process through which informal traders are linked with other entrepreneurs who share a common vision on the expansion of the product offerings and trading spaces.⁷⁵⁸ The aim of creating incubators is to create networking channels between traders of the same kind to work together and possibly forge partnerships amongst themselves.⁷⁵⁹ The chamber will serve as a forum that will consult and resolve conflicts between informal traders and other local stakeholders or other interested parties in relation to informal trading.⁷⁶⁰

⁷⁵⁰ Preamble of the City of Johannesburg *Informal Trading Policy*.

⁷⁵¹ Preamble of the City of Johannesburg *Informal Trading Policy*.

⁷⁵² Preamble of the City of Johannesburg *Informal Trading Policy*.

⁷⁵³ Preamble of the City of Johannesburg *Informal Trading Policy*.

⁷⁵⁴ Part C para 6.4 of the the City of Johannesburg *Informal Trading Policy*.

⁷⁵⁵ Part C para 7 of the City of Johannesburg *Informal Trading Policy*.

⁷⁵⁶ Part C para 8 and part D para 15 of the City of Johannesburg *Informal Trading Policy*.

⁷⁵⁷ Part D para 13 and part F para 17 of the City of Johannesburg *Informal Trading Policy*.

⁷⁵⁸ Part D para 15.1 of the City of Johannesburg *Informal Trading Policy*.

⁷⁵⁹ Part D para 15.1 of the City of Johannesburg *Informal Trading Policy*.

⁷⁶⁰ Part F para 17.1 of the City of Johannesburg *Informal Trading Policy*.

This policy seeks to manage street trading as opposed to developing the sector through the constitutional law approach developed in this study. This is because this policy addresses the technical issues that must be addressed within inner-City Johannesburg including spatial and infrastructure development. However, it does not address the tensions that exist between the City of Johannesburg and street traders. Instead, the policy shifts the focus to the tensions between the formal and informal economy in the City. Even in harmonising the relationship between the formal and informal economy, the policy advocates for the formalisation of the informal economy.⁷⁶¹

5.3.3.4 The City of Johannesburg Final IDP 2020/2021

The Johannesburg Inner-city is identified as a key driver of economic development in the City.⁷⁶² The City recognises this area as a national asset that cannot be allowed to go to waste.⁷⁶³ Rich with people, a "network of infrastructure and a stock of buildings", the City is a place of opportunity and inclusivity.⁷⁶⁴ Home to some of the largest banks, insurance companies and Information and Communications Technology (ITC) companies, the inner-city is also an incubator for SMMEs.⁷⁶⁵ According to the City, the inner-city is also the home of chief developmental challenges.⁷⁶⁶ These challenges include urban decay, the hijacking of buildings, homelessness and street trading.⁷⁶⁷

In its objectives, the City seeks to create an enabling economic environment and to improve the livelihood of its residents who either work in the formal or informal economy,⁷⁶⁸ thereby ensuring that the City promotes economic and social development. This approach also aims to improve service delivery in local businesses, to amend restrictive by-laws, especially the by-laws that currently

⁷⁶¹ Preamble of the City of Johannesburg *Informal Trading Policy*.

⁷⁶² The City of Johannesburg *Final Integrated Development Plan 2020/21* 114.

⁷⁶³ The City of Johannesburg *Final Integrated Development Plan 2020/21* 114.

⁷⁶⁴ The City of Johannesburg *Final Integrated Development Plan 2020/21* 114.

⁷⁶⁵ The City of Johannesburg *Final Integrated Development Plan 2020/21* 115.

⁷⁶⁶ The City of Johannesburg *Final Integrated Development Plan 2020/21* 115.

⁷⁶⁷ The City of Johannesburg *Final Integrated Development Plan 2020/21* 115.

