FREE MARKET FOUNDATION

RADICAL ECONOMIC TRANSFORMATION

THE LEGAL ROUTE TO ECONOMIC FREEDOM

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INTRODUCTION

“Radical Economic Transformation,” or “RET,” has become a very well-known term in South African political discourse. It is, in fact, a term of abuse, understood to refer to a particularly corrupt and opportunistic faction of politicians. But what does Radical Economic Transformation actually mean, when we break it down into its component parts?

To authoritarian interventionists, it has a particular meaning. But when abstracted away from the errant thinking of its invokers, what can this term tell us?

“Economic transformation” means that the economic lot that most South Africans are burdened by, changes. This lot is one of destitution and unemployment. But this cannot simply be ordinary change, it must be “radical” change, a complete 180-degree turn away from where South Africa is presently going.

To understand change – radical change – we must first understand where South Africa currently finds itself.

South Africa had an interventionist government for most of the twentieth century. It was only in the late 1980s that the National Party realised that economic freedom was a necessary part of creating a prosperous society. The African National Congress, long under the sway of the Soviet Union and its communist satellite states, also came to realise in the early 1990s that it would need to become much more market friendly if it wanted South Africa to flourish.

With the transition out of Apartheid, South Africa underwent significant liberalisation, not unlike those seen in post-communist states after the Iron Curtain fell in 1989. The result was a significant turnaround in lacklustre economic growth and rising incomes across all population groups.

The seeds of Radical Economic Transformation were planted in the 1990s when this liberalisation was being taken seriously. But almost as soon as they were planted, some wanted to dig them back up again. In the late part of that decade, the government introduced a set of labour laws that plateaued the rising incomes of black South Africans, and, with time, created a situation where more than 12 million South Africans today find themselves unemployed. Labour was made painfully expensive – too expensive for small and medium enterprises to contribute meaningfully to the joblessness crisis.

But as the 2000s came and went, the South African government moved further and further away from any residual belief in the reality that markets, when free, create prosperity. It instead sought to rekindle the economic fallacies of the Soviet Union and pre-1980s South African state, and try to regulate South Africa into prosperity – an impossible feat. As the government did this, economic growth all but disappeared, and skilled and high-net-worth individuals have been leaving the country in droves ever since.

South Africa’s economic freedom apparently peaked in the year 2000, when the Canadian Fraser Institute’s Economic Freedom of the World (EFW) report pegged South Africa as the 54th most economically free state in the world. Today South Africa ranks 81st, and its trend is away from economic freedom.

The Free Market Foundation (FMF) has been committed to the cause of economic freedom in South Africa since being founded in 1975. Economic freedom – allowing free people to determine their economic affairs without the undue interference of indifferent politicians or officials – is shown, year on year, to be correlated with economic prosperity.

The poorest 10% of people in countries in the top quartile of economic freedom in the EFW, had incomes nearly eight times higher than their counterparts in the lowest quartile (those states with a more economically involved government) over the 2000-2018 period. Where people are free to pursue their own economic and commercial ends, they tend to be wealthier than those places where a State bureaucracy is constantly accosting, taxing, and regulating them.

Radical Economic Transformation, in other words, can in all honesty mean only one thing: South Africa's present political-economic direction, that of more and more government involvement in economic affairs, must be abandoned, in favour of a radical new path. This radical new path is that of intensive market liberalisation.

As South Africa's economic situation becomes more dire, the FMF has taken the initiative to prepare this book, which is divided into three parts. The first part is the Promotion of Economic Activity Bill, the second is a series of analyses on the laws that undermine small business, and the third is research conducted by Dr Christoph Klein on the benefits of decentralisation and deregulation.

Together, these texts represent a comprehensive liberalisation agenda that will make Radical Economic Transformation a reality for all South Africans.

PROMOTION OF ECONOMIC ACTIVITY BILL

The Promotion of Economic Activity Bill is based on a simple initiative: empowering the President to deregulate certain sectors of the economy where laws and regulations are unduly hindering or impeding economic development, competition, or the creation of job opportunities.

The exercise of this power would be subject to parliamentary oversight, and the President would be prohibited from exercising it in such a way that might result in the protection or advancement of any economic incumbent, monopolisation, or exempting the State from complying with laws that the private sector must.

Similar bills can be adopted at the provincial level to bestow a similar power upon premiers.

LAWS AFFECTING SMALL BUSINESS

The Laws Affecting Small Business (LASB) series was originally written by a group of expert authors between 1997 and 1999. These authors were Gary Moore (Finance), Gary Moore & Leon Louw (Health), Leon Louw (Justice), Michael Bagraim & Eustace Davie (Labour), Jim Harris & Leon Louw (Land), Gary Moore & Eustace Davie (Licensing), Eustace Davie (Schooling) and Ian Hetherington & Eustace Davie (Tax). Since then, Gary Moore has updated the LASB series, the final product of which has been incorporated into this book.

Each LASB entry attempts to identify those laws and regulations in a particular social field that hinder economic growth, in particular by small and medium enterprises. After identifying and describing the problem, each LASB includes a host of particular recommendations for how those legislative or regulatory obstacles could be eliminated or made less severe.

Some of the standout recommendations include:

Labour

- Allow prospective employees to contract out of certain statutory entitlements that stand in the way of them obtaining work;
- Bestow certain exemptions upon small businesses as far as the Labour Relations Act is concerned; and
- Subject small businesses to a simpler and shorter form of arbitration in the place of the present burdensome CCMA process.

Land

- The Constitution should be amended to strengthen property rights by prohibiting any future legislative or regulatory obstacles to the obtainment of secure title;

- Superfluous government land should be transferred to the homeless free of charge;
- The requirement to use a conveyancer (a lawyer) for routine property transactions should fall away;
- Restrictions on land use should be repealed; and
- Any agenda for expropriation without compensation or State custodianship of land should be abandoned.

Licensing

- Most, if not all, licencing laws and regulations should be repealed;
- Refusing a licence in the "public interest" should not be allowed;
- State-owned enterprises must not be exempted from complying with the same licensing regime as ordinary businesses; and
- Refugees should not be hindered from starting businesses.

Tax

- All government expenditure should be reduced to less than 25% of GDP within five years;
- Tax laws should be significantly simplified; and
- Small businesses should be granted a tax deduction.

DECENTRALISATION AND DEREGULATION

In his research, Dr Christoph Klein focuses on both deregulation and decentralisation, particularly to the municipal level, and how these two phenomena interlink with one another.

He explains that small and medium enterprises (SMEs) have not only suffered from overregulation in South Africa, but that the apparent distinction between SMEs and large enterprises might be superficial. While KFC South Africa is, when seen from afar, a large fast-food chain, in reality every KFC branch is a franchise with a particular operator, who is responsible for the dozen or so salaried employees who work there. These branches are, in fact, small businesses. In other words, even when government believes it is regulating large enterprises, in reality whatever it does also has real consequences for small business owners. Everyone benefits from deregulation.

Dr Klein also emphasises the importance of municipal services to SMEs. South Africa's municipalities, on the whole, have fallen to debilitating corruption and mismanagement, and the crucial infrastructure they are responsible for – water, electricity, roads, sewage, refuse removal, etc. – have all followed suit. This is to be expected when, as in South Africa, municipalities are almost entirely dependent on the central government financially.

Municipalities must take responsibility for their own finances and in so doing become entirely accountable to their inhabitants. Moreover, the fact that many associations of municipal inhabitants have taken the initiative to provide municipal services themselves, is something to be celebrated and encouraged. It is fundamentally important for the powers that be to recognise that South Africans are more than capable of providing for themselves without the active "assistance" of government.

Dr Klein also encourages the government – and the general public – not to obsess over "formalising" so-called "informal" (that is, unregistered) businesses. The State should concern itself with its core mandate, and fulfil that mandate effectively. By doing so, the informal sector will take the initiative in formalising itself. But trying to formalise that sector – to tax and regulate it – while government is hopelessly incompetent, corrupt, and economically reckless, is to put the cart before the horse.

Competition across the length and breadth of the value-chain is crucial for economic growth and prosperity, explains Dr Klein, even if this means State monopolies are to be abolished or reigned in. Without legislative protection, companies like Eskom will be disciplined by consumers.

Dr Klein also warns us not to be misled by the good intentions of economic regulations. More often than not, they yield detrimental consequences for the economy as a whole, even though they might have noble objectives.

On the strength of his observations, Dr Klein makes various recommendations. One of them is that licensing should be limited to considerations of public health and safety. Discriminatory licences based on “needs” and geography must be abolished. This recommendation echoes what the LASB entry on Licensing recommends to a large extent.

Dr Klein’s research is a valuable contribution to the literature on deregulation in contemporary South Africa.

THE IMPERATIVE OF LIBERALISATION

No economy can grow while the dead hand of the State keeps it down, particularly not an economy like South Africa’s with a great deal of unemployed, often unskilled, people. South Africa’s salvation comes with empowering the millions with an entrepreneurial spirit to be enterprising without having to jump through multiple hoops set by political elites.

This book combines multiple perspectives that reach this same conclusion.

Economic freedom is always within grasp. It is up to South Africans, and those who lobby on their behalf, to simply reach out and take it.

Martin van Staden
10 April 2022

PROMOTION OF ECONOMIC ACTIVITY BILL

BILL

To empower the President to suspend provisions of laws or conditions, limitations, or obligations thereunder or to grant exemption therefrom, if he or she is satisfied that circumstances exist under which the application of or compliance with those laws, conditions, limitations, or obligations unduly impedes economic development or competition in the economic field, or the creation of job opportunities; and to provide for incidental matters.

PREAMBLE

WHEREAS the superior courts have repeatedly recognised the importance of freedom of choice to the advancement of the constitutional value and right to human dignity;

AND WHEREAS sections 10 (human dignity), 12 (freedom and security of the person), 14 (privacy), 18 (association), 22 (trade, occupation, and profession), 23 (labour), and 25 (property) of the Bill of Rights contained in the Constitution of the Republic of South Africa, 1996, read together, guarantee the right to everyone to engage freely in economic activity and decide their own economic affairs;

AND WHEREAS the over-encumbrance of the economy with unnecessary and burdensome conditions, limitations, or obligations has slowed down inclusive economic growth, economic development, and job creation;

AND WHEREAS inclusive economic growth, economic development, and job creation, are necessary for the realisation of the rights in the Bill of Rights in the Constitution,

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BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Power of President to suspend or grant exemption from provisions of laws or conditions, limitations, or obligations thereunder

1. (1) Subject to compliance with the provisions of subsections (2), (3) and (4), the President may, if satisfied that circumstances exist under which the application of a provision of any law administered by the national government or compliance with any condition, limitation, or obligation thereunder, unduly impedes economic development or competition in the economic field, or the creation of job opportunities, by proclamation in the Gazette—

(a) suspend in whole or in part —

(i) that provision, other than a provision of an Act of Parliament;

(ii) that condition, limitation or obligation; or

(b) grant exemption in whole or in part from the provisions of that law, including an Act of Parliament, or that condition, limitation or obligation,

in general, or with regard to—

(i) a specific undertaking, industry, trade or occupation or a specific class thereof

(ii) a specific area;

(iii) a class of persons;

(iv) specific circumstances under which any undertaking, industry, trade or occupation or class thereof is carried on or exercised.

(2) (a) Any condition, limitation or obligation under an Act of Parliament shall be so suspended or exemption from the provisions of that Act or any condition, limitation, or obligation thereunder shall be granted, only—

(i) if and to the extent to which that Act relates to any matter mentioned in the Schedule;

(ii) on the advice of a standing committee of Parliament to which the suspension or exemption in question has been referred.

(b) Paragraph (a) shall not be construed as including any condition, limitation, or obligation under any proclamation, regulation or notice under such Act.

(3) A proclamation with regard to the suspension or exemption from the provisions of any law relating to any matter concerned with labour affairs and relations, conditions of employment, and workplace safety, shall not affect any contract of employment entered into before the issue of such proclamation.

(4) Before the President issues a proclamation under subsection (1), he or she shall cause to be published in the Gazette a draft of the proposed proclamation together with a notice calling upon all interested persons to lodge any objections and representations in writing within a period of 60 days from the date of publication of the notice with the Secretary to Parliament for submission to the standing committee contemplated in subsection (2): Provided that if the President on the advice of the standing committee thereafter determines on any alteration in the draft proclamation published as aforesaid, it shall not be necessary to publish such alteration before finally issuing the proclamation in terms of this section.

(5) The President may, by the said proclamation, make regulations—

(a) relating to conditions subject to which the law, condition, limitation, or obligation in question is suspended or exemption from the provisions thereof is granted; and

(b) in order to give effect to that suspension or exemption, to regulate matters in connection therewith, to remove ambiguities and contradictions with other laws, and to remove any administrative problems which may be experienced.

(6) Regulations contemplated in subsection (5) may provide for penalties for any contravention thereof or failure to comply with the provisions thereof, of a fine or imprisonment not exceeding the maximum fine or imprisonment prescribed in the law to which the suspension or exemption in question relates.

(7) No proclamation contemplated in subsection (1) may have as its direct or indirect purpose the protection of any industrial or sectoral incumbent person; the exclusion of any new or existing persons from an industry, sector, or geographical area; the monopolisation, by a state or private person, of any good or service; or the exemption of state persons from compliance with laws, conditions, limitations, or obligations with which private persons must comply. After determining that a proclamation has had such consequences, a court shall be competent to invalidate the proclamation to the extent that it creates such consequences, or to modify it so as to not create such consequences.

Consultation

2. Before issuing a proclamation under section 1, the President may consult with, or authorise any Minister to consult with, any person or organ of state who or which in the opinion of the President—

(i) represents the persons or class of persons concerned contemplated in section 1;

(ii) is concerned with the administration of the law in question; or

(iii) is otherwise competent to advise the President.

Tabling of proclamations

3. (1) A copy of any proclamation in terms of section 1 shall, in the case of a proclamation dealing with a matter which falls within a functional area of concurrent national and provincial legislative competence, be tabled in the National Council of Provinces or, in the case of a proclamation dealing with a matter which falls outside any such functional area, be tabled in the National Assembly within 14 days after the issue thereof, if Parliament is then in ordinary session, or, if Parliament is not then in ordinary session, within 14 days after the commencement of its next ordinary session.

(2) A proclamation contemplated in subsection (1) or any provision thereof may be annulled by the National Council of Provinces or by the National Assembly, as the case may be, by resolution passed during the same session during which it was tabled, and if the proclamation or provision thereof has been so annulled, that proclamation or provision shall cease to be of force and effect from the date on which it was annulled by the National Council of Provinces or the National Assembly, as the case may be.

(3) The provisions of subsection (2) shall not derogate from the validity of anything done in terms of that proclamation or any provision thereof before the date upon which it so ceased to be of force and effect, or from any right, privilege, obligation, or liability acquired, accrued or incurred at the said date in terms of such a proclamation or provision thereof.

Duration of Act, and saving

4. (1) Any proclamation issued under section 1 shall continue to be of force until it is amended, withdrawn, or partially withdrawn by the President by proclamation in the Gazette: Provided that any proclamation with regard to the suspension of or exemption from the provisions of an Act of Parliament, and of any other law relating to any matter concerned with labour affairs and relations, conditions of employment, and workplace safety, shall only be amended, withdrawn, or partially withdrawn on the advice of a standing committee of Parliament to which the amendment or withdrawal in question has been referred.

(2) Any amendment, withdrawal, or partial withdrawal of a proclamation referred to in subsection (1) shall not come into operation before the expiry of 30 days after the issue thereof, if Parliament is then in ordinary session, or, if Parliament is not then in ordinary session, before the expiry of 30 days after the commencement of its next ordinary session.

(3) The provisions of section 3 (1) and (2) shall mutatis mutandis apply in respect of any proclamation issued under subsection (1) of this section.

Short title

5. This Act shall be called the Promotion of Economic Activity Act, 2022.

Schedule

Matters with regard to—

(a) the registration, recognition, and licensing of businesses, undertakings, industries, sectors, trades, professions, and occupations; of child-care facilities; of educational institutions; of health services; or of firefighting services;

(b) the employment, subdivision, lease, sale, or use of land, premises, and buildings;

(c) the transfer, lease, sale, or auction of state land to private persons; or of radio frequency spectrum;

(d) health and safety restrictions or requirements with which persons, premises, and buildings must comply;

(e) the prohibition or regulation of, or restriction on, the erection of dwellings, buildings, and other structures, including building codes and standards;

(f) the conveyance of persons and goods;

(g) restrictions or requirements on the days on which and the times when business may be done;

(h) labour affairs and relations, conditions of employment, and workplace safety;

(i) environmental standards, restrictions or requirements;

(j) road traffic and transportation standards, restrictions or requirements;

(k) consumer protection restrictions or requirements;

(l) credit, usury, and loaning restrictions or requirements;

(m) monopolies that are directly or indirectly supported by the state;

(n) media, broadcasting, and digital services conditions, restrictions or requirements;

(o) tourism, hospitality, and recreational affairs;

(p) the monetary jurisdiction of the small claims courts;

(q) the administration or enforcement of taxation;

(r) vendor, seller, and street trading restrictions or requirements; and

(s) any other matter reasonably relating to any item or items contained in this schedule.

MEMORANDUM ON THE OBJECTS OF THE PROMOTION OF ECONOMIC ACTIVITY BILL, 2022

1. OBJECTS OF THE BILL

The purpose of the Bill is to empower the President to suspend provisions of laws or conditions, limitations or obligations thereunder or to grant exemption therefrom, if he or she is satisfied that circumstances exist under which the application of or compliance with those laws, conditions, limitations or obligations unduly impedes economic development or competition in the economic field, or the creation of job opportunities; and to provide for incidental matters.

2. CONTENTS OF THE BILL

Clause 1 empowers the President, by proclamation, to suspend provisions of laws or conditions, limitations or obligations thereunder or to grant exemption therefrom, if he or she is satisfied that circumstances exist under which the application of or compliance with those laws, conditions, limitations or obligations unduly impedes economic development or competition in the economic field, or the creation of job opportunities.

Clause 2 provides the President with a discretion to consult before issuing a proclamation.

Clause 3 provides for the tabling of the President's proclamations in Parliament, and empowers Parliament to annul any such proclamation.

Clause 4 provides for the duration of the Act until withdrawn or amended.

Clause 5 provides for the short title of the Bill.

3. CONSTITUTIONAL IMPLICATIONS

The Bill allows the President to suspend provisions of laws or conditions, limitations, or obligations thereunder or to grant exemption therefrom, if he or she is satisfied that circumstances exist under which the application of or compliance with those laws, conditions, limitations, or obligations unduly impedes economic development or competition in the economic field, or the creation of job opportunities; and to provide for incidental matters. This does not conflict with the constitutional separation of powers as practiced in South Africa. Parliament retains the power to annul any proclamation made by the President under clause 3.

4. PARLIAMENTARY PROCEDURE

It is proposed that the Bill be dealt with in terms of the procedure established by section 76 of the Constitution.

LAWS AFFECTING SMALL BUSINESS

FINANCE

SYNOPSIS

Problems

All businesses need money to start up, trade, or expand. Existing businesses generally obtain the necessary finance from their own trading income, but new businesses, and established businesses that want to expand, often have to borrow money.

All lenders need to charge sufficient interest to cover the costs of assessing the loan application and monitoring the loan repayments, and to include a premium for the risk as well as a profit margin. But the National Credit Act prohibits a lender in a credit agreement entered into for the development of a small business from recovering more interest than a specified percentage. This statutory interest-rate ceiling, rather than assisting the poor and small businesses, has instead had the effect of drying up loan finance for these groups. There was an exemption under the Usury Act, 1968 which allowed lenders to charge an economic rate of interest on loans up to R10,000, but this fell away with the repeal of that Act by the National Credit Act.

Lenders frequently need to borrow money themselves to lend to their borrowers. However, the Banks Act states that only public companies that are registered as banks may accept deposits from the public as a regular feature of business. There are exemptions, but only for stokvels and credit unions that accept deposits from, and provide funds to, their members.

Small businesses often need to buy vehicles and other expensive equipment. Banks and other credit-grantors provide the necessary credit to small businesses, which then pay the purchase price with interest to the credit-grantor in instalments. If the equipment breaks down during this repayment period and the small business cannot afford the cost of repair, the business is often forced to cease operations, and the credit-grantor is unable to recover the money owing to it. The credit-grantor may be willing to keep the small business in operation by paying the repair costs itself, but the Credit Agreements Act prohibits a credit-grantor from recovering the cost of repair or interest on it as part of the transaction for the purchase of the vehicle. It does not pay a general bank to enter into a separate loan agreement just for repair costs. Anomalously, the National Credit Act allows lenders to recover the cost of insurance for repair costs. However, it prohibits the recovery by lenders of repair costs themselves.

Recommendations

- Repeal the National Credit Act's limits on interest rates.
- If the National Credit Act's credit ceilings are not repealed, the Act should be amended to allow for an exemption for loans up to R175,000.
- If the proposed amendment of the Act and exemption are introduced, the exemption should be adjusted annually for inflation.
- Financial intermediaries that borrow money from the public to lend to small businesses should be exempted from having to register as banks under the Banks Act.
- If the National Credit Act's credit restrictions are not repealed, the Act should be amended so that grantors of credit to purchase movables can recover the costs of repairing the movables plus interest from the credit-receiver.

THE NEED FOR FINANCE

All businesses need money. Aspiring entrepreneurs need funds to start up in business. Some established businesses need capital to expand. And every business requires money to buy stock, spares or raw materials, and to pay wages

and other overheads.

Business undertakings usually pay overheads from their own trading income. However, if a firm's income fluctuates, or the firm is faced with sudden high expenses or bad debts, or wants to move into new fields of activity, the business may temporarily need to find finance from an outside source.

THE NEED FOR START-UP FINANCE

Some people have money of their own to finance a new business venture, such as savings, severance pay from previous employment, or an inheritance. But it is unusual for young people to have personal resources of this kind.

A few prospective entrepreneurs are fortunate enough to receive start-up finance in the form of a donation from a family member or a close friend. And sometimes an entrepreneur can find an investor who is prepared to risk his or her funds in a new venture in return for a share of the profits if the business should succeed. However, investment finance such as this is usually not forthcoming unless the investor believes that the potential for success is high; investors do not always share the small entrepreneur's confident expectation that the pursuit will be profitable. Moreover, an investor expects a higher return than a lender because of the risk that the business will fail and there will be no profits to distribute.

In practice, many small businesses have to seek finance in the form of a loan. Loan finance is also the source of finance which is most affected by legislation.

OBTAINING LOAN FINANCE

The small entrepreneur or entrepreneur-to-be can approach a number of different persons or institutions for a loan. He or she may try family members or close friends first. If they are either unable or unwilling to lend the required sum, the prospective borrower might resort to a local moneylender or mashonisa. Mashonisas are factory-floor financiers, and they can be found in many workplaces in South Africa. Most of their loans are to fellow employees, and the amounts involved are often quite small, with short repayment periods. For example, R2,000 could be advanced on condition that R2,200 be repaid one month later. The interest is thus ten percent for the month, or 120 percent per year.

Besides these workplace lenders, there are other small credit agencies. Unlike mashonisas, who almost always know their borrowers, these lending agencies usually offer loans to strangers, and they therefore require some form of security. If the borrower has no assets to offer, he or she may be asked to hand over his/her electronic banking (ATM) card, together with the code (PIN) number, so that the lender has first access to the borrower's monthly salary.

A prospective borrower can also obtain finance from a pawnbroker, who lends money against a pledge of the borrower's movable property.

These informal moneylenders are often disparaged as "loan sharks" who exploit the needy and gullible. Alternatively, a prospective borrower could raise finance from a stokvel or similar savings club. To obtain money from such a club, the borrower must be a member, and must contribute funds to the club's common pool. Usually, members have to wait until it is their turn to receive a lump sum from the common fund of the society.

There are also other microlending institutions which have been established as non-governmental organisations (NGOs) specifically to lend to the developing business sector.

Besides all these more or less informal sources of loan finance, a borrower can approach an established bank for a loan.

The size of the loan and the creditworthiness of the borrower influences whether, and from whom, a potential borrower will be granted a loan. Mashonisas, credit agencies, pawnshops, and microlending NGOs are organised to lend small amounts to start-up businesses and other small borrowers. Banks, on the other hand, are equipped to make large loans to people with sophisticated business plans and property to pledge to the banks as security.

INTEREST ON SMALL OR RISKY LOANS

A lender must assess whether the loan applicant is a good risk. Once a loan is granted, it must be monitored and administered.

The time and work involved in assessing an application for a small loan can be the same as that required to assess a loan for a large amount. Indeed, the cost could be even greater if the loan applicant has no security or proven credit record or is otherwise a risky prospect.

Moreover, the time spent by the lender in monitoring the debtor's repayments can be the same for small loans as for large loans, and may be greater if the borrower is a notable credit risk. Clearly, too, it is far more costly to administer ten loans of R30,000 each than one loan of R300,000.

Also, if the lender believes that the borrower may be an unsafe credit risk, the lender may wish to compensate for the greater possibility that the loan may not be repaid by charging the borrower a higher rate of interest than he would charge to a more reliable borrower.

This means that in order for the lending institution to protect itself against risk, cover its overheads and make a profit, the amount of interest it charges on a small or risky loan would have to be disproportionately bigger in relation to the size of the loan than the interest on a larger loan.

NATIONAL CREDIT ACT

The National Credit Act, 2005 places limits on the amount of interest that lenders may charge to their borrowers.

A lender is prohibited from charging a small-business borrower interest at a rate exceeding the Reserve Bank's ruling repo (repurchase) rate (which for a time had been 6.75 percent but has since July 2019 been reduced to address economic conditions and the coronavirus crisis to 3.5 percent to date) plus a prescribed interest rate of, currently, 27 percent per annum (totalling 30.5 percent).

Any lender who contravenes this prohibition is guilty of an offence and liable on conviction to a fine of up to R40,000, or one year's imprisonment, or both.

The Reserve Bank is exempt from these lending restrictions. The Act does not apply to loans to companies and partnerships with an asset value or annual turnover of R1 million or more, or to loans with a principal debt of R250,000 or more to smaller companies and partnerships.

EFFECT OF NATIONAL CREDIT ACT ON LOAN FINANCING OF SMALL BUSINESSES

The effect of the Act is that where a loan falls below a certain amount, the lending institution cannot recover all its overheads (i.e., its administration costs for assessing the loan application and monitoring repayments) plus some profit. Since it cannot compensate for higher costs and higher risk by increasing its interest rates, it simply refuses to make loans to higher-risk applicants, and at the same time establishes high minimum-loan amounts to discourage loan applications from small borrowers.

The result has been that the grant of small or risky loans at legal rates of interest to small businesses has been constrained. Banks usually do not grant loans of amounts less than about R50,000. The Small Enterprise Finance Agency lends out bulk wholesale capital to intermediaries which grant loans to small businesses of amounts which could be as small as R500.

While the oft-stated intention of interest-ceiling legislation is to help those classes of debtors which include the poor and very small businesses, its effect is to exclude them from the market. Far from solving their credit problems, interest-rate ceilings intensify them by diverting credit to better classes of borrower, because lenders cannot assume the high cost of investigation, collection and probable default inherent in lending to the more modest or risky borrower. The main beneficiaries of interest-ceiling laws are therefore the wealthy, who get more of the available credit, at lower rates of interest, than they would in the absence of interest-rate ceilings.

Hardest-hit by interest-ceiling laws are high-risk innovators who need money to promote new products. While their applications for loans are turned down, established businesses with existing capital find it easy to borrow more to expand their existing product lines. Interest-ceiling laws thus protect existing businesses and discriminate against new businesses and entrepreneurship.

By limiting the amount of interest that banks and other financial intermediaries are permitted to charge to their borrowers, the National Credit Act in effect also reduces the rate of interest that a financial institution can pay to its depositors. The result is that savings are discouraged.

Finally, the National Credit Act is widely ignored. It is known that many lenders do not observe its limits on interest rates. Nor is the statute effectively enforced. The widespread disobedience to its provisions breeds disrespect for law in general.

RECOMMENDATION 1

Repeal the National Credit Act's limits on interest rates.

If the National Credit Act's ceilings on interest rates are repealed, lenders will once again be free to charge a market rate of interest that will enable them to cover the costs and risks of lending small amounts to risky borrowers. In particular, it will become economically viable for them to grant loans to small businesses.

This in turn will attract lenders back to the small-loan market. Greater competition amongst lenders will benefit borrowers, who will be able to choose the lending institution that charges the lowest interest rate.

Considerations *(regarding recommendation 1)*

This is a controversial recommendation. Many people believe that it is necessary to fix maximum interest rates to protect the poor and apparently gullible from unscrupulous moneylenders who take advantage of their desperate situation. These people maintain that banks must simply start granting loans to small businesses and poor people.

While such sentiments may be worthy, they overlook the harmful economic effects of interest-ceiling legislation on the very classes of people that they are meant to protect. The National Credit Act fixes a maximum price of credit, and like all price-fixing laws, it has the effect of drying up the supply of the product the price of which has been fixed. While it may seem counter-intuitive, legislation that fixes a maximum rate of interest on loans does not help the poor to borrow at cheaper rates of interest, but instead prevents lending to the poor. Small businesses and other small and risky borrowers will benefit from the repeal of the National Credit Act's limits on interest rates. The small borrower is not so much concerned with the interest rate as with the lack of finance, and would in most cases agree to pay higher interest if only he or she can obtain capital.

If the interest-rate ceiling is repealed, the common law of usury will apply. The common law holds that when a

creditor sues his debtor, the court will reduce the rate of interest if the debtor can show that the transaction is tainted with oppression or extortion or something akin to fraud, or that there has been unfair dealing, or that undue advantage has been taken of youth or inexperience.

EXEMPTION UNDER PREVIOUS ACT FOR SMALL LOANS

The Usury Act empowered the Minister to exempt any category of loan from the provisions of that Act.

In 2005, the Minister had issued a notice exempting from the provisions of the Act any moneylending transaction in which the loan amount did not exceed R10,000 if the borrower had to repay the loan within 36 months after the date on which the loan amount was paid to him or her. The lender, before agreeing to the loan, had to give the prospective borrower a written statement of the amount of the loan and the amount of interest and other costs which the borrower would have to pay.

The introduction of that exemption had meant that microlending NGOs, mashonisas and credit agencies of any kind could lend up to R10,000 to small businesses at economic rates of interest within the law. This led to an increase in the granting of loans to small businesses. But the Usury Act was repealed in 2006 by the National Credit Act, and the exemption itself lapsed with the commencement in 2007 of the National Credit Act's provisions governing interest rates.

RECOMMENDATION 2

If the National Credit Act's credit ceilings are not repealed, the Act should be amended to allow for an exemption for loans up to R175,000.

Exempting loans up to R175,000 will enable all providers of loan finance, microlenders of different kinds as well as large banks, to grant loans economically to small businesses.

The effect of such an exemption would be that a lender could then lawfully charge a borrower interest on small loans up to R175,000 at a rate which would be sufficient to cover the lender's costs and risks.

RECOMMENDATION 3

If the proposed amendment of the Act and exemption are introduced,the exemption should be adjusted annually for inflation.

The proposed exemption for loans up to R175,000 should be increased each year to compensate for the continued decline in the value of money.

Considerations *(regarding recommendations 2 and 3)*

It could be argued that it is undesirable to extend the present exemption to larger loans on the ground that it is unacceptable to allow loan sharks to exploit borrowers of larger amounts.

It must be stressed, however, that the interest-rate ceilings did not enable the poor and small businesses to borrow at lower rates of interest. Instead, they have caused loans for these intended beneficiaries of the legislation to dry up altogether. This credit gap for loan amounts below the amounts at which banks and other finance providers can lend economically will not be bridged except by an exemption.

SAVERS AND OTHER LENDERS OF LOAN FINANCE

On the other side of the loan finance equation are savers and other lenders. Many members of the public are lenders without even realising it: When they deposit their savings in a bank, what they are doing in fact is lending their money to the bank, which agrees to repay it with interest.

According to the terms of the Banks Act, any person or business that accepts deposits from the general public as a regular feature of business commits a criminal offence unless registered as a bank. Only a public company can register as a bank. The Prudential Authority established by the Financial Sector Regulation Act, 2017 must be satisfied that every executive officer of the bank is competent in finance and honest, that the company will be able to establish itself successfully as a bank, and that its business will be conducted prudently and with the necessary financial means.

A bank must manage its affairs in such a way that its share capital and reserve funds never fall below R250 million or ten percent of its quarterly average assets and its risk exposures weighted according to the degree of risk, whichever is the greater. It must also keep a special reserve account and deposit account with the Reserve Bank, and maintain a minimum balance in those accounts.

The Banks Act allows the banking authorities to grant exemptions from the registration requirement. The authorities have granted exemptions to stokvels (which, if they hold members' contributions exceeding R100,000, must be members of an approved self-regulatory body), and to credit unions or savings and credit cooperatives which are subject to the Cooperatives Act, 2005, and supervised by the Cooperative Banks Development Agency established by the Cooperative Banks Act, 2007. A stokvel, or a credit union or savings and credit cooperative, may only raise money from its members.

These exemptions are very narrow. They do not benefit other credit agencies and microlending NGOs which may want to borrow money from the public to use for making loans to small business.

RECOMMENDATION 4

Financial intermediaries that borrow money from the public to lend to small businesses should be exempted from having to register as banks under the Banks Act.

Lending institutions that take in deposits from the public to finance their own lending operations to small businesses should be granted an exemption from the Banks Act's requirement that they be registered as banks. This will facilitate the provision of funds for small business development.

Considerations *(regarding recommendation 4)*

Investors depositing money with moneylenders would probably be at higher risk than if they deposited their funds with registered banks. In return they would expect a higher interest rate than they receive from the banks. It would be necessary to make clear to the general public that deposits with exempted institutions would not enjoy the protection of the Banks Act. A possibility would be for such exempted deposit-takers to state in all publicity material and in a prominent place at their business premises that they are not registered under the Banks Act. Depositors are most at risk when they are under the illusion that repayment of their capital is guaranteed – government surveillance can reduce risk but not eliminate it entirely.

FINANCING THE COST OF REPAIRING VEHICLES AND EQUIPMENT BOUGHT ON CREDIT

Besides obtaining loans, small businesses (for example, taxi operators) often buy vehicles and other capital

equipment on credit. These purchases are financed by a bank, which pays the full purchase price to the dealer and acquires ownership of the goods. The purchaser has immediate use of the equipment, but acquires ownership only after refunding in instalments to the bank the full purchase price plus interest. While the purchaser is still paying, the bank has an interest in the equipment. If the purchaser defaults, the bank usually has the right to repossess the equipment and resell it to a third party.

Equipment that is used regularly in a small business often requires major maintenance and repair work. A taxi or other vehicle, for instance, can be very expensive to maintain. A small business purchasing a vehicle on credit frequently cannot afford to pay repair costs on top of the credit instalments and interest due to the bank. The vehicle then falls into disrepair; the taxi operator starts losing income and ceases to pay his or her instalments to the bank.

Taxis and other vehicles that have not been serviced and repaired are worth less than vehicles that have been properly maintained. The bank is prejudiced if it repossesses a neglected vehicle, because the resale price of the vehicle is lower.

A small-business-person whose equipment requires major repairs and who does not have the money to pay for them sometimes asks the bank to advance the money to pay the repair costs. But the bank is discouraged by legislation from helping in this way.

CREDIT AGREEMENTS ACT PROHIBITS SELLERS ON CREDIT FROM RECOVERING REPAIR COSTS

The Credit Agreements Act prohibits a bank, or other credit-grantor which has financed a sale of property, from recovering from the purchaser costs disbursed for the repair and maintenance of the property.

The bank is not prevented from lending its purchaser the money to repair the property. Such a loan agreement would be a separate transaction from the existing credit transaction for purchase of the goods. But it is uneconomic for the bank to enter into a separate agreement to lend money for repairs, especially for repairs to movable property: There are administrative costs in relation to assessing and granting the loan application, and controlling and monitoring repayment of the loan. It does not usually pay a bank to enter into such a transaction for an amount less than about R30,000.

The practical effect of this prohibition is that a small-business-owner who is purchasing a vehicle or other equipment on credit and who does not have the necessary funds to pay for the repair and servicing of the vehicle is often unable to carry on business or to continue paying instalments to the bank.

The bank is unable to recover the amount outstanding by reselling the vehicle without itself paying the cost of repair, and the price realised by the bank on reselling the vehicle to a third party frequently does not cover these repair costs.

RECOMMENDATION 5

If the National Credit Act's credit restrictions are not repealed, the Act should be amended so that grantors of credit to purchase property, and movables in particular, can recover the costs of repairing the property plus interest from the credit-receiver.

It would assist a purchaser of movable property on credit if the bank which granted the credit could disburse the cost of necessary repairs of the movables. Credit-grantors should accordingly be permitted to grant and recover, as part of the credit transaction relating to the sale of the movables, the cost of repair and maintenance of the goods.

The most likely kinds of equipment which credit-grantors would agree to pay to repair are vehicles of all kinds,

including vehicles used for the conveyance of passengers or freight or for earth-moving purposes, electronic equipment such as computers or computer-network server units, and television sets. Some general banks specialise in the financing of the purchase of computers and similar electronic goods.

If banks and other credit-grantors are permitted to recover repair costs plus interest, they may find that it is in their interest, as well as the interest of the purchaser, to allow the purchaser on credit to pay the amount owing over a longer period than at present. Purchasers of movables on credit often experience difficulty in paying the high monthly instalments. On minibus taxis, for example, banks are often asked to agree to lower instalments payable over longer periods.

Small businesses are using vehicles for longer periods than before. The average life of a vehicle on the road in South Africa is now longer than ten years. This means that vehicles require more maintenance and repairs over their lifetime than was the case when they were replaced more frequently.

Considerations *(regarding recommendation 5)*

It could be argued that allowing an entrepreneur to obtain repair costs from his or her bank and repay them with interest will drive the small business even deeper into debt and make it even more difficult to repay the purchase price still owing on the equipment.

But this concern is outweighed by the very real possibility that, if the business owner is unable to obtain the money to pay for repairs, the vehicle or equipment will fall into disuse and in many cases the small business will cease to operate altogether.

It is anomalous that the Credit Agreements Act does not permit costs of the repair of vehicles, equipment or other movable property to be recovered by credit-providers, but allows credit-providers to recover the cost of insurance for the repair or replacement of any such movable property.

Vehicles and other equipment can often cost more than a house. The cost of insuring them can be very high. Small businesses should have the option to borrow repair costs from his or her bank.

SELECT SOURCES

FREE MARKET FOUNDATION

Statutes and statutory instruments

South African Reserve Bank Act 90 of 1989 s 10A (maintenance by banks of minimum reserve balances in accounts with Bank);
Banks Act 94 of 1990—
s 1(1) svv "the business of a bank" (excludes activity designated by and performed i.a.w. conditions in Gazette notice), s 2 (application of Act), s 11(1) (registration pre-requisite for conducting business of bank); s 70 (minimum share capital and unimpaired reserve funds);
Govt Notice R1003 of 5 Oct 2001 (minimum capital and reserve funds to be maintained by banks);
Govt Notice 620 of 15 Aug 2014 (designation of activity not falling within "the business of a bank": group of persons with common bond);
Adjustment of Fines Act 101 of 1991 s 1(1)(a) and (2) (calculating maximum fine): read with
Magistrates' Courts Act 32 of 1944 s 92(1) (jurisdiction in punishments); and
Govt Notice 217 of 27 Mar 2014 (monetary jurisdiction);
National Small Enterprise Act 102 of 1996;
National Credit Act 34 of 2005—
Assented to 10 Mar 2006: Govt Notice 230 of 15 Mar 2006 (Gazette 28619);
s 4 (application of Act), s 7 (threshold determination and industry tiers), s 9 (categories of credit agreements), s 40 (registration of credit providers), s 42 (thresholds applicable to credit providers), s 89 (unlawful credit agreements), s 90 (unlawful provisions of credit agreement), s 100(1)(d) (prohibited charges), s 101(1)(a) (cost of credit), s 102(1)(b) (fees or charges: cost of extended warranty), s 105 (maximum rates of interest), s 106 (credit insurance), s 131 (repossession of goods), s 161 (penalties), s 172(3) and (4)(a) (repeal of laws, transitional arrangements), Sched 3 (transitional provisions) item 7(1) (preservation of instruments: Usury Act s 15A exemption registrations);
Proc 22 of 2006 (Gazette 28824 of 11 May): specific provisions inter alia of National Credit Act commencing-
On 1 Jun 2006:
s 172(4)(a) (repeal of Usury Act);
s 172(3) (transitional arrangements are in Sched 3);
Sched 3 item 7(1) (Usury Act s 15A exemption registrations are preserved for period determined by regulation under National Credit Act);
On 1 Jun 2007: Ch 5 (consumer credit agreements) incl s 105 (maximum rates of interest);
Govt Notice R489 of 31 May 2006 (regulations under National Credit Act): reg 73(1) (Usury Act s 15A exemption registrations remain valid until the coming into effect of National Credit Act's s 105 (maximum rates of interest);
Co-operative Banks Act 40 of 2007—
s 14(1)(g) (additional banking services prescribed by Minister); and
Govt Notice R712 of 1 Jul 2009 Part 3 (regulations: banking services by cooperative bank);
Financial Sector Regulation Act 9 of 2017—
s 1(1) (definitions) svv "Prudential Authority", "financial sector law" par (b) read with Sched 1 (Banks Act, 1990); s 111(1)(b) (licence requirement i.r.o. financial-product providers); s 290 (amendments) read with Sched 4 (Banks Act,1990: item 1(a), (d), (f) and (h); item 2; item 15)

Caselaw

Taylor v Hollard (18851888) 2 SAR 78 (Supreme Court of the Transvaal (South African Republic)) [1886] (per Kotze CJ, Brand and Burgers JJ concurring):
(The Transvaal courts will not countenance usury, in the sense of excessive and exorbitant interest, because to do so would be contrary to good morals, the interest of citizens, and the policy of the Roman-Dutch common law;
(There is a similar practice in the Court of Chancery in England in the case of unconscionable bargains, but which Courts of Equity there apply only with reference to the debt obligations of minors and other young persons: In one

case the person relieved of his debt was 26 years old and a member of parliament when he entered into the transaction;
(In contrast, the Transvaal courts will enforce the rule against usury irrespective of the age of the debtor);
R v Sutherland [1961] 3 All SA 50 (A) at 54;
Msunduzi Municipality v MEC for Housing and ano [2004] 2 All SA 11 (SCA) par [21];
S A Bank of Athens Ltd v Van Zyl [2006] 1 All SA 118 (SCA);
AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and ano 2006 (11) BCLR 1255 (CC) pars [58]–[60];
National Credit Regulator v Standard Bank of South Africa Ltd [2013] 1 All SA 335 (SCA) pars [11], [12];
Paulsen and ano v Slip Knot Investments 777 (Pty) Ltd [2015] 5 BCLR 509 (CC);
Edwards v FirstRand Bank Ltd t/a Wesbank [2016] 4 All SA 692 (SCA);
National Credit Regulator v Lewis Stores (Pty) Ltd and ano [2020] 2 All SA 31 (SCA) pars [11]–[22]

Legal commentaries

Guide to the National Credit Act (J W Scholtz, J M Otto, E van Zyl, C M van Heerden), LexisNexis (as updated to Jul 2020), pts 10.2(a) and 10.3.(b)) (Items recoverable by a credit provider);
Tydskrif vir Hedendaagse Romeins-Hollandse Reg 2010 pp 569–586, H Coetzee, “Voluntary surrender, repossession and reinstatement i.t.o. National Credit Act 34 of 2005”

Financial resources

The Small, Medium and Micro Enterprise Sector of South Africa, Jan 2016, Bureau for Economic Research, Stellenbosch University (research note commissioned by Small Enterprise Development Agency);
South African Business Funding Directory 2016/2017, Nov 2016, compiled by Ukwanda Growth Partners (author Lindo Sibisi);
Trading Economics, “South Africa: Interest rate 1998–2020” https://tradingeconomics.com/south-africa/interest-rate

Media reports

Fin24 20 Jun 2010, “Crisis in car insurance” (A van Zyl);
Finance and Banking Alert, 9 Mar 2016, “New Limits for Consumer Credit Charges”, Cliffe Dekker Hofmeyr (B King, R Ismail);
Independent Online, 9 Apr 2016, Personal Finance, “Microlenders fume about lower rates” (Angelique Arde);
BusinessTech 13 Apr 2017, “The cost of owning a car in South Africa is about to get a whole lot more expensive” (staff writer);
Business Day 20 Jul 2017, “Reserve Bank surprises by cutting interest rates” (S Menon, T Foyn);
TimesLIVE SEBENZA 18 Oct 2017, “Need funding for your small business? Here’s what you need to know” (GCIS Vuk’uzenzele);
SowetanLIVE 7 Dec 2017, “Consumers borrow from mashonisa at the risk of losing life or limb” (staff reporter)

LAWS AFFECTING SMALL BUSINESS

HEALTH

SYNOPSIS

Problems

Health laws are made with the praiseworthy intention of protecting the public. Frequently however, the benefits of the legislation are remote and unproven, and the costs to businesses and society are unacceptably high. Small businesses in particular are hampered by inappropriate health laws governing restaurants, foodstuffs, liquor, smoking, crèches and childminding, boarding houses and small hotels, and abattoirs.

These laws act as barriers to entry, preventing many people from starting a business and creating employment opportunities. They also limit consumer choice. Ironically, some health laws actually exacerbate South Africa's worst health problem, which is malnutrition caused by protein deficiency, by raising the costs of meat and dairy products and restricting their availability to the poor.

Recommendations

The following recommendations propose the repeal of a number of health laws. If repeal in toto is politically unattainable, they should be substantially relaxed.

There is a widespread misconception that in the absence of legislation, the consumer is unprotected. This is not so. If these laws are repealed, the common law will still apply. The common law provides adequate, and often superior, protection against people who endanger public health. One reason health regulations were considered necessary in the past was that the laws of civil and criminal procedure make the courts inaccessible to ordinary people, especially the poor. (See the entry on "Justice" in this series for recommendations for reform of these procedures.)

RESTAURANTS, TAKEAWAYS, AND CATERERS

- Health legislation regulating the premises and equipment of restaurants, cafes, and caterers should be repealed, or limited to what is regarded as strictly necessary for health and hygiene.
- The primary responsibility of environmental health officers should not be to enforce legislation, but to provide guidance, education and training.

FOODSTUFFS

- Foodstuffs laws criminalising the sale of unsound food should be repealed, and reliance should be placed solely on the laws requiring food manufacturers to have procedures for analysing the hazards at critical control points in the manufacturing process, and to have steps in place to avoid those hazards arising.

LIQUOR

- Restrictions on the times when bottlestores can sell liquor should be removed.
- The provincial Liquor Acts' provisions which treat liquor as a special commodity that must not be offered for sale alongside other goods should be repealed.
- The prohibition against making and selling skokiaan and similar liquor products should be repealed.

SMOKING

- The law prohibiting smoking in so-called “public” places and in workplaces should be repealed. In all privately-owned property, irrespective of whether the public has access to it, the right to smoke should be determined by voluntary agreement between proprietors, their employees, and their customers.
- The prohibition against advertising tobacco products should be repealed.

CHILD CARE

- The provision of the Children’s Act which criminalises unregistered child-care facilities should be repealed.
- Instead of relying on compulsory registration to ascertain where places of partial care in their jurisdiction are situated, the authorities should attract childminders by offering them expert assistance, guidance, education and training.
- If there are to be regulations for partial-care facilities, they should contain only the minimum necessary for the health and well-being of the children in care.

