

FEATURE

A Rights-Based Approach to Informal Street-Trading Challenges in Tshwane Metropolitan Municipality

Paul Mudau and Nomzomhle Kona

Although there are intense disagreements about associating informal street traders with poverty, the urban poor are profoundly impacted by pervasive poverty. In response to their inability to obtain decent employment opportunities, a considerable number of them resort to informal street trading in order to pursue a livelihood (Tissington 2009: 6). Importantly, the National Development Plan estimates that the informal sector has the potential to create 1.2-2 million jobs by 2030. Section 22 of South Africa's Constitution guarantees everyone the right to freely choose his or her trade, occupation and industry; the Constitution also provides for local government envisioned as democratic, participatory, inclusive, responsive and accountable to people's needs and aspirations.

Additionally, in *South African Informal Traders Forum v City of Johannesburg* (2014), the Constitutional Court held that informal trade is integrally linked to the right to human dignity. However, the vast majority of post-apartheid municipal by-laws and policies persist in alienating the urban poor, whose quest to live profitable, dignified and fulfilling lives through informal street trading is met with stringently restrictive and prohibitive regulations that aggravate their deplorable living situations. Their inability to comply with excessively strict conditions and requirements results in their exclusion from social benefits.

The City of Tshwane Metropolitan Municipality has a high number of people who participate in the informal sector (Chatindiara 2019: 5). Because of its restrictive and prohibitive by-laws and policies, the City is one of the many cities and towns in South Africa that encounter multiple challenges in dealing with the implementation of the urban poor's pursuit of informal street trading (Chatindiara 2019: 5).

From a human rights perspective, the purpose of this article is to explore the primary legal, institutional and structural challenges faced by the City in the implementation of informal street trading by its urban poor. The article identifies possible solutions to these predicaments from the starting-point of systematic commitment to integrally linking informal street trading with the urban poor's rights to dignity, equality, choice of trade, occupation or profession, access to just administrative action, and freedom from arbitrary deprivation of their property.



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Contextual background

The City of Tshwane is the executive or administrative capital of South Africa, and the largest municipality when measured by land area. The 2011 Census reveals that the City is home to 2,9 million people. Although the municipality's main economic sectors are community services and government, followed by finance and manufacturing, the plight of its urban poor is truly unbearable, with a 24.2 per cent unemployment rate and a 32.6 per cent youth unemployment rate. The urban poor are the most affected by poverty as their lives are characterised by lack of means to achieve a decent level of social well-being, including access to basic needs such as food, clothing and housing; due to their lack of education and skills, they have no access to economic opportunities (Landman and Ntombela 2006: 5).

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The City's main developmental challenges are inequality, unemployment, poor economic conditions, poverty, and the inherent need to survive (Chatindiara 2019: 4). The cumulative impact of living in such circumstances threatens peoples’ right to enjoy the highest attainable standard of physical and mental health (article 12, ICESCR). Neighbourhoods such as Hatfield, Sunnyside and Arcadia have fairly high population densities, with more than a thousand registered informal street traders. Other parts of the municipality, such as Marabastad and Magaliesberg, face similar challenges. For that reason, informal street trading plays a critical role in the informal economy, as it has created jobs and continues to improve the lives of people from disadvantaged communities.

Indeed, the Socio-Economic Rights Institute of South Africa (2018: 4) affirms that informal trade has an important role to play in addressing challenges such as high levels of unemployment, poverty and accelerated rates of rural-urban migration.

Legal framework for informal trading at local government level

The 1998 White Paper on Local Government envisages a developmental local government which centres on working with local communities to find sustainable ways to meet their needs and improve the quality of their lives. Section 152(1)(c) of the Constitution states that local government has the object of promoting social and economic development. A municipality is also obliged to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community (section 153, Constitution).

The Constitution enshrines a number of fundamental rights that are linked to informal trade; these include the right to human dignity, the right to equality, the right to choose one's trade, occupation or profession, the right to a just administrative action, and the right not to be arbitrarily deprived of one's property. These rights are given effect in the Businesses Act 71 of 1991, the Promotion of Administrative Justice Act 3 of 2000, and the National Small Business Act 102 of 1996. In terms of section 34 of the Constitution, street traders have the right to access to courts when there is a violation of these rights.

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dignity respected and protected. Currie and De Waal (2016: 465) argue that, ‘although section 22 does not expressly mention the freedom “to pursue a livelihood”, by implication, it is included within the scope of section 22’. This right can be extended to the urban poor’s pursuit to live profitable, dignified and fulfilling lives through informal street trading.