⁷⁶⁸ The City of Johannesburg *Final Integrated Development Plan 2020/21* 129.

regulate the informal economy.⁷⁶⁹ Some of the markers of a constitutional law approach that have been highlighted in the objectives of this IDP include improving service delivery to street traders and amending restrictive by-laws are important markers to the constitutional law approach.⁷⁷⁰ This means that the IDP of the City of Johannesburg does follow a constitutional law approach to the regulation of street trading to some degree.

5.4 Concluding remarks

The objective of this chapter was to assess the extent to which the by-laws, policies, and IDPs of the City of Johannesburg and eThekweni Metropolitan Municipality which are relevant to the street trading sector conform with the dictates of the *Constitution*. As the discussions have shown, both municipalities have adopted IDPs, by-laws, and policies on the street trading sector with some dating back to 2001.⁷⁷¹ These by-laws, IDPs, and policies are all relatively progressive, as they advocate for the development of the street trading sector as a means of reducing poverty and unemployment.⁷⁷² In a similar vein, the instruments address issues such as the need to provide adequate infrastructure in places where traders operate, and training for street traders on aspects of health and safety in and around their places of trade.⁷⁷³

Some provisions of the instruments are generic because they do not necessarily pertain to specific circumstances in the sector. For instance, some tend to impose harsh sanctions in the form of fines on street traders that they cannot afford to pay.⁷⁷⁴ For instance, in circumstances where a street trader cannot afford the imposed fine, the traders' goods would be sold at an auction to recover the fine imposed.⁷⁷⁵ While these measures might assist local government in the maintenance

⁷⁶⁹ The City of Johannesburg *Final Integrated Development Plan 2020/21* 129.

⁷⁷⁰ City of Johannesburg *Final Integrated Development Plan 2020/21* 129.

⁷⁷¹ See for example the eThekweni Unicity Municipality *Durban's Informal Economy Policy*.

⁷⁷² City of Johannesburg *Informal Trading By-laws*; City of Johannesburg *The City of Johannesburg Final IDP 2020/2021* 115; eThekweni Municipality: *Informal Trading By-law, 2014 Preamble*.

⁷⁷³ See para 5.3.1 above.

⁷⁷⁴ See para 4.3.3 above.

⁷⁷⁵ See for instance s 11(3)(e) of the City of Cape Town *Informal Trading By-law*.

of order in the street trading sector, they have the potential to violate the street traders' right to property.

The markers developed in Chapter 4 have been answered both positively and negatively by the assessment of the by-laws, policies, and IDPs of eThekweni Metropolitan Municipality and the City of Johannesburg. Firstly, the constitutional-based duties of local government towards the street trading sector have been primarily emphasised by the IDPs of both cities.⁷⁷⁶ These duties include the provision of municipal services to street traders in the form of street trading stalls.⁷⁷⁷ Secondly, neither the City of Johannesburg nor eThekweni Metropolitan Municipality explicitly makes reference to the use the constitutional values and principles as a foundation for the enactment of their instruments. Thirdly, all the rights discussed in sections 4.3 and 4.4 can be identified across all the instruments assessed in this chapter. The most observed rights include just administrative action and the right of access to information. The least observed right included the right to access to court as evinced from both the by-laws of City of Johannesburg and eThekweni Metropolitan Municipality.⁷⁷⁸ Interestingly, the policy of eThekweni Metropolitan Municipality (which predates the by-law) recognises more rights than the by-law including the right to choose a trade, occupation or profession, and the right for a street trader to work in an environment that is neither harmful to their health nor their wellbeing.⁷⁷⁹

In addition, the chapter found that the structure and contents of the eThekweni Metropolitan Municipality and the City of Johannesburg by-laws on street trading suggests that municipalities use some form of "template/draft standard by-law" for the regulation of street trading. For example, both by-laws outline the same procedure to be followed by municipal officials when confiscating goods of street traders. They both replicate the same procedure that a street trader must follow to retrieve their property after confiscation.⁷⁸⁰ Conclusively, if the practice of adopting

⁷⁷⁶ See para 5.3.2.4 and 5.3.2.4 above.