BOARDING HOUSES AND SMALL HOTELS

- All special bylaws for accommodation establishments should be repealed.

OCCUPATIONAL AND BUILDING HEALTH LAWS

- Occupational and building health laws should be replaced by the single, but clear and effective, common-law requirement that working conditions should be healthy. To this end there should be a systematic critical review of all such measures.

ABATTOIRS

- The Meat Safety Act should be repealed.
- Informal slaughter should be legalised.
- If there has to be a grading system, an abattoir should have the right to process any number of animals in a day in batches up to the maximum throughput of that grade of abattoir.
- Local authorities should establish communal slaughtering places at which small-scale slaughterers and others can slaughter their animals.
- A poultry abattoir should not be required to have a refrigeration facility if the meat and animal products will be disposed of at the abattoir directly to the final consumer.

RESTAURANTS, TAKEAWAYS, AND CATERERS

RECOMMENDATION 1

Health legislation regulating the premises and equipment of restaurants, cafes, and caterers should be repealed, or limited to what is regarded as strictly necessary for health and hygiene.

The business of supplying meals for sale is one of the most important small business activities in South Africa, employing hundreds of thousands of people. But inappropriate health laws increase the cost of entering and carrying on business in this sector, as well as the cost to consumers of the food it supplies.

Restaurants, takeaways, and catering businesses are governed by national regulations. These measures are intended to protect customers against falling ill from unsound food and dirty utensils. However, they cannot guarantee either cleanliness or good food. The incidence of food poisoning is in fact extremely rare. And to the extent that there is a risk, the health regulations tend to aggravate rather than prevent it. Under “natural” (i.e., unpreserved and unrefrigerated) conditions, contaminated food is immediately identifiable by sight, smell, or taste. This prevents us from eating enough of it to do us any harm. The problem of food poisoning usually arises when food is refrigerated in compliance with health regulations. Refrigeration does not prevent the growth of harmful bacteria but does tend to prevent the food from rotting and thereby alerting us to the fact that it is unsafe to eat.

Regulations stipulate that the interior walls of premises where food is prepared must be made of rust-free, non-absorbent, dustproof, and water-resistant material. The minimum dimensions of a window are specified. Food premises must have a specified number of latrines, urinal stalls, and hand washbasins.

The person in charge of food premises must ensure that the premises are kept free of any items that do not form an integral part of the food handling operation and that have a negative effect on the general hygiene of the premises. The person in charge of food premises must obtain from the municipality a certificate of acceptability of the premises. A certificate will not be issued if a municipal inspector is not satisfied that the premises and facilities comply with the regulations.

The benefit to the public health of regulations such as these is probably slight. But the cost to a small cafe or restaurant of complying with these stringent and arbitrary measures can be crushing. As a result, they are routinely breached by both formal and informal establishments.

Officials, restaurant proprietors, and their customers all tend to focus on whether the regulations are being observed, rather than on whether the business is being run with proper and appropriate attention to hygiene. People are lulled into a false sense of security, believing that the existence of the regulations and the powers of the officials can protect them from harm. They cannot.

The only effective way to protect the public against eating contaminated food is to analyse every meal and dish before it is served. This is of course impossible. In practice, what happens is that health officers react to complaints. A restaurant customer might complain to the municipal health department after having a bad experience from eating an unwashed salad or infected shellfish or, more dramatically, after seeing a rat while en route to the restroom.

Very commonly another restaurateur complains, in the hope that his competitor will be put to expense by the authorities or even forced to close down. Responding to the complaint, an official arrives, inspects the premises, and identifies all the features of the restaurant and its equipment, personnel and methods that do not comply with the regulations. The restaurant owner is told to remedy these shortcomings within a stipulated period at the risk of being prosecuted. The food poisoning or rodent incursion was not avoided, and cannot be prevented from recurring in the future.

Analyses conducted by environmental health and medical officers in Cape Town and rural KwaZulu-Natal showed that foodstuffs supplied by street vendors are seldom if ever unsound. The reason is that food prepared by street vendors is cooked and sold almost immediately, thereby avoiding the contamination that can arise when food is kept for long periods. By contrast, food kept in refrigerators in established restaurants often becomes infected by harmful bacteria, as health inspectors employed by major hotel chains can verify.

A real environmental health risk in the preparation of food is infection from dirty hands. Regulations stipulate that restaurant owners must have proper hand-washing facilities, and that all personnel involved in handling food must wash their hands after visiting the toilet. Of all the health regulations, this one is the most essential. Unfortunately, it is also completely unenforceable.

Environmental health laws are ineffective to achieve their purpose and simply create unnecessary expense. Restaurants and other suppliers of meals do their best to provide good food for the public, not in deference to the regulations, but so that customers will patronise them again and make their business a success. A restaurant or cafe that made a habit of producing meals which made people ill would quickly gain a bad reputation and go out of business.

There has been some recognition in official quarters that existing regulations are unduly stringent, impose expensive burdens on small businesses that are often not justifiable from a health point of view, and are practically impossible for small food businesses in disadvantaged areas to observe.

Some regulations issued in recent years by the national Department of Health contain relatively reasonable and appropriate rules compared to previous measures. Also, enlightened environmental health officers adopted a more flexible policy in their enforcement of health regulations. This approach is to be commended.

However, strict regulations are still on the books.

A flexible approach in applying them can lead to selective, discretionary, and arbitrary enforcement. This creates public perception that the law is what the officials choose to enforce, rather than what the law states.

Also, regulations allow an owner of food premises to apply for a municipal exemption from any of the regulations (other than the need to hold a certificate of acceptability). The owner will be exempted if an inspector reports that the regulation concerned imposes unreasonable requirements on him and that exempting him will not lead to a health hazard.

It would be preferable if the existing stringent legislation was replaced by more reasonable and appropriate measures that can be uniformly and consistently applied.

Considerations

In defence of all these regulations, it is argued that they are necessary to achieve environments which will tend to have a reduced risk of infection. But no one can accurately say how much infected food would be served if these regulations didn’t exist.

All they really achieve is to create a false sense of security, without addressing the real health risks. It is interesting to note that where there is conspicuous non-compliance with regulations, the evidence suggests that the incidence of food contamination has in fact been lower.

Some people may baulk at having minimal regulations that can be universally applied, and may prefer to have higher standards in some communities. But this is an elitist view. There cannot be two differing health standards for different people or different areas.

RECOMMENDATION 2

The primary responsibility of environmental health officers should not be to enforce legislation, but to provide guidance, education and training.

Health officials should concentrate on offering guidance and information about hygienic methods to businesses that supply meals to the public. The real risks arise out of ignorance, and bad practices that cannot be policed through regulation.

The national Department of Health acknowledges in policy documents that environmental-health education remains the most effective means to improve hygiene practices among individual and communities.

Whether the walls are rust-free or water-resistant has little to do with whether food will be contaminated. In the complete absence of such measures, food can be, and usually is, completely safe and healthy.

Conversely, in the presence of the most sophisticated buildings and equipment, bad practices would render food unfit for consumption.

What determines the quality of food remains, as it has been throughout history, the way it is handled and whether it is consumed before it goes off: i.e., whether there are dangerous germs present on the hands of those who handle food from harvesting to consumption, on the containers in which it is transported, stored or prepared for consumption, or on the tools and utensils used in the process; and whether the food is consumed promptly or stored for long periods. To put it plainly and unambiguously, all that matters is how the food is handled. All laws and regulations regarding equipment, utensils, premises and the like are irrelevant.

Considerations

People draw comfort from the belief that inspectors are enforcing legislation. But officials would be more effective if they became more pro-active, i.e., if they gave businesses advice about hygienic food preparation instead of merely reacting to infractions of the regulations.

FOODSTUFFS

Besides rules for the control of the premises where food is prepared and the people who prepare it, there are also measures aimed specifically at the food itself. Despite the fact that their stated purpose is to protect health, the criterion which these laws apply is whether the food is going to be used in trade. If food will not be sold, the law disregards its threat to health.

For instance, businesses involved in the preparation of food must keep the core of perishable food at a temperature below 7°C. Food that is not prepared in the course of a business is exempt.

The Foodstuffs Act prohibits the sale of food that is contaminated, impure, or decayed, or which is harmful or injurious to human health. But food that is not sold does not have to comply.

Poultry-meat and fish delivered to premises used for a business involving the handling of food must be conveyed in a vehicle in which a temperature of 4°C or lower is maintained. These rules do not apply to premises not used for food businesses. Thus, a housewife who carries on a bed- and-breakfast business in her home must transport the food home in a vehicle which maintains a temperature not higher than four degrees if she is going to prepare the food for her paying guests, but does not have to use a cold vehicle if she is going to serve it to her family.

There are, of course, a number of reasons why health legislation stops short at policing the preparation of meals that

are not for sale. First, people would regard it as an intolerable intrusion if the regulations applied to the preparation of meals at home for domestic consumption.

Second, if there are insufficient inspectors to police restaurants, there are certainly not enough officials to inspect every private household.

Third, there is a perception that meals made in the home will be prepared with more attention to hygiene than meals prepared as a business in a restaurant for paying customers. The implication is that business people are indifferent or reckless about the quality of the goods that they supply.

All these laws which control only food in trade, and not all food, are not health laws at all. They are in fact buyer-protection laws, which should be administered by the Department of Trade and Industry, not by health departments. By contrast, building regulations and vehicle-safety standards are genuine safety laws which apply even if the building or vehicle is not used for business purposes.

RECOMMENDATION 3

Foodstuffs laws criminalising the sale of unsound food should be repealed and relianceshould be placed solely on the laws requiring food manufacturers to have procedures for analysing the hazards at critical control points in the manufacturing process and to have steps in place to avoid those hazards arising.

Foodstuffs legislation which prohibits, on pain of criminal fines and imprisonment, the sale of food which is contaminated, impure, or decayed, or which is harmful or injurious to human health, should be repealed.

The criminal penalties in the legislation are not essential, whether they concern the environment where meals are prepared or the soundness of the food itself. Any person who negligently or intentionally supplies harmful food is liable at common law in damages to anyone who suffers harm or injury from eating it, and the injured person can claim compensation from the wrongdoer.

A more practical approach to avoiding accidental contamination of food in the production process is to require the producers to apply only the Hazard Analysis and Critical Control Points system (the “HACCP” system, as it is known), which has been prescribed under the Foodstuffs Act. The risky stages in the process of food production can be identified, and safeguards put in place to avoid the risk at those stages.

Considerations

As with environmental health laws applying to food premises, people draw comfort from the existence of foodstuffs laws prohibiting the sale of unsound food on pain of criminal penalties. But the public health would be better served by focusing entirely on ensuring a careful production process.

This will also satisfy countries to which we may export food products. Importing countries are more interested in there being effective internal controls in food factories, rather than that the exporting country having a plethora of food legislation.

LIQUOR

Legislation controlling the supply of liquor imposes unnecessary and arbitrary restrictions on small businesses that sell liquor. The harmful effects of the licensing requirements in the liquor laws have been referred to in the entry on “Licensing” in this Laws Affecting Small Business series. Here we discuss the supposed health objectives of the liquor laws.

RECOMMENDATION 4

Restrictions on the times when bottlestores can sell liquor should be removed.

The current provincial Liquor Acts are less restrictive than previous liquor laws. But they still impose restrictions in the name of protecting the public health, which on examination cannot be justified on health grounds.

These Liquor Acts tend to be an amalgam of conflicting policies. On one hand, they permit the sale of liquor subject to conditions. On the other hand, and to accommodate various sentiments about the harmful effects of liquor, they impose various constraints which are capricious and illogical.

The Acts commonly decree that a liquor licensee may sell liquor either for consumption off the premises (as a liquor store for example), or for consumption on the premises (as a restaurant does), but not for both on- and off-consumption: A liquor store (bottlestore) can sell liquor to take away, but a restaurant can't. And you can drink in a restaurant, but not in a bottlestore.

Liquor stores are required to close earlier on Saturdays than on weekdays, and earlier on Sundays than on Saturdays. To justify these restrictions, it is said that the excessive consumption of alcohol is harmful, that control over its availability is a recognised and rational means of limiting consumption, and that it is therefore justifiable to restrict the times when liquor may be sold for off-consumption on Saturdays and especially on Sundays.

In practice, however, these restrictions are completely ineffective. Any person can buy as much liquor as he or she wants, on weekdays and on Saturdays and Sundays before liquor stores close, and drink it after the stores have closed. And people can drink liquor all Saturday night and Sunday at pubs and restaurants.

Limiting the times when liquor may be sold for off-consumption appeases the temperance movement but does not curb excessive drinking, and serves only to restrict business activity and to inconvenience the public.

Considerations

Some would argue that any restriction on the availability of alcohol curbs consumption to some extent. But in practice this is not so.

The provincial Liquor Acts commonly forbid a barman, restaurateur, or bottlestore owner from supplying liquor to a person who is intoxicated. The laws also declare that a person who drinks or is drunk in a public place is guilty of an offence, but do not proscribe private drinking or drunkenness. The real intention in both cases is to prevent offensive scenes in public, not to discourage alcohol consumption per se.

RECOMMENDATION 5

The Liquor Acts' provisions which treat liquor as a special commodity that must not be offered for sale alongside other goods should be repealed.

Another common restriction on liquor stores prohibits them from selling other goods on the premises, except soft drinks, cigarettes and the like. Presumably the intention is to check liquor consumption by preventing buyers of other goods from being exposed to the temptation and opportunity to buy liquor at the same time. But this stipulation is unlikely to reduce liquor consumption. It is also inconsistent in that the holder of a grocer's wine licence is allowed to sell wine alongside groceries and other general goods.

Perhaps those of us concerned about small business are placing too much store on the prohibitions. In reality, the liquor laws are widely ignored, and the authorities appear unable or unwilling to enforce them.

The government stated in its 1997 liquor-policy document that the criminalisation of liquor traders had ironically led to a regulatory breakdown so that the state licensed less than 10% of the estimated 250,000 liquor outlets. This meant that nine out of ten small businesses that sell liquor to the final consumer simply ignore the legislation. In 2014, it was reckoned that the majority of the estimated 200,000 shebeens still remain unlicensed and illegal. It has been observed that legal requirements are too stringent for the vast majority of traders whose small turnover and modest profits do not justify the direct and indirect costs of navigating a complicated formal system for licensing.

The rules that require liquor to be sold apart from other goods are ineffective in curbing drinking and should be repealed. Countries with strict rules on liquor sales such as the Scandinavian countries have more problems with drunkenness than do southern European nations where liquor is treated like other commodities and sold alongside them. The only rule in the Liquor Act that could be sustained on health grounds is the prohibition against supplying liquor to persons under 18 years of age.

Considerations

Some may contend that liquor is not an ordinary commodity and that it should therefore be subject to special rules. But these provisions are both arbitrary and ineffective, and their main effect is to restrict small business activity and limit the reasonable requirements of the public.

RECOMMENDATION 6

Prohibitions against making and selling skokiaan and similar liquor products should be repealed.

Another rule ostensibly aimed at protecting the public health is the prohibition against the making, possession, sale, supply, or consumption of anything made by fermenting treacle, sugar or other substances, and known as skokiaan, barberton, or hopana. Hopana or hop beer was originally made by Chinese on the Reef and sold to Africans. In time, Africans also started making these drinks. The liquor laws apply mainly to drinks containing above a certain percentage of alcohol, but the law prohibits the making of hopana even if it contains less than that percentage.

It is clear from reported court cases from the early years of the century that the aim of these laws was simply to outlaw drinks made for sale to Africans at a time when selling liquor to persons of colour was forbidden. Even though the law against selling liquor to persons of colour has long since been repealed, a rule prohibiting skokiaan, barberton, and hopana still exists on the statute book in some provinces. It is astounding that such a racist measure continues to apply.

There is no health justification for banning skokiaan and the other prohibited drinks. Just as there is no law prohibiting mampoer (which is drunk mainly by whites), there should be no law prohibiting skokiaan (which was mainly drunk by blacks). The ingredients of liquor are already governed by the Liquor Products Act and the Foodstuffs Act and its regulations. The prohibition against skokiaan is a legacy of apartheid.

Considerations

Some may think that these drinks should be banned for health reasons, whatever their alcoholic content. But their ingredients are the same as those which can be found in other alcoholic drinks that are lawful. The reported court cases from the 1920s are an eye-opener; the judges (using language which would be unacceptable today) never mention health reasons for these laws, and say only that they were intended to prevent the native population from access to alcoholic beverages.

SMOKING

RECOMMENDATION 7

The law prohibiting smoking in so-called “public” places and in workplaces should be repealed. In all privately-owned property, irrespective of whether thepublic has access to it, the right to smoke should be determined by voluntaryagreement between proprietors, their employees, and their customers.

The Tobacco Products Control Act, 1993, prohibits smoking in any public place. A public place is given a special definition to mean any indoor or enclosed area which is open to the public or any part of the public. This includes any place to which members of the public have access, even if they have to pay to be admitted. It includes any such place owned by a private person and not by the government. In other words, a public place is defined to include a private place.

This covers any shop, shopping mall, office open to the public, exhibition hall, retail warehouse, or tented area. The law prevents businesses from accommodating customers who smoke. It removes the power of businesspeople and their customers to negotiate and make their own arrangements.

The prohibition against smoking extends to any indoor or enclosed workplace where employees perform the duties of their employment. The definition of an employee in the basic conditions of employment legislation probably applies, where an employee means any person who works for another person and who receives any remuneration, and any other person who in any manner assists in carrying on or conducting the business of an employer.

Experience is that where workplaces are made non-smoking areas, some employees leave the area to smoke outside. The legislative prohibition of smoking in workplaces will therefore affect the productivity of every business. People in a workplace will be unable to make their own arrangements regarding ventilation, separating smokers from non-smokers.

The statute is not aimed at protecting smokers, who are the people most at risk of falling ill from smoking. Nor will it prohibit the possession and use of tobacco. The legislation is aimed at protecting people who don’t smoke.

This legislation is a draconian measure which should be repealed. A more intrusive Bill being contemplated to replace the existing Act should similarly be withdrawn.

Considerations

People against smoking will insist that the law is necessary to protect the public health. But the anti-smoking lobby’s main concern must surely be active smokers, not non-smokers. It is undesirable to enact a law which even the health authorities concede cannot be properly enforced.

RECOMMENDATION 8

The prohibition against advertising tobacco products should be repealed.

The same legislation prohibits the advertising of tobacco products, tobacco brands, and company names and trademarks. This harms the business of advertising agencies, advertising subcontractors, market researchers, billboard suppliers and erectors, and sign-writers, many of whom are small businesses.

The prohibitions against advertising effectively criminalise the display by a tobacconist of a cigarette box, tobacco packet, or cigar tube in his or her shop window. A retailer is allowed to post signs, in accordance with regulations made under the statute, that indicate the availability of tobacco products. The regulations are so strict that in effect they permit only the display of a sign stating starkly “Tobacco products available here”.

The law also bans the use of tobacco brand or company names and trademarks for the purposes of advertising any organisation, service, activity, or event. This restricts the income available for sports matches, musical concerts, and similar events. This has an effect on small businesses in this sector, including sportsmen and women and businesses in the fields of security, parking, seating, catering, stage construction, event management, cleaning, and so on.

The placing of vending machines containing tobacco products in any indoor or outdoor location is forbidden, other than in smoking areas not exceeding 25 percent of the public place concerned as designated by the owner thereof. The sale of tobacco products from vending machines is restricted to places where the machines are inaccessible to persons under the age of 18 years. This harms the many small businesses that supply and fill cigarette vending machines. In 2018, the national Minister of Health published for public comment a draft Bill that would entirely prohibit the locating in any place or premises of vending machines containing tobacco products.

The 1993 legislation also prohibits the sale of tobacco products to persons under the age of 18 years and a person who contravenes this is liable to a fine not exceeding R100,000. By contrast, a person who contravenes the prohibition against using a tobacco brand name to advertise any event is liable to a fine of up to R1,000,000. This suggests that the commercial crime is regarded as 10 times more serious than supplying cigarettes to children.

Banning advertising will not stop smoking. People smoke, not in response to advertisements, but because they find smoking a pleasant and comforting activity, because of tobacco’s mild stimulating effect, and because it promotes concentration and increases resolve. Suppressing all advertising of tobacco products will create the perception among children and teenagers that smoking is an illicit activity. Youngsters’ natural rebelliousness will tempt them to experiment with this forbidden fruit. The banning of tobacco advertising in some countries has not led to a reduction of smoking among young people. Any decline in smoking is due to growing opinion that smoking is harmful to health rather than because of legislated criminalisation.

Considerations

This is a controversial recommendation. The proponents of anti-smoking legislation say that advertising makes smoking appear glamorous to impressionable minds. But attempts to sweep smoking under the carpet will make it appear even more glamorous to the young.

CHILD CARE

RECOMMENDATION 9

The provision of the Children’s Act which criminalises unregistered child-care facilities should be repealed.

The legislation governing children criminalises thousands of crèches and day-care businesses that undertake the part-time care of children.

The business of childminding is carried on in all areas, communities, and socio-economic classes. In low-income areas, where mothers of preschool children are in full-time employment for economic reasons, there is a particularly high demand for day care. Many live-in domestic servants leave their children in places of care from early childhood.

Parents also place their children of school-going age in lodgings to remove the children from an environment of violence and crime. In the past, many children were cared for within the extended family system, but this social structure no longer exists for many families, particularly in urban and peri-urban areas.

The Children's Act, 2005 stipulates that a person may operate a partial-care facility (the care of more than six children on behalf of their parents during part of the day or night), only if the facility is registered with the government of the province concerned.

The provincial authorities may issue a "notice of enforcement" instructing anyone operating an unregistered partial-care facility either to stop operating or to apply for registration in a specified period. The authorities can also instruct anyone operating a registered facility in contravention of the Act or its conditions of registration to comply. Any person who contravenes these provisions is guilty of an offence.

Municipalities may in terms of the Constitution also enact laws governing child-care facilities. There are municipal bylaws that say a child-care facility which cares for six or fewer children must obtain a municipal health-compliance certificate. Contravention of the bylaw is an offence.

However, the Act and these bylaws are widely disregarded. There are probably more children in unregistered or uncertificated facilities than in registered or certified ones. This is almost certainly true in disadvantaged areas.

The result of criminalising unregistered or uncertificated places of care is that they do not receive the benefit of any education and guidance that the authorities could provide. The criminal penalty discourages places of care that are unable to comply with the prescribed standards from seeking registration. This means that facilities that are most in need of help are the least likely to receive it.

To enable parents to earn incomes, and to ensure that their children are cared for while they do so, is an important priority. The common law governing any person who acts in loco parentis protects the health and safety of the child. (The procedural rules of our legal system should be amended to improve access to the courts, which are the upper guardian of all children under common law.)

Considerations

Some officials feel there should be a registration requirement, if only to notify the authorities that the place of care exists.

Instead of registration linked to the disincentives of criminal penalties, there should instead be voluntary notification linked to the incentives of advice and assistance. This will meet the concern of the authorities who wish to know of the existence of all places of care in their areas of jurisdiction. Official policy should be aimed at improving the standards of childcare by providing training and education for childminders.

RECOMMENDATION 10

Instead of relying on compulsory registration to ascertain where places of partial care intheir jurisdiction are situated, the authorities should attract childminders byoffering them expert assistance, guidance, education and training.

Education, rather than law enforcement, should be the primary governmental function. The registration requirement does not reflect the real world in which most South Africans live and work from day to day. It is simply not possible for most places of care in poor areas to satisfy all the conditions for registration. The best one can do is to ensure that parents have affordable and expeditious access to common-law remedies against abuse.

By criminalising unregistered childminders, the registration requirement drives the activity underground. If the officials change their policy from law enforcement to assistance and advice, childminders will come forward.

Considerations

Certain officials would still prefer the registration requirement to oblige childminders to make their businesses known to the authorities. But compulsory registration has in fact proved to have the opposite effect.

RECOMMENDATION 11

If there are to be regulations for partial-care facilities, they should contain only the minimum necessary for the health and well-being of the children in care.

A partial-care facility will be registered only if it complies with requirements prescribed by the national Minister of Social Development by regulation. The regulations include the requirements that the premises must be safe, clean and "well-maintained", space for different activities and functions must be "clearly demarcated", there must be "cooling facilities for storage of perishable food", and the food preparation area must be "clearly marked".

An application for registration must describe the qualifications, skills and experience of the applicant in partial care, and "the contents of the programmes and services to be offered, including the aims and objectives", a "business plan" containing the "day care plan", and "the constitution" of the facility containing information of the composition of the management and its powers to delegate authority with regard to care, behaviour management and development of children to the head of the partial care facility "where applicable", and the procedure for amending the constitution.

It is undesirable to enact standards that are impossible for all communities to comply with.

As so often with legislation aimed at health or safety or preventing ill-treatment, these regulations are off-target in focusing on standards that have a relatively remote influence over the health and well-being of children.

There are municipal bylaws which say that a child-care facility, regardless of the number of children it accommodates, must have a sickbay with first-aid equipment and a bed; an indoor play area with 1,5 sqm of free floor area per child; a sleeping mat or mattress for each child in full-day care; a separate approved kitchen (if it provides meals to children) with a double-bowl sink and hot-water supply and a separate wash-handbasin; a pantry and storage facilities for each child's and staff member's personal belongings; separate toilets for children over three years old; separate toilets for boys and girls of school-going age; washing facilities; a minimum outdoor area of 2 sqm per child fencing 2 metres high; an indoor study area of 1.5 sqm per child of school-going age.

The suitability of most of these requirements are subject to the municipality's approval having regard to "the reasonable environmental health requirements that may apply in the circumstances". Contravention of the bylaw is an offence.

These demands are well and good, in the sense that everyone would want their children to be cared for in a place that had these prerequisites, as well as a wide choice of safe and stimulating toys and activities, and also nutritious food and highly-trained childminders. But they are to some degree out of touch with reality.

In practice, very few childminders in underprivileged areas can comply with all these regulations and bylaws. The result is that they might make no attempt at obtaining registration or certification, and carry on business under the stigma of criminality, with health authorities unaware of their existence. Where the authorities discover an unrecorded child-care facility that does not comply with the prescribed requirements, they do not have the option of providing assistance or guidance to improve the quality of care and the health and well-being of the children there: they are obliged to lay a criminal charge against the childminder for conducting an unregistered or non-compliant

place of care.

Instead of inappropriate regulations and bylaws describing ideal standards for buildings and equipment, there should be an appropriate set of rules containing the minimum standards necessary to safeguard the health and physical welfare of all children in care in South Africa without exception.

The law should focus, not on registration, but on the health and safety of the child. If a child in a place of care is abused, it is irrelevant whether the place of care is registered or unregistered. Conversely, if a child is well-cared-for in an unregistered place of care, the fact that it is not registered should be of no importance. Registration adds nothing to officials' and social workers' ability to protect children; the laws against child abuse apply irrespective of whether a childminder is registered. There should be no disincentives in the law to prevent childminding from being an open and visible activity that is easy for parents and neighbours and the community to monitor.

Considerations

In some quarters, universal rules of this kind will not be enough. More prosperous parents will demand additional and more luxurious amenities and facilities in crèches to which they entrust their children. There is nothing to stop any child-care facility that wants to meet these consumer demands from doing so, and advertising that it does. A number of facilities could form a self-regulatory voluntary association with a code of conduct imposing standards additional to the legislation, and market their services accordingly.

BOARDING HOUSES AND SMALL HOTELS

RECOMMENDATION 12

All special bylaws for accommodation establishments should be repealed.

Carrying on business as a bed-and-breakfast establishment or small hotel, often from their own home, presents a business opportunity for many people. But unnecessary bylaws increase the costs of entering and carrying on these businesses.

In terms of the Constitution, municipalities may make bylaws prescribing trading regulations. The bylaws usually state that no person may conduct an accommodation establishment unless the premises comply with the bylaws' requirements. They often require separate ablution facilities for each sex, including two baths.

The minimum floor area of the dining room provided for the guests is often prescribed.

As with so many other bylaws, the real criterion appears to be to control business rather than the health of the public. If the criterion was health, these requirements should be imposed on all domestic residences, not only on boarding establishments. Compliance with general building regulations by boarding houses, hotels and bed-and-breakfast establishments should be sufficient.

Considerations

If there must be special rules for accommodation establishments, they should be restricted to what is clearly justifiable in the interests of health.

RECOMMENDATION 13

Occupational and building health laws should be replaced by the single, but clear and effective, common-law requirement that working conditions should be healthy. To this end, there should be a systematic critical review of all such measures.

There are complex and diverse requirements concerning health in many statutes, bylaws, regulations, and directives, ranging from local government building codes to employment agreements. They prescribe a multitude of costly requirements that are not considered necessary in private homes, where people spend most of their time.

These laws provide perverse incentives for employers, especially small businesses, to avoid employing people and to use machinery instead.

Such formal and costly requirements tend to disadvantage small businesses disproportionately, while increasing unemployment and providing no real guarantee of healthy working conditions. The good health of employees can be secured only by healthy practices, which, in turn, will be observed only if people are properly informed about such matters.

We do not discuss the many specific provisions in this publication. We propose a systematic analysis of the extent to which the costs of health measures exceed the benefits.

ABATTOIRS

RECOMMENDATION 14

The Meat Safety Act should be repealed.

As is the case with restaurants, there are elaborate regulations governing the premises where animals are slaughtered. And as with restaurants, the health benefits of many of the regulations are indirect only. The cost disadvantages to small businesses involved in supplying fresh meat to the public can outweigh the supposed health advantages. The meat-safety legislation also allows for many arbitrary discretions and exemptions. It is clear that many of the exemptions have been granted for social or economic rather than health reasons.

Abattoir legislation is inappropriate and is widely ignored. More than half of all animal slaughter in South Africa takes place outside approved abattoirs. About 80% of sheep are slaughtered illegally.

The Meat Safety Act, 2000 states that no person may slaughter any animal at any place other than an abattoir which has been approved, registered, and graded by the designated veterinarian at the provincial agriculture department. Meat from an animal which has been slaughtered at a place other than such an abattoir may not be sold to any person.

A person wishing to construct an abattoir must apply for the officer's approval and submit design plans that comply with the requirements prescribed for abattoirs in the regulations made under the Act. Approval can be withdrawn if the abattoir is not operated in accordance with the regulations.

The regulations prescribe fairly detailed requirements, depending on the grade of the abattoir.

Many of the rules are relatively expensive to observe, except perhaps in the lowest grade of abattoir.

The yardstick used to determine the grade of an abattoir is its "throughput", or maximum allowable number of animals

that may be slaughtered there each day. Each grade of abattoir must have specified facilities. If an abattoir reaches its maximum throughput before the day's end, it must stand idle for the rest of the day. No abattoir can exceed the maximum throughput for its grade by slaughtering more animals, without first meeting the requirements prescribed by the regulations for the higher grade.

There are three grades of red-meat abattoirs, and three grades of poultry abattoirs.

In the lowest grade of red-meat abattoir (the so-called "rural" abattoir) the daily throughput must not exceed two cows or twelve goats. A rural abattoir is the most basic abattoir and the fewest facilities are required, effectively a gate and fencing and one room with two anterooms, with a partitioned area for offal, and a toilet-cum-cloakroom. The main slaughter-hall can also serve for hanging, bleeding and dressing the carcasses. There must be an adjacent curbed and drained area for handling and keep rough offal and to hold containers with inedible products prior to removal. There must be a toilet and washing facilities.

Corresponding provisions that are appropriate for poultry apply to rural poultry abattoirs (i.e., abattoirs with a throughput of not more than 50 fowl per day.)

The design of a rural abattoir must allow for future upgrading of the facility.

Additional requirements are prescribed for the two higher grades of abattoirs. If a red-meat abattoir will have a throughput of more than two cows or twelve goats per day, its premises must be fenced, lairages must be available at least six meters from the abattoir with sides at least 1.8m high for cows and 1.0m for goats and minimum floor space per animal, lairage passages and crushes for herding animals to the stunning area must have a prescribed minimum width, separate entrances and separate restraining and stunning facilities must be provided for cattle and goats, stunning apparatus and facilities for shackling stunned animals and bleeding in a hanging position must be provided, dressing rails and equipment with prescribed minimum clearances must be provided, a room where paunches and intestines are emptied and washed must be provided, and a change room as well as a shower and hand-wash facilities and toilet must be provided on the premises for employees.

Chillers equipped with accurate thermometers must be provided to hold at least the daily slaughter throughput. Minimum clearances are prescribed for rails and equipment in bleeding areas, dressing areas, and chillers.

(Corresponding provisions appropriate for poultry apply to poultry abattoirs with a throughput of more than 50 fowl a day.)

More stringent requirements are prescribed for high-throughput abattoirs, i.e., abattoirs with a daily throughput of more than 20 cows or 120 goats (or 2,000 fowl).

The Act does not apply to, and thus exempts from the requirement that animals must be slaughtered in an abattoir, slaughter "for own consumption" or for cultural or religious purposes. If the criterion for requiring slaughter in an approved abattoir is hygiene, there can be no valid grounds for allowing someone to slaughter outside an abattoir for own consumption or cultural or religious purposes. As with restaurants, while the ostensible standard is health, the actual benchmark is trade: the rules don't apply if the food isn't sold.

The exemption for slaughter for cultural or religious purposes recognises that standards other than those in the regulations can be acceptable.

The legislation lays down an ideal for inspection which is not attained in practice. The Act decrees that the owner of a red-meat abattoir must employ a veterinarian or other qualified person as a meat inspector, who must be registered by the provincial executive officer for that abattoir. No person shall slaughter any animal at an abattoir unless it has been inspected and passed as fit for slaughter by a meat inspector (or in the case of a rural abattoir and if the provincial

executive officer has granted an exemption, a meat examiner). And no carcass, part thereof, or red offal may be sold or dispatched from an abattoir unless it has been inspected and approved by a registered inspector.

There used to be over a thousand abattoirs, but national legislation introduced in the 1960s imposed expensive requirements and led to a reduction in the number of abattoirs to fewer than 300. The now-repealed meat scheme administered by the Red Meat Board also encouraged centralisation of abattoirs and benefited big business in the meat industry. The repeal in the 1990s of the abattoir industry legislation under which abattoirs could be prohibited in certain areas, and the repeal of the red-meat scheme, favour the creation of new abattoirs, but the legislation still makes entry into this sector relatively uneconomic for small-scale slaughtering businesses.

The old policies caused the closure of many rural abattoirs. This harmed the economy of numerous small towns and surrounding districts. Local abattoirs assisted rural development by creating employment opportunities and by supporting leather and tanning and other related industries.

Small business opportunities in the meat production sector should not be restricted by unnecessary legislation. Undernourishment is prevalent among many communities, and there is a need to make protein available cheaply.

Though the aim of the current legislation is to promote meat safety, its effect is still to restrict access to any meat by increasing its cost above many people's ability to pay. It also operates to the disadvantage of smaller abattoirs. It requires excessive capital investment in infrastructure, which often has to lie idle after the daily throughput has been reached, or while waiting for an inspector to arrive. The goal of maintaining meat safety could be performed equally well and probably better by self-regulatory and voluntary associations run by the abattoirs, cold-chain transporters and retailers, engaging independent vets and inspectors, and applying measures for the supply of safe meat, which will be marked and labelled accordingly as fit for public consumption. Any exporter wishing to export to another country should simply have the choice to comply with that country's requirements.

Considerations

Many will feel that the meat-safety legislation is indispensable to protect the public from infected meat. But its environmental requirements cannot guarantee the soundness of the meat. The numerous exemptions from the legislation discredit any argument that the law has an essential health purpose.

The standard of meat products should merely be governed by the Agricultural Products Standards Act and by compulsory standard specifications under the Standards Act governing canned meat foodstuffs.

RECOMMENDATION 15

Informal slaughter should be legalised.

If there must be abattoir legislation, it should not criminalise informal slaughter outside an abattoir.

Meat has been slaughtered under perfectly hygienic conditions for centuries using a slaughter pole. Indeed, the original Afrikaans word for abattoir is slagpale – literally, slaughter poles.

In the 1970s the abattoir laws were relaxed in the north of Namibia (then South West Africa) to permit the continued production of meat for the local population at a time of capital shortages and other difficulties incidental to the liberation struggle being waged in that territory. This relaxation gave rise to a mushrooming of informal slaughter, and meat was lawfully offered for sale from carcasses hanging on trees. This led to an increase in the supply of essential protein to the public, a steep decrease in the incidence of malnutrition, and a 50% reduction in the price of meat. The health authorities reportedly found no cases of food poisoning as a result of this relaxation of the abattoir legislation.

A 2017 study of the effect of post-slaughter handling during distribution on the microbiological quality and safety of meat in South Africa's formal and informal sectors concluded merely that foodborne disease (albeit a common public-health problem worldwide) is generally underreported and poorly investigated in South Africa; that the informal sector in the majority of cases does not adhere to the legal requirements that the formal sector follows before and after slaughter; and that a food-safety knowledge gap in the informal sector has been identified.

Considerations

If considered essential, there could be a regulation that there should be a net to stop flies, and a safe method of disposing of blood and stomach contents.

The Meat Safety Act, 2000, by providing for the registration of so-called rural abattoirs, should be saluted as a step in the right direction.

The Act also follows international trends by moving from the previous legislation's preoccupation with building standards to a more holistic emphasis on hygiene-management systems and programmes.

RECOMMENDATION 16

If there has to be a grading system, an abattoir should have the right to process any number of animals in a day in batches up to the maximum throughput of that grade of abattoir.

The current position where the legislation prescribes a fixed maximum daily throughput should be altered to give every abattoir the right to process batches more intensively. This will lead to the more effective use of abattoirs, and give a better return on capital invested.

Provided the number of animals being processed at any one time stays within the maximum capacity of the abattoir, it should be able to take in any number of animals in a day, in batches within its capacity. Instead of fixing a maximum throughput for an abattoir as a whole, which leads to underutilisation of some sections, there should instead be fixed a maximum throughput for each section of an abattoir, thus permitting each section to operate to its full capacity.

Considerations

Sufficient time must be allowed for the abattoir to be cleaned between batches. In practice, the rate of processing will be limited by the section of the abattoir with the smallest capacity.

RECOMMENDATION 17

Local authorities should establish communal slaughtering places at which small-scale slaughterers and others can slaughter their animals.

Communal slaughtering areas should be reintroduced. Municipalities provided communal slaughtering areas until the 1960s. The municipality supervised the facility and members of the public were permitted to slaughter there.

Considerations

Communal slaughtering places would make it easy for the health authorities to provide guidance and education to slaughterers, empowering them to acquire more skills in the hygienic production of meat.

RECOMMENDATION 18

A poultry abattoir should not be required to have a refrigeration facility if the meat and animal products will be disposed of at the abattoir directly to the final consumer.

The present requirement that larger poultry abattoirs must provide freezers should be done away with where the meat is not going to be transported over a long distance or be handled by intermediaries. Much slaughter takes place for immediate consumption, and no butcher or carrier intervenes between the abattoir and the final consumer. The slaughterer often hands over the poultry carcass or other products to the creature's owner or other customers, who intend to cook the meat at once. Refrigeration is expensive to provide. This proposal will lead to lower costs in the production of poultry meat.

Considerations

Refrigeration can be required if poultry carcasses or meat will be transported over a long distance, or be delivered to retail butchers, where there is a risk of infection between the arriving meat and the butcher's existing meat stock.

SELECT SOURCES

FREE MARKET FOUNDATION

Legislation and policy documents

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972—

s 1 (definitions) svv "appliance", "foodstuff", "manufacture", "premises" and "sell";
s 2(1)(b)(i) (prohibition of sale of foodstuff which is contaminated, impure or decayed);
s 8 (liability of employer or principal); s 11 (powers, duties and functions of inspectors); s 15(1)(nA)–(nN) and (9) (regulations); s 17 (offences); s 18 (penalties); s 20 (forfeiture); s 22 (proof of facts, and presumptions); s 23 (administration of Act by authorized local authority); s 24 (right to prosecute); s 25 (delegation of powers by Director-General); s 26 (defect in form not to invalidate); s 27 (restriction of liability)

Govt Notice 638 of 22 Jun 2018: Regs governing general hygiene requirements for food premises and transport of food: Reg 1 (definitions) svv 'food premises', 'handle', 'health hazard', 'perishable food' and 'person in charge', reg 3 (certificate of acceptability), reg 4 (prohibition on handling and transportation of food), reg 5 (standards and requirements for food premises), reg 6 (standards and requirements for facilities on food premises), reg 7 (standards and requirements for food containers, appliances and equipment), reg 8 (standards and requirements for display, storage and temperature of food), reg 9 (standards and requirements for protective clothing), reg 10 (duties of person in charge), reg 11 (duties of food handler), reg 12 (standards and requirements for handling of meat and meat products), reg 13 (standards and requirements for transport of food), reg 14 (exemptions, additional requirements and reservations), reg 15 (offences), reg 16 (commencement), reg 17 (repeal of regulations);

Govt Notice R908 of 27 Jun 2003 (as amended in 2009 and 2018): Regs relating to application of Hazard Analysis and Critical Control Point (HACCP) system;

Constitution of the Republic of South Africa, 1996—

s 104(1)(b)(i) and (ii) (legislative authority of provinces), s 156(2) (powers of municipalities to make by-laws); Sched 4 (areas of concurrent national and provincial legislative competence): Pt B (local- government matters): Child-care facilities; trading regulations;

Sched 5 (areas of exclusive provincial legislative competence) Pt B (local-government matters): Licensing and control of undertakings that sell food to the public;

National Health Act 61 of 2003—

s 1 svv "health nuisance", s 90(1)(n) (environmental health regulations);

Govt Notice 951 of 4 Dec 2013 (National environmental health policy): par 7.5.5 (food-borne diseases), par 10.1 (environmental health education), par 10.2 (food control);

Tobacco Products Control Act 83 of 1993—

s 2 (control over smoking), s 3 (advertising, display and labelling), s 4 (prohibitions relating to persons under 18, etc), s 5 (vending machines);
Govt Notice 2063 of 2 Dec 1994: (regulations re labelling, advertising and sale);
Govt Notice R975 of 29 Sep 2000 (ministerial notice re smoking in public places);
Govt Notice 475 of 9 May 2018 (draft Control of Tobacco Products and Electronic Delivery Systems Bill: Invitation for public comment);

Meat Safety Act 40 of 2000—

s 7 (no slaughter except at abattoirs, and exemptions), s 8 (approval of facility), s 11(1)(a)–(j) and (o) (essential standards);
Govt Notice 1072 of 17 Sep 2004 (red meat regulations);
Govt Notice R153 of 24 Feb 2006 (poultry regulations);

Children's Act 38 of 2005—

s 76 (partial care), s 79 (norms and standards for partial care), s 80 (partial-care facility to be registered), s 85(1)(a)(i) and (ii) (notice to stop operating partial-care facility or apply for registration), s 305(1)(f) and (g), (6) and (7) (offences and penalties for failure to comply);

SELECT SOURCES

Govt Notice R261 of 1 Apr 2010 (general regulations regarding children) reg 13 (norms and standards for partial care) read with annex B (norms and standards) pt 1 (partial care), reg 14 (application for registration of partial-care facility);

Agricultural Product Standards Act 119 of 1990—
s 3 (control over sale of products) and s 15 (regulations);
Govt Notice R946 of 27 Mar 1992 (regulations about control over sale of poultry meat);
Govt Notice R55 of 30 Jan 2015 (regulations about classifying and marking meat for sale);

Standards Act 8 of 2008—
s 24 (issuing of national standards);
National standard: "Requirements for a Hazard Analysis and Critical Control Point (HACCP) system" SANS 10330:2007 (ed 2.1) SABS;

Gauteng Liquor Act 2 of 2003 s 41(1) (licensed business must not be conducted on premises where any other business, trade or occupation is carried on or pursued);

Western Cape Liquor Act 4 of 2008 s 49(4) (licensee of premises where retail food store business is carried on may not sell liquor other than natural wine);

Limpopo Liquor Act 5 of 2009 s 53(1) (prohibition of sale of concoction made by fermenting treacle, sugar or other substances and known as hopana, skokiaan or barberton);

Kwazulu-Natal Liquor Licensing Act 6 of 2010 s 78 read with Sched 3 (trading hours)

Municipal bylaws

eThekwini [Durban] Municipality: Child Care Facilities By-law 2015 (Mun Notice 200 of 2015, Kwazulu-Natal Prov Gazette Extraordinary 1530 of 22 Oct);

City of Cape Town: Environmental Health By-law 2003 (Prov Gazette Extraordinary 6041 of 30 Jun 2003) s 28 (accommodation establishments)

Caselaw

Ex parte President: In re Constitutionality of Liquor Bill, 2000 (1) BCLR 1 (CC);
S A Liquor Traders Assoc and others v Chair, Gauteng Liquor Board and others, 2006 (8) BCLR 901 (CC);

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and others 2008 (11) BCLR 1123 (CC) par [80] (municipalities' enhanced status does not prevent two spheres of control from co-existing even if they overlap and even if the one may in effect veto the decision of the other, in light of the fact that the one sphere operates from a municipal and the other from a national perspective, each with its own constitutional and policy considerations);

City of Johannesburg Metro Municipality v Gauteng Development Tribunal and others (MEC of KwaZulu Natal for Local Government and others intervening, S A Property Owners Assoc and ano as amici curiae) 2010 (9) BCLR 859 (CC) par [56] (each sphere of government is allocated powers which it alone is entitled to exercise, apart from areas of concurrent competence);

Min of Local Govt W Cape v Habitat Council and others (City of Johannesburg amicus curiae) and related matter 2014 (5) BCLR 591 (CC) par [19] (provincial and national governments cannot overriding municipal decisions, but they may have coordinate powers to withhold or grant approvals of their own)

Articles

Rani Z T, Hugo A, Hugo C J, Vimiso P, Muchenje V, South African Journal of Animal Science 2017 vol 47(3), "Effect of post-slaughter handling during distribution on microbiological quality and safety of meat in the formal and informal sectors of South Africa: A review";

SELECT SOURCES

Alcohol, Development and Poverty in South Africa research collaboration (2015), Alcohol regulation in South Africa: Popular controversies;

Charman A, Petersen L, Piper L, Development Southern Africa 2013 vol 30(4–5), “Enforced informalisation: the case of liquor retailers in South Africa”

LAWS AFFECTING SMALL BUSINESS

JUSTICE

SYNOPSIS

Problems

Justice for small business is essentially inaccessible, costly and prohibitively time-consuming. There is too much red tape in the magistrates' and high courts. Litigants may not (or are not encouraged to) forego prolix procedures, pleadings, interlocutory procedures, delays, reviews and appeals. Incorporated small businesses may not sue in small claims courts. Small claims court jurisdiction is still too limited. Professional job reservation means that litigants are forced to use costly lawyers to assist or represent them. The courts, especially small claims courts, are under-funded. Court services are not user-charged, even when used by affluent people.

Recommendations

SMALL CLAIMS COURT

- Companies (and other juristic or artificial persona) should have access to small claims courts.
- The monetary jurisdiction of the small claims court should be increased from R20,000 to R150,000, or such greater amount as might be agreed by the parties.
- The small claims court monetary jurisdiction should be subject to a mandatory annual review by the Minister.
- Litigants should be free to consent to small claims court jurisdiction beyond the prescribed limit.
- To provide sufficient funds for an expanded role for small claims courts, and to ensure adequate funding for courts in general, the principle of user-charging should be introduced.
- Small claims court jurisdiction should be extended to include——
  - claims based on a cession or assignment of rights;
  - matters in which an interdict is sought;
  - claims for damages for defamation;
  - claims for damages for malicious prosecution;
  - claims for damages for wrongful imprisonment;
  - claims for damages for wrongful arrest.
- Provision for mediation should be introduced with a view to the settling of disputes between litigants in small claims courts.