By exercising the right of access to courts as stipulated by section 34 of the Constitution, informal street traders rely on judicial recourse for the protection of fundamental rights associated with informal trade. The courts in South Africa have duly reaffirmed that the right to human dignity is integrally connected to informal traders’ ability to participate in and carry on informal trade businesses. In *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism* (2015), the Supreme Court of Appeal declared that

the ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it [informal traders] faced ‘humiliation and degradation’. Most traders, we were told, have dependants. Many of these dependants are children...

The Businesses Act governs informal street trading; its section 6(1)(b) allows municipalities to make by-laws that restrict, regulate or control the businesses of street vendors, pedlars or hawkers. Section 6(1)(b) (i) of the Act provides for the creation of laws that provide for the removal and impoundment by an officer of any goods. This is seen in some quarters as an unconstitutional infringement of informal traders’ right to trade (Ligthelm and van Wyk 2004: 40).

The policy regime and the challenge of informal street trading

The post-apartheid national policy framework has given attention to informal activity within the context of economic development. However, the situation at grassroots level has not improved significantly. What

is needed is a realistic local policy framework, with appropriate support measures, that can contribute to enhancing the sustainability and profitability of informal trade businesses.

The street-trading sector is principally regulated by rules enacted at the municipal level. The City of Tshwane Metropolitan Municipality Street Trading By-Laws are directed at regulating the control and effective management of the informal sector, and in the process helping people to exercise their rights to choose their trade. An inclusive policy for lease and allocation of trading stalls and sites has to accommodate all traders, irrespective of their social origin, nationality, race, colour or creed.



A key contributing factor to this is the lack of effective communication channels between the municipality and the street traders.

However, the municipality is still facing challenges pertaining to the provision of sufficient space needed by the rapidly growing number of street traders who operate lawfully. Nkrumah-Abebrese (2016: 34) sums up the four main allocation challenges:

[T]he problem in the allocation of the trading sites and the regulation of storage facility; the lack or poor space allocation located within the Spatial Development Framework of the City to meet the demand of informal traders; inadequate level of legal support to protect informal traders against any abuse by the so-called trader organisation; and the lack of a governance regulatory framework to prevent illegal trading activities within the municipality’s streets and pavements.

The City of Tshwane Informal Trading Policy and Implementation Plan (2013) reveals that these issues

hinder the development of an effective informal trading policy because of the highly uncoordinated nature of the street-trading sector. Additionally, apart from problems with trading space and infrastructure, more challenges are encountered through lack of financial assistance, inadequate business skills, and poor working conditions. Another pressing problem is the wide gender disparity of informal traders; a large percentage are made up of men, for social reasons (Masonganye 2010: 8).

As South Africa is a patriarchal society, women are still not fully participating in economic activities, and the City of Tshwane's by-laws and policies lack the ability to address gender gaps in informal street trading, especially taking into account the fact that women are the primary caregivers of children. Lack of awareness of municipal by-laws and policies that regulate informal street trading is another challenge (Nkrumah-Abebrese 2016: 38). A key contributing factor to this is the lack of effective communication channels between the municipality and the street traders. Another impediment is the lack of policy guidance in creating an enabling environment for informal street traders. The municipality is not particularly sensitive to the needs of certain groups within the community, who tend to be marginalised.

These challenges remain unchanged despite the impressive legal framework which, through purposive interpretation, can be used to promote and secure the efficiency, sustainability and profitability of informal street trading. The City cannot renege on its constitutional obligation to address the plight of its urban poor, who are mostly disadvantaged and voiceless. Section 22 of the Constitution entitles the urban poor, just like any other citizens, to freely choose their own trade, occupation and industry. Given the fact that, through municipal by-laws and policies, the municipality plays a crucial role in minimising, perpetuating or increasing the vulnerability of street traders, it becomes a challenge for the municipality to implement this correctly when certain economic activities are prohibited or restricted.

Section 4 of the City of Tshwane Metropolitan Municipality Street Trading By-Laws prohibits street traders from operating businesses in a public amenity

or a garden or park to which the public has a right of access. The only exception is when a person has received special permission from an authorised officer. Additionally, in order to operate the business lawfully, the Tshwane Business Licence Application regulation serves as a compliance method, to ensure that street traders have the necessary permits and licences.



This would include negotiating with informal traders or informal trade organisations.