⁷⁷⁷ See para 5.3.2.4 and 5.3.2.4 above.

⁷⁷⁸ See para 5.3.3.2 and 5.3.2.2 above.

⁷⁷⁹ See para 5.3.3.3 above.

⁷⁸⁰ See para 5.3.2.2 and 5.4.2.2 above.

a standard or template by-laws on the regulation of street trading persists, it will mean that several municipalities will continue to adopt instruments that are contradictory with the local circumstances and prevailing conditions in their cities. This is by itself a threat to the protection of the rights and interests of street traders.

CHAPTER 6

CONCLUSION

6.1 Context, background, and outline of the study

A myriad of research has been conducted on the problems, vulnerabilities, and regulatory gaps in the street trading sector in South Africa.⁷⁸¹ There is also a significant amount of literature that focuses on the relationship between this sector and local government.⁷⁸² However, thus far, no study has focused on how the principles, values, and other provisions in the *Constitution* can assist towards the optimisation of the role of the street trading sector in the advancement of LED. The paucity of research on the subject motivated this study. This study departed from the premise that the *Constitution* serves as an invaluable yardstick for assessing the validity of municipal instruments that are currently used to regulate the street trading sector. The *Constitution* also serves as a guiding framework for the drafting of new governance instruments. The research question underpinning this study asked how a constitutional law approach to the informal economy (particularly, street trading) could optimise its growth, and by extension, strengthen LED in South Africa.

Chapter two provided an overview of the history, evolution, meaning and rationale for LED and developmental local government at an international, African regional and South African level. The primary aim of LED is to use local resources including capital, human, and institutional resources to reduce poverty, create employment, and develop local economies.⁷⁸³ In this regard, it was found that LED is a process engaged in by local governments to boost the economies of their cities, thereby making these spaces attractive to both local and foreign investment.⁷⁸⁴

⁷⁸¹ The work of WIEGO, SERI and SACN have primarily focused on identifying and remedying the vulnerabilities of street traders. See Socio- Economic Rights Institute of South Africa 2018 https://www.seri-sa.org/images/SERI_SALGA_Informal_Trade_Jurisprudence_WEB.pdf and Skinner *Street traders in Durban*.

⁷⁸² See para 3.6 below.

⁷⁸³ See para 2.2.1 above.

⁷⁸⁴ See para 2.2.1 above.

Chapter three analysed the descriptions, features, sectors, and role-players of the informal economy in general before the analysis crossed over to the legally relevant relationship between the street trading sector and local government. The objective of this chapter was to explore and contextualise theoretical perspectives on the rationale for, the features and sectors of, and the relationship between street traders and local authorities in the informal economy of South Africa. In a nutshell, it found that a lack of cordial relationships exists between local government and the street trading sector.

Chapter four analysed the values, principles, and other provisions of the *Constitution* to determine the applicable governing powers and instruments available to local government in relation to street trading. Furthermore, the chapter identified the substantive and procedural rights of street traders applicable to the operation of businesses in the street trading sector. The aim of this chapter was to use the *Constitution* as a yardstick for deciphering how municipalities should approach the regulation of the street trading sector with the rights and interests of the different actors in mind. The chapter found that the *Constitution* is a suitable yardstick that can be used to assess municipal instruments such as by-laws, policies, and the IDP as far as they regulate street trading.⁷⁸⁵

Chapter five evaluated the extent to which the by-laws, policies, and IDPs of the City of Johannesburg and eThekweni Metropolitan Municipality currently conform to the dictates of the *Constitution*. As will be further elaborated in the paragraphs below, it was deduced that on the one hand, some provisions of the by-laws, policies, and IDPs of the City of Johannesburg and eThekweni Metropolitan Municipality are indeed aligned to the dictates of the *Constitution*. These include the duty of municipalities to provide basic municipal services, and the objective of local government to promote social and economic development in local communities.⁷⁸⁶ On the other hand, other provisions of these instruments were not aligned to the dictates of the *Constitution* as they violate the rights of street traders, specifically,

⁷⁸⁵ See para 4.5 above.