MAGISTRATES' COURTS

- The Minister should establish short-process courts, and make rules of procedure and appoint adjudicators for such courts.
- The short-process court option should then be publicised, and lawyers and judicial officers should be encouraged to draw it to the attention of litigants.

ALL COURTS

- Litigants in any court should have the right to assistance of their choice.
- The requirement of security by close corporations for costs should be scrapped.

JUDICIAL REVIEW

Legislation along the lines of the Regulatory Flexibility Act 1980 combined with the Small Business Regulatory Enforcement Fairness Act 1996 and Small Business Paperwork Relief Act 2002 of the United States should be adopted in South Africa in order to minimise the economic impact of legislation on small business by subjecting the law-making process to judicial review.

Considerations

Such reforms will increase the volume of work in the small claims court substantially. Proceedings before the higher courts (and special courts) might be frustrated by an absence of formalities. Funding for lawyers working as judicial officers in small claims courts will have to be diverted from elsewhere. Less formal procedures may result in injudicious judgments. Vested interests (such as lawyers, officials, and big business) may resist reforms that reduce privilege, income, status, and power. Reform of tried and tested institutions often causes unexpected counter-productive effects.

THE NEED FOR REFORM

One of the few issues on which there is virtual unanimity is that there is inadequate access to justice for small business.

The problem is essentially that prescribed formalities are needlessly cumbersome, time-consuming and costly. What small businesses (and, for that matter, all people) should enjoy is affordable and expeditious access to justice. Indeed, “justice” implies that cases are dispensed with expeditiously and affordably in readily accessible courts.

Small businesses may, for instance, use small claims courts (SCCs) only if they are unincorporated. This creates a disincentive to the registration and incorporation of small businesses and discriminates against those small businesses that have incorporated. Typically, the cost of having claims adjudicated in a magistrate’s or high court is so high that it is not worth using the courts. The result is that small businesses often write off debts and settle phony demands. In the absence of effective access to justice, some small businesses resort to illegitimate or underground means of dispute resolution.

If all the procedures and interlocutories allowed for are resorted to by either or both parties (in order to defeat adversaries on technicalities, or by exhaustion and spiralling costs), proceedings could take many months. This might cost an entrepreneur (with a legitimate claim) over R50,000 in the magistrate’s court, or many more tens of thousands of rands in the high court.

Even after a favourable judgment and an order against the debtor for payment of the small business’s “party and party costs”, the small business might not be able to recover its judgment amount or its costs from the loser. Successful parties may also be faced with appeals or reviews that often cost more and take longer than hearings of first instance. A judgment against a debtor – after incurring the disproportionate cost in money and time that might be involved in obtaining it – may be of little value since there is no longer a risk of imprisonment for failure to honour a court order to settle civil obligations.

Procedures for attachment of or execution against debtors’ assets are time-consuming and costly. In practice, many debtors can ignore judgments with little risk of penalty or punishment, especially if they are not salary- or wage-earning employees, almost regardless of whether they own sufficient net wealth to settle their debts. For these reasons, it is probably not worth instituting proceedings in magistrate’s courts for less than R150,000.

For many years, experts in the legal profession and judiciary, and the business community, have been calling for reforms that would make access to justice a reality. Important progressive steps have been taken to benefit For many years, experts in the legal profession and judiciary, and the business community, have been calling for reforms that would make access to justice a reality. Important progressive steps have been taken to benefit consumers and private citizens, but to date nothing significant has been done to ameliorate the plight of small businesses.

SMALL CLAIMS COURT (SCC)

RECOMMENDATION 1

Companies (and other juristic or artificial persona) should have access to small claims courts.

The fact that only natural persons may institute claims in SCCs compromises and undermines any government policy to promote small business.

If South Africa is to achieve the culture of entrepreneurship envisaged in, for instance, the 1996 National Small Enterprise Act, such discrimination against SMMEs is unacceptable. Entrepreneurs should be encouraged to register close corporations (CCs) or companies, not penalised for doing so.

One of the perverse unintended consequences of this anti-business provision that only natural persons may institute claims in SCCs is that natural persons (whether small businesses or consumers) cannot use SCCs to defend themselves where plaintiffs happen to be companies. As so frequently happens in such matters, intended beneficiaries become victims. This conspicuous anomaly should be rectified by means of a provision under which the sole criterion for jurisdiction is that (as the court's name implies) the claim is "small".

The Act permits parties to SCC proceedings to consent to appear in the SCC which they agree is most conveniently located. However, where the defendant is a company and the plaintiff a natural person or CC, the plaintiff should have the choice of location.

If government continues with its policy that companies should not be permitted as plaintiffs in SCCs, the Act should, at the very least, be amended to allow CCs to institute SCC actions. Ownership of CCs is limited to no more than ten natural persons who bear greater personal responsibility than shareholders in private or public companies.

RECOMMENDATION 2

The monetary jurisdiction of the small claims court should beincreased from R20,000 to R150,000, or such greater amount as might be agreed by the parties.

Debts of up to R150,000 are commonplace between small businesses, between individuals and small businesses, and between small and big businesses. The SCC's jurisdiction should cover all such debts. Only abnormally large debts, such as those for a house or car, should fall beyond the SCC's jurisdiction, although a number of small business organisations would believe that even these should fall within the SCC's jurisdiction if the parties involved agree.

At present, all claims for more than R20,000 must be instituted in magistrate's and high courts, where they are subjected to the red tape, costs and delays that created the need for SCCs in the first place.

In practice, many small businesses and private citizens sacrifice substantial parts of their rightful claims in order to bring cases within the SCC's jurisdiction. The propensity to do so shows to what extent the laws of procedure and evidence in the higher courts are excessively burdensome.

RECOMMENDATION 3

The small claims court monetary jurisdiction should be subject to a mandatory annual review by the Minister.

When the Act providing for the establishment of SCCs took effect in August 1985, the jurisdiction of SCCs was limited in the Act to R1,000. In 1986, the Act was amended to state that the amount of jurisdiction would be fixed by the Minister of Justice from time to time.

The 1995 White Paper on National Strategy for the Development and Promotion of Small Business declared that the government would support steps to raise the level of claims falling within the jurisdiction of small-claims courts to "about R30,000" which, having regard to changes in consumer prices since 1995, would now be some R127,000. Today, however, 26 years later, the courts' monetary jurisdiction stands at a mere R20,000 (an amount which was set in March 2019).

The formal maximum monetary jurisdiction of the SCC may well not have fallen in real terms. It would certainly not fall if it were subject to mandatory annual ministerial review. Apart from that, the jurisdiction should be materially increased as recommended here.

RECOMMENDATION 4

Litigants should be free to consent to small claims court jurisdiction beyond the prescribed limit.

Since the SCC exists for the benefit of litigants whose claims do not, in their view, warrant the red tape, delays and costs of higher courts, the parties should be free to agree, either by contract in advance or at the time of an action, to submit their claims to the SCC, regardless of the amount in dispute. This would save a great deal of court and private time and cost.

Considerations *(regarding recommendations 1 to 4)*

The main problem that would arise with the implementation of recommendations 1 to 4 is that the SCC might not be able to cope with the increased volume of actions before it.

Whilst this is a legitimate concern, it clearly cannot be regarded as a basis for resisting reform. Presumably, no one would argue that courts should be made inaccessible deliberately, as this would amount to saying that access to justice should be available only for a privileged few. The real question is how best to finance effective access to justice rather than whether it should exist.

Whether the recommended reform would result in the need for additional funds is unclear. The combined effect of the increased number of cases, on the one hand, and the diversion of the existing case load from more costly and time-consuming higher courts on the other hand, might well result in a net saving. In any event, the effect of the set-off between these two factors would probably mean that the net difference is not significant.

Apart from the case load, there are other cost considerations. At present, SCC presiding officers are exclusively practising lawyers who volunteer their time at no cost. This was regarded initially as provisional and subject to review. The time for review is overdue.

Whether or not lawyers should be expected to continue to volunteer their time at the present level without reward, everyone should agree that significantly increased demands on their time without compensation are not justified.

To secure whatever additional time might be required, remuneration for presiding officers should be introduced. Additionally, consideration should be given to using other people as presiding officers, such as serving magistrates, respected laypeople (which is commonplace in some other countries), corporate and other non-practising lawyers, advocates serving their pupillage), senior officials in the Department of Justice, and the like.

If a significant volume of work is transferred to SCCs from magistrates' courts as a result of the increased jurisdiction recommended here, lawyers can be expected to object to the loss of work in respect of cases that would otherwise have required their professional services in the magistrates' and high courts.

Whatever problems may arise, it should be borne in mind that, apart from the provision of a police service, the provision of access to justice is probably the single most important function that legitimises the existence of government. Government should therefore divert whatever funds are necessary from other budgets. If it is unwilling or unable to do so, necessary funding should be provided through the introduction of user-charges (see recommendation 5).

RECOMMENDATION 5

To provide sufficient funds for an expanded role for small claims courts, and to ensure adequate funding for courts in general, the principle of user-charging should be introduced.

The assumption that court services should be provided at little or no cost regardless of the litigants' propensity to pay should be reviewed. In South Africa, as in other countries, there is a settled trend towards "user-charging" for state-provided goods and services. User-charging (for those who can afford it) would overcome the concerns (a) that the SCC will be overburdened if pro-small-business reforms are instituted, and (b) that lawyers would be unwilling to devote more time to acting as presiding officers (since they could then be remunerated). A compromise might be to require those who want to use the SCC's increased jurisdiction to pay for the service. Ideally, the SCC could become self-funding.

Impecunious recipients of justice services would not be required to pay (this could be subject to a means test at the presiding officer's discretion).

RECOMMENDATIONS 6 to 11

Small claims court jurisdiction should be extended to include:

6 claims based on a cession or assignment of rights;
7 matters in which an interdict is sought;
8 claims for damages for defamation;
9 claims for damages for malicious prosecution;
10 claims for damages for wrongful imprisonment;
11 claims for damages for wrongful arrest.

At present the SCC may not entertain claims based on a cession or assignment of rights or grant interdicts, nor may it award damages for defamation, malicious prosecution, wrongful imprisonment or wrongful arrest. In all these cases, however, the claim might be "small" and might arise in the ordinary course of business.

The exclusion of claims based on a cession or assignment of rights in the present Act is primarily to prevent juristic persons from indirectly gaining access to the jurisdiction of the SCC by cession or assignment of its claim to a director

or a member of the company or close corporation concerned. But for this limitation, a company's claim could be brought before the SCC merely by ceding it to a natural person.

If the monetary limit is raised to a realistic amount and if juristic persons are allowed to bring actions in the SCC, there will be no reason to retain this exclusion.

Matters in which an interdict is sought were included in the original draft of the Act and then subsequently excluded because they sometimes entail extreme measures (such as preventing people from travelling freely). However, the need for an interdict (or mandamus) is frequently in respect of a claim falling within the SCC's jurisdiction.

Since the purpose of interdicts is to protect a party against unlawful actual or potential interference with his rights, there should be no anti-interdict bias in the law. On the contrary, interdicts in respect of claims or potential claims falling within the SCC's jurisdiction should be allowed - though they might be confined to disputes that are already before or about to be brought before the SCC.

There is no good reason for excluding claims for defamation from SCC jurisdiction. Causes of actions are of little consequence to litigants: what concerns them is that justice should be dispensed expeditiously and affordably in disputes arising from whatever cause.

Claims for malicious prosecution, wrongful imprisonment and wrongful arrest may have been excluded because they are usually against the state, but the Act already provides that the state cannot be sued in the SCC.

A claim for wrongful arrest might also arise against a private person carrying out a "citizen's arrest". To the parties involved (and to society at large) such claims are like any other, and they should, therefore, fall within the SCC's jurisdiction.

The exclusion of such claims from the court's jurisdiction curtails access to justice in that, ironically, it makes it more difficult for people to defend themselves where their most fundamental and cherished rights - their rights to freedom and security of the person and to freedom of movement—are violated.

These are not, on the face of it, issues of a small business nature. However, they are crucial to small businesses. Rightly or wrongly, there is a widespread view, especially amongst businesspeople in disadvantaged communities, that small businesses are frequently targeted for harassment (including wrongful arrest and imprisonment, and malicious prosecution) by police, inspectors, and officials. Bringing such actions within the purview of the SCC will reduce real and suspected corruption and abuse.

Considerations *(regarding recommendations 6 to 11)*

It might be protested that bringing such actions before SCCs would, apart from increasing the workload, mean that presiding officers would be expected to have additional jurisprudential skills.

However, actions of a wide variety and complexity can be brought before SCCs. Claims within their existing jurisdiction can involve rectification of contracts, damages for negligent misstatements causing financial loss, the measure of damages payable by a builder to rectify defects due to his alleged negligence, the question of whether a particular contract should be enforced on the grounds of public policy, compensation for necessary or useful improvements to property, and so on.

There is therefore no good reason to exclude defamation, malicious prosecution, and wrongful imprisonment or arrest. If, in the presiding officer's opinion, the case contains difficult or complex questions of law or fact which cannot adequately or fairly or should not be decided by it, the presiding officer can exercise his or her existing power to stop the proceedings.

RECOMMENDATION 12

Provision for mediation should be introduced with a view to the settling of disputes between litigants in small claims courts.

At present the Small Claims Courts Act does not make provision for mediation with a view to settlement or narrowing the dispute between the parties.

The resolution of the Access to Justice Conference held in July 2011 under the leadership of the Chief Justice decided that steps be taken to introduce mediation or other alternative dispute resolution mechanism into the court system.

Mediation plays a useful role in encouraging the settlement or narrowing of court disputes with consequent saving of court time. Mediation has been introduced for the high courts and many magistrates' courts. Mediation is even contemplated for short-process courts (which are discussed below).

Considerations *(regarding recommendation 12)*

It might be argued that mediation is not suitable for settling disputes in small claims courts because, supposedly, small claims courts are not true courts but merely a kind of tribunal since small claims court commissioners (presiding officers) are not independent but are appointed by the Minister, proceedings are informal and rules of evidence do not apply, and cross-examination and legal representation are not allowed.

Yet those factors are appropriate for courts that hear small claims, and do not render mediation unsuitable for settling disputes in small claims courts. The Department of Justice includes small claims courts in its list of courts, and small claims court commissioners when appointed must swear to administer justice in accordance with the law, like judicial officers in any court. Provision for mediation should be made in the Small Claims Courts Act.

MAGISTRATES' COURTS

The rules of procedure and evidence for magistrates' and high courts cause enormous delays, costs and red tape. If a single case is subjected to all the pleadings, interlocutory procedures, witnesses, postponements, cross-examination and argument allowed for by the rules, it may take months or years, and many thousands of rands, to reach finality. And then the case could go on appeal.

For the average small business, this is simply prohibitive. Anyone with sufficient resources can defeat the ends of justice by utilising and abusing the laws of procedure and evidence to the point where a small business or private individual suffers defeat by exhaustion, exasperation, or impoverishment.

These observations are not new. Provision was made in 1991 for short-process courts, which have never been established.

On the face of it, short-process courts should solve much of the problem. The Act authorises the Minister to establish short-process courts, make rules for short-process courts, and appoint adjudicators to preside at short-process courts. The Act provides that the adjudicator presiding at a short-process court may, on the request of one party to the action and in consultation with both parties, take any steps in relation to the hearing of the action which may lead to the expeditious and cost-saving disposal of the case, including dispensing with any rule of evidence.

Having the matter dealt with in this way by "short process" with most formalities dispensed with should, in theory, result in substantial savings of costs and time to litigants and the court system. If the other party to the action opposes such a request to the adjudicator presiding at a short-process court to dispense with normal procedure and rules of evidence, and it later appears to the adjudicator that such opposition delayed disposal of the proceedings

unnecessarily, the adjudicator may make an appropriate costs order against the opposing party.

One of the most conspicuous victims of unduly prolix laws of procedure and evidence is, of course, the state itself. With improved access to justice via short-process courts, the state would also save money, which could then either be left in the taxpayers' hands or diverted to wherever there are greater real needs.

The main reason short-process courts are not being used is that, although the Act was passed 30 years ago, the Minister has not established any short-process courts or made rules pursuant to the Act regulating the practice and procedure of such courts. Although the Department's website lists a dozen or more types of court which exist in South Africa, short-process courts are not among them.

RECOMMENDATIONS 13 and 14

13 The Minister should establish short-process courts, and make rules of procedure and appoint adjudicators for such courts.

14 The short-process court option should then be publicised, and lawyers and judicial officers should be encouraged to draw it to the attention of litigants.

The main reason for the existing rules is to provide litigants with access to justice. To the extent that the rules might subvert this objective, litigants should be free to forego them.

What the state can do legitimately for free citizens is to facilitate the making of informed choices. People are not using the short-process option because it has not yet been implemented. The problem can be addressed by establishing short-process courts and making rules and appointing adjudicators for them, and then publicising the option.

Considerations *(regarding recommendations 13 and 14)*

One of the benefits of pleadings, pre-trial conferences, rules of evidence et al. is that less of the court's time is wasted at the hearing. To the extent that matters are clarified in advance, extraneous issues are eliminated and evidence is kept to the point, the court's task is facilitated. Short-process proceedings or summary hearings (especially without prior mediation) could aggravate matters for the courts.

However, the courts exist – or should exist – for the benefit of the public they serve. Their convenience should not be achieved at the expense of their raison d'être.

Fortunately, there is no need for a major trade-off. If these recommendations are implemented, the net effect will be a substantial alleviation of the judiciary's burden. Claims will be resolved more expeditiously, there will be fewer appeals and reviews, the economy will benefit (thus providing more resources with which the state can dispense justice), the courts' clerical infrastructure could be reduced, and so on.

ALL COURTS

RECOMMENDATION 15

Litigants in any court should have the right to assistance of their choice.

Both justice *per se*, and access to justice, would be enhanced (in most cases) if litigants had the right to be assisted in any court by non-professionals.

It is anomalous that people may appear in person without a lawyer in all courts (and other forums), but may not get

another layperson to represent them. In such matters there is job reservation for professional lawyers who are in full-time practice. Even fully qualified lawyers may not represent people in the courts if they are no longer in formal practice.

Reserved work for professional lawyers drives up the cost of litigation and, in some cases, curtails access to justice.

If the professional fees of lawyers are to be protected, then, at the very least, individuals and small businesses should be free to be assisted or represented by people of their choice without remuneration. For example, an illiterate street vendor might want her educated son or daughter to represent her against a supplier of her wares, or an entrepreneur might want to be represented by an employee such as a clerk or bookkeeper, who might be more conversant with the facts or the law, and might be more eloquent or more confident.

NGOs that promote SMMEs are frequently asked by their clients for legal assistance in court, which they would gladly provide if it were allowed.

Considerations *(regarding recommendation 15)*

There is a danger that incompetent laypeople will be used instead of professionals. Gullible litigants might be cheated by fly-by-night operators. Unqualified people might delay proceedings or frustrate presiding officers. They might lose cases on technicalities and waste the court's time by presenting extraneous evidence.

However, a moment's reflection suggests that the overwhelming majority of people will rely on what is appropriately called common sense and engage the assistance of whoever will do greater justice to their cause.

If such freedom is "going too far", the right to assistance and representation by choice can be qualified by prescribing precisely what non-professional assistants can and cannot do and for what they might be remunerated.

If reserved work is to remain, provision should be made for eminently qualified people such as professional debt collectors, administrators of estates, accountants and para-legal staff in law firms to appear in appropriate cases for reward.

RECOMMENDATION 16

The requirement of security by close corporations for costs should be scrapped.

Section 8 of the Close Corporations Act 1984 says that, when a close corporation (CC) is a plaintiff in legal proceedings, the court has a discretion to require the CC to furnish security for the costs of the defendant if it appears that there is reason to believe that the CC will be unable to pay the defendant's costs if the latter is successful in his defence, and may stop the proceedings till the security is given. This means that a plaintiff CC could be frustrated in its endeavour to recover legitimate debts or damages from a defendant if the CC does not have enough funds. This is discrimination against businesses that have incorporated as CCs. The corporate nature of the plaintiff should not impede its access to justice.

Section 13 of the Companies Act 1973 contained a similar provision, but the 2008 Companies Act which replaced it does not. It is incongruous, when a company is no longer subject to this stricture, that a CC can be required to furnish security for a defendant's costs merely "if it appears that there is reason to believe" that the CC will be unable to pay.

Considerations *(regarding recommendation 16)*

Repealing the relevant provision in the Close Corporations Act would increase the risk that a successful defendant would not recover costs. However, since natural persons and companies are not, as a rule, liable to be required to provide security for costs, CCs should also be relieved of this statutory restriction on their access to the courts.

The ordinary common-law rule, that a court may order a natural-person or company plaintiff to furnish security for costs, but in its discretion and only if satisfied that the claim is vexatious or reckless or an abuse of court process, should apply to CCs too.

JUDICIAL REVIEW

RECOMMENDATION 17

Legislation along the lines of the Regulatory Flexibility Act 1980 combined with the Small Business Regulatory Enforcement Fairness Act 1996 and Small Business Paperwork Relief Act 2002 of the United States should be adopted in South Africa in order to minimise the economic impact of legislation on small business by subjecting the law-making process to judicial review.

Improving access to justice for small business must not be confused with the process of creating a just dispensation for small business, that is, creating a legislative and regulatory framework within which small businesses can thrive. Both are necessary, as governments are discovering. Laws and regulations that have detrimental consequences for business, and particularly small business, are receiving increasing attention in many countries around the world.

In the United States, for instance, the 1980 Regulatory Flexibility Act (RFA) requires federal agencies to take steps to collect input from small entities on regulations and to determine whether a rule is expected to have a significant economic impact on a substantial number of small entities. The federal agencies are also expected to identify alternative regulatory approaches for small businesses.

The Small Business Administration's Office of Advocacy reported in 1996, however, that many agencies were not complying with the RFA. The Small Business Regulatory Enforcement Fairness Act of 1996 was then adopted to give the Office of Advocacy greater powers and influence under the RFA, and to permit judicial review of compliance with the RFA by federal agencies.

According to the terms of the Act, any small business that is adversely affected by a law may subject the law-making procedure to judicial review. The Act also requires a 10-yearly review of every regulation as well as a final regulatory flexibility analysis, which must include a description of the steps an agency has taken to minimise the significant economic impact of regulations on small businesses.

These Acts are supported by the 2002 Small Business Paperwork Relief Act, which promotes the streamlining of paperwork requirements applicable to small businesses.

Perhaps the most important problem with laws that attempt to protect small businesses from excessive regulation is the natural resistance of legislators and civil servants to any constraint on their power. The above-mentioned laws nevertheless reflect a determination on the part of the United States government to impose constraints on the regulatory process.

Placing similar constraints on South Africa's regulatory process will assist in bringing about the entrepreneurial small business environment the government wishes to create.

South Africa's 1996 National Small Enterprise Act does not place constraints on the regulatory process. Even its limited aims are not being met.

The Act authorises the Minister to publish guidelines for governments on assessing the effect of legislation on small enterprise. No guidelines have been published although the Act was passed 25 years ago.

The Act states that it is administered by the trade and industry minister. But in 2014 the then-President created a Department of Small Business Development with its own director-general, appointed a Minister of Small Business Development, and transferred administration of the Act to that Minister.

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The Act requires an annual review to be compiled summarising the departmental director-general's findings or recommendations about laws and proposed laws and administrative practices which restrict the small enterprise sector. It is not clear that this is being done properly and regularly in the form required by the Act. The parliamentary committee for small business has been critical of the new Department's performance. It was rumoured that the Department might be closed down. But in 2019, the President appointed a new Minister for the Department.

As the United States' experience has shown, merely requiring government departments to determine whether regulations will adversely affect small business is not sufficient. Mechanisms such as judicial review need to be put in

CONCLUSIONS

Needless to say, some of these proposals will meet with resistance, especially from those who benefit from the *status quo*.

How to respond to vested interests is a political problem. Often the solution is to identify alternative benefits for such interests in order to secure their support for needed reforms. In other instances, governments are forced to overrule vested interests in the interests of the public and better government.

There are, of course, also *bona fide* concerns about reforms. Change is always risky. We have tried to identify most of these concerns and to make the case that the probable benefits from the proposed reforms outweigh the likely disadvantages. In some cases, the probability of net benefits is overwhelming. These "soft targets" should be implemented forthwith in the interests and in the spirit of the government's desire to promote small business and a national culture of enterprise.

Statutes and statutory instruments

Small Claims Courts Act 61 of 1984 as amended—
s 3(1) (not courts of record),
s 7 (parties):
(1) (only natural persons may institute action, and juristic persons may become parties only as defendants),
(2) (no legal representation),
s 9(6) (person appointed as commissioner of small claims court must swear to administer justice in accordance with the law),
s 13 (transfer of actions to a more convenient court by agreement or on application);
s 14 (jurisdiction i.r.o. persons):
(2) (no action to be instituted against State),
(4) (no jurisdiction i.r.o. claims based on cession or assignment of rights),
s 15(a)–(f) (court has jurisdiction i.r.o. specified causes of action where claim or value of matter does not exceed amount determined by Gazette notice),
s 16 (matters beyond jurisdiction):
(d)(ii) (specific performance, other than delivery of property in value not exceeding amount determined),
(f)(i)–(iv) (claims for damages for defamation, malicious prosecution, wrongful imprisonment or wrongful arrest),
(g) (interdicts),
s 18(1) (party may abandon part of claim in order to bring claim within court jurisdiction),
s 22 (no jurisdiction by virtue of parties' consent to hear action beyond jurisdiction),
s 23 (court must stop proceedings if of opinion there are difficult or complex questions of law or fact which it cannot adequately or fairly or should not decide),
s 25(1)(b) (Rules Board for Courts of Law may make rules regulating practice and procedure in small claims courts),
s 26 (procedure):
(1) (rules of evidence do not apply),
(2) (evidence may be written or oral),
(3) (no cross-examination by parties, only questioning by commissioner),
s 29(1)(b) (until judgment is given in an action arising from plaintiff's business, he may not institute another action arising from his business),
s 45 (no appeal),
s 46 (review on stipulated grounds),
amount determined for purposes of s 15 and s 16:
Govt Notice R1402 of 15 Sep 1995 (R3,000),
Govt Notice R313 of 12 Mar 2004 (R7,000),
Govt Notice R985 of 27 Oct 2010 (R12,000),
Govt Notice R185 of 18 Mar 2014 (R15,000) and
Govt Notice R296 of 5 Mar 2019 (R20,000),
Close Corporations Act 69 of 1984 as amended—
s 8 (security for costs),
s 10 (number of members),
Rules Board for Courts of Law Act 107 of 1985—
s 6 (Board may make rules for the Supreme Court of Appeal, high court divisions and magistrates courts regulating—
(m) manner of determining amount of security in any case where it is required that security shall be given),
(t) any matter which may be useful for proper despatch of functions of those courts in civil proceedings),

Govt Notice R48 of 12 Jan 1965 (rules of superior courts as amended)—
rule 41A (mediation),
rule 47 (party entitled and desiring to demand security for costs from another must deliver notice setting forth grounds on which security is claimed and amount demanded),
Govt Notice R740 of 23 Aug 2010 (rules of magistrates' courts as amended)—
rule 62(1) (party entitled and desiring to demand security for costs from another must deliver notice setting forth grounds on which security is claimed and amount demanded),
rules 70–87 (mediation),
Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991—
ss 2, 3 (mediation),
ss 4, 6 (Minister may establish short process courts and appoint adjudicators for them),
s 10 (procedure and evidence),
s 11 (judgment or order final),
s 13 (Minister may make rules),
s 14 (advocate or attorney may appear on behalf of any party),
Public Service Act, 1994 (Proc 103 of 1994)—
s 7(1) and (2)(a) (public service shall be organised into, inter alia, national departments mentioned in Sched 1),
s 7(5) (President may, on advice of public-service-and-administration Minister, amend Sched 1 to establish or abolish a department, designate department and head thereof, or amend designation),
Sched 1 (national departments and heads thereof),
Proc 43 of 2014 (Gazette 37814 of 8 Jul) (amendment of Sched 1 to establish Dept of Small Business Development and designate as head thereof Director-General: Small Business Development),
National Small Enterprise Act 102 of 1996 as amended—
s 18 (ministerial guidelines for assessing effect of legislation on small enterprise),
s 19(3)(b) (entities designated by Director-General must, in co-operation with Director-General, annually compile a review called the Annual Review of Small Enterprise, which must cover summaries of any findings or recommendations of the Director-General about legislation, proposed legislation and administrative practices which restrict the small enterprise sector),
Annual Review of Small Business in South Africa 2003, TIPS (Trade & Industrial Policy Strategies) for Dept of Trade & Industry,
Annual Review of Small Business in South Africa 2004 (a Qualitative Review), TIPS for Dept of Trade & Industry,
Annual Review of Small Business in South Africa 2004 (a Statistical Review), TIPS for Dept of Trade & Industry,
Annual Review of Small Business in South Africa 2004 (Definitions, Data & Methodology), TIPS for Dept of Trade & Industry,
Annual Review of Small Business in South Africa 2005–2007 (final draft Aug 2008), Dept. of Trade and Industry, 2008, pp 48, 49, 108, 168,
Annual Review of Small Business in South Africa 2007–2014, Dept of Small Business Development, 2014,
Annual Review of Small Businesses and Cooperatives in South Africa (2016-2017), Dept of Small Business Development,
Contingency Fees Act 66 of 1997

Constitution and measures thereunder
Constitution of the Republic of South Africa, 1996—
s 12 (fundamental right to freedom and security of the person),
s 21(1) (fundamental right to freedom of movement),
s 34 (fundamental right of access to courts),
s 91(2) and (3)(b) (President appoints Ministers and assigns their powers and functions,

may dismiss them, and may select any number of Ministers),
s 97 (president may transfer statute's administration, powers and functions from one Minister to another),
Proc 47 of 2014 (Gazette 37839 of 15 Jul) (transfer of National Small Enterprise Act's administration, powers and functions to Minister of Small Business Development),
s 173 (superior courts have inherent power to regulate their process),
s 174(8) (read with Sched 2) (judicial officers must must swear to administer justice in accordance with the law),
s 197 (public service must be structured in terms of national legislation)

Court judgments

Commissioner of S A Revenue Service v Sprigg Investment 117 CC [2011] 3 All SA 18 (SCA) (purely-interlocutory applications and orders concern incidental matters which do not determine principal dispute),

Boost Sports Africa (Pty) Ltd v S A Breweries Ltd [2015] 3 All SA 255 (SCA) pars [5]–[19] (a court should order a plaintiff whether natural person or company to furnish security for costs only in its discretion and if satisfied the claim is vexatious or reckless or an abuse of court process, even if in other instances the prospects of recovering costs may be poor)

Commentaries

Law of South Africa vol 10 3 ed—
"Costs" (M Dendy), par 290 (security: limited companies and close corporations), par 407 (proceedings in magistrates' courts: security: grounds for demanding security),
"Courts and Tribunals" (M D J Wallis), par 503 (tribunals: small claims courts: status),

Final Report: Regulatory Burdens on Small Business: Options for Improvement, TIPS (Trade & Industrial Policy Strategies), Apr 2017 (for Dept of Planning, Monitoring & Evaluation, and Dept of Small Business Development),

The Real Economy Bulletin Special Edition - The State of Small Business in South Africa 2019, TIPS

Government documents

White Paper on National Strategy for the Development and Promotion of Small Business in South Africa, par 4.2.4 (proposal to increase small claims courts' jurisdiction to about R30000). Parliament, Cape Town. WPA/1995. Gen Notice 213 of 1995 (Gazette 16317 of 28 Mar 1995),

Small claims courts: guidelines for commissioners, Dept of Justice, May 2010, p 38 (commissioners are not remunerated),

Draft guidelines for commissioners of small claims courts, Dept of Justice, Oct 2016, p 24 (commissioners are not remunerated),

Parliamentary Monitoring Group—
"Department of Small Business Development 2016/17 Annual Report" 4 Oct 2017,
"Department of Small Business Development progress in aligning functions" 21 Feb 2018,

Parliament of the Republic of South Africa, 15 Mar 2018, "Small Business Development Committee disappointed by Department's performance"

Statistics South Africa. Consumer Price Index. CPI History. Table B1 - CPI headline index numbers (Mar 1995 28.4 – Apr 2021 120.1; Dec 2016 = 100; substantial changes were made to CPI compilation in Jan 2009: documentation available on Stats SA website) *http://www.statssa.gov.za/publications/P0141/CPIHistory.pdf* (accessed 31 May 2021),

South African Government. *www.gov.za*. "FAQs: Justice and crime prevention: What are the different courts in South Africa?" *https://www.gov.za/faq/justice-and-crime-prevention/what-are-different-courts-south-africa* (accessed 31 May 2021),

Dept of Justice & Constitutional Development. "Courts in South Africa" *https://www.justice.gov.za/about/sa-courts.html* (accessed 31 May 2021)

SELECT SOURCES

Media

De Rebus, 1 Apr 2013, "Attorneys urged to serve as small claims court commissioners", B Whittle (law society concerned at shortage of commissioners),

Small Business Insight, Stephen Timm—

"SME department's questionable performance", 6 Jul 2017,

"Will Ramaphosa cut South Africa's SME ministry?" 8 Mar 2018,

Cars.co.za, 6 Apr 2021, G Lilleike, "5 Cheapest New Cars in South Africa 2021" (from R153,537 on average)

Dictionaries and calculators

Claassen, R.D., *Dictionary of Legal Words and Phrases* (svv "liquid document"),

South African inflation (inflation adjustment calculator) *https://inflationcalc.co.za/* (R30,000.00 on 31 Mar 1995 is worth R125,540.07 on 31 May 2021)

LAWS AFFECTING SMALL BUSINESS

LABOUR

SYNOPSIS

Problems

Labour legislation, which may be appropriate for regulating relations between large employers and employees represented by large trade unions, is wholly inappropriate for regulating relations between small employers and their employees. The legislation imposes an excessive burden on small employers, especially employers who are illiterate or not literate in the languages in which the laws are written. As small businesses offer the main avenue of employment for the young, unskilled or otherwise disadvantaged, there is usually an above-average labour turnover in such businesses.

Not unexpectedly, by far the largest volume of cases coming before the Commission for Conciliation, Mediation and Arbitration (CCMA) involves small businesses, and most of those are for alleged wrongful dismissals. The unwillingness of small employers to take risks in employing people who may later turn out to be unsuitable or unaffordable is consequently understandable, particularly when there is a prospect of having to contend with disputes about the fairness of dismissals being referred to arbitration by a bargaining or statutory council (or the CCMA, if a party to the dispute falls outside such a council's registered scope), and dismissed employees might be represented by a highly qualified trade union official who has detailed knowledge of the labour laws. In the event that a dispute about the fairness of a dismissal is referred to the Labour Court, the employer will have to contend with the dismissed employee's labour lawyer.

All disincentives to job creation should be swept away in order to reduce the numbers of the unemployed and increase economic growth. Demand for labour from small businesses offers the greatest potential for reducing unemployment. But small employers will avoid employing people if they face the possibility of being involved in perpetual disputes with their employees, of having to spend hours of their time in arbitration or the Labour Court, and having to pay high fees to labour lawyers.

If government wishes to achieve its economic growth targets, it can do no better than to release the entrepreneurial energy of small employers, combined with the rapid absorption of the unemployed, to achieve an acceleration in economic growth. This desirable result can be achieved by increasing the fluidity at the bottom end of the labour market. This requires exempting small employers from all inappropriate legislation and regulations.

Definition of small employer
"Small employers" in this entry refers to small employers as may be defined for purposes of granting exemption from the application of particular legislation. It is envisaged that small employers would be defined by reference to number of employees, turnover, capital employed or a combination of these factors. It is also envisaged that statutory definitions of "small employers" would differ for different exemptions.

Recommendations

- Allow employees, after counselling by officials of the Department of Labour, to enter into written "customised contracts" with small employers in which they waive some of their statutory entitlements under certain specified sections of the Labour Relations Act and the Basic Conditions of Employment Act, such agreements to be recorded by the Department.
- Recognise the right of small employers to freedom of association as well as disassociation by exempting them from the provisions of the Labour Relations Act which interfere with that right.
- Exempt small employers from section 10 of the Labour Relations Act, thereby restoring the burden of proof to the person making an allegation regarding the conduct of another person.
- Exempt small employers from the requirements of section 16 of the Labour Relations Act relating to disclosure of information.

- Exempt small employers who are non-parties to collective agreements from extension of those agreements.
- Automatically exempt small employers from sectoral determinations promulgated in terms of section 44 of the Labour Relations Act read with section 54 of the Basic Conditions of Employment Act.
- If wider exemptions have not been granted, exempt small employers and their employees from the provisions relating to strikes and lock-outs.
- Withdraw the allowance of employees employed by small employers to take part in work stoppages for the purpose of promoting or defending the economic interests of others in general.
- Allow a short form of arbitration for small employers in place of the existing dispute resolution procedures required for the resolution of disputes under the auspices of the CCMA.
- Allow small employers to be represented by experts in labour law in conciliation proceedings held in terms of section 135 of the Labour Relations Act if the employer is not a member of an employers' organisation and if the employee is being represented by a member of a trade union.
- Set a ceiling of two months' salary on compensation that may be awarded in terms of section 194 of the Labour Relations Act against small employers in the event of a finding against the employer.
- Exempt small employers who employ temporary employees through a labour broker from section 198(4) of the Labour Relations Act which imposes joint liability on the labour broker and client if the labour broker contravenes the Basic Conditions of Employment Act or a collective agreement.
- Provide for the exemption of small employers from the application of Chapter II (regulation of working time—sections 6 to 18) of the Basic Conditions of Employment Act, 1997.
- Exempt small employers from section 20(11) of the Basic Conditions of Employment Act which prohibits an employer from paying an employee for leave not taken.
- Exempt small businesses from the National Minimum Wage Act, 2018.

SMALL BUSINESS AND LABOUR

This entry on *Laws Affecting Small Business* identifies labour laws which impose unduly burdensome requirements on small businesses and which dissuade them from taking on more employees. It identifies the labour laws that small businesses find most problematic and makes recommendations for relief. While owners of small firms may contend that the recommendations do not go far enough, trade unions could maintain that they go too far.

The entry deals with what is economically desirable. There is no hesitation in contending that many of the existing labour laws are difficult, if not impossible, for small employers to comply with. Labour laws in general impose a relatively higher cost on small firms than on large firms and undoubtedly have the effect of reducing the number of people employed by small firms. Small employers are at a disadvantage in dealing with highly trained trade union officials, whose skills are honed in negotiations with the experts employed by large corporations. The labour laws need to take these factors into account, not only to provide relief to small firms, but to increase job opportunities for the unemployed and allow the economy to grow faster. This is the only sustainable antidote to the destitution that grips increasing numbers of ordinary South Africans.

SMALL BUSINESSES AS "JOB LABORATORIES"

Highly skilled people are inclined to gravitate towards large firms whereas the less skilled look to small firms for employment. Applicants to large firms are evaluated and interviewed several times by highly qualified personnel managers, have to produce detailed CVs and references, and are given positions only if they have good track records and fit the profiles of the posts being offered. Everything possible is done to ensure that candidates are right for the jobs in order to avoid subsequent dismissals for reasons of unsuitability.

Owners of small firms, on the other hand, are more likely to assess people by instinct rather than by thorough evaluation. They function on a “hit-or-miss” or “trial-and-error” basis, hoping that the person they appoint will fit the job and handle it efficiently. People with low skills are taken on in the knowledge that they will have to be taught the job and may initially not be productive. Small employers also hope, when they appoint people, that the new employees will help increase the earnings of the business sufficiently to cover their wages. When this does not happen, or there is incompatibility for some other reason, employers are faced with having to dismiss the unsuitable employee.

It has been observed that, throughout the CCMA’s life, the overwhelming majority of cases referred to it have been for unfair dismissal, and a significant proportion have involved very small businesses. It is not surprising, therefore, that of the 221,547 cases referred to the CCMA between 1 April 2019 and 31 March 2020, a significant proportion would involve small businesses, and that most of these cases would be for allegedly unfair dismissals. Employees, however, often leave without giving adequate notice and small employers seldom take action against them. Consequently, contracts of employment and notice periods for termination of employment at the small firm level are in practice binding on the employer but not on the employee.

Employees tend to regard small firms as “jumping-off-places” from which they can move to larger firms once they have accumulated knowledge and experience. Staff turnover in small firms is therefore relatively high, but total employment in these firms keeps growing in line with growth in the economy.

Given their preparedness to take risks by employing inexperienced staff with poor or inadequate employment histories, small businesses are the “job laboratories” of South Africa and cannot carry out this important function within a rigid regulatory framework. If they are compelled to do so, the whole economy becomes less efficient and unemployment levels increase. While the rigid labour law regime ostensibly exists to further the interests of the vulnerable employee, in practice it is vulnerable South Africans, condemned to unemployment, who are these laws’ greatest victims.

EMPLOYMENT FOR THE “UNEMPLOYABLE”

Wages of workers in South Africa have risen rapidly in real terms over the past twenty years, yet there is high unemployment. According to Statistics South Africa’s expanded definition of unemployment (which includes those discouraged from seeking work), 38.5% of the workforce was unemployed at the end of the third quarter of 2019, before reports in December 2019 in China of coronavirus disease 2019 (COVID-19), the viral disease which is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) and which in a few months became a global pandemic, the response to which aggravated unemployment in South Africa and elsewhere. Other surveys provide differing views on the severity of the unemployment problem but whatever criteria are used there is no doubt that, even apart from COVID-19, unemployment in South Africa is unacceptably high.

Legislation formulated on the basis of agreements entered into between large trade unions and large employers are part of the problem. Not unexpectedly, the respective organisations focus entirely on their own interests without consideration for the effects of their agreements on what in labour terminology are described as “non-parties”. If non-parties were permitted to go about their business undisturbed, the unemployed and small firms would be able to reach accommodation on wages, conditions of employment, working hours and all the other factors involved in employer-employee relations. The unemployed would rapidly be absorbed into the small firms and all would be better off than they are now. However, under current labour laws, many of the agreements between trade unions and employer organisations are extended to small firm “non-parties” who are then compelled to pay the same wages and meet the same employment conditions as the large firms.

A consequence of rigid labour laws is that some people become “unemployable” because employers are not prepared to employ them at the wages and under the conditions laid down in the laws. These unfortunate potential employees

are then deprived of the right to offer to compensate for their perceived deficiencies by agreeing to work for lower wages or finding some alternative way to reach an accord with an employer.

During the apartheid era, unskilled black workers were kept out of employment by job reservation and rate-for-the-job minimum-wage laws which were designed to protect the jobs of white workers. The underlying intention of current labour laws is totally different from the thinking that motivated the apartheid legislation, yet the effect is the same. The unemployed and small employers are unintended casualties.

Naturally, if barriers to employment in the small firms sector are reduced, salaries will initially be lower than they are presently. At the bottom end of the labour market working conditions would also be below currently stipulated standards. However, more people would be employed as a result of the increased competitiveness of South African firms. What the country needs is for increased demand for labour to drive up wages and bring about improved working conditions, and for this to happen legislative measures which indirectly discourage the hiring of workers should be removed so that the currently "unemployable" can more easily get work.

CUSTOMISED CONTRACTS

RECOMMENDATION 1

Allow employees, after counselling by officials of the Department of Labour, to enter into written "customised contracts" with small employers in which they waive some of their statutory entitlements under certain specified sections of the Labour Relations Act and the Basic Conditions of Employment Act, such agreements to be recorded by the Department.

Giving individual employees the right to enter into whatever voluntary agreements they choose with small employers offers a method of accommodating the variety of circumstances that exist at the bottom end of the business and labour markets. Labour legislation too often proceeds from the apparent assumption that employees need protection from unscrupulous employers who, if the law did not prevent them, would exact maximum labour for minimum benefits. It does not provide for employees who, of their own free will, and for their own personal reasons, wish to enter into agreements with reputable employers to work for lower benefits and on less favourable terms than the law allows. Possible reasons for agreeing to work for low wages or under trying conditions could range from being unemployed and desperate to work, to being young and inexperienced and being prepared to "pay" to learn special skills or merely to get job experience.

Small employers offer the greatest hope to the unemployed. They will hire the inexperienced, the young, the old, the illiterate and the otherwise disadvantaged. They do not have standard hiring procedures and minimum requirements that have to be met before offering someone employment. They have niches into which they can fit people who would have no hope of getting jobs in large firms. The law therefore needs to make provision for variations that will allow small employers to hire those who would otherwise be unemployed.

Variations could be accommodated by allowing employees, after counselling by the Department of Labour, to enter into "customised contracts" with small businesses in which they agree to working arrangements that are less favourable than allowed by current legislation. Such contracts would have to be officially recorded and subject to termination by the employee at not more than one month's notice.

This recommendation would place the decision relating to conditions of employment entirely in the hands of the employee, who would at all times be able to withdraw from the agreement by giving the necessary notice. The Department of Labour could ensure that all those entering into such "customised contracts" are fully aware of the implications of their actions. The Department would not have the authority to reject such contracts, but simply provide

advice to employees. General application of the labour laws, and especially their application to large firms, would not be affected. Trade union members would, in addition to the advice available from the Department of Labour, have access to the advice of their union officials.

FREEDOM OF ASSOCIATION

RECOMMENDATION 2

Recognise the right of small employers to freedom of association as well as disassociation by exempting them from the provisions of the Labour Relations Act which interfere with that right.

Sections 4 to 10 of the Labour Relations Act, 1995 form Chapter II of the Act under the heading Freedom of Association and General Protections. What these sections in effect do is to forbid freedom of association and disassociation.

The rights that are granted to small employers to become members of employer organisations and to exercise their rights as members are of little or no value to them in their dealings with their employees, or with trade unions to which their employees may belong. The rights that are granted to employees in section 5 of the Act, however, give employees very powerful union allies, who are in turn granted special privileges under the law. Small employers are at a decided disadvantage under this dispensation, as they are granted rights of dubious value in comparison with powers granted to employees.

Contracts between employers and employees have long been considered to be different from contracts relating to goods and services. It has been regarded as legitimate for government to interfere with the contractual rights of the parties because of the social impact of their relationships. In a world in which institutions of all kinds are downsizing, this view deserves reconsideration as there is an increased need for a variety of arrangements between small employers and their employees.

BURDEN OF PROOF

RECOMMENDATION 3

Exempt small employers from section 10 of the Labour Relations Act, thereby restoring the burden of proof to the person making an allegation regarding the conduct of another person.

Our law is based on the principle that a person claiming something from another party has to prove that he or she is entitled to it. It is therefore usually the case that anyone making an allegation has the burden of proof. But section 10 transfers part of the burden of proof to the other party. It states:

"In any proceedings-

(a) a party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and

(b) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter."

This means that a complainant, in order to make a claim, need merely prove the other party's conduct, and does not also have to show that the other party's conduct infringed the statute.

The other party is then subjected to the "reverse" burden of proving that his conduct did not infringe the statute.

In practice, employees submit written statements alleging that their employers have infringed their rights to participate in trade union activities (or other rights protected under Chapter II of the Labour Relations Act which deals with "freedom of association and general protections") as "proof" of the fact of their employers' conduct. The employers then have to prove that their conduct did not infringe the provisions of this chapter of the Act.