The City of Tshwane Metropolitan Municipality By-Laws Pertaining to Public Amenities (2005) prevent a person from selling anything without first seeking permission from the municipality. Any person who deliberately contravenes the by-law shall be fined not more than R10,000 or shall be imprisoned for a period of one year. Almost 60 per cent of the informal traders in the area do not have licences to trade in that particular trading space, yet anyone, no matter how poor, working as a street trader without a licence, can be sentenced to a hefty fine or imprisonment.

Pieterse (2017: 3) contends that local governments are struggling to deal with informal street trading as they need to balance their obligations to create and sustain healthy and safe urban environments conducive to economic growth and the sustainment of all urban activities, against the fundamental socio-economic rights of traders, who are often some of the most vulnerable members of society. These 'arbitrary restrictions' can be deemed to be contrary to the underpinned developmental duty of maximising social development and economic growth, and encompassing the resolve to secure the best interests of persons living in poverty.

Before the City considers restricting or prohibiting trading in an area, it must investigate how this will affect informal traders (SERI 2018: 35). The investigation must consider two things. The first is to ascertain the realisation of the City's objectives through more effective supervision and control of informal trade in

the area. This would include negotiating with informal traders or informal trade organisations. The second is to assess whether the restriction or prohibition of street trading in an area would mean that traders would go out of business.

The Report of the United Nations (UN) Special Rapporteur on Extreme Poverty and Human Rights focusing on Penalization of People Living in Poverty & Human Rights (2011: 2) recognises the concerns relating to the 'laws, regulations and practices which unduly restrict the performance of life-sustaining behaviours in public spaces by persons living in poverty'. The Report further notes that, rather than to permit the imposition of restrictions by the state, the primary objective of the human rights framework is to protect the rights of individuals.

Accordingly, states are obliged to demonstrate that the restrictions imposed on the exercise of rights by the urban poor comply with the following criteria: they must be 'determined by law', 'compatible with the nature of these rights', 'solely for the purposes of promoting general welfare' and 'necessary in a democratic society', and are therefore legitimate, reasonable and proportionate to the aim sought (UN Special Rapporteur 2011: 2).

To make matters worse, the Tshwane Spatial Development Framework (2012) fails to recognise and address informal street trading because spatial plans do not provide space for this activity (Masonganye 2010: 5). The City contends that informal street trading businesses destroy the character of an area, are not in line with the zoning of the area, and are associated with anti-social behaviour (e.g. drugs being sold from the stalls). Killander (2019: 87) rightly bemoans that 'by-laws treat people as objects that should be removed from the view'. More constraints stem from the absence of vital infrastructure such as access roads, efficient public transport, health facilities, electricity, water, telephones and ablution facilities (Wiego Law & Informality Project 2014: 8-9).

Conclusion

This contribution has explored the legal, institutional and structural challenges that beset the City of Tshwane in the implementation of informal street trading with regard to its urban poor who rely largely on the activity to earn a living and support themselves and their families. The City's by-laws and policies are complicit in the alienation of street traders. The municipality must review the By-Laws Pertaining to Public Amenities (2005), the Street Trading By-Laws (2008), and the Informal Trading Policy and Implementation (2013). These by-laws and policies need to allow all relevant government departments to unite in creating an efficient, sustainable and profitable informal sector that benefits its participants, the informal street traders, stakeholders, and the municipality as a whole.

 **A rights-based approach towards the regulation of street trading anticipates a revitalised commitment to developmental local government.**

The Street Trading By-Laws can be revised to the extent that they enable the City to provide sufficient capacity for trading space and infrastructure, promote entrepreneurial skills and increase the number of street traders. A rights-based approach towards the regulation of street trading anticipates a revitalised commitment to developmental local government. This would encompass an urban poor-friendly policy framework anchored on the protection and promotion of the poor's rights to dignity, equality, choice of trade, occupation or profession, just administrative action, and an end to arbitrary confiscation of property.

Because the municipal by-laws and policies have the potential to uplift the socio-economic status of the urban poor, the municipality should craft and sustain a conducive policy environment that allows informal street trading to flourish. Through progressive by-laws and policies that are pro-poor and development-oriented, the formulation and implementation of these measures should be geared towards combating poverty and unemployment and avoid reinforcing the patterns of the exclusion of the most powerless and marginalised social groups. The solution is to link informal trade integrally with the rights of the urban poor.

Paul Mudau is a PhD Candidate and Researcher under the NRF SARChI in Equality, Law and Social Justice at the School of Law, University of the Witwatersrand.

Nomzomhle Kona is a final-year LLB student at the School of Law, University of the Witwatersrand.

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