⁷⁸⁶ See para 5.5 above.

the right to access to court.⁷⁸⁷ It further emerged that some policies such as the eThekweni Metropolitan Municipality *Durban's Informal Economy Policy*, 2001 recognise the rights of street traders more than the subsequent By-law on the regulation of street trading named the eThekweni Municipality: *Informal Trading By-law*, 2014.⁷⁸⁸

6.2 Main findings

The legally relevant findings of this study can be structured as follows:

6.2.1 There is merit in adopting a constitutional law approach to street trading

The principle of constitutionalism states that all the powers, duties, and functions of local government are derived from and limited by the *Constitution*.⁷⁸⁹ A constitutional law approach to street trading recognises that all the governing instruments used by municipalities in the regulation of the street trading sector including by-laws, strategies, and plans must be aligned with the *Constitution*.⁷⁹⁰ A constitutional law approach to street trading explicitly ensures that the powers of local government in regulating the street trading sector are in alignment with important constitutional principles such as legality and the rule of law, and requisite values such as equality, human dignity, and freedom.⁷⁹¹ Furthermore, the constitutional law approach invariably protects not just the rights of street traders, but also the concomitant duties of local government towards these rights.⁷⁹² From the foregoing, the study has established that the merit in adopting a constitutional law approach to street trading is grounded in the fact that the *Constitution* serves as the ultimate legal foundation upon which local government should a) build its relationship with the street trading sector; and b) approach its regulatory measures as applicable in the informal economy.

⁷⁸⁷ See para 5.5 above.

⁷⁸⁸ See para 5.4 above.

⁷⁸⁹ See para 4.5 above.

⁷⁹⁰ See para 4.5 above.

⁷⁹¹ See para 4.2.3.1 to 4.2.3.3 above.

⁷⁹² See para 4.2.3.1 above.

6.2.2 LED is a crucial objective of developmental local government

The central responsibility of local government is to assist local communities to devise innovative and sustainable ways of meeting their needs and improving their livelihoods. Therefore, developmental local government extends to the objectives of LED. Under developmental local government, municipalities should seek to support LED through the sustainable use of local resources.⁷⁹³ Secondly, developmental local government seeks to create a working relationship between local stakeholders including local municipalities, local communities, CBOs, and the immediate private sector.⁷⁹⁴ LED is adequately understood as an objective of developmental local government in policies and laws such as the *Constitution*, the White Paper on Local Government, and *the Municipal Systems Act*.⁷⁹⁵ Nonetheless, a paucity of links still exists pertaining to the expression of the interconnection between the informal economy and LED in the aforementioned frameworks. This link has only always been implied.⁷⁹⁶ This suggests that the relationship between the informal economy and local government is still underappreciated and outrightly overlooked by the legal and policy framework of local government.

6.2.3 From a legal perspective, the "informal economy" is lucidly defined

This study has shown that the informal economy does not have a concise definition. The failure to have a precise definition for the informal economy has manifested into shortcomings whereby legal and policy framework also fail to expressly provide a link between the informal economy, specifically street trading, and LED. The shortcomings on the part of the local sphere of government, explains why municipalities have often exuded indifference towards the development of street trading as a viable means of achieving LED. Arguably, so long as the policy and legal framework do not expressly conceptualise and acknowledge street trading as a

⁷⁹³ See para 2.2.2 above.

⁷⁹⁴ See para 2.2.2 above.

⁷⁹⁵ See para 2.2.3 above.

⁷⁹⁶ See para 3.5 above.

means of developing LED, local officials will continue to assume that the informal economy exists outside the realm of LED.