Where the employer has access to a highly skilled personnel department, transferring the burden of proof to the employer may not result in injustice. However, where the burden of proof is transferred to a small employer with no experience of such matters and, at most, a rudimentary understanding of the law, the outcome may frequently be manifestly unjust.

DISCLOSURE OF INFORMATION

RECOMMENDATION 4

Exempt small employers from the requirements of section 16 of the Labour Relations Act relating to disclosure of information.

One of the greatest problems facing small businesses is the necessity to keep proper records. Failure to maintain adequate financial records and to understand the implications of financial results is a major cause of small business failure.

Section 16(2) of the Labour Relations Act states that an employer must as a rule disclose to a trade union representative all relevant information to allow the trade union representative to effectively perform his or her functions of representing employees in grievance and disciplinary procedures, and of monitoring the employer's compliance with the Act and other laws regulating terms and conditions of employment and collective agreements binding on the employer. In addition, the trade union representative has the power to report any alleged contraventions of the Act to the employer, the representative trade union, and any responsible authority or agency.

However, the nature of the information that might be required by the trade union representative to perform all these functions is nowhere spelled out.

Compliance with this requirement constitutes a substantial burden on small and micro employers who are often uninformed about what information is relevant to enable a union representative to represent employees in grievance and disciplinary procedures.

If an exemption will not be granted to small businesses from the disclosure requirements, then at least the nature of the information that may be required of such a business should be clearly specified.

BARGAINING COUNCILS

RECOMMENDATION 5

Exempt small employers who are non-parties to collective agreements from extension of those agreements.

Sections 27, 28 and 31 of the Labour Relations Act state that a trade union and employers' organisation may establish a bargaining council for a sector and area, with power to adopt and enforce collective agreements containing terms and conditions of employment. A collective agreement binds the union and the employers' organisation who are parties to the agreement, and also (if the agreement regulates terms and conditions of employment) the union's members and employer members of the employers' organisation.

Section 32 states that a bargaining council may ask the Minister to extend a collective agreement concluded in the bargaining council to non-parties to the agreement.

Bargaining councils must have a procedure to deal with applications by non-parties for exemptions from the agreement, and collective agreements are obliged to provide for an independent body to hear appeals against council refusals to grant exemptions to non-parties from the provisions of the collective agreements.

In practice, applications for exemption are very costly and beyond the capacity of most small businesses. An automatic exemption for small employers would save them the cost and time required to make application.

Large firms which are compelled by pressure from trade unions to pay high wages are protected from competition by the extension of labour agreements to non-parties. Extension of the agreements prevents small firms from employing labour at lower rates and out-competing large firms by charging lower prices. Rigid, inflexible and compulsory conditions of employment make it difficult for small firms to offer compensating advantages to workers, such as flexible arrangements regarding hours of work, methods of compensation, time off, job responsibilities, leave periods and wage rates, varied to suit the capabilities and preferences of the individual employee. In particular, they prevent variations being introduced to suit the needs of employees whose personal circumstances make them unsuitable for employment in large firms.

Benefits to trade unions of extending agreements to non-parties include the expansion of their sphere of influence and the achievement of higher wages and improved conditions for those of their members who are employed by non-party employers. A direct and little-recognised benefit to trade unions is the protection of the jobs of their members employed by large firms through a reduction in the threat to those employers of competition from small firms.

Trade unions would be deeply concerned if employees and employers were allowed by law to contract freely with each other at whatever wages and under any conditions they may agree upon. It is therefore in the interests of trade unions to make collective agreements as all-encompassing as possible by extending them to non-parties.

Exemptions would no doubt have to stipulate that if a business should grow beyond the size for which exemptions are granted, it would automatically become party to the agreement.

STATUTORY COUNCILS

RECOMMENDATION 6

Automatically exempt small employers from sectoral determinations promulgated in terms of section 44 of the Labour Relations Act read with section 54 of the Basic Conditions of Employment Act.

Sections 39 and 43 of the Labour Relations Act provides that a trade union whose members constitute, or an employers' organisation whose members employ, at least 30% of employees in a sector and area, may apply to the Registrar of Labour Relations for the establishment, in a sector and area with no industrial council, of a statutory council with power to enter into collective agreements to perform dispute-resolution and other agreed functions of a bargaining council.

Section 44 states that a statutory council that is not sufficiently representative may submit a collective agreement to the Minister, who must treat it as an Employment Conditions Commission recommendation on matters to include in a sectoral determination under sections 54 and 55 of the Basic Conditions of Employment Act, and may promulgate the agreement as a sectoral determination under that Act.

A sectoral determination may set terms and conditions of employment including remuneration, provide for increases and prohibit remuneration in kind; prohibit task-based work, piecework, home work, sub-contracting and contract work; regulate travelling and other allowances; specify conditions of employment for trainees; regulate training and education schemes; regulate pension and other funds; and set a representation threshold at which a trade union will automatically have organisational rights in workplaces covered.

The Minister must be satisfied that the recommendation gave consideration to inter alia, the operation of small and new enterprises, and the likely impact of any proposed condition of employment on current or new employment in that sector and area.

In practice, however, trade unions and large employers will have less concern for the effects of an envisaged sectoral determination on small business, and will focus on other matters to be given consideration, that are more aligned with their own interests: Employers' ability to carry on business; employment conditions; and "any other relevant information".

An automatic exemption for small employers and their employees would be preferable to having their fate decided by sectoral determination.

Exemptions for small employers can expire once the criteria for exemption are exceeded.

STRIKES AND LOCK-OUTS

RECOMMENDATION 7

If wider exemptions have not been granted, exempt small employers and their employees from the provisions relating to strikes and lock-outs.

Section 64 of the Labour Relations Act grants every employee the right to strike and every employer recourse to lock-out if proper procedures have been followed as laid down in the Act. Small businesses function differently from large employers, and strikes and lock-outs are not an appropriate method of resolving disputes in small organisations.

In practice, the right to lock-out is of very little value to a small employer because of the high cost involved in pursuing this course against employees supported by a large trade union.

The interests of the employees have to be weighed up against the interests of the employer. Small employers are not necessarily in a powerful position in the employer-employee relationship and are unable to deal with the severe consequences of a strike or lock-out. In terms of section 76 of the Labour Relations Act, an employer under certain circumstances is precluded from hiring replacement labour. This could have severe repercussions for small firms with contract deadlines. Section 23(2)(c) of the Constitution of the Republic of South Africa protects the fundamental right of workers to strike, but does not determine conditions under which strikes may occur.

Small employers and their employees should be exempted from the provisions relating to strikes and lock-outs. Section 36(1) of the Constitution authorises reasonable and justifiable statutory limitations of fundamental rights (including the right to strike) in light of more pressing social necessities.

SECONDARY STRIKES

RECOMMENDATION 8

Withdraw the allowance of employees employed by small employers to take part in work stoppages for the purpose of promoting or defending the economic interests of others in general.

Section 77 of the Labour Relations Act states that every employee who is not engaged in an essential service or a maintenance service may take part in the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the economic interests of others.

Small employers are unable to afford the cost of employee participation in actions that are in reality of a political nature. The survival of small businesses is dependent on the cooperation and full involvement of employer and employee in the operations of the business at all times. It is not in the interests of the employees if the survival of the business is threatened and their future employment is jeopardised.

Large firms may be able to absorb the cost when employees participate in secondary strikes, but small employers can be badly harmed if they are not able to continue to function as a result of such strikes.

DISPUTE RESOLUTION

RECOMMENDATION 9

(a) Allow a short form of arbitration for small employers in place of the existing dispute resolution procedures required for the resolution of disputes under the auspices of the CCMA.

(b) Allow small employers to be represented by experts in labour law in conciliation proceedings held in terms of section 135 of the Labour Relations Act if the employer is not a member of an employers' organisation and if the employee is being represented by a member of a trade union.

The resolution of disputes under the auspices of the CCMA is expensive and complicated. It was not designed for the purpose of resolving disputes between low-income small employers and their employees. The introduction of a short and inexpensive form of arbitration to deal with such cases would be in the interests of both the employer and employee.

Small employers, many of whom are not literate in the languages in which the laws are written, and some of whom may be illiterate, are at an unfair disadvantage in being compelled to appear on their own in conciliation proceedings where they are faced with a highly-trained trade union representative who is fully conversant with the law. Justice demands that the scales should be balanced in such dispute hearings.

To establish which cases should be dealt with according to a short form of arbitration, a determination could be made by size of business and/or number of employees.

If there is an objection to the employer having expert representation, the matter could be resolved by excluding employee representation by trade unions in the event that the employer is not a member of an employer's organisation.

UNFAIR DISMISSAL

RECOMMENDATION 10

Set a ceiling of two months' salary on compensation that may be awarded in terms of section 194 of the Labour Relations Act against small employers in the event of a finding against the employer.

The average small employer does not have the administrative capacity and knowledge to deal with the complicated procedures required to prove that a dismissal has been fair. The lengthy process of consultation that has to take place before a dismissal under section 189 can occur is also excessively costly and time-consuming.

Hearings may be delayed for reasons that have nothing to do with the actions of the small employer. It is therefore unjust to determine compensation on the basis set out in this section.

Making the dismissal of employees complicated and expensive will tend to reduce the number of people in employment, because small employers will be reluctant to take on employees when they may be faced with the existing dismissal and compensation procedures. In the longer term, this barrier to employment is detrimental to both employers and potential employees.

TEMPORARY EMPLOYMENT SERVICES

RECOMMENDATION 11

Exempt small employers who employ temporary employees through a labour broker from section 198(4) of the Labour Relations Act which imposes joint liability on the labour broker and client if the labour broker contravenes the Basic Conditions of Employment Act or a collective agreement.

Small firms cannot be expected to take responsibility for the actions of labour brokers when the broker firms may be very much larger than they are themselves. Imposing such a responsibility on small firms is unfair as they do not have the administrative capability or knowledge to ensure that the labour brokers through whom they are employing temporary staff are complying with the requirements of the labour laws.

If the requirements of the labour laws are not being complied with by labour brokers, small firms should not be made responsible. Small firms often need temporary staff to fill in when their own staff are on leave or are absent for any

other reason. They should not be discouraged from hiring such staff by the potential threat of being held responsible for actions which are not under their control.

REGULATION OF WORKING TIME

RECOMMENDATION 12

Provide for the exemption of small employers from the application of Chapter II (regulation of working time - sections 6 to 18) of the Basic Conditions of Employment Act.

The following is a simplified summary of some of the main provisions of Chapter II of the Basic Conditions of Employment Act:

- Ordinary hours of work are limited to 45 hours per week.
- Daily ordinary working hours are limited to nine hours in a five-day working week and eight hours where the employee works on more than five days in any week.
- An employer who works for less than four hours on any day must be paid for four hours work on that day.
- Overtime is limited to ten hours per week overall, with a maximum working day of twelve hours.
- Employees must be paid at least one-and-a-half times their ordinary wage for overtime worked.
- Employees must be paid at double their normal wage rate for working on Sundays, except that if they normally work on Sundays the rate is one and one-half times the normal rate.
- Night work (which is defined as work performed after 18:00 and before 06:00 the next day) may only be required or permitted by agreement, and only if the employee is compensated in the form of an allowance or reduced working hours, and if transport to and from the employee's home is available.

Chapter II of the Act further provides for variations on the main provisions, and also covers matters such as a compressed working week, averaging hours of work, determination of hours of work by the Minister, meal intervals, daily and weekly rest periods, and public holidays.

Section 6 of the Act provides that Chapter II, except one provision, does not apply to, among others, employees such as senior managers and sales staff – thus setting a precedent for granting exemptions. Employees of small employers should be excluded from the whole of Chapter II in order to provide the parties with the flexibility they need to arrive at mutually satisfactory arrangements regarding working hours. Very few small businesses maintain standard working hours because they tend to fill gaps in the market not covered by large firms. Small employers themselves traditionally work longer hours than any of their employees because of the wide range of activities they have to cover and they are inclined to expect employees to work as hard as they do. Any form of statutorily determined rigidity acts as an impediment to small business efficiency.

Any recommendation to leave the determination of working hours to voluntary agreement between small employers and their employees is likely to conjure up visions of sweat shops and other unpleasant working conditions. But employees always have the freedom to seek better wages, better working conditions and shorter working hours elsewhere. Nothing binds them to stay in jobs that demand unduly long working hours. Relationships between most small employers and their employees are congenial and not at all adversarial, so that mutually satisfactory arrangements are achieved without undue difficulty.

The ministerial determination for the small business sector that was promulgated in 1999 is very limited in scope, applying only to employees who are employed by employers that have nine or fewer employees, and providing that an employee may only agree with the employer to adjust the employee's overtime limit and overtime pay, and then only by—

Extending the weekly overtime limit (from 10 hours), to 15 hours,
adjusting the rate of payment for weekly overtime worked (from time-and-a-half), to—
time-and-a-third for the first 10 hours, and
time-and-a-half for the next 11–15 hours.

That determination should be extended to include employees employed by employers that have up to twenty employees, and broadened to allow agreements permitting any extension of the weekly overtime limit and any adjustment of the rate of payment for overtime worked.

RECOMMENDATION 13

Exempt small employers from section 20(11) of the Basic Conditions of Employment Act which prohibits an employer from paying an employee for leave not taken.

Employees very often prefer to be paid out for part of their annual leave rather than taking all their leave. This matter should therefore be left to voluntary agreement between small employers and their employees.

The 1999 ministerial determination for the small business sector is unduly limited, applying only to employees employed by employers with nine or fewer employees as mentioned, and providing that an employee may only agree with the employer to reduce the employee's annual leave entitlement by the number of family responsibility leave days (up to three days per annual leave cycle) taken by the employee.

That determination should be extended to include employees employed by employers that have up to twenty employees, and broadened to allow agreements permitting any reduction of an employee's annual leave entitlement.

RECOMMENDATION 14

Exempt small businesses from the National Minimum Wage Act, 2018.

The National Minimum Wage Act requires every employer to pay its workers a wage which is no less than a specified minimum wage.

The entitlement to be paid that minimum wage cannot be waived, and it takes precedence over contrary provisions in any contract, collective agreement, or sectoral determination.

The Act states that the minimum wage will constitutes a term of the worker's contract, unless the contract or a collective agreement or law provides a higher wage.

An employer may apply for an "exemption" (in fact merely a discount) from having to pay the minimum wage.

An exemption must be for a year or less, and must specify the wage that the employer must pay.

The minimum wage specified (currently R21.69 for each ordinary hour worked) is subject to annual review by the National Minimum Wage Commission.

Those who argue for a statutorily prescribed minimum wage assume that all businesses will afford the minimum wage. The compliance burden impact small businesses the most. The small business sector does not have the resources to adjust easily as labour costs rise, although it accounts for the majority of new jobs created. The consequence of the minimum wage will be a loss of jobs in the small business sector. This will benefit dominant companies who can exploit their market power at the expense of small businesses.

Minimum wages and other onerous employment requirements make employers, especially small business owners, reluctant to employ staff. Compliance costs drive up the total cost of labour and increase the barriers to entry into the labour market.

Many people who would otherwise have been eligible for jobs are consigned to unemployment. As Nobelist Milton Friedman observed, “A minimum wage law is, in reality, a law that makes it illegal for an employer to hire a person with limited skills.”

Statutory and other legislative measures

Labour Relations Act, 1995—
- Chap II (freedom of association and general protections)—
  - s 4 (employees' right to freedom of association),
  - s 5 (protection of employees, and persons seeking employment)—
    - (2) (no-one may)—
      - (a)(i) (require an employee not to be a member of a trade union),
      - (b) prevent an employee from exercising rights conferred by this Act)
    - (3) (without precluding settlement of a dispute, no-one may promise to advantage an employee in exchange for not exercising a right conferred by this Act)
    - (4) (a contract not permitted by this Act which limits these provisions is invalid),
  - s 6 (employers' right to freedom of association),
  - s 7 (protection of employers' rights),
  - s 8 (rights of trade unions and employers' organisations),
  - s 9 (procedure for disputes),
  - s 10 (burden of proof)—
    - (a) (a party alleging that a protection conferred by this Chapter was infringed must prove merely the facts of the conduct) and
    - (b) (the party who engaged in that conduct must then prove that the conduct did not infringe a provision of this Chapter),
- Chap III (collective bargaining) —
  - s 14 (trade union representatives)—
    - (1) ("representative trade union" means a union, or two or more jointly, that have the majority of employees in a workplace as members),
    - (2) (where at least ten members of a representative union are employed in a workplace, they may elect from among themselves)—
      - (a) (a trade union representative, if ten union members are employed)
      - (b) (two representatives, if more than ten union members are employed)
      - (c) (two representatives for the first 50 union members plus one for every other 50 members up to seven representatives, if more than 50 members are employed)
      - (d)–(f) ([etc]),
    - (4) (a trade union representative has a right to perform the functions of)—
      - (a) (assisting an employee on request in grievance and disciplinary proceedings);
      - (b) (monitoring employer compliance with the workplace provisions of this Act, any law regulating employment conditions and any collective agreement), and
      - (c)(i) (reporting alleged contraventions of those provisions to the employer and union and any responsible authority or agency)
    - (5) (subject to reasonable conditions, a union representative may take reasonable time off with pay during working hours to)—
      - (a) (perform those functions) and
      - (b) (be trained in any subject relevant to performing those functions),
  - s 16 (disclosure of information)—
    - (2) (an employer must disclose to a union representative all relevant information that will allow the union representative to perform those functions effectively)
    - (3) (an employer bargaining with a representative union must disclose to the union all information that will allow the union to engage effectively in collective bargaining)

(5) (an employer is not required to disclose information that)—
(a) (is privileged)
(b) (cannot be disclosed without the employer contravening a law or court order)
(c) (is confidential and disclosure may cause it or an employee substantial harm) or
(d) (is private information about an employee, unless he or she consents),
s 20 (annual leave)—
(11) (employer may not pay employee instead of granting paid leave),
s 27 (family responsibility leave),
s 28 (powers and functions of bargaining council),
s 32 (extension of collective agreement concluded in bargaining council)—
(1) (council may ask Minister to extend agreement to identified non-parties who are in sector and area for which council is registered, if at a council meeting—
(a) (unions whose members constitute majority of members of the unions party to the council vote in favour) and
(b) (employers' organisations whose members employ majority of employees employed by members of the organisations party to the council vote in favour),
(2) (Minister must publish Gazette notice declaring that, from date and for period specified, the agreement will be binding on specified non-parties),
(3) (collective agreement may not be extended unless Minister is satisfied)—
(b) (majority of employees who on extension of the agreement will fall in its scope are members of the unions party to the council),
(c) (members of employers' organisations party to council will on extension be found to employ majority of employees in agreement's scope),
(dA) (the council has effective procedure to deal with non-parties' applications for exemption from the collective agreement and can decide applications in 30 days)
(e) (provision is made in the agreement for independent body to hear and decide, not later than 30 days after appeal lodged, any appeal against—
(i) (council's refusal of non-party's application for exemption)
(ii) (withdrawal of an exemption by the bargaining council)
(f) (the agreement contains criteria that independent body must apply when considering an appeal, which are fair and promote Act's primary objects)
(g) (the agreement does not discriminate against non-parties),
(3A) (no official of union or employers' organisation party to the council may be member of appeal body or participate in its deliberations),
(5) (despite (3)(b) and (c) (employee majorities), Minister may extend agreement if)—
(a) (parties to bargaining council are sufficiently representative in its scope)
(b) (satisfied failure to extend may undermine sectoral collective bargaining) and
(c) (comments invited by Gazette notice),
s 39 (application to establish statutory council),
s 43 powers and functions of statutory councils),
s 44 (Ministerial determinations),
Chap VII (Dispute resolution)—
Pt A (Commission for Conciliation, Mediation and Arbitration),
Pt C (resolution of disputes under auspices of Commission) ss 133–150,
Chap IX (regulation of non-standard employment and general provisions)—
s 198 (temporary employment services)—
(4) (temporary employment service and its client jointly and severally liable if former contravenes i.r.o. latter's employees)—
(a) (a collective agreement regulating employment terms and conditions) or

(c) (Basic Conditions of Employment Act),
Govt Notice R223 of 17 Mar 2015 (rules for conduct of proceedings before Commission)
rule 25(1) (representation in conciliation proceedings)

Basic Conditions of Employment Act, 1997—
Chap 2 (regulation of working time)—
s 9 (ordinary hours of work)
s 10 (overtime)
s 11 (compressed working week)
s 12 (averaging of hours of work)
s 13 (determination of hours of work by Minister)
s 14 (meal intervals)
s 15 (daily and weekly rest period)
s 16 (pay for work on Sundays)
s 17 (night work)
s 18 (public holidays)
s 50 (variation by Minister)
(1) (Minister may make determination to replace or exclude a basic condition of employment in this Act, i.r.o. (a) (any category of employees or employers),
(3) (such determination must be made on Employment Conditions Commission's advice and by Gazette notice),
s 51 (sectoral determination),
s 54 (Director-General must prepare report advising Minister)—
(3) (when advising Minister on publication of sectoral determination, Commission must consider regarding the sector and area)—
(b) (ability of employers to carry on business successfully)
(c) (operation of small, medium or micro-enterprises and new enterprises)
(d) (cost of living)
(e) (alleviation of poverty)
(f) conditions of employment)
(g) (wage differentials and inequality)
(h) (likely impact of proposed conditions of employment on current employment or creation of employment)
(i) (possible impact of proposed conditions of employment on employees' health, safety or welfare)
(j) (other relevant information made available)
(4) (Commission must prepare report for Minister recommending matters to include in sectoral determination for relevant sector and area),
s 55 (making of sectoral determination)—
(4) (sectoral determination may i.r.t. sector and area concerned)—
(a) (set minimum terms and conditions of employment, including rates of remuneration)
(b) (provide for the adjustment of remuneration)
(c) (regulate the manner, timing and other conditions of payment of remuneration)
(d) (prohibit or regulate payment of remuneration in kind)
(e) (require employers to keep records)
(f) (require employers to provide records to their employees)
(g) (prohibit or regulate task-based work, piecework, home work, sub-contracting and contract work)
(h) (set minimum housing and sanitation standards for employees residing on employers' premises)

(i) (regulate payment of travelling and other work-related allowances)
(j) (specify minimum conditions of employment for trainees)
(k) (specify minimum conditions of employment for persons other than employees)
(l) (regulate training and education schemes)
(m) (regulate pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds)
(n) (regulate other matters re remuneration or employment terms or conditions)
(o) taking Labour Relations Act s 21(8) in account, set a representativeness threshold at which a union will automatically have organisational rights in workplaces covered)
s 200 (representation of employees or employers)
Govt Notice R1295 of 5 Nov 1999 (Ministerial determination: Small business sector)

Constitution, 1996—
s 23 (labour relations)—
(1) (everyone has the right to fair labour practices)
(2) (every worker has right to)—
(a) (join a trade union)
(b) (participate in its activities) and
(c) (strike)
(3) (every employer has right to)—
(a) (join an employers' organisation) and
(b) (participate in its activities)
(5) (every trade union, employers' organisation and employer has right to engage in collective bargaining),
s 36(1) (limitation of rights)

Official reports and surveys
Annual Report 2019/2020, Commission for Conciliation, Mediation and Arbitration
Quarterly Labour Force Survey, Quarter 3: 2019 (statistical release P0211, 29 Oct 2019) Statistics South Africa

Commentaries
Industrial Law Journal (2009) "Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges", 30 26 (P Benjamin),
"A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration" (2010), B O K Kwakwala (in part fulfilment of Univ of Stellenbosch M Comm),
"Assessing South Africa's Commission for Conciliation, Mediation and Arbitration," P Benjamin (Apr 2013), International Labour Office, Governance & Tripartism Dept, working paper 47,
Globe Asia, Apr 2014, "Let the Data Speak: The Truth Behind Minimum Wage Laws", (Steve H. Hanke, Prof of Applied Economics, Johns Hopkins Univ, Baltimore, MD),
Free Market Foundation, 5 Jun 2015, "The spectre of a national minimum wage" (T Nolutshungu),
Free Market Foundation, 19 Apr 2017, "The National Minimum Wage will deepen South Africa's unemployment crisis" (D Ansara),
Free Market Foundation occasional paper, 1 Oct 2017, "The market for jobs in South Africa – why it performs so poorly and what can be done to improve it" (Brian Kantor),
Free Market Foundation, 29 Mar 2018, "NMW to cause economic havoc in rural areas and destroy SA job opportunities" (E Davie),
Free Market Foundation, 10 May 2019, "Workers' Day means nothing to many people – a consequence of SA's laws" (C Hattingh),
Free Market Foundation, 15 Jun 2021, "Ideas matter – the government-imposed unemployment crisis continues apace" (C Hattingh)

LAWS AFFECTING SMALL BUSINESS

LAND

SYNOPSIS

Problems

Many black South Africans have suffered dispossession of their land, denial of adequate access to land, inadequate tribal or apartheid forms of title to accessible land, and restrictions on their use of accessible land. These historical disadvantages have severely handicapped small business development, small-scale agriculture, and the provision of housing. Various other factors, including unrealistically high building, surveying, and registration standards, continue to impede rapid land reform and economic growth.

The gradualist approaches thus far adopted to address the huge need for land and housing have hardly made a dent in the problem. The longing for property and shelter cries out for a swifter and more purposeful approach. Many of the measures recommended in this report involve the simple suspension or abolition of obstructive laws and regulations. They can be implemented at the stroke of a pen and will have a dramatic and virtually immediate effect.

Recommendations

PROPERTY AND RIGHTS IN LAND

Amend the Constitution to prevent future legislation from placing obstacles in the way of obtaining secure title.
Grant security of tenure to holders of informal land rights.
Give people the right to deal with or dispose of their land without undue restriction.
Withdraw the 2019 State Land Leasing Policy.
Ensure free transferability of tribal land rights subject to possibly confining transfer to members of the tribe.
Respect tenant/owner agreements relating to land.

SUPERFLUOUS GOVERNMENT LAND

Transfer superfluous government land to the homeless free of charge.

DEMOCRATISED ADMINISTRATION AND DISPOSAL OF TRIBAL LAND

Empower tribal chiefs to dispose of land into secure and tradeable forms of title.

CHALLENGE OF SECURE TITLE

Allocate new land by a simple form of registration.
Suspend the Land Survey Act for conversions to ownership and transfers to existing occupiers.
Make the Deeds Office registration requirement optional.
Suspend the requirement to use a conveyancer for routine property transactions.
Convert all apartheid title to full ownership.

CHALLENGE OF FINANCING

Repeal credit law ceilings on interest rates.

SUBDIVISION OF AGRICULTURAL LAND

Repeal the Subdivision of Agricultural Land Act.

REMOVAL OF RESTRICTIONS ON LAND USE

Scrap prescriptive land-use controls.
Simplify requirements for the establishment of formal settlements.
Create Special Housing Zones exempt from building codes, interest-rate ceilings, and costly formalities for mortgage or non-mortgage finance.
Reduce minimum housing standards to realistic levels.
Amend land-use schemes and municipal by-laws, replacing zoning laws with nuisance and neighbourhood law.

HOUSING CONSUMERS PROTECTION MEASURES ACT, 1998

Repeal the Housing Consumers Protection Measures Act.

REMOVAL OF TRANSFER DUTIES

Abolish duties and taxes on transfer or supply of land.

EXPROPRIATION

Withdraw the Bill to amend the Constitution that would authorise expropriation of land without compensation and state custodianship of land.

Considerations

Relaxed standards and formalities will probably result in slightly increased uncertainty. There is a trade-off between reduced costs, speed of delivery and more land reform, on the one hand, and administrative imperfections, objections from vested interests, and less orderly development on the other.

The question is whether net benefits exceed net disadvantages.

PROPERTY AND RIGHTS IN LAND

RECOMMENDATION 1

Amend the property clause in the Constitution to include a requirement to prevent future legislation from placing any unjustifiable obstacle in the way of a person's obtaining secure title to state land which he or she holds under inferior statutory tenure.

The Constitution's Bill of Rights, and the property clause it contains, protects those who already hold secure property rights from being deprived of those rights. It charges the state to foster conditions that will enable citizens to

gain access to land. It recognises that those with legally insecure land tenure are entitled to legally secure tenure or to comparable redress.

What the Constitution does not do is help the historically disadvantaged, including small business owners, to overcome obstacles to obtaining secure title. Government's commitment to help is needed, and it is important to avoid creating further obstacles in future. Amending the Constitution would be desirable to extend the property clause to include a requirement to prevent future legislation from placing any unjustifiable obstacle in the way of a person's obtaining secure title to state land which he or she occupies under apartheid tenure.

RECOMMENDATION 2

Grant permanent security of tenure to holders of informal land rights, including the right to hold, use and enjoy, sell, let, and mortgage the rights.

It should hardly be necessary, in the light of the world's experience, to present the case for permanent security of rights, and particularly land rights. Small business people need to acquire and enjoy secure title. That is, they need the right to hold, use and enjoy, sell, let, and mortgage land and rights in land. Secure land rights promote optimal land use, provide access to finance, and encourage investment. People who feel secure are more likely to look after what they hold, to optimise its short-term use, to enhance its long-term value, and to seek the ideal balance between long-term and short-term use. They will be less inclined, for instance, to cause long-term damage such as soil erosion for short-term gain if this will be detrimental to their ultimate interests, or those of their heirs.

At present, the Interim Protection of Informal Land Rights Act, 1996 provides temporary protection for the use or occupation by a person of an urban or rural erf as if he or she is the holder of a "black" tenure right in respect of that erf such as a so-called "deed of grant right", leasehold, quitrent or "permission to occupy", despite not being formally recorded as the holder in a land-rights register.

The Act also provides temporary protection for the use or occupation of land under a right of occupation granted by indigenous tribal custom.

And it provides similar protection for the continuous occupation of land by a person for at least five years before the end of 1997 as if he were the owner, without force and openly, but without the registered owner's permission.

To cure the legal insecurity attaching to all these informal forms of tenure, the Act stipulates that no person may be deprived of any such informal right to land without his or her consent (subject to the expropriation laws).

This 1996 Act states that it would lapse at the end of 1997, but that the Minister of Land Reform may in the Gazette provide notice from time to time extend the Act's operation for up to 12 months at a time. The Minister has extended its operation by a year 24 times to date.

This impermanent situation should be rectified as soon as possible by the substitution of the Act with a permanent measure, so that all land rights which black South Africans hold now or will acquire in future are secured unambiguously and include the power to hold, use and enjoy, sell, let, and mortgage the rights.

Considerations *(regarding recommendation 1 and 2)*

Greater security of tenure will meet with resistance from some traditional leaders, politicians and officials who do not want to relinquish the power they exercise over disadvantaged people in historically black areas.

RECOMMENDATION 3

Give people the right to deal with or dispose of their land without undue restriction.

Whites in general have been, and remain, free to dispose of their land as they wish, whether by sale freely contracted between a “willing buyer, willing seller”, inheritance, or donation. Under apartheid, with rare exceptions, blacks had no such freedom, either in “black” area homelands or in “white” area townships.

RECOMMENDATION 4

Withdraw the 2019 State Land Leasing Policy

In recent years, redistributive programmes have not included the transfer of ownership of the land to the purported beneficiaries of the programmes. As preceding policies did, the 2019 State Land Lease and Disposal Policy envisages land under state control being leased to users at a fee.

The policy creates tenants who farm according to the dictates of officials. Small-scale farmers are excluded from acquiring ownership.

Small farming businesses need access to capital. If they own the land, they would be able to mortgage it as security for a loan to finance a harvest. If they merely rent the land, they will have no access to loans, because they will have no property to put up as security for a loan. This is probably the main reason for the current high failure rate among new small-scale black farmers.

Considerations *(regarding recommendation 3 and 4)*

The right to sell is often curtailed where land is acquired with state assistance. The reason is the fear that people will sell the land and squander the cash. The evidence to date does not support this fear.

In any case, it is patronising to restrict people’s right to dispose of their own land. It also reveals an unwarranted lack of confidence in the common sense of ordinary people. Government policy in an emancipated society should assume that individuals are capable of looking after themselves – that they are “rational profit-maximisers”.

RECOMMENDATION 5

Ensure free transferability of tribal land rights, confined to the members of the tribe if that is the tribe’s preference.

Tribal land rights appear to be more complex. But whatever the rights are, including familial rights, there seems to be no good reason why they should not be freely transferable, though confined to members of the tribe if that is the tribe’s preference.

In July 2017, the Minister of Land Reform gazetted for public comment a draft Communal Land Tenure Bill. The Bill contemplates the transfer of state land to traditional communities who have shared rules which determine access to land held in common.

In terms of the Bill, the Minister would have a survey general plan of the land framed outlining, among other things, subdivided portions of communal land designated for industrial and commercial purposes. The Bill stipulates that it must be a condition of registration that portion designated for industrial and commercial purposes cannot be disposed

of to a person who is not a member of the community without first giving the owner's family, other community members or the state, the first option to acquire the land.

This is a useful proposal and should be adopted, except for giving the state an option.

Considerations *(regarding recommendation 5)*

The same resistance from a few reactionary chiefs mentioned in respect of security of tenure might arise.

RECOMMENDATION 6

Base arrangements such as labour tenancy solely on agreements between owner and tenant.

An effective way for low-income earners, most of whom are black, to gain access to land is through lease agreements such as labour tenancy.

People who cannot afford to buy, or who prefer not to do so, should have the option to rent. Even if they have no money, the law should permit them to gain access to land by offering their services in exchange. The Land Reform (Labour Tenants) Act, 1996 entitles persons who were labour tenants on 2 June 1995 to occupy and use land owned by farmers. Concern that this could be amended to cover persons who were labour tenants on dates later than 2 June 1995 continues to discourage farmers from taking on or keeping labour tenants. Instead, the law should uphold whatever agreement a farmer and tenant choose to make.

Holders of rights should be able to use them as they see fit, not confined to personal use or outright sale.

Considerations *(regarding recommendation 6)*

The Land Reform (Labour Tenants) Act, 1996 was intended to grant benefits to labour tenants by providing them with greater security of tenure and the opportunity to purchase land, and ensuring that they could not be summarily evicted. Although existing labour tenants may have secured benefits under the Act, landowners are discouraged from allowing workers to occupy houses or keep their own cattle on the farm whilst the Act remains in place in case it is extended to labour tenants on later dates. Because of the failure to adopt a dynamic labour tenancy policy, many disadvantaged people will remain or become landless.

SUPERFLUOUS GOVERNMENT LAND

Government owns vast tracts of South Africa's land, which is controlled by the departments of Public Works and Infrastructure; Agriculture, and Reform and Rural Development; Defence; Human Settlements, Water and Sanitation; and Transport, and by provincial and local governments. Much of this land is superfluous to government requirements and readily disposable.

RECOMMENDATION 7

Transfer superfluous government land to the homeless free of charge.

Some of this superfluous state land could be used dramatically and immediately to empower every homeless and landless household with a free plot of land. A "one-household-one-plot" approach could proceed without financing or housing construction. Land could be transferred into full and immediate ownership under secure and unambiguous title that can be freely sold, mortgaged, or let.

Currently, land is made available only after infrastructure or basic housing can be provided. So most landless people are destined to stay that way indefinitely. A national site-without-service approach would establish people with undeveloped, securely-held land which they can develop. Site-without-service is a proven approach, as it has always been the basis of traditional land allocation.

A short-term benefit of this approach would be an end to land invasions and sprawling, uncontrolled squatter settlements. Large numbers of plots could be provided at very low cost. The approach can dovetail easily with existing housing subsidies, and there would be no need to wait for housing subsidies to be processed.

There are more than 25 million hectares of state land, including "unaccounted for" (unregistered) state land. Of South Africa's 17,100,000 households with an average household size of four, it may be that up to one-third or 5,700,000 are homeless or landless and can be provided with land.

This estimate may be too high, as many of the nominally homeless are tenants or traditional-community residents, or occupy accommodation supplied by employers. But even on this estimate, the state could supply land easily to all landless South Africans using just eight per cent of its land. Probably one-third of these 5,700,000 households (i.e., 1,900,000) would prefer rural land. They could receive one rural hectare each (i.e., 1,900,000 hectares), while the remaining 3,800,000 households might receive urban plots of 200 square metres each (76,000 hectares). This would all require less than two million hectares (i.e., 1,976,000 hectares). The government could thus provide all homeless households with unencumbered title to land and still retain at least 23 million hectares.

Alternatively, the 1,900,000 rural households who would prefer rural land could be given two hectares each (i.e., 3,800,000 hectares), with one million hectares going to the 3,800,000 urban households (i.e., 4,800,000 hectares in all). This would still leave the state with over 20 million hectares – over 16 percent of South Africa's total land area (121,924,881 hectares).

All South Africans would then at least have a place of their own, and be able to build a house, even if the initial structures were very rudimentary. This is better than nothing and would launch a dynamic and dramatic process of empowerment and housing improvement.

What is envisaged is not a repeat of homeland "dumping grounds" far from employment opportunities or of poor farming potential. State land is of great variety, and common sense should be used to allocate appropriate land to meet the needs of each target homeless population.

Considerations *(regarding recommendation 7)*

Even though most government land is idle, and the economy is currently denied any benefit from it, there is a r eluctance on the part of governments to part with government land.

On purely economic grounds and without regard to historical realities and the need for redress, it might be considered more "efficient" to sell superfluous government land to the highest bidder. There is, however, good economic evidence that if the land is distributed as suggested, the distribution will result in efficient outcomes, provided that initial recipients are not prevented from dealing freely with the land. In addition, it could be argued that the symbolic benefit of a massive land redistribution from the state to the historically disadvantaged would be so enormous as to far outweigh any concerns about economic optimality.

DEMOCRATISED ADMINISTRATION AND DISPOSAL OF COMMUNAL LAND

Communal land issues include whether there should be compliance with existing "white" land survey and registration formalities, what the attitude of the traditional leaders might be, and whether financial institutions will lend against privately owned community land.

RECOMMENDATION 8

Enable traditional leaders to allocate or dispose of land as they or their people choose, with the proceeds going into the community trust account.

There is a widespread belief that most traditional leaders are reactionary and will resist the introduction of land ownership and mortgage. This view is mistaken, as most traditional leaders wish to promote development in their areas. Communities also want the income they can derive from selling or leasing land. However, there is no need to settle that debate in advance. Traditional leaders should simply be given the right to allocate or dispose of land however they or their people choose. The proceeds could go into the community bank account.

Where businesspeople hold land from the past, but without title because of apartheid laws, some traditional leaders might prefer not to confirm title. But those leaders already lack effective control of land which is already gone. It would be an abuse of their power to deny again to apartheid victims the full title which apartheid denied to them.

Land reform in traditional community areas is hampered by misconceptions, created by mainly white commentators over many years, about traditional tenure. Much more land was held under secure title, and traded, than is commonly believed, though this varied from community to community. Upgraded title can exist within a traditional system without undermining it in any way. Far from undermining the traditional leaders' powers, these rights would be enhanced in the shorter term by enabling them to upgrade existing plots and allotments and sell and let land into full ownership or long registered lease.

Democratic methods such as community referenda should be widely used and encouraged to establish whether all non-residential land in traditional community areas should remain "communally held" or whether and how some or all of it should be converted to ownership. Communities might be empowered to sell or let farms, or to convert pasturage grazing rights into cooperative farms.

The draft Communal Land Tenure Bill that was gazetted for public comment in July 2017 should fully accommodate these proposals and be enacted as soon as possible.

Considerations *(regarding recommendation 8)*

There is a danger that some reactionary traditional leaders who believe that they will lose power by granting security of tenure will resist reform. Fortunately, traditional land is held under a considerable degree of security and land removals are almost unknown. The assumption that traditional leaders can remove land from their subjects with impunity tends to be more of a legal fiction than a practical reality.

CHALLENGE OF SECURE TITLE

The challenge is to transfer government land into private hands with secure title, and to convert inadequate private or communal title to secure title, without costly and unnecessary survey and deeds registration.

The legal requirements of land survey and deeds registration have impeded rapid large-scale provision of cheap land and housing. Systems of registration and survey historically used for "white" land have been far too costly and slow, for too little gain, to use in the short term, if our aim is to facilitate the swift creation of secure title.

RECOMMENDATION 9

Allocate new land under a simple low-cost form of registration, defining land boundaries by description.

Frequently, survey and transfer costs exceed the value of the land in rural areas. If there were a market (and some informal markets do exist), an undeveloped plot in a rural area might be worth around R1,700. A cadastral survey of this plot could cost the landowner (the state) anything from R2,480 to R40,520 in land surveyor's fees, depending on whether the number of plots surveyed was 100, say, or just one, and assuming the size of plots surveyed to be one hectare or less.

The surveyor's office would prepare a diagram of the surveyed area's outer boundary and a general plan showing all the plots if more than one was surveyed. The land surveyor would sign the diagram and plan and submit them to the Surveyor-General for approval.

Before transferring ownership of any plot to a farmer, the state would have to obtain from the Registrar of Deeds a certificate of the state's agricultural-settlement title to the whole area shown on the diagram, and lodge the general plan with the Registrar to enable him to open a register in which transactions affecting each plot shown on the plan will be registered.

Conveyancer's fees for obtaining registration of a deed of grant or transfer by the state of ownership to a farmer of such a newly subdivided plot in the Deeds Office would approximate R5,400. (The same applies to town lots: residential, industrial, commercial.)

(Conveyancers in the State Attorney's office might not charge the fees to the state for such grants or transfers but, because conveyancing fees are usually paid by the transferee, fees might be levied and passed on to the farmers or other small-business transferees to pay.)

Thus, existing lesser forms of tenure ("apartheid" titles) should be upgraded to full ownership under simpler forms of registration and demarcation. New land should be defined and allocated under a simpler form of registration, like vehicle ownership registration, with land boundaries defined inexpensively by description.

People who oppose the suspension of cadastral survey and Deeds Office registration requirements argue that banks need title to be secured by survey and registration before granting mortgages. In fact, the banks need to comply with the law. The law currently requires that they lend only against title secured in this way, but the law can and should be changed.

Land survey is not necessary.

RECOMMENDATION 10

Suspend the Land Survey Act wherever it applies to conversion to ownership and transfer to existing occupiers.

"White" boundaries to portions of land in South Africa are defined by costly land survey. In the 1960s South Africa adopted an even more accurate, and therefore even more costly and inappropriate, system of cadastral land surveying, potentially the most accurate in the world.

The Deeds Registries Act requires a Surveyor-General (SG) diagram to be attached to a deed of grant or transfer or that the plot or lot concerned be represented on an SG general plan. The Land Survey Act requires an SG diagram or

general plan to be prepared in a land surveyor's office after the land surveyor has surveyed the land, and to comply with cadastral standards for a detailed survey showing extent and position. (An SG diagram or general plan's unique positional (X, Y) coordinates relate to the country's network of trigonometrical beacons and hence to planetary latitude and longitude.)

But there can be secure title with boundaries defined by means other than surveys. Title in older countries such as the United States and the United Kingdom commonly exists without survey. Deeds of transfer existed in Holland since the 12th century containing descriptions but no diagrams. In the past, our courts have also said that a survey diagram is not absolutely necessary to transfer land. In the Transvaal, title deeds of farms were issued to burghers with a written description of the boundaries and without a survey. Our judges have said that the boundaries of a piece of land can be fixed monuments or natural objects. There is no magic in a diagram. Clear boundary descriptions in title deeds take precedence over a diagram.

The Land Survey Act states that if a surveyor surveys land for which a title deed has been issued without a diagram, he must ensure that neighbouring landowners agree to the boundaries that he is adopting in the survey. In other words, the factual position accepted by the neighbours is more important than the survey.

The Act also says that an arbitrator deciding a boundary dispute where a diagram exists must be guided by the principle that the original boundary markers (beacons) of a piece of land define the true boundaries even if they do not correspond to the diagram.

It would therefore not violate legal principles and tradition in this country to once again permit ownership to be acquired before a survey.

Nevertheless, as stated above, the law presently requires a survey, done to the highest standards, before transfer of ownership. This imposes huge costs and delays. It has been estimated that all existing South African land surveyors would need ten to 15 years to survey only existing unsurveyed properties (there may be as many as five million of these). Black South Africans cannot wait this long to acquire secure title to their properties, especially when the cause of the delay, the survey of existing boundaries, is of negligible legal value. Furthermore, a cadastral standard survey of every such property could cost a few billion rand and such money is clearly not available. For converting existing black plots and allotments to freehold and transferring them to lawful occupiers, therefore, the Act should be suspended. Survey would then be optional for owners and mortgagees, and conversion and transfer could proceed immediately.

(The flood of ownership disputes two decades ago could not be blamed on a lack of surveyed, registered title deeds. The disputes arose because a number of farmers sold land unlawfully to blacks more than once in the same land's history without transferring, and later acknowledging, real ownership. The proposals in this document will not result in such disputes.)

To mass-produce new properties, where survey is appropriate, the government might choose to adopt less accurate forms of survey than cadastral land survey.

Whether or not banks will give mortgages is no reason to withhold security of title from the victims of apartheid. If blacks get unencumbered land, without diagrams, there is no fear that they would be unable to use it as security for borrowing. Where the property is of high value, it would be within the interest and means of the owner or potential purchaser to have it surveyed by choice. If, say, an expensive casino or shopping centre is to be built in a rural area, it would be up to the developer concerned to have the property accurately surveyed and registered.

The Land Survey Act regulations provide some small flexibility, by stating that it is not necessary prior to the Surveyor-General's approval of a township general plan for the surveyor to place internal beacons on the plan showing erf boundaries, provided the Surveyor-General informs the Registrar of Deeds which erven are not beaconed, and those erven may not be transferred in ownership until their beacons have been placed. This exception to the general rule should be made much broader.

Considerations *(regarding recommendations 9 and 10)*

There is a danger, though it has been somewhat exaggerated, of an increased number of boundary disputes if the procedures relating to land survey are changed. It must be borne in mind, however, that this recommendation does not suggest that existing boundary definitions should be degraded. It merely suggests that high-standard and costly land surveys should not be a precondition for the granting of more secure ownership rights to the millions of people whose rights are currently insecure.

The interests of the people who presently suffer as a consequence of insecure title should take precedence over vested-interest arguments against the introduction of a more rapid and less costly means of identifying properties and their boundaries.

Deed registration is not necessary

Conveyancing is the branch of law dealing with the transfer of ownership of property, after the document (conveyance) which transfers legal title. It is in the interest of conveyancers and deeds registrars that upgraded apartheid titles should have to be registered in the existing deeds registry system or some slightly amended form of it. Although this faith in deeds registries is without practical substance, nearly 30 years into post-apartheid South Africa it still denies black South Africans the enjoyment of immediate, secure land title.

RECOMMENDATION 11

Make the Deeds Office registration requirement optional.

Formal registration under the existing deeds registry system should not be allowed to delay upgrading titles and normalising the position for millions of South African blacks. It is not possible without huge delay and cost to bring all upgradeable titles into the deeds registry system.

Deed registration does not guarantee title in law. It is evidence at first glance in favour of ownership, but registered title is subject to fraud and error or to servitudes that arise from long-term usage.

RECOMMENDATION 12

Suspend the requirement to use a conveyancer for routine property transactions involving simple transfer of ownership or the registration or cancellation of a mortgage bond.

There is no reason why title of land should not be established in the same way that other forms of title are. There is also no reason why there should be only one form of registration of title in a country. For land that is already surveyed and registered, the existing “white” system can be maintained, and co-exist with a parallel system or systems. Transfers and mortgages should take place in much the same way as vehicles and shares are transferred or pledged, or as land registers already operate in most areas of the world.

All forms of indigenous “land title” have worked well for centuries without being registered in a deeds office. Traditional communal law provides mechanisms to allot and later transfer land. Title disputes are extremely rare and, when they arise, they are usually readily resolved by courts or communities. Land title in black areas is recorded in various ways, from formal sealed contracts to a handshake or even tacit non-verbal agreement like a mere nod to secure a binding legal contract of sale. A voetstoots sale was secured, for instance, by the action, before witnesses, of placing the object being sold on the ground and pushing it by foot across to the buyer. Such visual memories in the minds of witnesses and community elders are a proven centuries-old method of recording title.

Title might be secured similarly by ceremonially breaking off a branch to hand it to the new holder, imprinting this visual record indelibly on people's minds. By the time they die, title is so adequately secured as to need no further evidence of this kind.

The great historical episodes of prosperity in the first world occurred when there was no land registration. In some of the world's richest countries, land registration is not compulsory to this day, and some of the most valuable properties in Europe's greatest cities are unregistered.

In the United States, title may be secured, if the owner chooses, by insurance rather than registration. Insurance costs are lower and delays briefer than those incurred by our existing registry system.

All existing unregistered titles could become the lawful property of the existing lawful holder "at the stroke of a (statutory) pen". Where registration already exists, it can be used and upgraded.

Land reform must not be held up by requiring conveyancers to process all acquired land at huge cost. Almost everything that conveyancers do has become an anachronism. No routine property transactions involving simple transfer of ownership or registration or cancellation of a mortgage bond should require a conveyancer; costly property (for example, jewellery, boats, cars, and machinery) is transferred daily throughout the country without them. Conveyancers should be consulted only where unusual transactions take place – for example, where a servitude, usufruct, subdivision, or consolidation is concerned.

Registration in a deeds office is costly and cumbersome. It is not needed to establish adequate legal ownership of land, just as it is not needed to establish vehicle or machinery ownership (where the value often far exceeds that of plots of land). Local and international history shows that land titles and land boundaries will be secure under most methods of tribal land allocation and demarcation. The costs and delays of Deeds Office registration should not be allowed to impede the immediate upgrading of title, in tribal areas and elsewhere.

Considerations *(regarding recommendations 11 and 12)*

The conveyancing and deeds registry communities are likely to resist these proposals, which argue that increased security should be extended to historically disadvantaged people without having to wait for the "Rolls Royce model" of property registration. Government will have to choose whose interests should have precedence.

It is simply impossible to survey or register all the land presently held by black South Africans, and land which will be acquired by them, for many years. We really have no choice. Either we permit ownership under systems other than those that exist at present, or the deprived majority of South Africans will continue to be deprived for many decades.

If these proposals are implemented, there would continue to be two systems of land ownership and land registration. This recommendation proposes that the second and less costly system be used to record ownership as well as historical forms of tenure.

RECOMMENDATION 13

Convert all forms of apartheid title (such as permissions to occupy) and all forms of lease to freehold title and ownership by the existing lawful occupant, after suitable local advertising of property-holder lists where these exist.

It should prove simple to convert all existing tenancies (formerly residential permits) in established townships such as Soweto to secure title automatically by operation of law. Initial local advertising of lists of tenants will reveal if there are competing claimants. The tenancies should thereafter be summarily converted to ownership without depending on prior deeds registration.

It should also prove simple to convert all informal titles to rural parcels of land held under some form of individual or non-"communal" arrangement, whether residential or non-residential, into secure title automatically by operation of law, bypassing the costly and cumbersome "perfect system" of both cadastral survey and deeds office registration.

All this summarily converted urban land and non-"communal" rural land held under some form of individual title should automatically become the property of the existing lawful holder. Legal provisions for rectification of title can handle any boundary problems which may emerge later.

Considerations *(regarding recommendation 13)*

Existing records in many parts of the country are notoriously inaccurate or derelict. Predictably there will be disputes regarding the rightful beneficiaries. In traditional areas, the rights of relatives will be problematic. Additional complaints may come from people who purchased neighbouring properties at great personal cost and who may feel that they have been treated unfairly.

Government has the unenviable choice of being accused of non-delivery, on the one hand, or of dealing with myriad problems relating to rapid property-rights recognition, on the other. Clearly the potential benefits far outweigh the risks.

CHALLENGE OF FINANCING

RECOMMENDATION 14

Repeal credit-law ceilings on effective interest rates to enable banks to lend against low-value property to those perceived as high-risk borrowers.

Banks would be more willing to lend, against the security of low-value property such as small plots of land, to those perceived as high-risk borrowers if there were no credit law to limit interest rates and related charges. Moreover, they would not necessarily need to raise interest rates if they were allowed to adjust their administration fees to compensate for risk and transaction size.

Housing finance comes mainly from government subsidies and private financial institutions. Credit laws and other laws relating to financing prevent poor people, who are perceived as high-risk borrowers without either security or a credit record, from borrowing lawfully for housing. Even when they have title that can be mortgaged, formal-sector lenders usually will not provide finance because the permissible return is too low and the perceived risk too high.

The National Credit Act does not apply to mortgage loans to partnerships or companies. And it allows higher interest rates for unsecured loans and loans to develop a small business, but these are maximum rates. The Act's lower interest rates apply to mortgage loans to individuals.

A possible solution to this problem would be to establish Special Housing Zones which would be exempted from interest-rate ceilings and costly formalities for mortgage or non-mortgage finance. Low-income people in these areas would then be able to obtain housing finance formally and lawfully. Though the bonds would be at higher interest rates than those available to lower-risk borrowers, they would nevertheless be at more favourable rates and have less-onerous repayment terms than those offered by "loan sharks" and other informal and underground lenders to whom the poor must currently go.

A further issue needs to be addressed, and that is the likelihood of payment. Even if banks are satisfied that Deeds Office registration is not needed for security, and they are allowed to charge higher interest rates to high-risk borrowers, they will still reject applications for bonds unless they are reasonably certain that they will be repaid.

Lenders need the likelihood of payment even more than security, and it is admittedly not clear whether rural borrowers will pay dependably. As soon as legal barriers are removed, banks can move into historically closed areas and this market issue can be addressed. As with the traditional leaders, this may not pose a serious problem for progressive and innovative banking. One possible solution may be for a loan applicant's stokvel to pledge collective security for repayment.

As far as government financing of land and housing is concerned, it is important not to repeat the error of soft loans to farmers through the Land Bank or some equivalent. Anyone who doubts the unsuitability and counter-productivity of soft loans should read Symond Fiske's excellent book Damage by Debt (FMF Books, 1995) in which he explains why debt subsidies waste capital and hurt the people who use them.

If the government has some millions of rands to help aspirant land holders, it can maximise the benefit of the money, not by lending it to a few borrowers at unjustifiably low rates, but by using it to underwrite numerous loans at market rates of interest. For example, it could enter into a contract with commercial bankers to underwrite, say, a fifth of their loans to historically disadvantaged people.

Considerations *(regarding recommendation 14)*

Unsophisticated people may possibly over-extend themselves but this problem has to be seen in the context of overall policies during the transition. Government has tough choices: it can strive for a perfect risk-free world for its citizens, or it can have a dynamic prosperous economy. Unfortunately, it cannot have both.

SUBDIVISION OF AGRICULTURAL LAND

RECOMMENDATION 15

Repeal the Subdivision of Agricultural Land Act.

To make land available in affordable chunks, and to more people, and to promote small-scale farming, restrictions on the subdivision of agricultural land should be scrapped.

The main reason for the Subdivision of Agricultural Land Act was to prevent farmers from subdividing their land among their male descendants to the point where the units could not be viably farmed. The obvious fallacy in this argument is that if a piece of land is too small to be viable, it will be sold or let to the user of a bigger unit. The self-interest of ordinary people is sufficient to ensure that this will happen, so no law is necessary.

For historically disadvantaged people, a large supply of land in small and affordable units is urgently needed. The repeal of the Subdivision of Agricultural Land Act would be a practical and cost-free way of making vast quantities of land rapidly accessible.

Labour tenants (bywoners) have been forced into their present situation by the prohibition of subdivision. If subdivision is permitted, existing landowners will be able to endow their tenant farmers with land by mutual agreement. It is the law that victimises labour tenants, not the farmers.

As long as the Act remains on the statute book, the state will continue to decide what sizes of farms are "viable". The proper place for that decision is the marketplace, and there is no need for concern that subdivision will go too far. Owners will be better off letting their land to tenant farmers who farm bigger units (this is common in any case) or selling it to small-scale farmers who can farm viably. Commercial properties already "move" from those who use them uneconomically to those who use them more profitably, and land will also "move" into the hands of optimal users and into optimal sizes. Bureaucratic intervention is unnecessary; indeed, officials are less likely to make correct decisions than those whose livelihoods and assets are at risk.

The Subdivision of Agricultural Land Act Repeal Act of 1998 will repeal the Subdivision of Agricultural Land Act with effect from a date to be fixed by the President. This Repeal Act has, however, never been put into operation. The President is urged to proclaim the repeal as soon as possible. The proposed replacement of the Subdivision of Agricultural Land Act, the Preservation and Development of Agricultural Land Bill, which is in many ways worse than the Act, should similarly be withdrawn.

Considerations *(regarding recommendation 15)*

We now know that under unregulated conditions the number of farmers tends to diminish and the size of farms to increase as portions are purchased and consolidated by successful farmers.

Subdivision of agricultural land will obviously facilitate acquisition of land by black farmers and as subdivision will not be economically harmful the government should expedite the repeal of the Act.

REMOVAL OF RESTRICTIONS ON LAND USE

Until the 1960s, as in many other countries, it took about four months from start to finish to develop new land into "townships". The conditions of establishment were seldom onerous; often the only requirement was for graded roads. Residents provided their own boreholes, septic tanks, and other infrastructure.

Thereafter, township development procedures became ever more cumbersome and costly, and today only wealthy developers can afford them. Under township development laws, the provincial government, through municipal planning tribunals, requires costly infrastructure including long-life tarred roads, storm-water drains, water-borne sewerage, water, and electricity. Formal approval from countless government departments and organisations can take a few years.

If laws for establishing "formal" settlements reverted to the 1960s versions, this would lead, as it did then, to empowerment of lower-income developers and an explosion of property development and rapid delivery of affordable land and housing to large numbers of people.

RECOMMENDATION 16

Scrap prescriptive land-use controls.

The right to hold and the right to use tend to be confused. It is possible to render the right to hold property meaningless by curtailing the right to use or enjoy it. If an inner-city office block were rezoned as a wilderness area, for example, the owners' or tenants' rights would be rendered valueless. In extreme cases, the courts in some countries have considered the curtailment of the right to use and enjoy to be tantamount to confiscation or expropriation. Normally, however, the curtailment of use rights is less obviously confiscatory and holders suffer losses without compensation or the right to due process. As a matter of principle, therefore, land policy should regard any new restriction on usage as a usurpation of property rights for which there should be just compensation.

In practical terms, land rights should include the reasonable right of use and enjoyment. Many existing restrictions, especially conditions of title and zoning, are excessively restrictive and should be reviewed critically.

Considerations *(regarding recommendation 16)*

This recommendation is controversial because of South Africa's tenacious planning mentality, which is a legacy of our authoritarian past. It is very difficult for most South Africans to imagine a voluntary spontaneous order. Their immediate assumption is that the absence of coercive central planning will lead to chaos or anarchy. Experience around the world proves that this is not so, but often perceptions are more important than realities.

There will accordingly be considerable resistance from vested planning interests in the private and government sectors to increased land use freedom.

These fears are not entirely unfounded. It is true that a controlled society is often more orderly. But it is also more stifling, and inhibits the cultivation of a national enterprise culture. If this recommendation is implemented, there will be undesirable neighbourhood effects, but again, the question is whether benefits outweigh advantages, and whether alternative methods of nuisance control would be more effective.

RECOMMENDATION 17

Drop most approval requirements for the establishment of formal settlements and make costly infrastructure (roads, drains, electricity, etc.) optional.

Formalities and compliance costs when developing property for residential purposes are huge obstacles to housing delivery, as is the need for approval of building plans for housing. The urgent plight of the homeless cries out for a radical interim solution.

RECOMMENDATION 18

Establish new Special Housing Zones in low-income areas, in which township-development laws and building-standard laws are suspended. Exempt these zones from building codes, interest-rate ceilings, and costly formalities for mortgage or non-mortgage finance.

A low-income housing option would be to suspend or relax housing, township development, and building-standard laws within new Special Housing Zones. There, homeless people would settle on land in which they have security and mortgageable wealth and where they can build immediately, confident that their buildings will not be condemned. This would rapidly improve the present plight of squatter settlements and obviate the need for land invasions. Special Housing Zones should be located with regard to neighbourhood effects and other externalities. In due course, social and physical infrastructure and housing subsidies would lead to further improvements.

Housing of a low standard is preferable to no housing, and lawful housing is better than unlawful housing. To address the urgent needs of the homeless, with or without Special Housing Zones, low-cost housing needs a blanket exemption from expensive legal requirements.

RECOMMENDATION 19

Reduce minimum housing standards to realistic levels.

South Africa's housing backlog cannot be alleviated for decades at current rates of delivery or within the existing policy framework. Housing delivery is far below RDP targets. Adjusted housing policy might accelerate housing provision. Housing standards should be drastically reduced, then raised by increments later if necessary. Only after most people are housed does it make sense to impose high minimum standards.

For example, fuses and innovative earthing systems could be permitted in place of circuit breakers and earth leakage protection. The latter provide a desirable safety net to cover other electrical shortcomings, accidents and abuse, but are hardly used elsewhere in Africa.

RECOMMENDATION 20

Amend land-use schemes and municipal bylaws, and replace zoning laws with nuisance and neighbourhood law (common law). Enable the courts, especially small claims courts, to enforce these and to issue interdicts.

Zoning laws should be relaxed or replaced with "neighbourhood law". Instead of trying to dictate to people how they should use their property, the state should let the market decide, while protecting the rights of neighbours against land uses that cause a nuisance. Nuisance and neighbourhood law is common law that has evolved over the centuries as a perfectly adequate method of protecting people against socially harmful land use.

What is lacking is not law, but access to redress. The courts should be able to enforce neighbourhood law, and the small claims courts should be able to issue interdicts. This would require an amendment to land-use schemes and zoning laws, as well as extension of the powers of the small claims courts.

Around the world the poor typically live on the most valuable inner-city land and drive the rich out to the periphery of cities. They out-compete the rich by living either in apartment blocks or in high-density housing developments. In South Africa, Group Areas Act zoning created an anomalous situation, in which the poor lived in peripheral "townships" while the rich lived in suburbs close to city centres such as Houghton in Johannesburg.

Zoning laws place a density restriction on land use; their effect is to make valuable land available at artificially low prices to high-income people. The laws and practices should be liberalised to allow market-driven land use and development. This will densify land use close to the CBD, making more land available for industrial and commercial purposes and (in optimal localities) for lower-income people and emerging entrepreneurs. These suggested reforms should apply to all existing zoning laws, and not just to the Spatial Planning and Land Use Management Act, 2013 and other zoning laws enacted after 1994.

Considerations *(regarding recommendations 17 to 20)*

As with all reforms, there will predictably be enormous resistance from those who benefit from the status quo. They will raise all the stale arguments about "regressive" reforms "lowering standards". But the economic consequence of pandering to the elite is an inefficient use of land and other resources. Inefficiencies are pervasive, and the economic, environmental, and human impact is hard to quantify. The fact that most people still live far from places of employment and from commercial and entertainment centres not only increases travelling costs, but also unduly burdens infrastructure. An enormous amount of potentially productive time is wasted and millions of rands have been invested in transport and other facilities which otherwise would not be necessary.

In many lower- and, to a lesser extent, middle-income areas, there are either no zoning provisions or the law is ignored. Areas in which strict zoning cannot be enforced in practice should be formally exempted so that the law coincides with reality and common sense.

Land use should be neighbourhood-focused and government's concern should shift from grand town-planning schemes to what communities want for themselves. In particular, zoning laws that are hostile to business should be amended to promote an enterprise culture and international competitiveness. Presently, the law restricts the use of land for business purposes, rather than preventing the disturbance of neighbours by the manner in which the land is used.

If someone makes furniture for themselves in their garage, it is lawful under zoning laws. However, if the same person makes the same furniture, but for sale, it would be unlawful. There is clearly no logic in this position.

Relaxed zoning laws are not problem-free. Yet methods can be found of allowing people to make optimum use of their land without being a nuisance to their neighbours.

HOUSING CONSUMERS PROTECTION MEASURES ACT, 1998

RECOMMENDATION 21

Repeal the Housing Consumers Protection Measures Act.

Current laws impose entry barriers into the building industry and minimum standards for building materials and labour, thus raising costs and curtailing the supply of low-cost housing. The Housing Consumers Protection Measures Act, 1998 imposes further costs and entry barriers. It also creates an unnecessary, undesirable, and harmful bureaucracy.

The Act established the National Home Builders Registration Council (NHBRC) to regulate the home building industry. The Act prohibits a person from carrying on business as a home builder or from receiving consideration under an agreement with a housing consumer for the sale or construction of a home, unless that person is registered as a home builder with the NHBRC.

The Act also prohibits mortgage lenders from lending money to home buyers to enable them to buy a newly built home from a builder, unless the lender is satisfied that the builder is registered with the NHBRC and that the home is or will be "enrolled" with the NHBRC and the builder has paid or will pay the prescribed home-enrolment fee. This means that mortgage finance is not available at all for homes built by builders not registered with the NHBRC, or for homes that will not be enrolled, or if home-enrolment fees are not paid.

Some of the criticisms of the NHBRC from members of the building industry are:

The NHBRC is more concerned with collecting builder-registration fees and annual registration-renewal fees, and home-enrolment fees, than with inspecting homes constructed by home builders. The prescribed registration-application fee plus initial registration fee payable currently add up to R1,350, and the current annual registration-renewal fee payable is R600.

The home-enrolment fee payable is currently 1.3% of a home's selling price up to R500,000, i.e., R6,500 for a home priced at R500,000. (At higher selling prices, the fee increases at successively lower percentages per price increment).

Enrolment fees are reduced or increased depending on the "grading" of builder (calculated by reference to the number of legitimate consumer claims against him in the previous year, the number of his home enrolments which were late in the previous three years, the recorded number of his failures to comply with national building regulations the previous year, and the build quality of houses he built the previous year).

Land values and municipal infrastructure are included in the selling price upon which the home-enrolment fee is calculated, although the Act's indemnity applies only to the building.

If a home builder fails to meet his obligations to rectify major structural defects caused by noncompliance with prescribed technical requirements occurring in the home within five years from the occupation date (or to repair roof leaks occurring within 12 months from the occupation date), the NHBRC will expend an amount to rectify the defect, up to (whichever is less) the home's selling price or (currently) R500,000 (which may include professional fees incurred by the NHBRC in investigating a cost-effective method of rectification) or a much smaller amount in the case of a subsidised provincial housing-development project.

Much better and more flexible warranty schemes would probably be offered by the country's highly competitive insurance companies.

Homes are subject to inspection by local authorities and mortgage lenders as well. A third inspection agency in the form of the NHBRC is unlikely to detect additional examples of defective workmanship that escaped the notice

of these agencies.

The Housing Consumers Protection Measures Act does not improve building quality. There are and always will be building failures, because of inherent, irreducible risk.

The Act states that all contracts for building homes must be in writing, with plans, specifications, price and payment terms. This section is presumably intended to protect home-buyers, but has the consequence of disempowering illiterate and monolingual builders. The Act deems home-building agreements to include a warranty that the home builder shall rectify, at his cost, any major structural defect in the home occurring during a period set out in the building agreement, which must not be less than five years from the occupation date, and caused by failure to comply with the prescribed technical requirements. It is fair to say that these ambitious attempts to obtain perfection in home-building are, in practice, passed on by builders to purchasers in the form of higher prices.

Inspectors are employed, presumably to cover the whole country including the loneliest rural areas. A small builder in a village, who is unaware of the existence of the NHBRC, and builds a house which falls within its ambit, is guilty of an offence and liable to a fine or imprisonment. If the government wishes to promote small business, it cannot adopt Acts that have these implications. Honest, hard-working people should not have to worry constantly that they may be committing an offence that carries a harsh penalty.

Withholding information is an offence, and courts are given interdict powers to stop a construction project. Penalties of R25,000 or one year of imprisonment are set for not registering as a home builder or not enrolling homes, for lending money to a housing consumer against security of a mortgage bond over a home to enable the consumer to purchase the home from a non-registered builder or to purchase a “non-enrolled” home, or for attending as conveyancer to registration of such a mortgage bond where the builder is not registered or the home not enrolled, or for withholding information from an inspector, as if house-building were like some heinous crime, to be prevented at all costs.

The Act should be repealed. There is no justification for the registration of builders, let alone the “enrolment” of houses. The Act is calculated to ensure that less housing is built, not more.

Despite all this, in May 2021 a Housing Consumer Protection Bill was introduced in Parliament that would replace the Act and bring in even more stringent enforcement measures. This bill ought to be withdrawn.

REMOVAL OF TRANSFER DUTIES

RECOMMENDATION 22

Abolish duties and taxes on transfer or supply of land.

In a country where land redistribution is a priority, it is anomalous that the state intervenes to make it difficult and costly. Land transactions should not be a source of general revenue, so transfer duties or value-added taxes attached to land transactions should be scrapped.

Transfer duty is levied at rates based on the value of the property transferred. Duty is currently payable at the rate of 3% of that portion of the value of the property which exceeds R1,000,000, 6% of the portion of the value which exceeds R1,375 million, and so on with duty being payable at higher rates for higher thresholds of value.) Transfer duty is payable by the transferee.

Value-added tax (VAT) is levied on the supply by a vendor of fixed property (or other “goods”, or services) in the course or furtherance of an enterprise carried on by the vendor, at a rate based on the value of the supply, commonly the consideration paid. VAT is currently levied at the rate of 15% of the value of the supply. The price charged by the vendor is deemed to include VAT.

A property acquisition is exempt from transfer duty where the transferor certifies to the tax authorities that the transferee paid VAT which has been or will be accounted for by the transferor to the authorities.

Transfer duties originated in the medieval notion that the land belongs to the Lord of the Manor. Value-added taxes are a 20th century development.

In the modern world there should be no such transfer or supply cost, and duties and taxes on land transfer and supply should be abolished forthwith. The state should stop prohibiting and inhibiting voluntary land redistribution, and facilitate it instead.

Considerations *(regarding recommendation 22)*

The obvious consequence of this recommendation would be a loss of revenue to government. This will be offset by the economic benefits of removing a restriction on market-driven land redistribution, as well as the benefit of removing an obstacle in the path of landless people.

EXPROPRIATION

RECOMMENDATION 23

Withdraw the intended amending of the Constitution that would authorise expropriation of land without compensation and state custodianship of land.

In February 2018, the National Assembly passed a motion to have the Constitution's property clause amended in order to intensify involuntary land redistribution though the introduction of expropriation of land without payment of compensation to the owners. This proposal was revised in 2021 to additionally empower government to declare "certain land" under state custodianship – effectively nationalisation.

In December 2019, the parliamentary ad hoc committee concerned gazetted an invitation to comment on a draft constitutional amendment to alter the property clause in the Bill of Rights to provide that, where land is expropriated for land-reform purposes, a court may determine that the amount of compensation is "nil", and that national legislation must set out specific circumstances where a court may do so.

In October 2020, the Minister of Public Works introduced in the National Assembly an Expropriation Bill that would replace the 1975 Expropriation Act, extend the purpose for expropriation to include the public interest, and specify circumstances when it may be just and equitable to pay "nil" compensation when expropriating land in the public interest.

In September 2021, the parliamentary ad hoc committee concerned introduced in the National Assembly a Constitution Eighteenth Amendment Bill to alter the property clause in the Bill of Rights to provide that, where land is expropriated for land-reform purposes, the amount of compensation may be nil, and that national legislation must set out specific circumstances where the amount of compensation is nil. These two measures together expressly authorise expropriation without compensation.

Apart from any other criticisms which might be levelled against such measures, it seems unlikely that expropriation of land without compensation will benefit any small-scale farmers who might be allocated a portion of the land concerned.

Even if the expropriated farms are transferred in ownership to new prospective farmers, thus enabling them to mortgage the land as security for necessary loan funding to finance farming operations, the prospect of any farmland

being expropriated without compensation materially increases the risks associated with agriculture and would be a major disincentive for banks who lend to farmers.

Commercial agriculture cannot operate without access to funding sources, for capital expenditure and operational expenditure. The prospect of borrowers' farms being seized would deter banks from continued lending to the agricultural sector large or small.

The Banking Association of South Africa warned in 2017 that if expropriation of land without compensation were to be implemented, it was highly likely that banks would no longer finance the sector.

Considerations *(regarding recommendation 23)*

Some may think that a policy of expropriation without compensation and state custodianship is necessary for the land distribution policy because payment of compensation is consuming scarce state funds.

However, the Motlanthe High Level Panel on the assessment of key legislation and fundamental change reported in 2017 that the land-reform budget was at an all-time low of less than 0.4% of the national budget, with less than 0.1% set aside for land redistribution.

The Panel reported that having to pay compensation was not the most serious constraint on land reform. Other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious stumbling blocks to land reform.

The Panel was of the view that government has not used powers it already has to expropriate land for land reform purposes effectively. Rather than recommend that the Constitution be changed, the Panel recommended that government should use the provisions in the Constitution that allow compensation to be below market value in particular circumstances, particularly in relation to unutilised or underutilised land.

Constitution (including proposed amendments)

Constitution of Republic, 1996—
Chap 2 (Bill of Rights) s 25 (property)—
(2) (property may be expropriated only i.t.o. law of general application—
(a) (for a public purpose or in the public interest; and
(b) (for compensation, in amount agreed by those affected or approved by court);
(3) (compensation amount must be just, and equitably balance public interest and interests of those affected, having regard to all circumstances including—
(a) (the property's current use,
(b) (the history of the property's acquisition and use,
(c) (the property's market value,
(e) (the expropriation's purpose),
(4)(a) (public interest includes national commitment to land reform);
(5) (State must take reasonable legislative and other measures, within its available resources, to foster conditions enabling citizens to gain access to land equitably),
(6) (person or community whose tenure is legally insecure as result of past racially-discriminatory laws is entitled, to extent provided by Act of Parliament, to legally secure tenure or comparable redress),
(7) (person or community dispossessed of property after June 1913 as result of past racially-discriminatory laws is entitled, to extent provided by Act of Parliament, to restitution of the property or equitable redress),
(8) (this section may not impede the State from taking legislative and other measures to achieve land reform to redress results of past racial discrimination);
Chap 4 (Parliament) s 76(3) (ordinary Bills affecting provinces),
Chap 12 (traditional leaders) s 211 (recognition)—
ss (1) (role of traditional leadership according to customary law is recognised),
ss (2) (traditional authority that observes system of customary law may function subject to any applicable legislation and customs),
ss (3) (the courts must apply customary law when applicable, subject to Constitution and any legislation specifically dealing with customary law);
Sched 4 (areas of concurrent national and provincial legislative competence—
(Pt A—housing, trade, traditional leadership, urban and rural development,
(Pt B (local government matters—building regs, municipal planning, trading regs);
Sched 5 (areas of exclusive provincial legislative competence)—
(Pt A—provincial planning;
(Pt B (local government matters—control of undertakings selling food to public);Gen N 652 of 2019 (Gazette 42902 of 13 Dec), Parliament: ad hoc committee on amendment of Bill of Rights s 25 (property): draft Constitution Eighteenth Amendment Bill;
Constitution Eighteenth Amendment Bill 18 of 2021 (as introduced in the National Assembly) (to amend Bill of Rights s 25 (property)

Statutes, Bills, draft Bills and explanatory summaries thereof, and regulations

Geomatics Profession Act 19 of 2013 s 13(2)(b)(i) read with section 8(1)(b)(iii)(bb) (persons whose names are not entered in register for professional land surveyors may not practise in or perform any survey for purposes of preparing a diagram or general plan to be filed or registered in terms of any law governing registration of any land or rights in land);

Upgrading of Land Tenure Rights Act 112 of 1991 (as amended in 1992, 1993, 1995, 1996, 1998, 2007 and 2011);
Land Reform: Provision of Land and Assistance Act 126 of 1993 (designation of State land for small-scale farming, residential, public, community, business or similar purposes; subdivision thereof into pieces; and settlement and transfer of ownership of pieces);
Interim Protection of Informal Land Rights 31 of 1996—

Long title (temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law);
s 2 (deprivation of use of, occupation of, or access to land i.t.o. tribal, customary or indigenous law or practice);
s 3 (sales and other dispositions are subject to such informal rights);
s 5(2) (Act lapses on 31 Dec 1997, but Minister may by Gazette notice extend its application for 12 months at a time);

Govt Notice 1008 of 25 Jul 1997 et al to Govt Notice 1323 of 11 Dec 2020 inclusive (extensions of application of Act for successive periods of 12 months);
Deeds Registries Act 47 of 1937—

s 1A (discontinuance of homeland deeds registries, and transfer of their functions to deeds registries) inserted by Proc R9 of 1997 i.t.o. 1993 Constitution s 237(1) and (3) read with s 236(1);
s 3(1)(c) and (d) (registrar must register grants of land issued by the government, and attest and register deeds of transfer of land),
s 10(1)(b) (deeds registries regulations board may make regulations prescribing fees of office to be charged for anything to be done in a deeds registry),
s 14(1)(a) (transfers of land must follow the sequence of successive transactions pursuant to which they are made, as a rule),
s 15 (no deed of transfer or certificate of title shall be attested or registered by a registrar unless prepared by a conveyancer, as a rule),
s 16 (land ownership may be conveyed from one person to another only by deed of transfer attested by registrar, as a rule),
s 18 (manner of dealing with State land)—
ss (1) (ownership of unalienated State land may, only be transferred from the State by deed of grant issued under proper authority and, as a rule, with a diagram of the land annexed, unless the land is represented on a general plan);
ss (3) (if a piece of unalienated State land is surveyed and shown on a diagram, the registrar must, on application by the responsible Minister or an official authorised by him accompanied by the diagram, execute i.a.w. the diagram a certificate of registered State title thereof prepared by a conveyancer),
ss (4) (transfer of ownership of land held by the State under certificate of registered State title must be by deed of grant issued under proper authority; it shall not be necessary to annex a diagram of the land to it, but the grant must refer to the certificate and to the diagram annexed to the certificate),
s 20 (deeds of transfer must be executed in the registrar's presence by the owner or a conveyancer authorised by her by power of attorney, and be attested by the registrar),
s 43(1) (if portion of a piece of land is surveyed and the surveyor-general approves a diagram of the portion, the registrar may on the owner's application issue a certificate of registered title of the portion),
s 46 (subdivision of land into township or agricultural settlement)—

(1) (if land is subdivided into agricultural lots or township erven which are shown on a general plan, the owner of the subdivided land must furnish the general plan to the registrar, who must register the plan and open a register in which registrable transactions affecting any lot or erf shown on the plan must be registered),
(4) (if the land subdivided as shown on the general plan forms a portion only of a registered piece of land held by the title deed, the registrar must, on application by the owner of the land, issue a certificate of township or settlement title in her favour in respect of that portion in accordance with a

diagram thereof),
s 102(1)—
("settlement" means a group of subdivisions of a piece of land which are used or intended for use mainly for farming or horticulture),
("township" means a group of subdivisions of a piece of land which are combined with public places and are used or intended for use mainly for residential, industrial or similar purposes),
Govt Notice R474 of 29 Mar 1963 (deeds registries regs) reg 84 read with schedule (fees of office) amended by Govt Notice R153 of 1 Mar 2021 (Gazette 44202)—
item 1(a)(i) (for registering transfer of property of which purchase price or fair value, whichever is greater, does not exceed R100000—R41),
item 1(d) (any other registration or annotation in registers or records, including certificates of title and all other registrations which are not exempted by law or where no purchase price is involved—R371);
National Building Regulation and Building Standards Act 103 of 1977—
s 1 svv "this Act" (Act includes national building regulations made under it);
s 2(2)(a) (Minister may, on conditions he thinks fit, and after consulting the South African Bureau of Standards Board and provincial Premier concerned, of his own accord or at request of a local authority or any other person, exempt the area of jurisdiction or part thereof of any local authority, from application of the Act or any provision thereof);
s 4 (approval by local authorities of applications in respect of erection of buildings)—
(1) (no person shall without prior approval of the local authority erect any building i.r.o. which plans and specifications are to be drawn and submitted i.t.o. the Act);
(4) (a person erecting a building in contravention is guilty of an offence);
s 6(1) (the municipal building-control officer must—
(a) (make recommendations to the local authority regarding such plans and specifications submitted to the local authority);
(c) inspect the erection of a building i.r.o. which such approval was granted;
(d) report to the local authority regarding non-compliance with any condition on which approval was granted);
s 7(1) If a local authority, having considered such a recommendation—
(a) (is satisfied that the application complies with the Act and any other applicable law, it must grant its approval in respect thereof;
(b) (i) (is not so satisfied; or
(ii) (is satisfied that the building will—
(aa) (be of such nature or appearance that it will probably—
(aaa) (disfigure the area;
(bbb) (be unsightly or objectionable;
(ccc) (derogate from the value of neighbouring properties; or
(bb) (be dangerous to life or property,
(the local authority must refuse to grant its approval);
s 10 (erection of buildings in certain circumstances subject to prohibition)—
(1) (a) (if a building in the opinion of the local authority is being or is to be erected in such manner that it—
(i) (will not be in the interest of good health or hygiene;
(ii) will be unsightly or objectionable;
(iii) (will probably be a nuisance to occupiers of neighbouring properties;
(iv) (will probably derogate from the value of neighbouring properties;
the local authority may prohibit the person erecting it from proceeding or commencing with erection except on conditions determined by the local authority);
(2) (anyone failing to comply with such prohibition or condition commits an offence);

s 14 (certificates of occupancy)—
(1)(a) (a local authority must issue a certificate of occupancy i.r.o. a building if it is of opinion that the building has been erected i.a.w. the provisions of the Act);
(4)(a) (a building's owner who occupies or uses it or permits its occupation or use—
(i) (unless a certificate of occupancy has been issued for the building;
(ii) (except in so far as is essential for erection of the building; or
(iv) (otherwise than in circumstances prescribed by national building regulation,
shall be guilty of an offence);
s 17 (national building regulations)—
(1) (the Minister may, after consulting the SABS Board, make regulations—
(a) (regarding preparation and approval of plans and specifications of buildings;
(c) (regarding strength and stability of buildings;
(d) (to provide for requirements with which buildings must comply as precautionary measures against fires or other emergencies, including resistance against outbreak and spreading of fires, protection of occupants or users of buildings or other persons against fires, aids or installations to be in buildings for combating or prevention of fires and for vacating of such buildings in cases of fires or other emergencies;
(f) (regarding resistance of buildings against floods, moisture, transmission of heat, sound or other injurious factors, and infestation by insects, vermin or other pests;
(g) (regarding durability and other desirable properties of buildings;
(h) (regarding provision of water and of sewerage and drainage services i.r.o. buildings, including connection with municipal supply or sewage disposal works;
(i) (regarding ventilation and provision for daylight i.r.o. buildings, including provision of open spaces;
(j) (regarding heating and artificial lighting of buildings;
(k) (regarding supply and installing in buildings of gas or electrical equipment or service, including the manner of installing equipment for cooking or heating, or for preventing or restricting emission of smoke or other offensive fumes;
(l) (restrict or prohibiting the use of a building or category thereof;
(r) (regarding demolition of buildings, subject to housing laws;
(s) (regarding local authorities' powers if buildings are being erected or used in contravention of the Act or of approval granted thereunder or if no approval was granted for erection of such buildings;
(u) (regarding safety, health and convenience of occupiers or users of, or persons present in or having access to, buildings and compulsory installing of equipment or services);
(2) (different national building regulations may be made i.r.o. different categories of buildings or uses of buildings, areas or categories of areas, local authorities or categories of local authorities, or portions or categories of portions of areas of jurisdiction of local authorities);
s 25 (if in a prosecution for an offence i.t.o. the Act it is necessary, to establish the charge against the accused, to prove that he failed to comply with its requirements relating to standard or quality of materials, design or workmanship, an allegation in the charge sheet that he so failed shall be sufficient proof thereof unless the contrary is proved);
Govt N R2378 of 12 Oct 1990 (national building regulations);
Housing Consumers Protection Measures Act 95 of 1998—
s 2 (establishment of National Home Builders Registration Council),
s 7(1) (Council rules regulating conduct of builders, home-enrolment fees),
s 7(2) (minister's regulations prescribing builders' registration and registration-renewal fees, and technical requirements for design and construction of prescribed homes),
s 10(2) (no home builder shall construct a home unless that home builder is a registered home builder),
s 14 (home enrolment)—

(1) (a home builder shall not commence construction of a home falling in any category of home prescribed by the Minister, unless the home builder has submitted the prescribed documents, information and fee to the Council, and the Council has enrolled that home in its records and issued a certificate of enrolment of that home),
(2)(c) (a home builder shall not commence construction of a home the acquisition of which will be financed solely by a state housing subsidy, unless the Council has enrolled the project),
18 (obligations of mortgagees, conveyancers, MEC)—
(1) (no financial institution shall lend money to a housing consumer against security of a mortgage bond to be registered, to enable the consumer to purchase a home from a home builder, unless the institution is satisfied that the home builder is registered, that the home is or will be enrolled, and that prescribed fees have been or will be paid);
(2) (a conveyancer attending to registration of a mortgage bond i.f.o. the institution must ensure that the home builder is registered, has enrolled the home and has paid the prescribed fees i.r.o. that enrolment),
(3) (the MEC for housing in a province shall not, unless the home builder is registered and has en rolled the project concerned—
(a) (approve a housing-development project i.r.o. which a housing consumer is eligible for a state housing subsidy for a dwelling in the project,
(b) (grant a state housing subsidy to a consumer for construction or sale of a home by a home builder, or
(c) (pay a home builder any housing-subsidy funds i.r.o. a housing-development project approved by it); Govt Notice R1406 of 1 Dec 1999 (technical requirements, maximum payable by NHBRC for builders' failure to meet obligations),
Govt Notice R1407 of 1 Dec 1999 (calculation of home-enrolment fees),
Govt Notice R1410 of 1 Dec 1999 (fees for registration of home builders),
Govt Notice 354 of 22 Mar 2002 (maximum payable by NHRBC for builders' failure to meet obligations in provincially-subsidised development projects), and
Govt Notice R192 of 22 Feb 2008 (builder grading for weighting home-enrolment fees);
Housing Consumer Protection Bill 10 of 2021;
Transfer Duty Act 40 of 1949 s 2(1)(b)(i)–(vi) (imposition of duty);
Land Survey Act 8 of 1997—
s 1—
"diagram" (document containing geometrical etc representations of a piece of land forming the basis for registration of a real right, and signed by a land surveyor),
"general plan" (plan representing relative positions and dimensions of two or more pieces of land, and signed by a land surveyor),
s 10 (regulations)—
(1) (survey regulations board may make regulations regarding—
(a) (how surveys must be performed,
(b) (degree of accuracy to be obtained and limit of error allowed in land surveys,
(c) (diagrams and general plans for registration of land in a deeds registry, manner of preparing them, and information to be recorded thereon,
(f) (manner and circumstances in which cadastral surveys of land must be based on or connected to trigonometrical stations and reference marks;
(h) (how Surveyor-General must test accuracy or correctness of surveys whose results appear on diagrams or general plans to be registered in deeds registry),
(2) (board may prescribe circumstances when Surveyor-General may authorise departure from such regulations if compliance is impossible or impracticable),

s 14 (no general plan or diagram of any piece of land shall be accepted in any deeds registry in connection with any registration therein of that land, unless the general plan or diagram has been approved by the Surveyor-General);
s 15 (numerical and other data recorded on a general plan or diagram lodged for approval of the Survey or-General must be within prescribed limits of consistency);
s 16 (no general plan or diagram shall be approved by the Surveyor-General unless prepared under the direction of and signed by a land surveyor, as a rule);
s 18 (survey of land for which title deed has been issued without a diagram),
s 29 (acceptance of boundary by agreement of owners if doubt arises),
s 30 (in deciding which beacons or boundaries common to contiguous pieces of land are correct, an arbitrator must be guided by the principles that—
(a) original beacons erected at original survey of a piece of land if surveyed define the true boundaries despite not corresponding to the diagram or general plan,
(b) well-ascertained beacons recognised as correct for 30 years or more by the parties or their predecessors must be taken to be the original beacons);
Govt Notice R1130 of 29 Aug 1997 (land survey regulations) reg 20(4) (unnecessary to place internal beacons on general plan until erven concerned to be transferred);
Geomatics Profession Act 19 of 2013—
s 1(1) sv "surveying" (is a component of geomatics work),
s 2(a)(iii) (geomatics includes determining position of boundaries of land for purposes of registration of such and i.t.o. applicable laws),
s 3 (establishment of Geomatics Council),
s 8(1)(b)(iii)(bb) (Council must register professional land surveyors qualified to perform surveys for diagrams or general plans to be filed i.t.o. land registration laws),
s 11(c) (land surveyor must deposit with Surveyor-General, for examination and filing, records of any survey carried out by her for purpose of land registration in a deeds registry, and i.r.o. a general plan or diagram prepared as result of that survey);
s 13(2)(b)(i) (persons not so registered may not perform such surveys),
s 30(1) (Council may determine guideline professional fees),
Bd N 203 of 2019 (Gazette 42902 of 13 Dec) (guideline professional fees proposed by Council for land survey work),Immigration Act 13 of 2002—
s 19(4) read with reg 19(5);
Govt Notice 459 of 3 Jun 2014 (determination of critical skills for critical-skills visas or permanent-residence permits): svv "land surveyor";
National Credit Act 34 of 2005—
s 1 (definitions)—
("consumer" includes (d) the mortgagor under a mortgage agreement,
("juristic person" includes a partnership, association or other body of persons corporate or unincorporated,
("mortgage agreement" is a credit agreement secured by registration of a mortgage bond by the registrar of deeds over immovable property),
s 4(1) (Act applies to every arm's-length credit agreement, except inter alia—
(a) (a credit agreement where the consumer is a juristic person whose asset value or annual turnover exceeds a threshold determined by the Minister,
(b) (a large agreement where the consumer is a juristic person, even if its asset value or annual turnover is below that threshold),
turnover is below that threshold),
s 7(1)(a) (Minister to determine asset-value or annual-turnover threshold up to R1m),
s 8 (credit agreements)—
(1)(b) (a credit agreement includes inter alios a credit transaction),

(4)(d) (a credit transaction includes inter alios a mortgage agreement),
s 9(4)(a) (a credit agreement is a large agreement if it is a mortgage agreement),
s 10(1)(b)(iii)(aa) (a credit agreement is a "developmental credit agreement" if the credit provider is a registered developmental-credit provider and the agreement is entered into for inter alios the purpose of development of a small business),
s 100(1)(c) (credit provider must not charge the consumer i.r.o. an interest charge under a credit agreement exceeding the amount that may be charged consistent with the Act),
s 101(1)(d)(ii) (credit agreement must not require payment by consumer of interest exceeding applicable maximum prescribed rate determined),
s 105(1)(a) (Minister, after consulting National Credit Regulator, may prescribe method for calculating maximum rate of interest applicable to each consumer-credit-market subsector determined by Minister),
Govt Notice R489 of 31 May 2006 (regulations i.t.o. National Credit Act, 2005) —
reg 42 (maximum rates of interest, where RR = ruling Reserve Bank Repurchase Rate:
(mortgage agreements: RR + 12% p.a.,
(unsecured credit transactions: RR + 21% p.a.,
(small-business developmental credit agreements: RR + 27% p. a.),
Govt N 713 of 1 Jun 2006 (R1m asset-value or annual-turnover threshold determined),Subdivision of Agricultural Land Act 70 of 1970;
Subdivision of Agricultural Land Act Repeal Act 64 of 1998 (not yet in operation);
Small Claims Courts Act 61 of 1984 s 16(g) (matters beyond jurisdiction—interdicts);
Spatial Planning and Land Use Management Act 16 of 2013—
s 1(1) (definitions)—
svv "land development" (means erection of structures on land, or change of use of land including township establishment, subdivision or any deviation from land uses permitted i.t.o. an applicable land-use scheme);
s 10(1)(a) (provincial legislation consistent with Act may provide for matters in Sched 1);
s 24 (land use scheme)—
(1) (a municipality must adopt a single land use scheme for its entire area;
(2) (a land use scheme must—
(a) (include appropriate categories of land-use zoning and regulations for entire municipal area, including areas not previously subject to a land use scheme;
(c) (permit incremental introduction of land-use regulation in traditional-leadership areas, rural areas, informal settlements, slums and areas not previously subject to a land use scheme);
s 35 (municipal planning tribunals—
(1) (a municipality must establish a municipal planning tribunal to determine land use and development applications in its area;
(2) (a municipality may authorise the considering and determining of certain land-use and land-development applications by an official in its employ;
(3) (a municipality must categorise applications into those to be considered by an official and those to be referred to the tribunal).
s 55 (exemptions) —
(1) (Minister may, in public interest, on request from a province or municipality—
(a) (exempt from any provisions of the Act—
(i) (a specified piece of land;
(ii) (a specified area;
(b) (substitute alternative provisions to apply;
(c) (withdraw an exemption).
(2) (exemptions may be subject to conditions the Minister considers appropriate).