6.2.4 A relationship of mutual understanding between street traders and local authorities will help advance LED

The actions of municipalities indicate that the conduct of officials has been primarily based on a general misunderstanding of the features and functionalities of the street trading sector.⁷⁹⁷ For instance, the argument that street trading is unruly, chaotic, and disruptive has driven many cities to forcefully remove and relocate street traders to remote areas.⁷⁹⁸ The actions of local government have also been driven by the displeasure expressed by the formal economy which argues that its businesses pay levies and taxes and as such deserve the protection of the state from unfair competition by the informal economy, for example.⁷⁹⁹ These interactions reinforce the vulnerability of the street trading sector before the formal economy and local government. The continued exclusion of street traders from the legal and policy framework of local government further exacerbates the vulnerability of this sector. Perhaps, this represents the greatest motivation for local government's imposition of strict regulations against the street trading sector, even though it should be creating a symbiotic relationship between itself and the sector.

6.2.5 Cities do not hold unfettered powers to regulate

The by-laws, policies, and IDPs currently used by local government must be consistent with the *Constitution* including national and provincial laws.⁸⁰⁰ The autonomy of local government ensures that national and provincial laws do not infringe upon the right of local government to govern effectively.⁸⁰¹ This means that the role of other spheres in matters of local government is limited to assisting it to govern effectively. Where the laws of national and provincial spheres impede or

⁷⁹⁷ See paras 3.1 and 3.5 above.

⁷⁹⁸ See paras 3.1 and 3.5 above.

⁷⁹⁹ See para 3.2 above.

⁸⁰⁰ De Visser and Poswa 2019 *PELJ* 10.

⁸⁰¹ S 151(4) of the *Constitution*.

compromise, by-laws will prevail.⁸⁰² This study has found however, that every provision in the IDPS, policies, and by-laws regulating street trading must be interpreted against the values and principles of the Constitution. This is because the principles and values of the *Constitution* including equality, human dignity, the rule of law, legality and supremacy of the *Constitution* are the anchors on which the Bill of Rights, structures of government, objectives, duties, and functions of local government should be interpreted.⁸⁰³ Similarly, the instruments used by local governments to regulate street trading must also be interpreted against the aforementioned principles and values.

6.2.6 The by-laws, policies, and IDPs of the cities are relatively progressive

The by-laws, policies, and IDPs of the eThekweni Metropolitan Municipality and the City of Johannesburg recognise the role of local government in the development of street trading as a means of promoting social and economic development. The study also found that some municipalities have a concerted approach to the advancement of street trading. In this approach, municipalities primarily focus on providing street traders with trading stalls, training, and mentorship to assist them to boost their businesses.⁸⁰⁴

Although the provision of municipal services forms a crucial feature of the yardstick developed in chapter 4, several other markers must be present for the by-laws, policies, and IDPs of municipalities (such as the City of Johannesburg and eThekweni Metropolitan Municipality) to be in full compliance with the dictates of the *Constitution*. In this regard, this study has found that not all provisions in all the instruments assessed are consistent with the stipulations of the *Constitution* to the extent that they intentionally or unintentionally violate the rights of street traders such as the right to access to court and the right to just administrative action.⁸⁰⁵

⁸⁰² De Visser and Poswa 2019 *PELJ* 10.

⁸⁰³ See para 4.2.3.1-4.2.3.3 above.

⁸⁰⁴ See para 5.4 above.

⁸⁰⁵ See para 5.4 above.

6.3 Recommendations

The following recommendations can be made based on the findings of this study:

- National government should revise the existing framework or develop and adopt a new National Framework on LED.⁸⁰⁶ This framework should expressly identify and emphasise the nexus between LED and the informal economy focusing on specific sectors such as street trading. The sectors of the informal economy and the economy itself, needs to be legally redefined.
- Municipal councils should revise existing regulatory instruments that are currently applicable to the street trading sector in the City of Johannesburg and eThekweni Metropolitan Municipality. These include in the case of eThekweni Municipality: *Informal Trading By-law, 2014*, and eThekweni Metropolitan Municipality *Durban's Informal Economy Policy, 2001*. In the case of the City of Johannesburg: *Informal Trading By-law, 2012* and *Informal Trading Policy for the City of Johannesburg (undated)*. This is crucial for ensuring that they are aligned with the dictates of the *Constitution*.
- Municipalities must develop and adopt by-laws, policies, and other applicable instruments that explicitly address the challenges faced by street traders including the lack of adequate infrastructure and measures that can be taken by local government such as the allocation of funds to build and maintain infrastructure and stimulate the development of street trading.⁸⁰⁷ The by-laws and policies on the regulation of the street trading sector must outline the constitutional values including equality, human dignity, and freedom. It should also affirm principles such as constitutional supremacy, the rule of law, and the principle of legality as enshrined in the *Constitution* as far as

⁸⁰⁶ Department of Provincial and Local Government "A Policy Paper on Integrated Development Planning Africa (2007)".

⁸⁰⁷ See para 3.8 above.

they inform how the by-laws, policies, IDPs (and other instruments) are implemented and enforced by local government.⁸⁰⁸

- Municipalities should consider ensuring that the development and adoption of other (alternative) instruments at their disposal support the street trading sector. These instruments include municipal budgets, participatory forums, and sourcing for funding. Municipal budgets may typically have to dedicate funds to the street trading sector that are specifically aimed at providing and maintaining municipal services and infrastructure such as trading stalls and storage facilities. Participatory forums could be organised to listen to the challenges faced by street traders and adopt practicable solutions that street traders might suggest for rectifying the identified problems. Sourcing for additional funding should also be aimed towards developing the street trading sector and investing in relevant resources and infrastructure that are needed by the street traders in their daily business operations.
- Municipalities must devise innovative ways of regulating street trading including the incentivisation of street traders who keep their trading spaces clean and cooperate with municipal officials when they conduct inspections on trading sites. Such incentives could include discounts of fees payable on renewal of trading permits.
- State institutions that support constitutional democracy such as the South African Human Rights Commission (SAHRC) design conscientisation and awareness programmes to adequately educate local government officials and street traders on the law, the *Constitution*, and approaches to the regulation of the street trading sector.

⁸⁰⁸ See paras 4.6 and 4.7 above.

- Finally, it is also recommended that the SAHRC proactively functions as a "watchdog" that ensures that local government refrains from infringing on the rights and dignity of street traders.

6.4 Conclusion

The constitutional law approach espoused in this study examined diverse parts of the *Constitution* including its principles, values, and structures of government, and the functional areas of competence of these governments as outlined in Schedules 4 and 5.⁸⁰⁹ Borrowing from several parts of the *Constitution*, this constitutional law approach devised a yardstick that would later be used in chapter 5 of the study to appraise the constitutional validity of the by-laws, policies, and IDPs of the City of Johannesburg and eThekweni Metropolitan Municipality.

This study was limited in its scope and focus. Therefore, it was possible to identify aspects of the study which could benefit from further research. It is envisaged that further research into these issues would positively contribute to the adoption of a constitutional law approach towards the regulation of street trading in South Africa. These are briefly listed below as future research questions:

- To what extent can the constitutional powers, duties, and functions of national and provincial government enhance local governments' role in the regulation of the street trading sector?
- How can a constitutional law approach to the regulation of street trading be used to promote the rights of women street traders in South African cities?
- How can a constitutional law approach be used to balance the rights of street traders against the rights of non-participants of the street trading sector?

In summation, it is pertinent to remember that the informal economy, particularly street trading, is a permanent feature of South African cities. In a similar vein, informality remains an inextricable part of urban development in the contemporary

⁸⁰⁹ See para 4.2.3 above.

South African and African contexts. Hence, this study advocates for the development of legal and policy frameworks at national and sub-national levels that acknowledge and explicitly support the vulnerable sectors of not just the economy, but the entire South African society, in this case, the street trading sector. Ideally, such frameworks must be strictly guided by the principles, values, and the vision for developmental local government in tandem with the *Constitution*.

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