Sched 1 (provincial legislation may—

(d)(ii) (repeal or amend provincial legislation that applies to land development, land-use management, township establishment, spatial planning, land subdivision or consolidation or removal of restrictions; and

(f) (establish procedures for public consultation, advertising and notification where a municipality amends a land use scheme or rezones land in its area;

(g) (determine procedures relevant to approval of an application for—

(i) (establishment of a township;

(ii) (amendment of a land use scheme;

(iv) (subdivision of land,

(v) (consolidation of land;

(viii) (formalisation or incremental upgrading of an informal settlement or slum, including any matter related to tenure, land use control and service provision;

(n) (provide uniform content of conditions of approval for the province;

(y) (regulate engineering-service provision and imposing of development charges);

State Land Disposal Act 48 of 1961;

Government Immovable Asset Management Act 19 of 2007;Gen N 510 of 2017 (Gazette 40965 of 7 Jul), draft Communal Land Tenure Bill, 2017 and explanatory memorandum for public comment;

Expropriation Bill B23 of 2020 (as introduced in National Assembly)—

cl 2(4) read with cls 5 to 27 and 30 (Bill seeks to establish uniformity for expropriations by all spheres of government),

cl 3(1) (property may be expropriated for a public purpose, or in the public interest),

cl 7 (notice of intention to expropriate) —

(1)(a) (authority must serve notify of intended expropriation on affected persons),

(b) (expropriating authority must publish such notice),

(2) (the notice must—

(c) (describe the purpose for which the property is required);

(d) (give the reason for the intended expropriation of that particular property),

(h)(ii) (invite the owner to state the amount claimed as just and equitable compensation),

(4) (the owner must give the authority a statement indicating—

(a) (the amount claimed as just and equitable compensation if the land is expropriated and full particulars of how it is made up,

(b) (full particulars of all improvements which in his opinion affect the land value),

cl 8 (notice of expropriation)—

(1) (if the expropriating authority decides to expropriate the property, it must serve a notice of expropriation on the owner),

(3) (the expropriating authority's notice of expropriation must contain—

(g) (the amount of compensation offered or agreed by the authority),

(h) (if the amount of compensation is disputed, a statement that the expropriated owner may institute court proceedings to decide the amount, or request that the authority commence such court proceedings),

cl 12(3) (it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to—

(a) (where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;

(b) (where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;

(c) (notwithstanding registration of ownership i.t.o. the Deeds Registries Act, where an owner has abandoned the land by failing to exercise control over it;
(d) (where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
(e) (when the nature or condition of the property poses a health, safety or physical risk to persons or other property);

cl 31 (repeals Expropriation Act 1975);

Preservation and Development of Agricultural Land Bill B8 of 2021;

Official policies and reports

State Land Lease and Disposal Policy, 26 Aug 2019;

Land Audit Report, Phase I, 2013: Registered State land. Dept of Rural Development & Land Reform (registered State land and unaccounted land totals 25,422,409 ha (unaccounted land is unregistered State land in former Transkei, Ciskei, Gazankulu, Lebowa, Venda);

Land Audit Report, Phase II, 2017: Private land ownership by race, gender and nationality. Dept of Rural Development & Land Reform (erven in urban areas are 94% of all parcels of land but only 3% of all land and are owned by 93% of all owners of land, with an average per owner of 0.4 ha, yet these tiny land parcels command highest locational rent and prices in national property market);

Report of the Motlanthe High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, Nov 2017, pp 50–51, 205–224, 300;

General Household Survey 2019. Statistics South Africa: §§ 2.1, 2.2 (population, household estimates) (household growth outstripped population growth over the period 2002–2019)

Caselaw

African & European Inv Co Ltd v Warren and others 1924 AD 308 (where owners of three adjoining unsurveyed farms were agreed on a particular boundary beacon's position, but then, after survey of the farms error by the surveyor in calculating its position placed it at a materially different location on the farms' diagrams, it was held that, despite statute providing that confirmed diagrams were unimpeachable and unalterable without all owners' consent, such diagrams could despite one owner's opposition be rectified if they conflicted with a beacon lawfully established and recognised when they were framed),

Union Govt Minister of Lands and ano v Lovemore 1930 AD 13 at 25 (where the diagram contradicts the unambiguous text of the title deed, the diagram must give way to the text),

City of Cape Town v Khaya Projects (Pty) Ltd and others [2015] 1 All SA 81 (WCC) pars [10], [37];

Ex parte Western Cape Prov Govt and others: In re DVB Behuising (Pty) Ltd v North West Prov Govt and ano 2000 (4) BCLR 347 (CC) (provinces have no power to legislate on land tenure and deeds registration);

Tongoane and others v Min for Agr and Land Affairs and others 2010 (8) BCLR 741 (CC) (Communal Land Rights Act 2004 held invalid for noncompliance with Constitution's procedures for enacting a Bill affecting provinces);

University of Venda v Mathivha and others (Limpopo high court) [2015] ZALMPTHC 6 pars 18.4.10 and 18.5 (no legislation authorises traditional leaders to grant Permissions to Occupy communal land, but by customary law they may permit occupation thereof),

Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd, 2009 (3) SA 384 (T) Satchwell J pars 10–13 (National Credit Act 2005 does not apply to a mortgage agreement where the borrower is a juristic person, whether its asset value or annual turnover exceeds or falls below a threshold determined by the Minister);

Silver Falcon Trading 333 (Pty) Ltd and others v Nedbank Ltd, 2012 (3) SA 371 (KZP) Gorven J pars 10–13 (National Credit Act does not apply to mortgage agreements with borrowers who are juristic persons, regardless of their asset value or annual turnover);

SELECT SOURCES

FREE MARKET FOUNDATION

Books, articles, booklets and research

Eglin, R. and Kenyon, M., "Between a Shack and an RDP House: Managed Land Settlement", Chap 21 in Upgrading Informal Settlements in South Africa: Pursuing a partnership-based approach, eds. Cirolia, L. et al. (2016), Univ. of Cape Town Press;

Land Audit Booklet, 5 Sep 2013, Dept. of Rural Development and Land Reform;

Prof. H. P. Binswanger-Mkhize, "From failure to success in South African land reform" African Journal of Agricultural and Resource Economics (Dec. 2014) pp 253–269;

New World Immigration (Pty) Ltd, "Land Surveyors needed in South Africa", Cape Town, https://www.nwivisas.com/nwi-blog/south-africa/land-surveyors-needed-in-south-africa/ (accessed 31 Mar 2021);

Kang'ethe, S., Manomano, T. "Exploring the Reconstruction and Development Programme (RDP): Residents' Perceptions of Housing Allocation Malpractices in Golf Course, Alice Town, Eastern Cape, South Africa" Journal of Human Ecology 2017 407–415;

Simpson, K W and Sweeney, G M J, The Land Surveyor and the Law, Univ of Natal Press, 1973, 103–104 (a beacon to indicate the corner position of a rectilinear boundary may be a natural object such as a rock);

BizNews, 5 Jan 2018. "Land expropriation without compensation: Implications of a seismic shift–IRR", T. Corrigan;

News24, 22 Feb 18, "Why expropriation without compensation is incompatible with economic growth", T. Corrigan;

News24 in partnership with City Press, 1 Mar 2018, "Expropriation without compensation spells economic disaster";

Max du Preez, 2013, A Rumour of Spring: South Africa after 20 Years of Democracy—

(the land-restitution programme was quite successful but land restored was less than expected because most beneficiaries opted for cash rather than receive their land back;

of about 80,000 land-restitution claims received by 1998, only 5,856 claimants preferred land, with 71,292 claimants preferring cash payouts (totalling R6 billion);

(the then minister of land reform Gugile Nkwinti said in 2013 "people have become urbanised, they have become de-culturised in terms of tilling land and so on; we no longer have a peasantry, we have wage earners now";

Institute of Race Relations, Apr 2016, A. Jeffery, "Escaping South Africa's Race Curse"—

(a national survey of opinions on key 'transformation' policies which have been in force for many years was conducted for the Institute in Sep 2015; survey firm MarkData did the sampling, fieldwork and data-processing; results became available in 2016;

(a representative sample of 2 245 respondents was selected in households in all provinces in ten socio-economic categories from traditional rural areas to big cities; racial representivity was unavoidable given the study's purpose and subject and was secured by interviewing 1 757 black people (78.3% of the total) and 203 coloured (9%), 63 Indian (2.8%), and 223 white people (9.9%); trained experienced field teams interviewed respondents face-to-face in their language of choice;

(respondents were asked whether, if the government were to give them land, they would prefer rural land to farm or urban land for housing; 58.3% opted for urban land and 37.1% land to farm; among blacks the proportions were similar, with 55.2% favouring urban land and 39.5% land to farm, confirming South Africa is a rapidly urbanising society where relatively few people want land to farm);

Africa Check, L Pretorius and G Makou, 25 Apr 2019, "Frequently asked questions about land ownership and demand in South Africa";

The Conversation, Prof B Cousins, 27 Oct 2020, "Problematic assumptions raise questions about South Africa's new land reform plan"—

(government's recently-announced plan to allocate 700,000 ha of state land to black farmers is unclear on how many farms and beneficiaries will be involved and whether there will be sufficient safeguards against its being captured by elites;

property rights on the allocated farms will continue to take the form of leases rather than private title so beneficiaries will not have collateral to secure bank loans;

(the minister admitted state land administration was deficient and corruption existed;

(land will be allotted to successful applicants with farming experience or will to learn;

(there will be compulsory training in record keeping and financial management;
(the farming model underlying land-reform policies is of modern, high-tech, large-scale commercial production by skilled business managers;
(lip service is paid to the need to provide land to smallholder farmers, but in practice the current model sidelines small-scale farmers;
(the current focus on promoting emerging commercial farmers means relatively few people gain access to a small number of medium-scale farms;
(land policies should urgently focus on small-scale farmers as the most practical way to provide real opportunities to enhance livelihoods);
S. Zantsi, "Explaining land size demand among potential emerging farmers in South Africa: what does it mean for land redistribution policy?" South African Geographical Journal, Dec 2020, https://doi.org/10.1080/03736245.2020.1854838 (studies report demand by smallholders for small land sizes and to meet it advocate subdividing land-reform farms despite 1970 Subdivision of Agricultural Land Act prohibiting subdivision);
Business Insider SA, 29 Mar 2021, "Expropriation without compensation is coming – what you need to know";
SABC News, 23 Mar 2021, A Kobokana, "Communal Land Tenure Bill ready to be tabled before parliament"

LAWS AFFECTING SMALL BUSINESS

LICENSING

LICENSING

SYNOPSIS

Problems

Licensing laws protect existing businesses by preventing new entrepreneurs from entering into the economy and competing with them.

Licensing laws reduce productivity and impose financial costs and administrative burdens on small businesses. Ordinary economic activities are criminalised and opportunities are created for corruption. Although licensing laws relating to many different types of business have been repealed, it appears that the old laws are still on the statute book in the former homeland of KwaZulu. A wide range of businesses also still require a licence in South Africa. A few licensing laws allow licensing authorities to decide who is or is not suitable to be granted a licence, and disqualify applicants with criminal records. Some laws create monopolies by permitting only one supplier, others allow licences to be refused "in the public interest", and a few expressly empower the authorities to discourage competition. Legislation often requires high qualifications or standards. Government enterprises are frequently exempted from the obligation to have a licence. Licensing laws subject business people to policing by their competitors.

Recommendations

- No national general Business Registration Act should be introduced.
- Limpopo's general Business Registration Act should be repealed, except in relation to sales of meals and perishable foodstuffs.
- Repeal trade licensing laws in the former homeland of KwaZulu.
- Most, if not all, licensing laws should be repealed.
- Licensing laws should entitle applicants to licences automatically, unless they will clearly violate essential health and safety laws.
- No new licensing laws should be introduced unless strictly necessary.
- Repeal any licensing laws that permit only one supplier and create a monopoly.
- No licensing law should require an applicant to be "suitable" or "fit and proper".
- Licensing laws should not disqualify applicants who have prior convictions.
- Licensing authorities should not have the power to refuse a licence "in the public interest".
- Licensing laws should not authorise the discouraging of competition.
- There should be no special requirements for individuals or premises.
- There should be no exemptions for government-owned businesses.
- Licensed operators should not be disciplined by people in the same business field.
- Municipal bylaws should not authorise the impounding of the goods of informal or street traders who fail to produce a licence to trade.
- Legislation permitting seizure of street traders' property should also provide for the return of property.
- Bylaws should not require itinerant hawkers who sell goods other than meals to hold a permit.
- The Immigration Act's financial and staffing requirements imposed on immigrants seeking to establish a business should be relaxed.
- Laws should not prevent refugees from starting a business.
- An unlicensed trader convicted for a first offence should be discharged with a caution.

LICENSING LEGISLATION RESTRICTS ECONOMIC ACTIVITY

Licensing legislation requires a person to obtain a licence from a government authority before he or she can carry on a

specified type of business. Anyone who contravenes the law is guilty of a criminal offence. It does not matter whether the permission is called a licence, permit, authority, consent, approval, or certificate of acceptability; the effect is the same in every case: a person is prohibited from carrying on the activity without the licence or permission.

Licensing laws prevent people from entering the economy

Legislation that requires a person to obtain a licence from a government authority before he or she can carry on a business inhibits economic growth by preventing or restricting people from entering the economy. This is especially true of people who are poor, uneducated, or disadvantaged in some way. Where no such requirement exists, people are much more likely to start a business.

Licensing laws prescribe certain requirements that applicants must satisfy in order to obtain a licence; applications that do not meet these requirements are rejected by the licensing authorities. The effect of any licensing law, therefore, is always to limit the number of people carrying on a particular business, since it ensures that not everyone who wants to carry on that business activity is allowed to do so. That, in turn, means that customers have fewer choices.

Licensing legislation reduces productivity at public expense

Because established (licensed) businesses are protected by licensing laws from free and open competition, they do not have to work as hard to satisfy their customers by improving their goods and services and keeping their prices down. If there were no entry limitations, customer dissatisfaction would encourage new entrants to open competing businesses to supply the quality of products and services that customers are seeking. Thus, whilst licensing laws are generally described as being introduced to protect the consumer, the effect is invariably the opposite. Consumers benefit most from having the greatest possible choice.

Licensing laws raise costs

Limiting the number of businesses that may participate in a sector not only reduces the level of quality and service but also raises costs. Licensees in such a sector become members of a government-created cartel. In the absence of the cartel, high returns would encourage more investors to enter the industry and prices would tend to decline. Limiting the number of competitors in the gambling business, for instance, reduces the gamblers' odds of winning because casinos do not have to be as concerned about the frequency or number of pay-outs.

Licences enrich some people at the expense of the public and create what has been called a tyranny of beneficiaries. This phenomenon tends to favour entities with more resources over those with less, thus being most disadvantageous to entrepreneurs from poorer communities. Licences reduce the number and variety of businesses that would otherwise exist, and keep up the prices charged by the persons who are permitted to carry on the licensed businesses.

Licensing laws protect existing businesses at the cost of everyone else

The people who introduce and administer licensing laws argue that the laws are required in the public interest, and that the motives for introducing them are altruistic. In other words, they justify the laws by referring to their good intentions, and ignore the harmful effects. Noble intentions, however, are no assurance of beneficial outcomes and do not justify the infliction of harm on consumers. Moreover, hidden behind most proposals for licensing control are the vested interests of the promoters. Whatever altruistic arguments they put forward, their aim is almost always to protect the existing businesses in an industry from new competitors.

For example, businesses in a particular industry may urge that a licensing law is necessary to protect the public from

dishonest and unscrupulous suppliers – they say there is a need to "clean up the industry" and "clear out the fly-by-nights". This often occurs in regard to new and fast-growing industries. However, the people who argue for minimum entry standards tend to forget that if the standards they propose had been in existence when they started, many of them would not have been able to comply.

The people who introduce and administer licensing laws argue that the laws are required in the public interest, and that the motives for introducing them are altruistic. In other words, they justify the laws by referring to their good intentions, and ignore the harmful effects. Noble intentions, however, are no assurance of beneficial outcomes and do not justify the infliction of harm on consumers. Moreover, hidden behind most proposals for licensing control are the vested interests of the promoters. Whatever altruistic arguments they put forward, their aim is almost always to protect the existing businesses in an industry from new competitors.

Licensing laws criminalise ordinary economic activity and create opportunities for corruption

Licensing legislation makes criminals of ordinary small-business-people who are making a living for themselves and their families, providing goods and services, and creating employment. Their only crime is that they have not complied with the often burdensome and intensive requirements associated with taking out a licence.

Another pervasive consequence of the laws is that they create opportunities for official corruption. Dishonest law enforcement officials often use the fact that businesses are operating without licences to extract bribes from them, particularly in the case of activities such as liquor sales and gambling.

Licensing legislation imposes financial costs and burdens on businesses

Even in cases where licensing is introduced in an attempt to ensure compliance with requirements such as health standards, unnecessary costs are imposed on businesses. For example, licensing laws have sometimes required the installation in restaurant kitchens of expensive tiling, stainless steel equipment and other costly items, supposedly to ensure hygienic food handling. However, kitchen standards cannot prevent faulty hygiene habits or carelessness in the handling of food.

In addition to such compliance costs, the laws often place heavy administrative burdens on businesses. Besides the expenses and red tape involved in applying for a licence, business people are often also required to keep records, to report to licensing authorities and to apply for the renewal of their licences.

Many licensing laws once considered essential have been repealed

Some progress has been made towards repealing licensing laws. At one time it was thought necessary to require a person to hold a licence before being permitted to carry on any of a very wide range of trades and occupations. These licensing laws are no longer regarded as necessary.

As a result of the enactment of the Businesses Act, 1991, a person is free to start up a business in any of the following trades without first having to apply to a licensing authority for a licence to do so:

> accommodation establishment, advertising agent, auctioneer, baker, barber, bicycle dealer, building contractor, butcher, café, cartage contractor, commercial traveller, driving instructor, fishmonger, gardening services contractor, general dealer, hawker, hiring service, kennel, laundry, livestock or produce dealer, mail order undertaking, market agent, motor garage, motor graveyard, motor vehicle attendant, motor vehicle dealer, parking garage, pawnbroker, photographer, poultry farm, private investigator, quarrier, recreation ground, rickshaw hauler, riding school keeper, salesman, vending machine keeper, warehouse, and workshop.

RECOMMENDATION 1

No national general Business Registration Act should be introduced.

There have been two attempts to impose a much wider business-licensing system than the old-order licensing regime that prevailed before the Businesses Act. One of those attempts failed, the other has succeeded.

The failed attempt was at national level in March 2013, when the national Minister of Trade and Industry published for comment a proposed national Licensing of Businesses Bill which would have prohibited any person from carrying any business whatsoever supplying any goods or any services to the public, without a licence.

After vehement opposition, the Minister withdrew the draft bill.

No general Business Registration Act should be introduced – the 1991 Businesses Act is all that is necessary.

RECOMMENDATION 2

Limpopo's general Business Registration Act should be repealed, except in relation to sales of meals and perishable foodstuffs.

The Limpopo province has imposed a wide-ranging business-licensing system.

The province has enacted a Business Registration Act which prohibits anyone from conducting business by dealing in any goods or rendering any services whatsoever, unless he or she has applied for and obtained registration of the business.

The Limpopo Business Registration Act criminalises what should not be criminalised. A person who carries on an unregistered business commits an offence and is liable to a fine or imprisonment for up to six months. Bizarrely, the Limpopo Act states that its purpose is to "empower those previously disadvantaged through creating prompt, simplified and inexpensive access to economic activities" and to "promote trading activity".

RECOMMENDATION 3

Repeal trade licensing laws in the former homeland of KwaZulu.

Even though the Businesses Act, 1991, repealed licensing requirements for many trades, occupations and businesses, legislation requiring licences for these businesses still existed in the former TBVC states or self-governing territories. Although these states and territories no longer exist as separate entities, in terms of the Constitution their laws continued in force until repealed by the competent authority.

In most provinces which contain territory of former homelands, steps have been taken since 1994 to repeal those laws and to enact legislation which either extended the Businesses Act to the former homeland areas and repealed the homeland business-licensing laws, or which repealed the Businesses Act and homeland laws and replaced them with a new provincial business-licensing law identical in substance to the Businesses Act.
For instance, the Eastern Cape repealed the Licences Acts of Transkei and Ciskei and extended the Businesses Act to those territories, in terms of the Businesses Act (Extension of the Application of the Businesses Act, 1991) (Eastern Cape) 3 of 1997.

It is unclear whether the KwaZulu-Natal province has passed such a statute to extend the Businesses Act to the former homeland of KwaZulu (and repeal the KwaZulu licensing law). If it has not, the KwaZulu Licensing and Business Hours Act, 1984 is still in force in the former KwaZulu areas of the province.

It is therefore recommended that the KwaZulu homeland trade licensing law should be repealed, and that this former homeland be brought into line with the rest of KwaZulu-Natal.

RECOMMENDATION 4

Most, if not all, licensing laws should be repealed.

A wide range of trades, occupations, and businesses still require a licence of some kind or another in South Africa. These include carrying on the business of:

> an abattoir, accountant, advocate, agricultural produce agent, airport, air service, air traffic control, animal embryo collector, animal exporter, animal genetic material import agent, animal genetic material processing centre, animal embryo transferor, animal importer, animal inseminator, animal semen collector, aquaculture establishment, attorney, auditor, bank, bingo-game operator, bookmaker, boxer, boxing official, boxing manager, boxing promoter, boxing trainer, broadcaster, buffalo breeder, casino, chiropractor, cinema, clinical technologist, commercial fishing undertaking, commissioner of oaths, conveyancer, correspondence college, debt collector, dental technician, dental therapist, dentist, diamond beneficiator, diamond dealer, diamond researcher, diamond trading house, dietician, discotheque, dispensing optician, emergency care, engineer, environmental assessment practitioner, estate agent, escort agency, financial adviser, financial adviser's or intermediary's representative, financial exchange, financial intermediary, financial service, fish processor, friendly society, fund-raiser from the public, gaming machine operator, health spa, homeopath, horse-racing club, hospital, infrared-treatment provider, insurer, investment manager, keeper of three or more pinball or similar machines, keeper of three or more snooker tables, land surveyor, liquor blender, liquor distributor, liquor importer, liquor manufacturer, liquor retailer, lottery, masseur, meal provider whether from fixed premises or as a street trader, medical aid scheme, medical practitioner, medical orthodontist and prosthetist, medical scientist, medical technologist, minerals prospector, mining, municipal accountant, natural scientist, naturopath, nightclub, notary, nurse, occupational therapist, optometrist, oral hygienist, passenger transport by bus or taxi, patent agent, pension fund, perishable foodstuff supplier, petroleum manufacturer, petroleum retailer, petroleum wholesaler, pharmacist, physiotherapist, place of care for children, plant breeder, podiatrist, postal delivery, psychologist, quantity surveyor, racecourse operator, radiographer, remedial gymnast, sauna, school, security officer, security service provider, social worker, society for the protection of cruelty to animals, speech therapist and audiologist, stock exchange, technikon, telecommunication service, telephone company, theatre, totalisator, tour guide, town clerk, town planner, Turkish bath, unit trust scheme, university, valuer, and veterinarian.

Financial service representatives engaged (as independent operators or employees) by a financial adviser or intermediary to render services on its behalf to clients are subject to a "negative licensing" system. Representatives do not need to obtain a prior licence to operate, but if they are subsequently perceived to have breached rules of fit and proper conduct, the financial adviser or intermediary who engaged them must debar them from the industry.
It is proposed that most, if not all, licensing laws should be repealed.

Against this, it is often contested that a licensing requirement is the only way to protect the public, particularly in an industry that involves high risk such as medicine, banking, or air transport. It is prudent that in sectors such as these there should be a prior screening process, such as is afforded by a licensing law, before a person is permitted to embark on business.

However, licensing laws do not guarantee that the public will be protected, and that there will be no failure in the licensed activity. Dishonesty and accidents happen even within licensed industries.

It is also argued that the rationing of admission to certain industries is necessary where the industry is exploiting a scarce resource, such as broadcasting on the radio waves, or fishing.

However, people carrying on activities in these sectors do not require any special treatment. They can provide a

service and protect existing resources simply by relying on property rights. For example, there is no need to introduce broadcasting legislation as broadcasters are able to obtain interdicts against other broadcasters who attempt to use their frequencies. In the same way, the right to exploit wild animals vests by common law in the person who holds the rights of property over the area concerned, and the same approach can be used in the case of shoals of fish and similar natural resources.

It is also maintained that a licensing law is needed to protect the public where the licensed businesses use moneys obtained from the public, and that it is necessary to protect these trust moneys by means of fidelity funds.

This problem can be overcome by requiring that conveyancers, estate agents, debt collectors and so on maintain the necessary insurance or fidelity cover. It is not necessary to impose the requirement that they obtain a prior licence in the guise of a “fidelity fund certificate”.

It is also asserted that licensing laws are necessary as a source of revenue, to raise taxes and licensing fees from the licensed businesses.

However, licences are not an essential tool of tax collection. The majority of taxpayers are not licence-holders, and taxes can be raised through the ordinary taxation laws without imposing licensing burdens on particular industries. It is also to be doubted whether the benefits government enjoys with greater revenue outweighs the cost to society imposed by licensing laws – less employment, decreased investment, reduced entrepreneurship, and more expensive goods and services.

It is also argued that a licensing requirement is necessary as a source of information for the government so that it can keep track of the persons active in a business sector, and to enable government officials to inspect and enforce other laws.

In fact, however, licensing laws do not meet this requirement in many cases. For example, there are probably more unlicensed liquor retailers in South Africa than there are licensed ones. Government departments rarely have enough inspectors to enable them to police industries proactively by visiting all the business premises on their list. In most cases, inspectors and police officials respond only to complaints received, and they therefore investigate breaches of rules and regulations reactively. Because most violations are brought to the attention of the authorities by a complaint received from a member of the public, licensing as a source of information about businesses is redundant.

RECOMMENDATION 5

Licensing laws should entitle applicants to licences automatically, unless they will clearly violate essential health and safety laws.

Where the legislators are convinced that the benefits of particular licensing laws outweigh their costs and that these laws should be retained, it is urged that these laws stipulate that an applicant must be granted a licence automatically on request, unless the licensing authority can show on a balance of probabilities that the applicant will probably violate essential health or safety laws, or some other legal requirement which the legislators are convinced is essential in the industry in question for the protection of the public.

RECOMMENDATION 6

No new licensing laws should be introduced unless strictly necessary.

For example, a Debt Collectors Act was enacted in 1998 which requires the registration of debt collectors. Before a new registration or licensing law is adopted, its likely effects should be carefully considered, and the costs and benefits of the law should be weighed against each other. It may be that measures other than a licensing law could prevent whatever mischiefs are considered to exist in the affected industry.

The Businesses Act, 1991 has proved to be relatively resilient in the 27 years since it was enacted.
Relatively few legislatures have to date sought to re-enact anything similar to the pre-existing licensing laws which had imposed a licensing requirement on a wide range of businesses, in order to reintroduce that old licensing regime or something wider.

RECOMMENDATION 7

Repeal any licensing laws that permit only one supplier and create a monopoly.

The threat of competition benefits consumers. And the ability to enter an industry benefits persons who are not yet carrying on business in the industry but wish to do so. Existing businesses, on the other hand, benefit from having no competitors.

The best way for a person in business to ensure that he will have no competition is to secure the enactment of a law which states that only that person may carry on that particular business. Examples of this are the business of delivering letters, and the business of providing a network of fixed lines for telephone calls and other telecommunication.

If there are to be licensing laws, then these laws should not license a single monopoly to the exclusion of competition from other licence-holders. It is consequently urged that all monopoly legislation should be repealed.

This suggestion could be disputed in particular cases. For example, it was contended that the monopoly previously enjoyed by the state telephone company in terms of the Telecommunications Act, 1996 was justified because this company was required to extend telephone services to the needy, and also because it had to be sufficiently viable to attract an investment partner.

But these narrow reasons did not justify retention of the telephone company's monopoly rights. The needy could have been assisted by narrowly-targeted subsidies. And the economy as a whole would have benefited from the competition permitted if the monopoly had been removed. The discipline of the market would have led to greater efficiency, innovation, and variety in telecommunication services, as had been shown in countries around the world where deregulation had occurred.

RECOMMENDATION 8

No licensing law should require an applicant to be "suitable" or "fit and proper".

Licensing laws often say that the licensing authorities may refuse to grant an application for a licence if they are satisfied that the applicant is not a "fit and proper person" or a "suitable person" to carry on the proposed business.

This power enables the licensing authority to identify any shortcoming of the applicant, whether by reason of character, previous conduct, personal cleanliness, habits or methods, as a ground for refusing the application.

A licence for a sauna, cinema, theatre, nightclub, or discotheque must be refused in terms of the Businesses Act, 1991 and its provincial successors, for instance, if the licensing authority is satisfied that the applicant or person who will be in control of the business is not a suitable person because of his character or previous conduct, or for any other reason. And the Western Cape Gambling and Racing Act, 1996, prohibits the Licensing Board from granting any licence unless the applicant is "a fit and proper person whose character, integrity, honesty, prior conduct, regard for the law, reputation, habits and associations do not pose a threat to the health, safety, morals, good order and general welfare of the inhabitants of the Province and to the provisions and policy of this Act".

All too often, the licensing authority uses this discretion to protect existing licensees. It could also be used for corrupt purposes to elicit bribes or other favours from licensees.

It is impossible to know in advance whether or not an applicant for a licence to conduct business in a particular industry will conduct business ethically in that sector. Licensing laws should therefore not use such criteria.

RECOMMENDATION 9

Licensing laws should not disqualify applicants who have prior convictions.

Frequently, a licensing law lays down that the licensing authority must not grant a licence if the applicant has been convicted of theft or receiving stolen goods, or other offences involving dishonesty.

According to the Agricultural Produce Agents Act, 1992, for example, a certificate to act as an agricultural produce agent can be refused if the applicant has at any time been convicted of an offence involving an element of dishonesty. The Western Cape Liquor Act, 2008 disqualifies from holding a liquor licence anyone who has been sentenced to imprisonment without the option of a fine in the preceding five years, unless the licensing authority "in exceptional circumstances" and on good cause shown determines that a disqualified person is deemed to be qualified for the purposes of a particular application.

The applicant has already been sentenced by a court of law to a penalty that the court deemed appropriate to the crime, the circumstances of the accused, and the needs of society. Nevertheless, the licensing law is used to inflict further punishment on the applicant. The convicted person, although having already paid a debt to society, is prevented from rehabilitating himself or herself by starting a business in the licensed industry.

It could be argued that to permit persons convicted of an offence involving dishonesty would be to admit undesirable people into the industry.

But a blanket disqualification for offences involving dishonesty does not guarantee that persons who are granted licences will be honest. It also prevents a convicted person from rehabilitating himself. Also, the prohibition against granting licences to persons with previous convictions would not prevent these persons from being employed by other persons in the industry who have licences. Taken to its logical extreme, a disqualification for criminal convictions would mean that people with prior convictions would be prohibited from earning their living in any industry, sector or field of endeavour. The only areas of activity that would remain open to them would be criminal activities such as theft or robbery.

RECOMMENDATION 10

Licensing authorities should not have the power to refuse a licence "in the public interest".

Some licensing legislation empowers the licensing authorities to refuse an application for a licence if they are satisfied that it is not in the public interest that the applicant should have a licence.

This is an even more vague and general criterion than the requirement that the applicant be “fit and proper”, and allows a similar kind of corruption to take place under the table. It gives the licensing authorities an undesirably wide discretionary power to decide what the public interest is, and whether the granting of each particular application will be in the public interest.

Examples include the Gauteng Liquor Act, 2003, which states that the Liquor Board shall not grant an application for a liquor licence unless this is in the public interest. The Road Transportation Act, 1977, lays down that a road transportation authority must, in deciding whether an application for a permit to carry passengers should be granted or refused, take into consideration the extent to which the transportation is necessary or desirable in the public interest.

Objective rather than discretionary criteria should determine eligibility for licences. A power to refuse a licence application in the public interest leads to arbitrary and inconsistent decisions. The rule of law requires the laying down of clear rules and avoidance of discretion wherever possible. Licences should be granted to whoever satisfies objective criteria.

It could be argued that not every circumstance can be prescribed in advance in objective terms, and that the licensing authorities should have a discretion to refuse a licence in a particular case.

However, the uncertainty and potential for abuse that are introduced by a subjective criterion such as the “public interest” outweighs any alleged advantages of giving the licensing authorities the discretion to refuse a licence if they think that the public interest requires them to do so.

It is accordingly recommended that licensing laws should not authorise licensing authorities to refuse a licence application on the ground of the “public interest”.

RECOMMENDATION 11

Licensing laws should not authorise the discouraging of competition.

Some licensing legislation expressly empowers the licensing authorities to discourage competition in the licensed industry.

For example, the Diamonds Act, 1986 states that the licensing authority must not grant an application for a licence to carry on business as a diamond beneficiator, diamond dealer, diamond researcher, or diamond trading house, if the authority is of the opinion that a sufficient number of persons already hold that licence. And a person cannot hold a gambling licence in Mpumalanga unless the Gambling Board is satisfied that the granting of such a licence will not result in the establishment of an unduly large gambling industry in the province, in terms of the Mpumalanga Gambling Act, 1995.

It is recommended that licensing laws should not empower the licensing authorities to refuse a licence if they think that there are sufficient numbers of licensed businesses in the industry already. There should be no “need and desirability” criterion in a licensing law. Needs and desirability are determined by market forces – being the needs and desires of ordinary people and firms.

It may be argued that if too many licences are granted, the industry will become overtraded.

But it is not for a government agency like a licensing authority to determine what the optimum number of suppliers in an industry should be. This is best left to businesspeople and investors who are prepared to hazard their own efforts and finances in launching an enterprise. To give a government authority the power to decide if a particular industry is overtraded leads directly to that authority protecting the existing businesses, at the cost of the public and the economy in general.

RECOMMENDATION 12

There should be no special requirements for individuals or premises.

Licensing laws frequently require a person to comply with educational requirements or special skills before he or she will be granted a licence. For example, licensing laws sometimes provide that the person in control of the business must be able to read or write.

And the Western Cape Liquor Act, 2008, and its regulations requires liquor store licensees physically or electronically to write out records of sales and keep copies.

Legislative requirements such as these give an advantage to business applicants with a good education, at the expense of applicants who have not been fortunate enough to receive an education at the same high standard.

Or the legislation may empower the licensing authority to refuse a licence if in its opinion the business premises will be "unsuitable" in that they will be detrimental to "amenities" of the neighbourhood.

Requirements such as these give an advantage to applicants who have more funds to enable them to build grander or more stylish premises, and place applicants of more modest means at a disadvantage.

It is therefore recommended that licensing laws should not impose special requirements with which businesspeople or their premises must comply.

It could be contended that it is desirable to impose requirements of these kinds to raise standards in the industry.

However, legislation that increases standards tends to operate to the benefit of privileged people, and to the disadvantage of the less privileged. Industrial standards are best raised through market forces, usually being the demands and preferences of ordinary consumers.

RECOMMENDATION 13

There should be no exemptions for government-owned businesses.

Licensing legislation frequently exempts businesses that are run by the government from having to obtain a licence, even though private businesses with which they compete are obliged to comply with the licensing requirements.

For example, the Businesses Act, 1991, says that the state or a local authority is exempted from the obligation to obtain a licence under that Act to keep a cinema or theatre.

Exemptions such as these do not deal with all businesses equally, and give an unfair advantage to government businesses at the expense of private enterprise. It is a trite requirement of the rule of law that the law applies equally between the governed and the governing, and this is further reinforced by section 9(1) of the Constitution.

It is therefore proposed that licensing laws should not exempt enterprises conducted by governments from the obligations imposed on private-sector businesses to obtain licences before embarking on the enterprise.

It could be said that the government can be trusted to comply with all the provisions which the law requires must be met before a licence is granted. It could also be asserted that there is no point in asking the government to apply to itself for a licence.

These arguments ignore the costs to private businesses of having to obtain a licence. If any sector is exempt from the licensing requirement, this operates unfairly against businesses that are not exempt. Moreover, experience shows that

governments do not always comply with legislative requirements before exercising their powers. Licensing authorities are to some degree independent of the government, and it is not unreasonable to require the government to apply to the licensing authority for a licence, in the same way as a private business.

RECOMMENDATION 14

Licensed operators should not be disciplined by people in the same business field.

Licensing laws often subject people in business to being policed, investigated, and disciplined by their competitors.

For example, enquiries into charges of misconduct by a member of a medical or health profession are usually conducted by a board or committee which consists of members of the same profession. Thus, in terms of the Health Service Professions Act, 1974, enquiries into charges of misconduct on the part of a psychologist are conducted by a board which usually consists mostly of psychologists who can decide on what penalty to impose, including suspension of the psychologist from practice or even cancellation of the registration which entitled that psychologist to work.

A disciplinary panel which is constituted in this way is more likely to penalise that person and suspend his or her right to continue in business than a panel made up of independent laypersons might be.

On the other hand, if the panel of enquiry is too lenient, the public will have no confidence that the complaint was fairly considered and decided upon; the perception is often that the profession is siding with its member against whom the complaint is made.

It is hence proposed that, if there must be a licensing law, then the power to investigate the violation and suspend a licensee from continuing to practise his or her occupation should not be entrusted to panels drawn mainly from members of the same occupation. Panels of enquiry should consist in the main of ordinary lay members of the public.

This suggestion could be disputed on the ground that the persons carrying on business in the same field are the best judges of whether or not the member against whom the complaint is made should be penalised.

But in response, it must be remembered that a licensing law is introduced in the public interest allegedly, and accordingly members of the public would be better placed to decide whether the public has been harmed in a particular case. Persons carrying on business in the same industry could be tempted to place the interests of that industry above the general interest and impose a penalty which could be either harsher or more lenient than a penalty which would be appropriate for the protection of the public.

RECOMMENDATION 15

Municipal bylaws should not authorise municipal officials to impound the goods of informal or street traders who fail to produce a licence to trade.

The Businesses Act does not authorise municipal officials to remove or impound the goods and property of a person carrying on a licensable business who fails to produce a licence, or who carries on the business without a licence.

The Durban High Court in the *Makwickana* case in 2015 (rightly) declared that the sections of a bylaw of the eThekwini (Greater Durban) Municipality which authorised its officers to remove and impound the goods of an informal or street trader who failed to produce a licence to trade were invalid.

RECOMMENDATION 16

Legislation permitting seizure of street traders' property should also provide for the return of property.

The Businesses Act does create some injustice for street traders, licensed or not. The provincial Premier can make regulations about the disposal of things impounded.

The Act should provide for the return to street traders of impounded property, or for payment of compensation. A municipality's indiscriminate disposal of impounded property without proper notice to the street trader dispossessed, or supervision by a judicial officer or other impartial tribunal, and without accounting to the trader, is an unjustified limitation of the fundamental rights to equality before the law, to trade freely, and to be free from arbitrary deprivation of property.

RECOMMENDATION 17

Bylaws should not require itinerant hawkers who sell goods other than meals to hold a permit.

The Businesses Act and provincial replacements of the Act state that a municipal bylaw must not require a person carrying on the business of street vendor, pedlar, or hawker to hold a licence or permit for such business.

Yet some municipalities might be applying more stringent and unauthorised rules by insisting that even itinerant (mobile, or "roving") traders must register with the municipality, pay for the "right" to operate, and hold a permit issued by the municipality whether or not they sell meals.

RECOMMENDATION 18

The Immigration Act's financial and staffing requirements imposed on immigrants seeking to establish a business should be relaxed.

The Immigration Act, 2002 is not supportive of immigrants hoping to set up a small business.

The Act states that a business visa may be issued to a foreigner who intends to establish a business in South Africa, but only if the foreigner invests an amount determined from time to time by the Minister of Home Affairs after consulting the Minister of Trade and Industry, the amount being currently R5 million, and only if 60% of the permanent staff employed in the business are South African citizens or permanent residents.

These requirements discourage foreign investment in small businesses in South Africa and should be done away with.

Any new enterprise established by a foreigner in South Africa would boost local economic activity, whatever the amount invested in the venture or sourcing of its staff.

RECOMMENDATION 19

Laws should not prevent refugees from starting a business.

There should be no prohibition against asylum seekers and refugees (persons who have been granted asylum) from seeking self-employment and from being granted any relevant business or trading licences.

Some provincial Businesses Acts and municipal bylaws contain wording which appears to impose more restrictive requirements on refugees.

RECOMMENDATION 20

An unlicensed trader convicted of a first offence should be discharged with a caution.

It is recommended that an unlicensed trader convicted of a first offence of trading without a licence should not be sentenced, but should be discharged with a caution or reprimand.

SELECT SOURCES

FREE MARKET FOUNDATION

Constitutional statutes and instruments

Constitution of the Republic of South Africa, 1996: Chap 2 (Bill of rights) ss 9, 22, 25, 34; Chap 4 (Parliament) s 44(1)(a)(ii); Chap 6 (Provinces) s 104(1)(b)(i); Sched 4 (Areas of concurrent national and provincial legislative competence) part A;
Proc R18 of 9 Mar 1995 (Assignment to provinces of provisions of Businesses Act, 1991);
Self-governing Territories Constitution Act 21 of 1971

National statutes, statutory instruments and notices

Businesses Act 71 of 1991;
Adjustment of Fines Act 101 of 1991, s 1(1)(a) and (2), read with Magistrates' Courts Act 32 of 1944 s 92(1) and Govt Notice 217 of 27 Mar 2014 (monetary jurisdiction of courts);
Films and Publications Act 65 of 1996 ss 18(3)(c) and 24(3)(c);
Natal Prov Notice 23 of 24 Feb 1994, Natal Official Gazette 4952 p 131 (declaration of perishable foodstuffs for purposes of Businesses Act, 1991);
Criminal Procedure Act 63 of 1977 s 35 (Forfeiture of article to State), s 297 (Conditional or unconditional postponement or suspension of sentence, and caution or reprimand);
Refugees Act 130 of 1998 ss 22, 24(3)(a);
Immigration Act 13 of 2002, s 15(1), read with Immigration Regulations Govt Notice R413 of 22 May 2014 reg 14 and Gen Notice 560 of 15 Jul 2014 (financial or capital contribution for business in respect of business visa);
Invitation for public comment on draft Bill (Gen Notice 231 of 2013, Gazette 36265 of 18 Mar 2013), and accompanying draft Licensing of Businesses Bill, 2013 cls 3, 25(1), 27

Provincial statutes and statutory instruments and other measures

Eastern Cape Businesses (Extension of Application of Businesses Act, 1991) Act 3 of 1997;
Free State Business Laws Rationalisation Act 6 of 1997;
Kwazulu Licensing and Business Hours Act 11 of 1984;
Limpopo Business Registration Act 5 of 2003 (Provincial Gazette 971 of 14 Feb 2004), read with Limpopo Premier's Proc 1 of 2015 (commencement of Act) and Limpopo Business Registration Regulations 2015 (Provincial Gazette Extraordinary 2492 of 2 Apr 2015);
Mpumalanga Business Act 2 of 1996;
North-West Business Act 6 of 1997

Municipal bylaws and policies

City of Cape Town: Informal Trading Bylaw [2009], as amended;
City of Johannesburg Metropolitan Municipality: Informal Trading By-Laws, 2009, Local Authority Notice 328, Gauteng Provincial Gazette No. 66, 14 March 2012;
Ekurhuleni Metropolitan Municipality: Informal and street trading policy and management framework, 17 April 2008 (esp s 2.1, s 2.2, s 3.1, s 5.4 and s 5.5);
eThekwini Municipality: Informal Trading Bylaw, 2014, s 35, s 39

Caselaw

Makwickana v Ethekwini Municipality and others [2015] ZAKZDHC 7 (17 February 2015);
South African Informal Traders Forum and others v City of Johannesburg and others; South African National Traders Retail Association v City of Johannesburg and others 2014 (6) BCLR 726 (CC) esp pars [6]–[8], [26]–[28];

Somali Association of South Africa, Ethiopian Community of South Africa, and others v Limpopo Department of Economic Development, Minister of Police, and others [2014] 4 All SA 600 (SCA) pars [29] and [30], [43] and [44];

Ex parte President of the Republic of South Africa, In re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC) par [79];

Dadoo Ltd and others v Krugersdorp Municipal Council 1920 AD 530 547

Legal commentaries

Beyond Retribution: Prospects for Restorative Justice in South Africa (ed. Traggy Maepa), Institute for Security Studies (2005), chapter 9: "Alternative Sentencing in South Africa: an Update", Lukas Muntingh;

Law of South Africa, vol 15(2) 2 ed, "Licensing" (M Dendy), par 5 (Transitional provisions);

Law of South Africa, vol 24 2 ed, "Sentencing" (A ST Q Skeen,updated by S Hoctor), par 5 (Transitional provisions)

Media reports

Independent Entrepreneurship Group, "Business Licensing Bill" (undated) *http://ineng.co.za/business-licensing-bill/* (accessed 21 February 2018);

Daily Maverick, 16 May 2013, "Licensing of Business Bill: A titanic mess of admin and poor logic," S Hlongwane;

eNews Channel Africa, 21 May 2013, "Business Licensing Bill to be redrafted"

LAWS AFFECTING SMALL BUSINESS

SCHOOLING

SYNOPSIS

Problems

Tax-funded, government-supplied, and compulsory schooling prevents small enterprises from performing a larger role in the education and training of young people. As a result, South Africa is forfeiting jobs that would otherwise have been created, as well as squandering the opportunity to rapidly develop a highly trained workforce.

At present, legislation is a barrier to entry which prevents some private enterprises from entering the education field altogether, and prevents those that do enter it from utilising the best methods available worldwide for teaching literacy, numeracy, communications skills, specific income-earning skills, and other subjects. This is unfortunate. If more enterprises were involved in education, competition would impose greater discipline on education providers and ensure that they supply a high-quality service. Moreover, a larger variety of providers would give parents and their children greater choice and increase their chances of finding a learning environment that is most suitable for the special needs of the individual child. Some skills-training organisations may wish to employ children as part of the skills-training process, and the prohibitions on such employment should be removed to encourage this.

The present funding system emphasises the school and the teacher instead of the pupil. Studies have shown that increased government funding is generally used to pay escalating administration and other costs rather than being spent on improving the quality of education. Private education organisations spend far less per child on administration.

The government's plans for improving schooling in South Africa will not rapidly reduce the gap between the skilled and the unskilled. The reason is very simple: the proposals say nothing about utilising the skilled to train the youth, yet a massive transfer of skills is precisely what South Africa needs to develop a highly trained workforce. Without it, any education plan is doomed to fail.

Learning to think entrepreneurially – i.e., to recognise opportunities for profit when they arise – should be an essential part of every child's education. The best way to teach this is on-the-job in an entrepreneurially-oriented private enterprise, but children are not given the opportunity to acquire such experience as part of the learning process. Small businesses could play a vital role in developing future entrepreneurs if the schooling system is changed to make this possible.

Recommendations

- Repeal legislative provisions that make school attendance compulsory.
- Repeal the legislative provisions that prohibit the conducting of independent or private schools without government registration.
- Issue vouchers to all pupils that will allow parents to choose freely the schools their children attend.
- Refrain from prescribing a standardised curriculum or a specific method of learning for private enterprise schools.
- Repeal legislative provisions which require parents who wish to educate their children at home to obtain official exemption from compulsory school attendance requirements.
- Allow employers to employ or provide work to children under the age of 15 years if the employment or work is voluntary, has the approval of parents or guardians, and relates directly to learning and the transfer of skills.

MILTON FRIEDMAN'S PROPOSALS FOR RADICAL RECONSTRUCTION OF SCHOOLING

The eminent American economist, Professor Milton Friedman, suggested that the twin revolutions in technology and politics that have occurred recently have increased the risk of "serious social conflict arising from a widening gap

between the incomes of the highly skilled (cognitive elites) and the unskilled." He believed that although the educational system has reinforced this tendency to stratification, it is nevertheless the only major force capable of offsetting it. In order to do so, however, schooling needs to be "radically reconstructed":

> "... the only way to make a major improvement in our educational system is through privatisation to the point at which a substantial fraction of all educational services is rendered by private enterprises. Nothing else will destroy or even greatly weaken the power of the current educational establishment – a necessary pre-condition for radical improvement ... And nothing else will provide the public schools with the competition that will force them to improve in order to hold their clientele.
>
> ... We know from the experience of every other industry how imaginative competitive free enterprise can be, what new products and services can be introduced, how driven it is to satisfy the customers—that is what we need in education."

Professor Friedman contended that the answer to the problem is the implementation of a voucher system that enables parents to choose freely the schools, private or public, their children attend. Vouchers must be universal, available to all parents, and large enough to cover the costs of a high-quality education. No conditions should be attached to vouchers that interfere with the freedom of private enterprises to experiment, explore, and innovate.

EMULATING THE PREVIOUS KNOWLEDGE REVOLUTION

A historical precedent can be found for Milton Friedman's proposals in the events of the "Knowledge Revolution" of the 18th and 19th centuries. This revolution came to be known, somewhat unfortunately, as the "Industrial Revolution", the accent on industrialisation obscuring the great leap forward in literacy, knowledge, and skills that was made by people who, in previous generations, would have remained illiterate.

In England and America, the countries that led the revolution, schooling was voluntary and provided almost exclusively by private enterprises or civil society initiatives. Most children attended school, and according to economic historian EG West, levels of literacy in those years compared favourably with current literacy rates. All pupils paid fees, including those attending church schools. The so-called "dame schools" were the backbone of the English system. These schools generally consisted of one room in the teacher's house set up as a classroom, an arrangement that was convenient for all concerned.

An important aspect of the knowledge revolution was the flood of "how to" publications that appeared on the market. People with special skills wrote manuals on every conceivable subject, imparting knowledge to the general public that had previously been reserved to the fortunate few who were members of guilds. Increased literacy enabled many people to acquire skills and lift themselves out of the grinding poverty in which their ancestors had toiled for centuries. This is a good example of the role that private enterprises can play in transferring knowledge cheaply and effectively to large numbers of people.

In effect, Friedman suggested a return to this system of privately provided schooling, except that he did see a role for the state in the funding of education. As private enterprise is able to deliver higher quality services at lower cost than government is capable of doing, it is probable that the voucher system could be implemented within the existing education budgets, especially once unnecessary layers of bureaucracy are removed.

SPENDING MORE ON SCHOOLING WILL NOT SOLVE THE UNDERLYING PROBLEM

Apartheid and "apartheid education" exacerbated the tendency to stratification in South African society and increased the tensions between the poor and the wealthy. However, the earnings gap has not miraculously disappeared despite

the abolition of apartheid more than 25 years ago. To close that gap, far-reaching changes need to occur in South African institutions, and the schooling system requires the most radical overhaul of all. Spending more money on the existing schooling system will not solve the problem. Examination of the American experience tells us why.

America spends more money per child on education than almost any other country. Real expenditure on public schooling grew by 89% from 1965-66 to 1985-86, yet during that same period the average Scholastic Aptitude Test (SAT) scores of college-bound high school seniors dropped sharply. Federal real expenditure on public schooling grew by 117% per student from 1984 to 2014, but average National Assessment of Educational Progress (NAEP) scores for 17-year-olds barely moved during that 30-year period. America spent more money per child on education in 2017 than any country, other than Luxemburg, Austria, and Norway, but the 2019 NAEP science assessment found no significant changes in average scores at grades 8 and 12 compared to 2015.

An estimated 21% of adult Americans perform at the lowest levels of literacy. As a result, colleges and businesses have to do the work the high schools should have done. According to an analysis in 2016 by a Washington DC education policy think tank of national datasets from the Department of Education, cross-checked against state higher-education system data, approximately one in four of all college freshmen in 2011 had to enrol in remedial coursework, and 45% of them were from middle- and upper-income families.

South Africa cannot hope to match what the US spends per child on schooling, and even if it could, the evidence shows that the exercise would be futile. As long as we persist with a conventional schooling system, with whatever modifications the central-planning educationists may devise, stratification of South African society will continue.

Another worrying factor is the extent to which an increasing proportion of government education budgets is captured by school bureaucracies. Between 1960 and 1984, the number of teachers in American government schools grew by 57%, but the number of principals and supervisors in those schools grew by 79%, and the number of other staff grew by 500%. Not surprisingly, the percentage of the education budget spent on teachers' salaries fell steadily in the 1970s from 49.2% in 1970-71 to 38.7% in 1980-81.

David Boaz of the Cato Institute in Washington DC compared the administrative staff of American public schools with that of Catholic schools:

> "As of 1987, there were 3 300 employees in the central and district office of the Chicago public school system. By contrast, the schools of the Catholic Archdiocese serve 40% as many students in a much larger geographical area but make do with only 36 central office administrators.
>
> In the nation's largest school district, New York, John Chubb found an even more striking contrast: 6 000 administrators in the government schools and only 25 in the Catholic schools, although the Catholic schools served about one-fourth as many students."

Figures from the US National Center for Education Statistics in 2012 showed that from 1970 to 2010, student enrolment at public schools increased by 7.8% but the number of public-school non-teaching staff positions increased by 138%.

The only way to discover whether South African schooling administrations are becoming similarly bloated is to create competition for the government education system and compel it to become cost-and-quality-conscious.

A KNOWLEDGE AND SKILLS REVOLUTION LED BY PRIVATE ENTERPRISE

If South Africa follows Professor Friedman's advice, competitive learning institutions would proliferate. Children and their parents would be able to choose from an array of educational and skills-training alternatives, all competing to

meet the requirements of their customers, many of whom would be funded by government vouchers. Some of the providers would be substantial businesses but most would be small. The skills gap would rapidly disappear if the skilled sector were given an economic incentive to transfer their knowledge to the young.

It is unreasonable to expect skilled people to become part of the conventional schooling system and accept lower incomes in order to impart their expertise to children. They would probably not qualify to be appointed as teachers, no matter how skilled they may be, and would probably not be welcomed by existing members of the teaching profession. But the establishment of privately operated learning centres would offer entrepreneurial opportunities to any individual with valuable skills and knowledge.

The main reason why the 1953 Bantu Education Act had such a devastating effect on the education of black pupils was that it limited their choices. It destroyed the private schools many were attending and forced them to use a schooling system that was deliberately designed to be inferior. The recommendations in this entry would have the opposite effect. Choices would be increased and existing schools would be prodded into providing a better education.

It is not possible to imagine what innovations would result if schooling were opened up to the inventive genius of competing private enterprises, given the dynamism and variation that comes about when freedom of choice is unleashed. Entrepreneurship consists of doing things differently, doing the unexpected, and utilising resources more effectively. What can be predicted is that private enterprises would set off a knowledge and skills revolution that would transform South Africa.

GOVERNMENT FUNDING WITHOUT GOVERNMENT PROVISION OF SCHOOLING

Most people are in favour of improving educational opportunities for the young so that their income-earning capacity as adults will be enhanced. However, there is frustration amongst taxpayers worldwide that the taxes devoted to schooling are not producing the hoped-for results.

Government does not have to provide schooling. It can continue to ensure that all children receive schooling by providing vouchers that can be tendered for any form of learning chosen by children and their parents. If government does continue to run schools, it should make those schools compete for voucher-paying students with private enterprise schools. Small businesses would fill the gaps in the learning system and offer attractive alternatives that conventional schools would be incapable of matching. There is solid evidence that competitive private enterprise schools would provide a greater variety of better learning options than government schools at a lower cost to the taxpayer.

COMPULSORY ATTENDANCE

RECOMMENDATION 1

Repeal legislative provisions that make school attendance compulsory.

On the surface, compulsory schooling laws appear to be motivated by compassion for the child who might otherwise be denied schooling by uncaring parents. But there is no reason why all children should be subjected to these laws because of the few parents who may not send their children to school for at least nine years in the absence of such laws. The situation has been compared to sentencing all citizens to nine years of detention without trial because some citizens may commit theft.

Moreover, desirable innovation is prevented by compulsory schooling laws because under such a system the state is compelled to define a "school" in order to apply the law. Acceptable schooling then becomes whatever the current bureaucracy says it is, imposing the rigidities that are inevitably part of any attempt by government to deliver services.

Furthermore, in order to decide whether a child is attending a "school", the state has to become involved in what is being taught. Few governments are prepared to confine themselves to a simple and adequate requirement that a school should teach numeracy and literacy as part of the child's learning experience. Instead, most become involved in prescribing a detailed curriculum that smothers experimentation and innovation.

It is clearly impossible to encompass the needs of all children in a single curriculum. The process of selecting what children should learn should be left to parents and their children and not to central-planning educationists.

In the absence of compulsion, learning institutions, and especially those run by small businesses, would do everything in their power to offer parents a choice of high-quality and competitively-priced learning environments for their children. They would cater for niche markets and specialities for which there may not be widespread demand but which may be crucial to the future happiness and success of small numbers of pupils. If all children were offered schooling vouchers, and the choice of educational institutions and opportunities expanded exponentially, there would be no need for compulsory schooling laws. Incentives are far superior to compulsion or force as a method of achieving an objective such as the education of a child, especially when the objective cannot be achieved without the willing cooperation of the parents and the child.

Considerations

Many people believe that in the absence of compulsion many uncaring parents would not send their children to school. As compulsion is now universal, we have to turn to historical examples to find evidence on this important issue. Economic historian EG West writes that before 1870 (the year the state became heavily involved in education in England and Wales) most children attended school for at least six years, literacy and numeracy rates were very high (93% amongst school-leavers), and parents paid the greatest proportion of school fees. America and Scotland experienced similarly high rates of school attendance before government became involved in education.

Considering that the world mean literacy rate was 60% in 1970, private schooling in Britain and the United States in the 19th century produced extraordinary results. Without compulsion, parents ensured that their children received good quality education even though they had to pay the largest part of the cost themselves. As Professor Friedman pointed out:

> "The compulsory attendance laws are the justification for government control over the standards of private schools. But it is far from clear that there is any justification for the compulsory attendance laws themselves. … research has shown that schooling was well-nigh universal in the United States before attendance was required. In the United Kingdom, schooling was well-nigh universal before either compulsory attendance or government financing of schooling existed."

The historical evidence therefore suggests that parents, with few exceptions, would educate their children in the a bsence of compulsory school attendance laws.

In evaluating this issue, one must not make the mistake of assuming that the compulsory attendance laws ensure 100% school attendance. Myron Lieberman wrote in Public Education: An Autopsy in 1995 that absentee rates in the United States were high, sometimes 25% or higher in inner-city areas. An American study in 2017 revealed that schools with extreme chronic absenteeism are still more likely to be located in urban areas in most states. One can only speculate whether the absentee rate would be that high in a non-compulsory environment in which the young people have a greater choice of educational opportunities.

Whilst this entry recommends the repeal of the compulsory attendance laws, it also recommends that all South African

parents be issued with vouchers with which to purchase schooling for their children. Given such empowerment, they would have no reason to withhold education from their children.

REGISTRATION OF INDEPENDENT SCHOOLS

RECOMMENDATION 2

Repeal the legislative provisions that prohibit the conducting of independent or private schools without government registration.

Prohibiting the establishment or maintenance of independent (i.e., private) schools unless they are registered by the head of a provincial education department constitutes an unnecessary barrier to entry into the business of providing schooling. In the absence of barriers to entry, parents and children would be able to choose from a wide variety of alternatives. Competition would then impose a greater discipline on the individual learning establishments, including public schools, than any form of government surveillance.

There is a real danger that government officials may refuse to register a school for political, religious, language, ideological or other constitutionally unjustifiable considerations, despite the fact that the school has all the qualities that some parents are seeking. Or a school may be denied registration for an equally pernicious reason, even if refusal for that reason is beyond official powers, such as that it would take pupils away from government schools. If small business is to make the substantial contribution to education and training of which it is capable, these uncertainties should be removed. The best way of doing so is to remove the onerous registration provisions from the statute books.

The education clause's provision in the Bill of Rights which declares that everyone has the right to establish independent educational institutions that "are registered with the state" should be seen in light of the other two subclauses of that provision, which provide simply that an independent school must not discriminate on the basis of race and must provide education at an equal or greater standard than that of public schools. Unless there is evidence that there is discrimination or inferior standards, any school must be registered by default without being required to go through any burdensome application or registration process.

Considerations

There may be some concern that an independent or private school may teach content or use methods that would be frowned on by the government or the educational establishment. Such a view would have to go hand in hand with a belief that parents are incapable of judging the quality or value of schooling being received by their children. It would also have to presume that civil servants are better judges of what is good for the child than parents, and that parents do not have the right to choose schools for their children.

ISSUE OF VOUCHERS TO STUDENTS FOR PAYMENT OF LEARNING FEES

RECOMMENDATION 3

Issue vouchers to all pupils that will allow parents to choose freely the schools their children attend.

Vouchers should be related to the present total cost of schooling, including the cost of premises and equipment, and

pupils should receive vouchers valued at their proportionate share of the government schooling budget. Parents should be free to use the vouchers to purchase any form of education they choose for their children, at both government and privately-owned schools. Most importantly, as proposed by Professor Friedman, no conditions should be attached to the vouchers that would interfere with the freedom of private enterprises to experiment, to explore, and to innovate.

School zoning would be inappropriate for voucher-based schooling. Government schools that provide the best quality schooling would have to be allowed to attract larger numbers of students so as to increase their funding. In order to enable government schools to compete with private schools to attract voucher-funded students, the government schools would have to be given greater autonomy and especially the right to provide incentives to teachers. Competition between all schools would improve the quality and standard of teaching more rapidly than any other programme intended to achieve that objective.

Considerations

Critics are likely to suggest that a voucher system would lead to the establishment of myriad fly-by-night schools that would provide an inadequate service, fail due to inefficient or dishonest administration, and perhaps leave pupils with neither schooling nor vouchers halfway through the year. There is no doubt that some new schools would experience difficulties and that parents would have to exercise care in choosing schools for their children. Vigilance is the price that parents and their children would have to pay for the privilege of being able to choose from a greatly-increased variety and quality of learning and skills-training options. Independent schools perform a service that would otherwise have to be performed by the provincial education departments.

It must be stated that a voucher system is not ideal. The optimal solution would be for parents to bear the entire cost of their children's schooling; the market for schooling would then be more responsive and innovations and increased choices would develop more rapidly. However, many South African children would be at a disadvantage if their parents did not receive state aid because their parents would not be able to pay for their schooling.

The state could, of course, confine funding to poor families, identified through means tests. Taxes could then be reduced to enable the rest of the parents to pay for their children's schooling out of their after-tax incomes. Poor families could be given either tuition vouchers or cash grants with which to purchase schooling for their children.

Professor Friedman's requirement that no conditions should be attached to vouchers that interfere with the freedom of private enterprises to experiment and innovate is a vital component of his proposal. It nevertheless appears to ignore the history of government administration. For instance, government currently insists on inspecting private schools before granting them subsidies. Schools wishing to apply for subsidies consequently dare not depart too greatly from whatever may be the accepted school formula. Yet the government acknowledges that subsidies to independent schools cost the state considerably less per learner than if the same learners enrolled in public schools, and that it is therefore cost-efficient for the state to provide subsidies.

Notwithstanding the valid arguments against the defining of "schools", the possibility therefore exists that if government were to introduce a voucher system it may prescribe the type of institution at which schooling may be purchased with the vouchers. If so, schools that rely entirely on fees and other private income and that do not accept vouchers should be exempted from the rules that apply to voucher-recipient schools. This would give families that decline to use the voucher an exit option.

A NATIONAL CURRICULUM

RECOMMENDATION 4

Refrain from prescribing a standardised curriculum or a specific method of learning for private enterprise schools.

Centralised control of schooling places strict limitations on what may be taught and how it may be taught. Invariably, a curriculum is imposed which dictates not only what subjects must be taught but also the detailed content of the subjects. The most serious problem with the imposition of such a curriculum is that there is no way of establishing the "truth" or the "optimal method" of conveying that truth. There is also no selection method that could successfully determine an "optimal content" for a curriculum that would be suitable for more than a small fraction of the pupils on whom it is imposed.

In the United Kingdom, an attempt was made to establish a basic syllabus that would allow schools a great deal of flexibility in deciding what to teach and how to teach it. The national curriculum that resulted has caused much frustration and anger amongst educationists and proved to be what a British educationist Dr James Tooley described as a "bureaucratic monstrosity". Five years after it was imposed, Sir Ron Dearing (as he then was) was appointed to slim it down and simplify testing.

Dr Tooley argued that a national curriculum neither raises standards nor promotes equality of opportunity. What was needed for both was improved teaching techniques and targeted resources. Problem schools, he maintained, needed specific solutions, and a national curriculum did not help them in any way. Using probability theory, he demonstrated that a committee charged with setting a national curriculum was highly likely to make at least one mistake, and perhaps more. These mistakes were then implemented in all schools and were much more difficult to reverse than errors at the individual school level. He concluded that decisions regarding the curriculum should be taken at the school level where the decision-makers are continually interacting with pupils and are aware of the multiplicity of their experiences. They can respond quickly if either problems or opportunities arise, and can more successfully innovate, learn from successful experience elsewhere, rapidly reject failed experiments, and adapt to the particular needs of individual students.

Teaching methods are crucially important, and prescriptions regarding method are as counter-productive as prescriptions regarding curriculum. The outcomes-based system that was implemented in South Africa was not a great success; prescribing such a system on such a vast scale was problematic. Its lack of success will probably have a detrimental effect on the country for years to come. The development of many private enterprise alternatives should therefore have been encouraged as a safety measure.

If private enterprise schools and learning centres were allowed to develop without interference, many parents would demand that they focus on turning out young adults with income-earning skills. As literacy, numeracy, and communication skills are essential to income-earning, these basics would be a fundamental part of parents' demands. A myriad skills-training courses could then be on offer, covering a vast spectrum of income-earning possibilities. As most people today have many distinctly different careers during their lifetimes, pupils could acquire multi-disciplinary skills. On the other hand, they could specialise at an early age as a modern young Mozart would probably insist on doing.

Considerations

Some central-planning educationists may contend that parents do not have enough knowledge to guide their children in the selection of subjects. Illiterate parents, especially, would be at a disadvantage. Yet illiterate people find their way around large cities, purchase items ranging from property to everyday necessities, and run businesses.

They have to compensate for their illiteracy by being astute in obtaining guidance from people around them. In a society in which private enterprises provide most of the schooling, there would be place for agencies that provide information on schools and other learning centres. Parents would consult recent school-ranking surveys and ratings, and they would also solicit information from parents of children already attending the schools they are considering.

South Africa also possesses an active educational civil society with an acute focus on the vulnerable. It is inconceivable that civil educational institutes will not provide guidance to parents struggling to navigate an educational environment characterised by freedom of choice.

What may prove worrying is the possibility that schools may make invalid claims about their capabilities. Naturally, any school that professed to offer what it patently could not deliver would lay itself open to criminal prosecution for fraud. Just as the media are very involved in monitoring the services provided to consumers in other fields, they would probably monitor very closely the services provided by schools. Extensive publicity for both good and bad schools would be of great value to parents.

HOME SCHOOLING

RECOMMENDATION 5

Repeal legislative provisions which require parents who wish to educate their children at home to obtain official exemption from compulsory school attendance requirements.

No government official can know better than a parent what is best for a particular child. Home schooling should therefore be an automatically available option with which the state should not interfere. This issue should not be confused with measures intended to prevent child abuse, which are dealt with in other legislation.

Home schooling is an essential part of the private enterprise alternative, and a one-child/one-parent school is the smallest possible educational unit in the spectrum of private enterprise possibilities. In addition, a qualified teacher who teaches his or her own children at home may over time accept other people's children as pupils and eventually establish a formal school. Home schooling is therefore an important entry-level option for private enterprise schooling.

In most cases, adherence to the curriculum followed by state schools would represent a burdensome restriction on the quality and range of learning experiences that could be provided by home schooling. Far from providing a minimum standard, this requirement would merely consume valuable time that could be better spent by the learner, with the assistance of the parent, in developing his or her potential to the utmost. What is to be learned and how it is to be learned should therefore be left entirely in the hands of the parent and child. The child's proficiency in mathematics, reading, writing, and communication skills could easily be assessed through tests set by an outside agency. Private enterprises, no doubt often with the active participation of South Africa's universities that seek to eventually attract competent undergraduates, would be quick to offer a testing service if a demand for such testing developed. No state involvement would be necessary.

Considerations

What about parents who have strange ideas, who would limit their children's opportunities if they were allowed to keep them at home? What about parents with extreme religious views who believe that sending children to school would expose them to evil ideas?

These questions have to be separated from cases of ill-treatment and abuse of children that would be matters for attention by social workers or the police. Compulsory school attendance does not protect children from abuse. Critics may say that a child is being "deprived" if it is denied the experience of attending school, and that this deprivation is

tantamount to a form of abuse, no matter how high the quality of the child's home education. And then there could be cases where, according to any objective assessment, a child is receiving an inferior education at home (for example, a ten-year-old child who reads and writes with difficulty, struggles to do arithmetic and spells very badly).

Does such a possibility justify the imposition of compulsory school attendance laws?

People who wish to assess this issue must bear in mind what they are comparing. They are not comparing a few potential home-schooling cases that deprive a child of educational opportunities through parental neglect or faulty judgment with a perfect government schooling system that will assure those children of a high-quality education. On the contrary, study after study shows that a large percentage of children who have spent twelve years in government schools are neither literate nor numerate. South Africa's universities without exception have courses that all first-year students have to take to bring them up to standard when it comes to basic arithmetic, comprehension, and writing skills.

What has to be considered is whether the state has the right to interfere with the decisions of concerned parents regarding the education of their children. In the United States, by 2014, an estimated 2 million children were being taught at home. SAT results show that these home schooled children outperform pupils taught in the public schools. The National School Boards Association responds: "We think that children should be in the traditional setting because home schooling takes away from a child's social skills and isolates children racially and ethnically." David Boaz of the Cato Institute comments: "Home-schooling parents take pains to see that their children spend time with other children, but – given that most families are indeed monoracial – they would probably have to acknowledge that during school hours their children are 'racially isolated'."

A question that consequently arises is whether compulsory school attendance laws are intended to ensure that children receive some form of education (literacy, numeracy, etc.) or whether they are aimed at bringing about some other outcome. If the latter is the case, are parents not justified in resisting the imposition of these other agendas, whatever they may be, and taking personal responsibility for the educational, emotional, social, cultural. and ethical development of their children?

ALLOWING CHILDREN TO DO PAID WORK

RECOMMENDATION 6

Allow employers to employ or provide work to children under the age of 15 years if the employment or work is voluntary, has the approval of parents or guardians, and relates directly to learning and the transfer of skills.

Section 43(1) of the Basic Conditions of Employment Act provides that no person may employ a child who is under 15 years of age or who is under the minimum school-leaving age in terms of any law. However, amending the legislation as proposed would allow small enterprises wishing to teach special skills as part of the learning experience to pay children for work performed as an incentive to them to increase their proficiency.

School-leavers generally acquire two-thirds of their income-earning power during on-the-job training and only one-third during formal education, according to research conducted by Nobel Prize-winner George Stigler. Allowing children to engage in productive work during their learning years would enable them to acquire valuable skills at an earlier age and give them the opportunity to earn an income at the same time.

Some people cite horror stories about child labour during the 18th and 19th centuries as an argument against allowing children to carry out productive work today. But this is ludicrous. We are talking about children operating computers,

using their artistic talents, developing their sporting abilities (swimming, tennis, gymnastics, etc.) and engaging in other “soft” skills, not about children being forced to work in dangerous coal mines, carry out dangerous work in dingy factories or sweep chimneys. Existing safeguards against the abuse of children who are over 15 years of age (or over the minimum school-leaving age in terms of any law) could very easily be adapted to apply also to children who are under 15 years of age (or under the minimum school-leaving age in terms of any law).

Children need the opportunity to be allowed to develop their talents in real-life situations and this option is not permitted under the present schooling system. That the motivation for the deprivation is concern for the welfare of the child, or fear that a small minority of parents may abuse their parental authority, is little consolation to the child whose life is destroyed by frustration.

Opposition to the above proposals can mainly be expected from two sources: labour organisations and teachers’ organisations. Labour organisations are likely to be opposed to the concept of the working child because of the perceived competition for their jobs. However, children would not generally be competing for existing formal jobs. They would be doing newly-created work designed specifically for carrying out on-the-job training.

Teachers, on the other hand, usually oppose child labour because they do not want to see a decline in the numbers of children attending school. If on-the-job training is an adjunct to schooling and not an alternative, there should be no decline in the demand for the services of teachers.

Considerations

There are two main perspectives from which the issue of the working child can be considered, one negative and the other positive. Many people will immediately conjure up visions of an unfortunate child, compelled to contribute to the family income by uncaring and perhaps dissolute parents, prevented from receiving an education, with the possibility of the child remaining illiterate and forever resigned to occupying the most menial jobs.

Another view is of concerned parents, caring passionately about their child’s future, knowing that their child will learn best by doing, knowing that their child will be bored to the point of destructive behaviour by conventional schooling, attempting to assure a bright future for their child by finding a learning environment in which the child can earn and learn at the same time.

What must be considered is whether a prohibition on the working child will successfully prevent damage to the child by the uncaring parent and whether the possibility of the prohibition protecting such children warrants the closing of opportunities for learning-by-doing for all other children.

Statutory

Constitution, 1996—
Chap 2 (Bill of Rights)—
s 29 (Education)—
(1) (Everyone has the right)—
(a) (to a basic education)
(b) (to further education, which the state through reasonable measures must make progressively available and accessible)
(3) (Everyone has the right to establish and maintain, at their own expense, independent educational institutions that)—
(b) (are registered with the state)
(c) (maintain standards not inferior to those at comparable public institutions)
(4) (State subsidies for independent institutions are permitted)
s 28 (Children)—
(1) (Every child has the right)—
(f)(ii) (not to be required or permitted to perform work or render services that place the child's education at risk)
(2) (Child's best interests of paramount importance in matters concerning child)
s 15 (Freedom of religion, belief and opinion)—
(1) (Everyone has right to freedom of conscience, religion, thought, belief, opinion),
s 44(1)(a)(ii) and (b)(ii) (national legislative authority includes power to legislate on matters in functional areas of concurrent national and provincial competence),
s 100 (national intervention when province fails to fulfil obligations),
Sched 4 (areas of concurrent national and provincial competence) part A (education, other than tertiary education),
South African Schools Act, 1996—
s 2 (application of Act) —
(2) (MECs and HoDs to exercise powers conferred on them by this Act after taking full account of applicable policy determined i.t.o. National Education Policy Act, 1996),
(3) (nothing in this Act prevents a provincial legislature from enacting legislation for school education in a province i.a.w. the Constitution and this Act),
s 3 (compulsory attendance from first school day of year in which learner reaches age of seven years until last school day of year in which learner reaches age of fifteen years, or ninth grade, whichever occurs first),
s 4 (provincial department head may exempt learner from compulsory attendance),
s 6A (Minister must determine, for public and independent schools—
(statement of minimum national curriculum outcomes or standards),
(national process for assessing achievement),
(curriculum and assessment process must also apply to independent schools),
s 45A (admission age to independent school)—
(a)(ii) (grade 1, is five turning six by 30 June)
(b) (independent school may admit under-age learner if)—
(i) (good cause shown, and)
(ii) (learner complies with criteria prescribed)
(c)(i) (Minister may prescribe criteria for admission at lower age)
(d) ("good cause" means)—
(i) (admission would be in learner's best interest)
(ii) (and refusal would be severely detrimental to learner's development),
s 46 (1) (no person may establish or maintain unregistered independent school)

(2) (MEC by Gazette notice determines grounds on which registration of independent schools may be granted or withdrawn)
(3) (provincial head of department must register an independent school if satisfied that school complies with grounds for registration)
(4) (establishing or maintaining an unregistered independent school is an offence),
s 47 (withdrawal of registration of independent school),
s 48 (subsidies to registered independent schools)—
(1) (Minister may determine norms and minimum standards for the grant of subsidies to independent schools after consulting the Council of Education Ministers and the Financial and Fiscal Commission and with concurrence of the Minister of Finance)
(2) (Member of the Executive Council may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school)
(3) (the Head of a provincial education department may terminate or reduce a subsidy if a condition on which it was granted is not complied with),
s 59(2) (every school must provide information reasonably required by HoD or Director-General of national Department in consultation with HoD)
s 61 (Minister may prescribe, for public and independent schools—
(c) (a national curriculum statement)
(d) (a national process for the assessment of learner achievement)
(g) (the age norm per grade);
Govt Notice 2433 of 19 Oct 1998 (admission age to public schools),
Govt Notice 869 of 31 Aug 2006 as amended to 2 Feb 2018 (national school-funding norms and standards)—
(2. policy framework)—
(State subsidies to independent schools)—
(par. 48. independent school enrolment amounts to about two percent of total school enrolment and may be increasing; independent-school enrolments vary in different provinces from a fraction of a percent of total school enrolment to several times the national average; if all learners were to transfer to public schools the cost of public education in certain provinces might increase by five percent)
(par. 50. subsidy levels have differed by province, but extreme pressure on provincial education budgets has resulted in sharp decline of independent-school subsidies per learner, and considerable uncertainty about the future trend of funding of independent school by provincial education authorities)
(par. 51. fees in independent schools have tended to rise in response to subsidy cuts; some independent-school proprietors have applied to be taken over by provincial education departments, which have been slow to comply)
(par. 54. independent schools perform a service to their learners that would otherwise have to be performed by the provincial education departments; public subsidies to independent schools cost the state considerably less per learner than if the same learners enrolled in public schools; it is therefore cost-efficient for the state to provide a subsidy)
(par. 55. But apart from that fiscal argument, extreme inequalities and backlogs in the provision of public education and pressure on public-education budget allocations dictate that public subsidies to independent schools should serve social purposes)
(par. 56. independent-school-subsidy allocations must therefore prefer schools that are well managed, provide good education, serve poor communities and individuals and are not operated for profit; these standards must be measurable by objective, transparent and verifiable criteria)
(7. subsidies to independent schools)—
(par. 176(f). an independent school may be considered for subsidy if it agrees to unannounced inspection visits by provincial departmental officials or authorised persons)
Children's Act, 2005—

s 1(1)—
("child" means person under 18 years of age)
("child labour" means work by a child which—
(a) is "exploitative", hazardous or otherwise inappropriate for person of that age; and
(b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development)
("exploitation" includes child labour which is prohibited under s 141)
s 141 (no person may employ a child for "child labour")
s 305(1)(c) (a person who employ a child for "child labour" commits an offence)

Basic Conditions of Employment Act, 1997—
s 1 ("child" means a person under 18)
s 43 (prohibition of work)—
(1) (prohibition of work by children under 15 or minimum school-leaving age i.t.o. any law)
(2) (a person must not require or permit a child to perform any work or provide any services—
(a) (that are inappropriate for a person of that age)
(b) (that place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development)
s 44(1) (regulations on work by children) (Minister may, on advice of the National Minimum Wage Commission, make regulations prohibiting or placing conditions on work by children "at least fifteen years of age" and "no longer subject to compulsory schooling" i.t.o. any law),

read with

Occupational Health and Safety Act, 1993—
s 43(1)(b), (2), (3) (the Minister may, after consultation with the Advisory Council for Occupational Health and Safety, make regulations necessary or expedient in the Minister's opinion in interest of health and safety of persons at work or i.c.w. use of plant or machinery, and apply any differentiation the Minister deems advisable),

Hazardous Work by Children Regs (Govt Notice R7 of 15 Jan 2010 i.t.o. Basic Conditions of Employment Act s 44 and Occupational Health and Safety Act s 43):
reg 1 ("child" means a person under eighteen)
reg 2 (purpose and interpretation)—
(1) (these regulations prohibit or place conditions on work by child workers, and which is not prohibited i.t.o. any law)
(2) (these regulations do not permit the employing of—
(a) (children under 15 or subject to compulsory schooling),
(b) (children aged 15 or older and not subject to compulsory schooling, in work which is prohibited i.t.o. any law)
regs 3–10 (risk assessment, respiratory hazards, work in elevated position, lifting of heavy weights, work in a cold environment, work in a hot environment, work in noisy environment, power tools and cutting or grinding equipment)

National Education Policy Act, 1996—
s 1 ("education institution" means any school contemplated in South African Schools Act)
s 3 (Determination of national education policy by Minister)—
(1) (Minister to determine national education policy i.a.w. Constitution and this Act)
(3) (national policy to prevail over a provincial policy if conflict)
(4) (Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation of education system including determining national policy for)—
(d) (innovation and development in education)
(e) (ratio between educators and students)
(f) (professional education and accreditation of educators)

(g) (management, funding, establishment, registration of education institutions)
(h) (compulsory school education)
(i) (admission of students to education institutions, which shall include admission age)
(j) (minimum number of hours a day and days a year when education to be provided)
(l) (curriculum frameworks, core syllabuses and education programmes, learning standards, examinations and certification of qualifications)
(m) (language in education),
s 4 (directive principles: national education policy must be directed to—
(a) (advancement and protection of fundamental rights of every person guaranteed in the Constitution, and international conventions ratified by Parliament, and in particular rights inter alia of)—
(iii) (parent or guardian in respect of the education of his or her child or ward)
(iv) (every child i.r.o. his or her education)
(v) (every learner to be instructed in the language of his or her choice where this is reasonably practicable)
(vi) (every person to freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions)
(vii) (every person to establish, where practicable, education institutions based on a common language, culture or religion)
(viii) (of every person to use the language and participate in the cultural life of his or her choice within an education institution),
(e) (providing opportunities for and encouraging lifelong learning),
(f) (achieving integrated approach to education in national qualifications framework),
Gen Notice 647 of 2000 (national education policy stipulating age requirements for admission of learners to independent schools),
National Minimum Wage Act, 2018—
s 8 (establishes the National Minimum Wage Commission)
s 11 (the functions of the Commission are inter alia to—
(g) (advise the Minister on any matter concerning basic conditions of employment)
(h) (perform any function required of the Commission i.t.o. any other employment law)
School Education Act (Gauteng), 1995
Kwazulu-Natal School Education Act, 1996

Caselaw

In re National Education Policy Bill 1996 (CC) (nothing in Bill obliges provinces to act in conformity with national education policy, or empower Minister to require them to adopt national policy or amend their own legislation),
Minister of Education v Harris 2001 (CC) (national education policy stipulating age for admission to independent schools (Gen Notice 647 of 2000 supra) declared invalid, in that policy purported to have binding effect),
Schneider NO and ors v Aspeling and ano 2010 (WCC) ("this is not a test case about home schooling or an evaluation of its merits or demerits, and determines only the best interests of two vulnerable young children"),
Federation of School Governing Bodies and ors v MEC Basic Educ and ors 2011 (EC) (decision of Department not to renew contracts of temporary teachers set aside as being unlawful and irrational and depriving learners of their right to education),
Centre for Child Law and ors v Minister of Basic Education and ors (National Assoc of School Governing Bodies amicus curiae) 2012 (ECG) (applicants sought orders to compel Eastern Cape government to implement the educator post establishment by appointing teachers to vacant posts, to pay salaries of temporary teachers who had not been paid, to employ and pay teachers appointed by school governing bodies to vacant posts, to make appointments to all vacant posts, and report to court on progress),
MEC Education Gauteng and ors v Governing Body Rivonia Prim School and ors (Equal Education and ors amici

curiae) 2013 (CC) (director of education can order school to admit learners in numbers exceeding its capacity),
KwaZulu-Natal Joint Liaison Committee v KZN Education MEC (Centre for Child Law amicus curiae) 2013 (CC) (impermissible for State to reduce promised subsidy to independent schools after scheduled date for payment),
Madzodzo obo Parents of Learners at Mpimbo Junior Secondary School v Min of Basic Education 2014 (ECM) (Eastern Cape education department's failure to provide school furniture violates learners' right to an education),
Minister of Basic Education and others v Basic Education for All and ors 2015 (SCA) (Limpopo department's failure to provide textbooks violates learners' right to education),
Tripartite Steering Committee and ano v Min of Basic Education and ors 2015 (ECG) (Eastern Cape government must provide transport where scholars' access to schools is hindered by distance and inability to afford transport costs)

Media and other reports

The Washington Post, 19 Feb 1995, "Public Schools: Make Them Private",Daily Maverick, 7 July 2010, "Analysis: RIP outcomes-based education and don't come back" (Andy Rice),
PolitiFact Virginia (partnership between Richmond Times-Dispatch and Tampa Bay Times's PolitiFact.com website) "Brat: U.S. school spending up 375 percent over 30 years but test scores remain flat", 2 Mar 2015 (Warren Fiske),
Intellectual Takeout, 26 Aug 2015, "32 million U.S. adults are 'functionally illiterate'... What does that even mean?" (D Lattier),
Education Reform Now, Apr 2016, "Out of pocket: The high cost of inadequate high schools and high school student achievement on college affordability" (Mary Nguyen Barry, Michael Dannenberg),
Business Insider Australia, 23 Jan 2017, "Americans are rejecting the 'homeschool myth'—and experts say the misunderstood education might be better than public or charter schools" (C Weller)
The Australian, 23 Apr 2018 "Unhappy parents embrace home schooling in record numbers", Rebecca Urban, national education correspondent, Melbourne (families are home-schooling children in record numbers amid growing dissatisfaction with teaching standard and lack of discipline in mainstream schools; number of children being taught at home has soared more than 80 per cent over past six years),
Library Journal, 29 Apr 2020, "How Serious Is America's Literacy Problem?" (Amy Rea), "According to the National Center for Educational Statistics (NCES), 21 percent of adults in the United States (about 43 million) fall into the illiterate/functionally illiterate category)",
National Review, 21 Mar 2021 "Bureaucracy Has Conquered Schools. Joe Biden Won't Fix It", Martha Bradley-Dorsey & Robert Maranto (the public-school system is the most layered, centralised and massive bureaucracy in America, and, with the system's government monopolies, makes it nearly impossible to advance academic standards)

Official reports

School Curriculum and Assessment Authority, London. "The Dearing Review (1994)". The National Curriculum and its Assessment: Final Report, Ron Dearing, Dec 1993—
(par 1.7: the national curriculum was defined by the Education Reform Act 1988)
(par 1.8: the national curriculum is structured in four phases of learning: key stage 1 - pupils aged 5 to 7, key stage 2 - ages 7 to 11, key stage 3 - ages 11 to 14, key stage 4 - ages 14 to 16)
(pars 2.1 and 3.3: urgent action is needed to reduce the statutorily required content of the national curriculum's programmes of study and to make it less prescriptive and less complex; a review of the statutory curriculum orders should be put in hand, guided by the need to reduce the volume of material required by law to be taught, simplify and clarify the programmes of study, reduce prescription so as to give more scope for professional judgement, and ensure that the orders are written in a way which offers maximum support to the classroom teacher)
(pars 2.2, 4.16 and 4.29: the primary purpose of the review at key stages 1, 2 and 3 should be to slim down the curriculum; make the orders less prescriptive; and free some 20% of teaching time for use at the discretion of the school)

(pars 2.3, 4.3 and 4.4: the review should, therefore, be primarily concerned with dividing the content of the present curriculum orders between a statutory core and optional material for use at the discretion of the school)
(pars 2.4, 3.26, 4.46 and 4.47: the first priority for discretionary time must be to support work in the basics of literacy, oracy and numeracy. Beyond this, the bulk of the time released should be used for work in those curriculum subjects which the school chooses to explore in more depth)
(pars 2.14 and 5.17–5.26: at key stage 4, schools should have greater opportunity to offer a curriculum which meets the distinctive talents and individual aspirations of their students; the mandatory requirements should be limited to English, mathematics and single science, physical education and short courses in a modern foreign language and technology; these minimum requirements will allow greater scope for academic and vocational options)
(pars 2.21 and 3.34–3.40: the increased trust placed in schools and teachers by reducing prescription in the curriculum and freeing up time for use at their own discretion should be complemented by proper accountability to parents and more widely through the provision of information, including that from simple, national tests in the core subjects, about progress and achievement)
U.S. Department of Education (Office of Educational Research and Improvement, National Center For Education Statistics) Adult literacy in America: A first look at the findings of the National Adult Literacy Survey (Apr 2002), I. S. Kirsch, A. Jungeblut, L. Jenkins, A. Kolstad,
Office of the President of the United States, Aug 2012, “Investing In Our Future: Returning Teachers To The Classroom”,
Organization for Economic Cooperation and Development, “OECD Skills Outlook 2013: First Results from the Survey of Adult Skills”,
US Department of Education, 11 Feb 2014, “Statistics About Non-Public Education in the United States”,
US Department of Education, National Center for Education Statistics, July 2019, “Adult Literacy in the United States”,
US Department of Education, Institute of Education Sciences, National Assessment of Educational Progress (NAEP), 2019 Science Assessment, “Highlighted results for the nation at grades 4, 8, and 12”

Economic, academic and thinktank analyses

Education and the State: A Study in Political Economy, E G West, 1965 (The Institute of Economic Affairs, London),
Free to Choose: A Personal Statement, Milton Friedman, 1980 (Harcourt)
“The compulsory attendance laws are the justification for government control over the standards of private schools. But it is far from clear that there is any justification for the compulsory attendance laws themselves. Our own views on this have changed over time. When we first wrote extensively a quarter of a century ago on this subject, we accepted the need for such laws on the ground that “a stable democratic society is impossible without a minimum degree of literacy and knowledge on the part of most citizens.” We continue to believe that, but research that has been done in the interim on the history of schooling in the United States, the United Kingdom, and other countries has persuaded us that compulsory attendance at schools is not necessary to achieve that minimum standard of literacy and knowledge. As already noted, such research has shown that schooling was well-nigh universal in the United States before attendance was required. In the United Kingdom, schooling was well-nigh universal before either compulsory attendance or government financing of schooling existed. Like most laws, compulsory attendance laws have costs as well as benefits. We no longer believe the benefits justify the costs.” […]
“Private schools now are almost all either parochial schools or elite academies. Will the effect of the voucher plan simply be to subsidize these, while leaving the bulk of the slum dwellers in inferior public schools? What reason is there to suppose that alternatives will really arise? The reason is that a market would develop where it does not exist today. Cities, states, and the federal government today spend close to $100 billion a year on elementary and secondary schools. That sum is a third larger than the total amount spent annually in restaurants and bars for food and liquor. The smaller sum surely provides an ample variety of restaurants and bars for people in every class and place. The larger sum, or even a fraction of it, would provide an ample variety of schools.”
Capitalism and Freedom, Milton Friedman, 1962/1982 (Univ of Chicago Press):
“Why is it that our educational system has not developed along these lines? A full answer would require a much more detailed knowledge of educational history than I possess, and the most I can do is to offer a conjecture.

For one thing, the “natural monopoly” argument was much stronger at an earlier date. But I suspect that a much more important factor was the combination of the general disrepute of cash grants to individuals (“handouts”) with the absence of an efficient administrative machinery to handle the distribution of vouchers and to check their use. The development of such machinery is a phenomenon of modern times that has come to full flower only with the enormous extension of personal taxation and of social security programs. In its absence, the administration of schools was regarded as the only possible way to finance education.” […]
“Any subsidy should be granted to individuals to be spent at institutions of their own choosing, provided only that the education is of a kind that it is desired to subsidize. Any government schools that are retained should charge fees covering the cost of educating students and so compete on an equal level with non-government-supported schools.”
Public Education: An Autopsy, Myron Lieberman, 1995 (Harvard University Press),
Education Without the State, 1996, James Tooley, (The Institute of Economic Affairs, London):
(Functional illiteracy, youth delinquency and lack of technological innovation all point to the failures of state schooling. They raise the question of why governments should be involved in education at all.
(One justification for state intervention in education is that, without it, there would not be educational opportunities for all. However, the great majority of people would not need state intervention for funding or provision of educational opportunities. Intervention would at most be required for a minority in need of financial support.
(This conclusion is supported by historical evidence from Victorian England and Wales, and from more recent experience around the world, of educational entrepreneurs stepping in to provide desired opportunities where state education is failing.
(A second justification offered is that equality of opportunity requires state intervention in education. When the record is examined, it is not clear that states anywhere have been able to provide equality. Strong theoretical arguments undermine the suggestion that they ever would.
(Moreover, arguments against ‘markets’ in schooling which purport to show how they increase inequality actually point to problems not with markets, but with state regulation and provision themselves.
(Many influential philosophers and economists agree that justice or fairness requires that everyone has adequate opportunities. But markets – with a funding safety-net – could provide adequate opportunities for all, and more effectively than further state intervention.
(A final justification is that state regulation of, inter alia, the curriculum is required. Lessons from the recent history of the national curriculum illustrate the general undesirability of government intervention in the curriculum. The problems of ‘competing visions’ and the ‘knowledge problem’ and considerations of the nature of education point to the folly of not leaving decisions to parents and young people themselves.
(If state intervention in education is not justified, except for a funding safety-net, how can we move towards markets in education? A simple proposal is put forward, linked to recent discussion of the learning society and lifelong learning accounts.
(Lowering the school leaving age to 14, and simultaneously giving young people two years’ state funding for them to use in a Lifelong Individual Fund for Education (LIFE) would help liberate the educational demand side which, coupled with liberation of the supply side, would lead to an enlivening and nurturing of the enterprise of education)
Government Failure: E. G. West on Education, 2003, J. Tooley and J. Stanfield (eds.) (The Institute of Economic Affairs, London): Ch 4 (the spread of education before compulsion: Britain and America in the nineteenth century),
The International Labour Organization’s Concept of Child Labour, Milla Mäkinen, 2006 (MSc thesis, Dept of Social Sciences & Philosophy, Jyväskylä University, Finland):
(“[T]here is no universal definition of ‘child labour’ due to the tremendous complexity of the concept. What child labour means to different people, how do we define a ‘child’ and ‘childhood’ and what we consider ‘labour’ or ‘work’ varies tremendously from continent to continent, country to country, town to town, village to village and, even, family to family…”),
Liberating schools: education in the inner city, ed. David Boaz, 1991, Cato Institute, Washington D.C.,
Cato Institute, Washington D.C., 10 Nov 2007, “Deregulating Education” David Boaz,
The Heritage Foundation, “How Escalating Education Spending Is Killing Crucial Reform”, 15 Oct 2012 (L Burke),

SELECT SOURCES

International Business & Economics Research Journal (2012) “A Historical Analysis of the Post-Apartheid Dispensation Education in South Africa (1994-2011)”, M. Mouton, G.P. Louw, G.L. Strydom,
South African Journal of Education (Feb. 2015) “Some aspects of education litigation since 1994: Of hope, concern and despair”, J. Beckmann, J. Prinsloo,
(We probed the opinions of a sample of high-profile and influential role players in education about aspects of education litigation in South Africa in which they were involved in various capacities. In their opinions almost all disputes were between the state and citizens, and the state lost virtually all cases. Officials often ignored legal advice and acted on “imagined powers”, causing embarrassment to the state where they seemed insensitive to the needs of the people, and sometimes deliberately transgressed prescripts and provisions, abandoning its mandate to children and the country. There is extreme concern about the tendency of officials to ignore court orders. No lessons seem to have been learned from judgments and infractions of the same kind occur repeatedly, even if litigation seems to have consumed 4%–6% of the education budget. Cases dealt almost exclusively with disputes about official powers, and few human rights and social issues have been litigated. Individual officials seem to suffer no consequences from unlawful actions and show apparent lack of professionalism in failing to acquaint themselves with the legal prescripts that govern their professional work. The destructive role that unions and politicians seemed to play in education caused concern for our respondents. However, litigation has nonetheless led to clarification of some issues.)
CDE Insight, Jan 2016, “The real cost of compliance: the impact of South African regulatory requirements on independent schools”, Centre for Development and Enterprise (regulatory framework not enabling, high compliance costs, demands more of independent than public schools, small independent schools experience higher relative compliance costs)
Portraits of Change: Aligning School and Community Resources to Reduce Chronic Absence, Sep 2017 (Attendance Works; Everyone Graduates Center at School of Education, Johns Hopkins University)

LAWS AFFECTING SMALL BUSINESS

TAX

SYNOPSIS

Problems

Tax and the compliance costs imposed by the various tax laws are a tremendous burden to small firms. They are, in fact, one of the greatest inhibitors of small firm development. Obviously, it has not been the government's intention to weigh down small firms by taxing them heavily or smothering them under tax forms, but this is what is happening, despite some reforms since the first edition of this entry in 1999.

Taxes are assessed, for example, on profits on goods invoiced but for which the small firms have not yet been paid, with some narrow exceptions. Allowable deductions off taxable profits in respect of equipment purchased are inadequate. In addition, many small firms are required to remit expected VAT collections to the South African Revenue Service before they have received them. These requirements compound the chronic capital shortages already experienced by most small firms.

The tax laws are far too complex for the majority of taxpayers to understand. If it is not possible to simplify all the laws, then a special, simplified Act of Parliament should be adopted that applies to the first part of income or to lower-income taxpayers.

Economic growth in South Africa is being constrained by excessive government spending. Studies show that the high growth needed by this country is not possible whilst government expenditure continues to consume such a large percentage of GDP. A reduction in government spending will make tax reductions possible, and this will lead to increased savings, investment and growth, especially in the small firms sector.

There are two particularly strong arguments for giving special consideration in tax legislation to small firms. The first is the competitive disadvantage suffered by small firms because of the distortion of South Africa's economic structures over many years. The second is the undoubted social and economic benefits the country will derive from having a stronger small firms sector.

References in this booklet to companies include any close corporations still in existence.

Recommendations

- Reduce government expenditure at all levels to less than 25% of GDP within five years.
- Adopt a new, simplified Income Tax Act within the next two years to govern the taxation of the first part of any taxpayer's income (say, commencing with R350,000 and adjusted automatically for inflation every year).
- Amend section 12E of the present Income Tax Act to allow small firms to deduct the cost of all capital equipment from their taxable incomes in the year in which the cost is paid, not just the cost of plant or machinery used in manufacturing.
- Allow not only small business corporations to deduct the cost of capital equipment, but also small firms that are sole proprietorships or partnerships.
- Raise the annual gross-income ceiling for this capital-equipment deduction from R20,000,000 to R45,000,000).
- Allow small firms to deduct a debtors allowance from their taxable incomes which is equivalent to the accrued profits on unpaid sales.
- Issue regulations under section 37G of the present Income Tax Act to define the taxable income of small business undertakings consisting of sole proprietors or partnerships of natural persons, solely by reference to amounts actually received.
- Amend section 37G to apply to small business undertakings which are companies.
- Raise the annual turnover ceiling which qualifies a micro business for registration, from R1,000,000 to R2,000,000.
- Grant small firms consisting of natural persons and partnerships of natural persons a tax deduction.

- Increase from R1,000,000 to R2,000,000 the value of “taxable supplies” at which registration for VAT becomes compulsory.
- Increase the threshold below which the payments basis for accounting for VAT by natural persons and unincorporated bodies of natural persons is permitted from the present R2,500,000 per year to R13,500,000,
- and extend this concession to companies.
- Increase the minimum consideration for a supply of goods or services that a vendor who accounts for VAT on
- a payment basis must account for on an invoice basis, from R100,000 to R350,000.
- Accept invoices from exempt small firms listed with SARS as VAT invoices when received by VAT-registered
- larger firms.
- Increase from R3,500,000 to R7,500,000 the amount deductible from the net value of an estate in determining
- the dutiable amount for estate duty purposes.
- Increase from R500,000 to R1,200,000 the minimum total remuneration paid by an employer to his employees before skills development levy contributions become compulsory.
- Provide for automatic inflation-adjustment of all figures embedded in tax legislation that fix exemptions and levels of income, turnovers, assets, and other measures that determine liability for compliance with particular elements of that legislation.

THE CASE FOR SIMPLIFYING TAX LAWS AND REGULATIONS

South African society at present is still characterised by extreme disparities in wealth, standards of living and levels of education. A minority of the population is largely economically advanced and sophisticated, but the majority is largely poor. Yet despite this, many hundreds of thousands of poor people are running their own businesses as hawkers, taxi operators, spaza shop owners, traditional healers, artisans, small farmers, small manufacturers and so on.

Current tax laws originated at a time when whites were taxed under separate and more complicated laws than those imposed on the black population. In other words, they were designed by, and for, people with relatively high incomes.

As tax rates increased inexorably over the years, wealthy taxpayers found it to be in their interests to hire experts to help them minimise their tax obligations. Thus, a never-ending battle began between sophisticated taxpayers and their expert advisers seeking legal ways to avoid tax, and the state seeking to close loopholes as they became a serious drain on state revenue receipts.

One result of this is that tax laws have become so complicated that almost everyone is baffled by them. The Income Tax Act still contains exceedingly technical and abstruse wording. Even the annual Tax Guide for Small Businesses prepared by the South African Revenue Service (SARS) uses words like ‘render’, ‘utilise’, and ‘accrual’.

All residents who carry on any trade, other than solely as an employee, must register with SARS as a taxpayer. And they must register within 21 days of achieving this affluent state. Pity the poor hawker! Worse still if she employs somebody, for then she must understand, keep records, and submit returns and money for PAYE deductions from the wages she pays.

The Income Tax Act is not the end of it for entrepreneurs. They must also cope and comply with the Value-Added Tax Act, if the total value of taxable supplies they make in a 12-month period exceeds R1,000,000.

The list is not yet complete. Still to come are the Transfer Duty Act, the Customs and Excise Act, and a number of imposts under various labour statutes and provincial and local laws. If it all gets too much and the entrepreneur gives up the ghost, there is the Estate Duty Act, which limits his ability to leave a thriving business to be continued in the next generation by his children.

A second result of the complexity and volume of tax laws and high tax rates is the ever-increasing size of the thriving tax advice industry – mainly comprised of lawyers, accountants, life assurance brokers, and financial advisers.

The gross annual fee income of this industry runs to several hundreds of millions of rands. The expert services provided are essential to taxpayers but in the overall picture they do not add wealth to the economy. Nor does the compliance burden placed on entrepreneurs in collecting and paying across not only their own tax liabilities but also the tax they collect from employees and customers. SARS rightly prides itself that its own costs per rand of tax collected are fairly low. But an equally important figure is the cost incurred by the taxpayers in acting as SARS's collection agents, and the added costs of the tax advice industry.

A third result of the tax system is that small business owners who cannot handle tax matters themselves, nor afford to hire the expert services to handle it for them, have no choice but to operate in the so-called informal sector. It is not a glamorous or pleasant place to be. Most people prefer to be on the right side of the law whenever it is possible and provided the laws accord with the community sense of justice. When it is not possible, as it is not for many small firm operators, confinement to the informal sector prevents growth, visibility, and security. Only the alternative of unemployment and destitution is worse.

Estimates of the size of the informal sector can vary, as can definitions of exactly what activities should be regarded as contributing to it. Statistics South Africa, in its most-recent published Survey of Employers and the Self-Employed, which aims to collect data about people running businesses not registered for VAT and to produce comprehensive statistical information about informal-sector businesses, estimated that, in the third quarter of 2017, some 1,800,000 persons ran businesses in the informal sector and that 63.5% of them stated that unemployment was the main reason they decided to start an informal business. Without the informal sector, poverty would be an even greater social problem.

It should not be thought that those who are forced to operate their businesses in the informal (or as some prefer to call it, the independent) sector, pay no taxes. They pay plenty in terms of VAT incurred on goods-and-services inputs for their enterprise (unrecoverable by many of them who do not qualify for even voluntary registration as VAT vendors), and in terms of the passed-on effects of corporate income taxes in the prices they pay for goods and services they purchase from large suppliers, and in terms of customs and excise duties and levies, such as those included in petrol prices. Many of them, although legally required to register and submit returns, would fall below the existing tax thresholds. It is not sensible to require registration and returns, let alone taxes, from those whose incomes do not provide them with any decent standard of living anyway. It is also very doubtful whether increasing exemption levels a little would seriously reduce tax collections.

It is generally agreed that a good tax system needs to be characterised by simplicity, certainty, neutrality, and a low cost of administration and collection. The present South African system falls short of all these ideals. It cannot be regarded as either simple or certain when it is not understood by most of the population; it is not neutral when compliance costs for small firms can be ten times the proportionate costs of big corporations Although the administration and collection costs incurred by SARS may be quite low, the huge size of the tax advice industry indicates that the overall costs are extremely high.

A possible solution would be to introduce a dramatically simplified income tax system applicable to, say, the first R350,000 of all taxpayers' incomes. The existing system would then apply only to those portions of more wealthy taxpayers' incomes that exceed that amount. Such relatively wealthy taxpayers can reasonably be expected to hire the expertise they need to comply. The rest, the vast majority with incomes below the R350,000 level, would not need to concern themselves with the more complicated, higher-level system. The simplified system should, among other things:

- Raise tax thresholds well above poverty threshold levels and not require registration or returns from people below these thresholds.
- Significantly reduce the number of tax bands.

- Simplify or even scrap rebates and certain types of deductions.
- Encourage saving.
- Encourage small firms to plough back profits.
- Allow small firms to calculate taxable incomes on a cash, rather than an accrual, basis.

The aim should be to exempt as many as possible from the requirement to submit any returns at all and, for the rest, to so simplify things that the annual return does not exceed one page in length and the explanatory brochure does not exceed two pages (both to be available in all official languages). Similar drastic simplification must also be considered for VAT levies at the lower end.

Let us not pretend that it is easy to change tax laws. Unless very carefully considered, changes can often have unanticipated and undesired effects. Obviously, precautions will have to be taken to prevent abuse by income-splitting or other means, but these difficulties can be overcome.

The need to simplify the Income Tax Act to "facilitate the carrying on of small business undertakings" was recognised when section 37G was added to the Act in 1995. Under this section, the Minister of Finance has powers to make regulations varying the Act's provisions governing the determination of the taxable income of natural persons carrying on business through small business undertakings, relaxing their duties relating to the submission of returns and payments, and making such other provision as in the Minister's opinion will facilitate the carrying on of small business undertakings, but no such regulation has yet been issued.)

THE CASE FOR REDUCING TAX

Taxation is inextricably linked to government spending. Sooner or later, all the money government spends has to be taken from the people by way of taxes of one sort or another. Many studies over many years have shown, however, that if a government takes too much, economic growth declines, especially when the excess is spent on non-core functions. In a study by the Joint Economic Committee of the US Congress, the core functions of government were identified as:

- The protection of individuals and their property.
- The enforcement of contracts.
- The maintenance of a stable monetary regime.
- National defence.
- The provision of infrastructure such as national roads, and sewage and sanitation facilities.
- Environmental protection.

OECD studies confirm the negative relationship between the size of government and economic growth. The higher the level of government spending, the lower the rate of growth of the economy.

If all our people were already enjoying a comfortable standard of living, we would not have to be so concerned about growth rates. But the fact is that the majority of South Africans are still poverty-stricken. The evidence is compelling that, if we want growth rates of 6% or more, we will have to reduce government spending. Lower spending will facilitate lower taxes. Lower taxes encourage people to work harder and smarter, to innovate, to spend, to save, and to reinvest in the growth of their own businesses. As the small firm sector begins to thrive, unemployment will fall, and so will crime. As more people are employed and more small firms are established and grow, total tax collections will increase even though tax rates remain lower than they are now.

THE CASE FOR SPECIAL CONSIDERATION OF THE SMALL FIRM SECTOR

If the effects of the present tax system and the more general structures of the economy were neutral in their impact on

businesses regardless of their size, the case for giving any special consideration to small firms would be weakened. In many ways, however, over many years economic structures have been distorted, leaving small firms at a significant competitive disadvantage.

- Laws were made (and still are) on the assumption that all citizens are equally well educated and equally fluent in English and whatever other official language is used to communicate the laws, being usually Afrikaans in the case of taxation laws.
- Many laws create barriers to entry into business, so that those on the inside are protected from new competition from those still on the outside.
- Many laws are enacted on the basis that 'one size fits all', i.e., with an implicit assumption that the costs of complying with them will be proportionately similar regardless of the size of the entity concerned. In practice, the compliance costs for small firms can be ten times greater, per unit of sales or per unit of profit, than the comparable costs for their larger competitors.
- Once legal action goes beyond the very limited jurisdiction of the small claims courts, justice through court action is largely confined to those with more wealth. It is not uncommon for small firms to abandon valid claims against affluent suppliers and customers because of their inability to pay for the necessary legal assistance.
- The small firms sector is poorly organised and has neither the money nor the time to match the sophisticated and continuous lobbying efforts of organised labour and of the corporate world. In many cases the rent-seekers triumph over the interests of small firm owners.
- Past state spending on infrastructure was biased towards the interests of a minority portion of the population. As a result, many black small firm owners still operate in areas poorly serviced with electricity, water, sewerage, banks, courts, roads, and all the other services that ease the establishment of a thriving business.
- Until recent times, black entrepreneurs were severely limited in terms of the education offered to them, the businesses they were permitted to run, the staff they could employ, and the places where they could operate. They were also largely denied the opportunity to acquire freehold or any other mortgageable titles to properties.

There is therefore a case for offsetting the structural disadvantages imposed on small firms with some countervailing benefits, if equality of opportunity to compete is to be achieved. A restructuring of the tax system is a good place to begin this process.

The case is strengthened by the undoubted economic and social benefits that South Africa would derive from having a much stronger small firms sector. This sector, in all the economically successful countries of the world, is the main generator of new, wealth-creating and sustainable jobs. It is also the source of most of the useful inventions and innovations. It is essential if South Africa is to become globally competitive, and it is essential if competitive business opportunities are to be redistributed to those entrepreneurs previously suppressed and disadvantaged.

It is accordingly cause for alarm that the deductions and allowances which the tax statutes confer on small firms are too narrow in scope or have shrunk due to bracket creep.

REDUCE STATE EXPENDITURE

RECOMMENDATION 1

Reduce government expenditure at all levels to less than 25% of GDP within five years.

The government must set itself the target of reducing state expenditure to less than 25% of GDP over the next five years. This will involve identifying its core functions and abandoning expenditure on peripheral matters. It will also involve rigorous scrutiny of all expenditure to ensure that the desired results are being achieved at the lowest cost.

involve rigorous scrutiny of all expenditure to ensure that the desired results are being achieved at the lowest cost.

Considerations

As has already been acknowledged, tax reform is not easy and cannot be achieved overnight. Still less can government expenditure be reduced in a single 'big bang' approach. However, if every journey begins with a single step, the time to take that first step is now.

This recommendation is not intended as a criticism of the present government – its commitment to the restoration of fiscal rectitude is commendable. But government spending is still too high to permit rapid economic growth.

REDUCE THE COMPLEXITY OF TAX LEGISLATION

RECOMMENDATION 2

Adopt a new, simplified Income Tax Act within the next two years to govern the taxation of the first part of any taxpayer's income (say, commencing with R350,000 and adjusted automatically for inflation every year).

A new, simplified Income Tax Act must be prepared and introduced within the next two years to govern the taxation of, say, the first R350,000 of any taxpayer's taxable income. The existing Act can be left in place to deal with those portions of incomes that exceed R350,000, though even here simplification will be highly desirable. Matters to be investigated and considered include the appropriate level of income to which the simplified Act should apply and the possibility of:

- Having no more than two tax brackets within this level of income;
- Devising a tax return consisting of one page and an explanatory brochure of no more than two pages – both to be available in all official languages;
- Establishing a reasonable threshold, certainly higher than that of basic subsistence living, below which no tax is payable, nor returns required;
- Indexing, and adjusting automatically, all thresholds and any other monetary amounts, such as tax brackets, to changes in the consumer price index (see Recommendation 11);
- Allowing small firms to have the option of being taxed on a cash basis, including the purchase or sale of plant and equipment (see Recommendations 3 and 4);
- Establishing Small Claims Courts for areas where they do not yet exist, if any, and widening their jurisdiction to cover disputes between taxpayers and SARS (to supplement hearings by a Tax Board appointed in terms of Section 108 of the Tax Administration Act, 2011);
- Incorporating a clause in the Act requiring SARS to explain to first offenders in the official language of their choice where they have been remiss and what they must do to correct matters and exempting such offenders from penalties or interest in respect of the offence;
- Requiring free assistance to be provided by SARS to all who are illiterate, in a language readily understood by the taxpayer, as well as the holding of regular SARS clinics and workshops at venues reasonably accessible (no more than an hour's travelling time) to all taxpayers; and
- Permitting individuals to deduct from their taxable incomes limited amounts invested as equity capital in non-controlling, arms-length stakes in small firms, in order to create a small venture capital market.

It is unjust to have laws of such complexity that they are inaccessible to the citizens whose lives and livelihoods are profoundly affected by them. It should be possible to have a brief, simple, and straightforward set of laws applicable to taxpayers earning less than a specified income. The objective should be to have laws that can be easily understood by those to whom they apply. Individuals with taxable income above R350,000 could remain subject to the existing laws in respect of income above that amount, or alternatively, continue to be taxed under the existing laws.

The simplified income tax laws should be stripped down to the bare essentials. This would mean determining in the simplest possible manner to calculate taxable income and tax payable. Any taxpayer wishing to claim an expense that falls outside the ambit of these laws could have the option of choosing to be taxed under the existing laws.

Simplified tax laws, if they were to be accompanied by simple procedures and requirements, would save taxpayers huge amounts in administrative costs, professional fees, and other compliance costs. They would also relieve SARS of a considerable part of its administrative burden.

A number of government policy statements, for example the "1997 Green Paper on Public Sector Procurement Reform in South Africa", state that small firm owners will not benefit from government initiatives unless they are complying with identified laws, including labour and tax laws. The 2020 draft Public Procurement Bill stipulates that a public institution may only contract with bidders who are tax compliant. Such conditions should be held in abeyance until laws, including tax laws, have been fully simplified to the point where ordinary people can realistically be expected to understand and comply with them.

Considerations

The rule of law requires that laws should be general in nature and apply equally to everybody. Friedrich Hayek maintained that if a distinction is made between one group or class of people and another, for example between men and women, and the distinction is favoured by the majority both inside and outside the group, there is a strong presumption that it serves the ends of both. However, if the distinction is favoured by only those within the group, it is privilege, whilst if it is favoured by only those outside the group, it is discrimination.

Adopting simplified tax laws for lower-income taxpayers and small firms would consequently not be discriminatory if such a process had the general approval of the majority of people who continued to be taxed under the existing laws. Support for the proposed reform may be obtained from high-earning taxpayers and large firms if:

1. The fundamental principles upon which the simplified law is based are substantially the same as those used in the formulation of the present tax laws.
2. Any special dispensation granted to low-income individuals and small firms is intended to remove or reduce disadvantages they suffer under existing legislation.
3. The simplified laws can be seen as a possible precursor to the simplification of all tax laws.

Professor Hayek also said that the requirement that the rules of true law should be general does not mean that special rules may not apply to different classes of people if they refer to properties that only some people possess. A distinction can be made between people based on their levels of income or the size of their firms but it must be recognised that such a distinction is arbitrary. However, arbitrary distinctions are made throughout the existing tax laws and some groups, such as small firms, believe that they are disadvantaged by those laws and that they have a legitimate claim to relief.

ALLOW ACCELERATED DEPRECIATION ON ALL CAPITAL EQUIPMENT

RECOMMENDATION 3

(a) Amend section 12E of the present Income Tax Act to allow small firms to deduct the cost of all capital equipment from their taxable incomes in the year in which the cost is paid, not just the cost of plant or machinery used in manufacturing.
(b) Allow not only small business corporations to deduct the cost of capital equipment,

but also small firms that are sole proprietorships or partnerships.
(c) Raise the annual gross-income ceiling for this capital-equipment deduction from R20,000,000 to R45,000,000).

The provision allowing the cost of plant or machinery used "directly in a process of manufacture" carried on by a "small business corporation" to be deducted in the year that the asset is brought into use should be amended to cover all capital equipment. Small firms, like any others, buy and use capital equipment other than just manufacturing equipment.

When a depreciation allowance on capital equipment in any year is lower than cash paid out for their purchase, small firms suffer cash flow problems, and these problems are exacerbated when the payments on equipment are large in relation to the total cash flow of their businesses. Allowing small firms to match depreciation allowances with cash paid for any capital equipment would remove a major problem for them without unduly affecting government tax receipts. The total taxable income of the small firm over the life of the equipment would be the same. The accelerated depreciation would merely take into account the reality that many small firms have to pay cash for equipment and are unable to arrange their affairs, as larger firms can do, so as to synchronise the payment of the purchase price of equipment with tax deductions.

The provision, which allows small business corporations to deduct the cost in the year that the asset is brought into use, should be extended to include sole proprietorships or partnerships. Not all small businesses are companies. The R20,000,000 annual gross income ceiling of a "small business corporation" who may make use of this deduction has not been altered since 2007 and should be increased appropriately.

Considerations

Accounting theory requires that depreciation or wear and tear should be provided for out of profits in amounts that will result in the writing off of assets over the periods of their expected useful lives. A part of the theory, which has been made redundant by inflation, consisted of the concept that the amounts provided would ensure the availability of funds for the replacement of the assets when that became necessary. Now, replacement costs of equipment, with the possible exception of computers, are always higher than the costs of earlier purchases, and additional funds have to be found to cover the extra amounts. The method used in calculating taxable profit does not take these effects of inflation into account, and an entirely new approach to taxation would be required to provide a more equitable alternative.

DETERMINE INCOME FROM CREDIT SALES ON THE CASH RECEIVED BASIS

RECOMMENDATION 4

(a) Allow small firms to deduct a debtors allowance from their taxable incomes which is equivalent to the accrued profits on unpaid sales.
(b) Issue regulations under section 37G of the present Income Tax Act to define the taxable income of small business undertakings consisting of sole proprietors or partnerships of natural persons, solely by reference to amounts actually received.
(c) Amend section 37G to apply to small business undertakings which are companies.
(d) Raise the annual turnover ceiling which qualifies a micro business for registration, from R1,000,000 to R2,000,000.

Having to pay income tax on profits that have not yet been received causes hardship for small firms. Debts owing to

them usually increase year by year with the result that the total amount of taxes paid on accrued income also steadily increases, draining the capital available to the firm.

In its simplest form, the calculation of the debtors allowance would consist of applying the average gross profit percentage achieved by the firm on all sales during the year to the amount by which total debtors (debtors being sales invoiced but not yet paid) at year-end have increased relative to the previous year. The figure resulting from this calculation would be equivalent to the profit on unpaid sales for the tax year. Deducting the figure from the taxable income of the small firm would have the effect of subjecting to income tax only those profits which have actually been received. This is similar to the dispensation granted to natural persons to pay over only VAT received and not VAT invoiced but not yet received.

The principle involved in this recommendation is also recognised in section 24(2) of the Income Tax Act which allows, in respect of the unpaid portion of the profits on instalment sales, a deduction which is reasonable in the special circumstances of the trade of the taxpayer.

An alternative to this recommendation would be to tax small firms on taxable income determined entirely on the cash basis. This would mean taking into account only amounts actually received and paid during the tax year. This alternative is accommodated, to some extent, in section 48A read with the Sixth Schedule of the Income Tax Act, which levy on registered micro businesses a turnover tax on amounts actually received.

Regulations should be issued to implement section 37G of the Act which authorises the Minister of Finance to make regulations to facilitate compliance with the Act by natural persons carrying on business through small business undertakings as sole proprietors or in partnership with other natural persons, by determining the taxable income of a small business undertaking by reference only to amounts actually received, as well as providing for exemption from, or extension of time limits for, submission of returns or payments. As mentioned earlier, the section was inserted in the Act in 1995 but has never been used.

Section 37G should also be amended to apply to small business undertakings which are companies.

The Act's provisions which levy a turnover tax on registered micro businesses were inserted in the Act in 2008, and the R1,000,000 annual turnover ceiling below which a micro business qualifies for registration has not been increased. It is appropriate to increase the ceiling to R2,000,000.

Considerations

Small firm owners are usually too busy working to band together and ask for special dispensations. They also cannot afford to pay tax lawyers and accountants to intercede on their behalf. The result is that, in an Income Tax Act containing a long list of special deductions and allowances for manufacturers, hotel keepers, farmers, carmakers, airlines, and a host of other categories of taxpayers, the allowances that apply specifically to small firms are either too narrow or have shrunk in scope due to bracket creep. Yet small firms can argue strongly that, given a greater measure of relief, their sector would probably do more than any other to increase economic growth and create jobs. Allowing wider and updated deductions will go some way to alleviating income-tax-related small-firm cash-flow problems.

GRANT TAX RELIEF TO SMALL FIRMS OWNED BY INDIVIDUALS AND PARTNERSHIPS

RECOMMENDATION 5

Grant small firms consisting of natural persons and partnerships of natural persons a tax deduction.

Lower tax rates for companies provides a precedent for extending the tax relief to include small firms consisting of individuals, partnerships, and trusts. Government's assumed purpose in reducing the company tax rate was to encourage investment and bring about higher economic growth.

However, small firms comprising individuals, partnerships, and trusts are at a competitive disadvantage as a result of the special tax dispensation granted to companies. Shortage of capital tends to be a greater constraint on the growth of small firms, especially in their first years of operation, than on larger firms. Reducing the rate of tax charged to small firms of individuals, partnerships, and trusts could consequently bring about more rapid growth and create more jobs than the granting of similar relief to large firms.

Considerations

Critics of this recommendation will maintain that it is unfair to grant small firms a competitive advantage. This criticism would be valid if all firms were presently competing on level terms. Some of the factors currently militating against small firms are:

1. Companies pay income tax at a rate of 28% on their taxable incomes compared to the top marginal rate of 45% paid by individuals. Many companies own large businesses.
2. In high-tax regimes, small firms have greater difficulty than large firms in increasing their investable funds. Investors expect much lower rates of return from large firms than from small firms and most would never consider investing in small firms because of the greater risk. Small firms consequently have to rely almost exclusively on generating their own capital out of after-tax profits. If there was no income tax, small firms would, on average, grow comparatively much more rapidly than large firms.
3. Several factors weigh against the ability of small firms to borrow money to expand their businesses. Firstly, because of the large amounts of money the government borrows, lending to private borrowers is less attractive and considered to be a higher risk than if government was borrowing less or not at all. Secondly, because lenders can earn reliable interest from lending to government and large firms, they are less inclined to lend to small high-risk firms. Thirdly, because of limits which the National Credit Act places on the rate of interest that can be charged on loans to small businesses (see the entry on "Finance" in this series), small firms cannot compensate lenders for risk by paying higher interest rates. Finally, small loans are unattractive to lenders as the administrative costs of making such loans are proportionately much higher than the costs of making large loans.

Government needs to take all these matters into account in considering the legitimacy of granting small firms operated by individuals and partnerships the above-mentioned tax relief. In particular, it would have to evaluate the potential economic growth and demand for labour that could emanate from this part of the small business sector.

INCREASE THE TURNOVER FIGURE AT WHICH VAT REGISTRATION BECOMES COMPULSORY

RECOMMENDATION 6

Increase from R1,000,000 to R2,000,000 the value of "taxable supplies" at which registration for VAT becomes compulsory.

The VAT Act currently applies to businesses making taxable supplies (that is, goods and services defined as being subject to VAT) exceeding R1,000,0000 per annum. This converts to R85,000 per month, which is the turnover of a fairly small business. It is unreasonable to expect owners of small firms with modest turnovers to comply with the VAT Act when even highly paid executives of large businesses have difficulty in understanding the complexities of the Act. Compliance becomes especially difficult if the owner of a firm is not fluent in a language used on VAT forms or the SARS website, or worse still, is illiterate.

The figure of R1,000,0000 has not been adjusted for inflation since it was set in 2008. This means, in real terms, that smaller and smaller firms are being required to register for VAT, imposing an unwarranted administrative burden on the firms and unnecessarily increasing VAT collection costs. Since that threshold was set in 2008, the consumer price index (CPI) has just about doubled and a threshold of R2,000,000 would be more appropriate to keep it the same in real terms and to be more realistic.

Small firms can naturally hire accountants to do the complicated calculations and complete the returns that have to be submitted. However, when a small firm is already hard pressed to make a profit, the added cost of hiring professionals to complete tax returns can add significantly to its difficulties.

Considerations

The Department of Finance will claim that the fiscus will lose a substantial amount of revenue if the VAT on value added by small firms with turnovers of more than R1,000,000 but less than R2,000,000 is excluded. What has to be taken into account is that a small firm that is not registered for VAT will pay VAT on all its purchases and government will lose only the VAT on the value added. Also to be taken into account is the cost of collecting VAT from the small firms.

For example, a firm with a turnover of R120,000 per month, VAT excluded, making an average gross profit of 20% on sales, would be liable for VAT at 15 % of R18,000 less at least R14,400 in respect of input VAT on taxable supplies purchased. The VAT on value added in this example would therefore be less than R3,600 whilst the cost to the firm of keeping all the records and submitting the VAT returns could quite easily exceed this amount. After taking into account the cost to SARS of collecting the VAT and monitoring compliance of small firms with taxable supplies of less than R2,000,000 per annum, it is dubious whether government gains any benefit from their registration.

ALLOW ALL SMALL FIRMS TO ACCOUNT FOR VAT ON THE PAYMENTS BASIS, EXTEND THE THRESHOLD, AND INCREASE THE AMOUNT OF CONSIDERATION FOR SUPPLIES WHICH VENDORS THAT ACCOUNT FOR VAT ON A PAYMENTS BASIS MUST ACCOUNT FOR ON AN INVOICE BASIS

RECOMMENDATION 7

(a) Increase the threshold below which the payments basis for accounting for VAT by natural persons and unincorporated bodies of natural persons is permitted from the present R2,500,000 per year to R13,500,000, and extend this concession to companies.
(b) Increase the minimum consideration for a supply of goods or services which a vendor that accounts for VAT on a payment basis must account for on an invoice basis, from R100,000 to R350,000.

As inflation erodes the purchasing power of the rand, the turnovers of firms increase even without any increase in the physical volume of sales. If a threshold such as the present R2,500,000 is not adjusted for inflation, smaller and smaller firms lose the right to use the payments basis for accounting for VAT. As the CPI has increased fivefold since this threshold was established in 1992, an upward adjustment to R13,500,000 is required in order to keep the threshold the same in real terms. Thereafter, the threshold should be automatically adjusted for inflation (See Recommendation 11).

Small firms, whatever type of legal personality they may have, suffer financial hardship when they are required to

pay VAT before they have received payment from their customers. The VAT Act currently allows only natural persons to account for VAT on a payments basis, that is, on amounts actually received and paid. Yet small companies have similar difficulties to those experienced by individuals, and compelling them to account for VAT on the accrual basis deprives them of capital with which to run their businesses. Tax laws should be even-handed in dealing with taxpayers, whether they are individuals or legal entities. The dispensation should therefore be based on the size of firms and not their legal personalities.

The VAT Act stipulates that a vendor who accounts for VAT on a payments basis must account on an invoice basis for the VAT payable in respect of any supply of movable goods or services for which the consideration is R100,000 or more.

Since that R100,000 minimum consideration was fixed in 1997, the CPI has increased three and a half times, so an upward adjustment to R350,000 is required in order to keep that minimum consideration the same in real terms. Thereafter that floor should be automatically adjusted for inflation (See Recommendation 11).

Considerations

Allowing small firms to account for VAT on the payments basis merely postpones the accounting until the firm has paid for its purchases or has been paid for its sales. The alternative method of accounting requires the firm to act as tax collector for the fiscus and also to make cash advances to it for VAT the firm will recover only later. The pressure on the cash flows of small businesses could therefore be greatly reduced by raising the “payments basis” threshold to R13,500,000 at the cost to the fiscus of a brief delay in receiving VAT payments.

The fiscus may be legitimately concerned that, if the payments basis is extended to companies, a few owners of firms may attempt to split their activities between a multitude of companies in order to qualify. However, it is harsh to refuse to allow the great majority of legitimate small firms that are owned by companies to account for VAT on the payments basis merely because of the activities of some individuals. Potential abuse could be prevented by appropriately worded legislation.

A VAT vendor who accounts on a payments basis must account on an invoice basis for VAT payable on a supply of movables or services for a consideration of R100,000 or more. If that amount is not adjusted for inflation, small firms will progressively lose the right to account on a payments basis as the real value of affected supplies declines.

RECOGNISE INVOICES FROM EXEMPT SMALL FIRMS AS VAT INVOICES

RECOMMENDATION 8

Accept invoices from exempt small firms listed with SARS as VAT invoices when received by VAT-registered larger firms.

At present many VAT-registered firms refuse to buy anything from exempt small firms. The exempt small firm will have paid VAT on its inputs, and will not be able to recover it from VAT-registered buyers – so the loss to the revenue will be no more than VAT on the value added by the small firm.

Considerations

To partially offset this, SARS will have a list of participating exempt small firms and will be able to monitor them to ensure that they register for VAT as soon as they reach the threshold.

INCREASE THE ESTATE DUTY EXEMPTION

RECOMMENDATION 9

Increase from R3,500,000 to R7,500,000 the amount deductible from the net value of an estate in determining the dutiable amount for estate duty purposes.

The present deductible amount of R3,500,000 has been unchanged since 2007 and the real value has been diminishing steadily. Since that amount was fixed, the CPI has more than doubled, and an increase to R7,500,000 is appropriate to keep the deduction the same in real terms.

Estate duty has a very disruptive effect on family businesses and special provisions are necessary to make it easier for them to be continued by the next generation. One possibility would be to allow, in these circumstances, for the valuation of family businesses at something below market value. Another possibility would be to permit the duty to be paid over an extended period, say five years.

An estate that consists chiefly of the assets in a business is very different from an estate consisting of easily liquidated investments such as quoted shares or interest-earning deposits with financial institutions. For instance, a family firm could be seriously harmed and its continued existence jeopardised if the family is compelled to sell or borrow against business assets in order to pay estate duty.

Considerations

Duty on deceased estates is the subject of much debate. Proponents of this form of taxation rely on sociological arguments to justify its imposition. The general thrust of the arguments is that the state, or the community, has a claim upon the assets of the deceased because of past benefits the individual derived from the state.

Opponents of the tax, on the other hand, argue that the tax is unjust because it amounts to double taxation. They argue that the deceased persons will have paid income and other taxes during their lifetimes at the highest marginal rates on much of the value of the assets in the estate. They also argue that there is no justification for the government to take property that it had no claim upon while the individual was alive; that there is no logical reason why death should confer upon the state such a claim.

However, this recommendation does not require a resolution of the philosophical or economic arguments regarding the merits or demerits of the imposition of estate duty. It relies solely on the fact that inflation has eroded the value of the rand and that, contrary to the original intentions of the legislators, smaller and smaller estates are being subjected to estate duty.

INCREASE THE MINIMUM TOTAL REMUNERATION PAID BY AN EMPLOYER FOR SKILLS DEVELOPMENTLEVIES TO BE COMPULSORY

RECOMMENDATION 10

Increase from R500,000 to R1,200,000 the minimum total remuneration paid by an employer to his employees before skills development levy contributions become compulsory.

The Skills Development Levies Act is administered by SARS, which collects the levies in accordance with tax administration laws.

The Skills Development Levies Act obliges every employer whose total remuneration payable to all his employees annually is R500,000 or more to register as a levy contributor and pay to SARS a skills development levy of one percent of the total remuneration he pays each month to his employees.

That R500,000 annual threshold was fixed in 2005, and since then the CPI has more than doubled, so an upward adjustment to R1,200,000 is required in order to keep that threshold the same in real terms. Thereafter the threshold should be automatically adjusted for inflation (See Recommendation 11).

Considerations

It may be thought that skills development levies are effectively applied to train firms' employees in appropriate skills. The bulk of levy funds collected goes to the relevant Sector Education and Training Authority (SETA), of 21 SETAs established for different economic sectors by the Minister of Higher Education and Training. The SETA must disburse the funds to occupational-skills-development providers or back to employers as grants for approved training purposes. Levy funds may also pay for the SETA's own administration costs within limits.

Twenty percent of levies collected are allocated to a National Skills Fund to finance skills development projects identified as national priorities.

In practice, skills development levies collected are not effectively used. The International Labour Organisation found recently that the perception in most South African employers' and workers' organisations is that the levies are just another form of taxation, particularly among small firms. SETAs pay out less in grants than it collects as levies. Because the R500,000 annual remuneration threshold has not been adjusted for 16 years, there has been a steady increase in levy revenue due to inflation as more and more small firms become contributors. Many SETAs have accumulated large unspent surpluses.

If this levy system is not scrapped entirely, at the least an adjustment in the R500,000 threshold to R1,200,000 would be an appropriate increase for inflation.

INFLATION-ADJUSTMENT OF FIGURES INCORPORATED IN LEGISLATION

RECOMMENDATION 11

Provide for automatic inflation-adjustment of all figures embedded in tax legislation that fix exemptions and levels of income, turnovers, assets, and other measures that determine liability for compliance with particular elements of that legislation.

The price index rose almost threefold during the past 20 years. This means that on average anything that cost R1 two decades ago now costs nearly R3. It also means that any figures that are included in tax legislation are soon out of date.

For instance, the threshold limit for the payments basis for accounting for VAT was increased to R2.5 million in 1992. Since then, the CPI has increased fivefold, hence the recommendation that the threshold be increased to R13.5 million (see Recommendation 7).

The R3.5 million that is deductible from the net value of an estate in determining the dutiable amount has remained unchanged since 2007. In the 14-plus years since that deductible amount was established, the CPI has more than doubled, hence the recommendation that the figure be increased to R7.5 million (see Recommendation 9).

If the tax legislation is to remain equitable it is essential that thresholds and exemptions be automatically adjusted annually. The problem manifests itself very clearly in so-called bracket-creep which imposes steadily increasing marginal rates of tax on taxpayers even if their incomes remain static in real terms. However, there are many other similar instances that do not receive the same amount of publicity as bracket-creep. Legislation should be introduced that requires new threshold and exemption figures, adjusted by the same percentage as the increase in the CPI, to be published annually in the *Government Gazette*.

Considerations

A great deal of thought obviously goes into the establishment of exemption levels and thresholds at the time legislation is written. However, the effect of subsequent inflation has received insufficient attention. For example, when Parliament in 1992 approved a R2.5 million threshold for accounting for VAT on the payments basis it must have had a certain size of firm in mind. Establishing a turnover threshold was merely the most practical way of setting the upper limit on the size of firm that was to be allowed to use the payments basis. It should therefore be a matter of concern to the legislators that the provision has been so eroded by inflation that it now applies to firms that are only one-fifth the size of those they originally had in mind.

Statutes and other legislative measures

Constitution, 1996—
s 217 (procurement)—
(1) (organs of state, and institutions identified in legislation, must contract for goods or services i.a.w. fair, equitable, transparent, competitive, cost-effective system)
(2) (organs of state, institutions may implement procurement policy providing for)—
(categories of preference when allocating contracts), and
(protection or advancement of persons disadvantaged by unfair discrimination)
(3) (legislation must prescribe framework in which such policy must be implemented)
Preferential Procurement Policy Framework Act, 2000 (framework for implementing procurement policy contemplated in Constitution s 217)—
s 1 (definitions)—("organ of state" includes national or provincial departments and municipalities, constitutional institutions defined in Public Finance Management Act, and institutions defined in Constitution as "organ of state" and recognised by Minister by Gazette notice as institutions to which Act applies)
s 5 (Minister may make regulations to achieve Act's objects)
Govt Notice R32 of 20 Jan 2017 (preferential procurement regulations)—
reg 1 (definitions)—("designated group" includes—
(black designated groups, black people, women, disabled) and
("small enterprises" defined in National Small Enterprise Act, 1996)
reg 9 (subcontracting)—(if contract above R30m and feasible to subcontract, organ of state must require successful tenderer to)—
(1) (subcontract to advance designated groups (including small enterprises))
(2) (subcontract 30% of contract value to black-owned small enterprises),
Income Tax Act, 1962 as amended—
s 1(1) (definitions)—
"small business funding entity" (an entity approved by Commissioner i.t.o. s 30C)
"small, medium or micro-sized enterprise" (means any)—
micro business), or
(small business corporation)
s 5 (normal tax and rates thereof)—
(1) (normal tax shall be paid i.r.o. the annual taxable income received by or accrued to or in favour of)—
(a) (persons other than companies, during the year of assessment ending the last day of February); and
(b) (a company, during its financial year)
(2)(a) (Minister may announce in the national annual budget that, w.e.f. a date announced, rates of tax chargeable i.r.o taxable income will be altered to extent announced)
(b) (that alteration comes into effect on that date and continues to applies for 12 months subject to Parliament passing legislation giving effect to it)
s 10(1) (exemptions from normal tax)—
(zJ) (amounts received by or accrued to registered micro business from carrying on business, other than investment income or remuneration)
s 12E (small business corporations may deduct the cost of manufacturing plant or machinery in the year it is brought into use)—
(4)(a) "small business corporation" means private company, etc., whose shareholders in year of assessment are all natural persons, and—
(i) its gross income for year of assessment does not exceed R20 000 000),
s 24 (credit agreements and debtors allowance)
s 37G (small business undertakings)—
(1) (Minister may make regulations to facilitate compliance with Act by natural persons carrying on business through small business undertakings as sole proprietors or in partnership with other natural persons)

(2) (regulations may)—
(a) (prescribe what shall constitute a small business undertaking, having regard to its nature, turnover, taxable income or profit, number of employees, nature and extent of other income derived by proprietor or partners, and any other feature which in Minister's opinion indicates that undertaking should be regarded as small business undertaking)
(b) (provide for variation of any provision of Act relating to the determination of taxable income derived from a small business undertaking, including)—
(i) (determining taxable income only w.r.t. amounts actually received)
(iv) (any other provision which, other than timing of receipt or accrual of income or incurral of expenditure, will not result in material variation in determination of undertaking's taxable income over time)
(c) (provide for exemption from, or extension of time limits in, provisions of Act relating to submission of documents, accounts, returns or payments)
(d) (make such other provision as in Minister's opinion will facilitate carrying on of small business undertakings)
s 48A (turnover tax payable by registered micro business on taxable turnover)
s 48B (rates of turnover tax fixed annually by Parliament)
Sixth Schedule (turnover tax payable by registered micro businesses)—
par 2(1) "micro business" (person or company (or cooperative or CC) qualifies as micro business if turnover does not exceed R1 000 000 in year of assessment)
par 5 "taxable turnover" (all cash receipts, not of a capital nature, by registered micro business from carrying on business activities in year of assessment)
pars 6, 7 (inclusions in, exclusions from taxable turnover)
par 8 (persons qualifying as micro business may elect to be registered)
s 66 (notice by Commissioner requiring returns for assessment of normal tax)
s 67 (registration as taxpayer),
Draft Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2021—
s 1 (fixing of tax rates)—
(1) (rates of normal tax i.t.o. s 5(2) of Income Tax Act 1962 are in Sched 1 inter alia pars 1, 3, 5)
(2) (rate of turnover tax i.t.o. s 48B of that Act of registered micro business is in Sched 1 par 8)
Sched I (tax rates)—
par 1 (natural persons, for year of assessment commencing on or after 1 Mar 2021:

Taxable income	18% of taxable income
0 to R216 200	R38 916 plus 26% of taxable income above R216 200
R216 201 to R337 800	R70 532 plus 31% of taxable income above R337 800
R337 801 to R467 500	R110 739 plus 36% of taxable income above R467 500
R467 501 to R613 600	R163 335 plus 39% of taxable income above R613 600
R613 601 to R782 200	R229 089 plus 41% of taxable income above R782 200
R782 201 to R1 656 600	R587 593 of taxable income above R1 656 600)
R1 656 601 and above	

Rate of tax
par 3 (companies, for year of assessment ending on or after 1 Apr 2021—28% of taxable income)
par 5 (small business corporations (s 12E), year ending on or after 1 Apr 2021—

Taxable income	Rate of tax
0 to R87 300	0% of taxable income
R87 301 to R365 000	7% of taxable income above R87 300
R365 001 to R550 000	R19 439 + 21% of taxable income above R365000
R550 001 and above	R58 289 + 28% of taxable income above R550 000)par 8 (registered micro businesses, year commencing on or after 1 Mar 2021—

Taxable turnover	Rate of tax as percentage of taxable turnover
0 to R335 000	0%
R335 001 to R500 000	1% of taxable turnover above R335 000
R500 001 to R750 000	R1 650 + 2% of taxable turnover above R500 000
R750 001 and above	R6 650 + 3% of taxable turnover above R750 000)

Value-Added Tax Act, 1991 as amended—

s 7 (imposition of tax)—

(1)(a) (value-added tax is levied and paid for benefit of National Revenue Fund on supply by vendor of goods or services in course or furtherance of enterprise carried on by vendor, at rate of 14 % on value of supply)

(4) (If Minister in national annual budget announces alteration of VAT rate, alteration is effective from date determined in announcement, and applies for 12 months subject to Parliament passing legislation in that period giving effect to alteration)

s 15 (accounting basis) (Commissioner may, on application by vendor who is natural person or unincorporated body of natural persons, direct vendor to account for tax payable on payments basis, if vendor's taxable supplies in any 12-month tax period have not exceeded R2 500 000, or are unlikely to in any 12-month period)

s 16 (calculation of tax payable) —

(2) (no deduction of input tax i.r.o. supply of goods or services shall be made, unless—

(a) a tax invoice i.r.t. the supply has been provided and is held by the vendor making that deduction when any return i.r.o. that supply is furnished)

s 23(1)(a) (person carrying on an enterprise becomes liable to be registered when total value of taxable supplies made by that person in last 12 months in the course of carrying on all enterprises exceeds R1 million)

Small Business Tax Amnesty and Amendment of Taxation Laws Act, 2006

Companies Act, 2008—

s 1 (definitions) "small business corporation"

Estate Duty Act, 1955—

s 2 (levy of estate duty on dutiable amount of estate)

s 3 (what constitutes estate)

s 4 (net value of estate)

s 4A(1) (dutiable amount of estate determined by deducting R3 500 000 from estate's net value)

s 5 (determination of value of property)

Tax Administration Act, 2011—

s 25 (submission of return)

s 169 (tax due or payable i.t.o. a tax Act is debt to SARS for National Revenue Fund)

s 170 (evidence as to assessment)

Govt Notice 419 of 14 May 2021 (Gazette 44571) (Commissioner requires persons specified to submit returns for 2021 year of assessment)—
Sched par 2(e) (every natural person who is)—
(i) (resident and carried on any trade)
(ii) (not resident and carried on any trade in Republic)
Gen N 94 of 2020 (Gazette 43030 of 19 Feb) (publication of draft Public Procurement Bill, 2020 for comment)

Official reports, announcements

Green paper on public sector procurement reform, Ministries of Finance, Public Works, Apr 1997, par 3.5.5 (affirmative small, medium, micro enterprise participation programme should in long term ensure that emerging businesses contribute to tax base)
Survey of Employers and the Self-employed 2017 (statistical release P0276), Statistics South Africa, Mar 2019
Financial statistics of consolidated general government 2019 (Statistics South Africa, statistical release P9119.4, 26 Nov 2020)
Tax Chronology of South Africa: 1979–2021 (Apr 2021), South African Reserve Bank
Tax Guide for Small Businesses 2019/2020, SARS
Taxation in South Africa 2020, SARS
Comprehensive guide to the ITR12 return for individuals, South African Revenue Service, 1 Jul 2021 (IT-AE-36-G05, rev 25, 114 pp)
Consumer Price Index history: headline index numbers (1980–2021), Statistics South Africa
Budget Speech, 2018 (21 Feb 2018), Min of Finance (M. Gigaba)—
(VAT increase from 14 % to 15 % as from 2018/19 financial year (w.e.f. 1 Apr 2018))

Media

Creamer Media's Engineering News, 28 Sep 2016, "PPPFA to be repealed" A Kilian (Preferential Procurement Policy Framework Act's preference points system too rigid to reshape business ownership, and Act to be replaced by Public Procurement Act)
Creamer Media's Engineering News, 21 Feb 2018, "Public procurement aligned to more stringent regulations as Bill goes to Cabinet", M van Wyngaardt (Procurement Bill to replace existing regulations would have gone to Cabinet next month for gazetting for public comment but is delayed by changes in government)
Bizcommunity, 22 Feb 2018, "#Budget2018: Public Procurement Bill to give women and youth in business a leg up" (K Magubane) (government to review "evergreen contracts" where big companies get permanent state business creating entry barriers for small firms)
eNCA, 17 Feb 2018, "Ramaphosa restored dignity to Parliament: Kathrada Foundation"

Commentaries

Income Tax in South Africa, D Clegg et al—
Chap 3 (taxes levied)—
par 3.2 (normal tax)
par 3.9 (taxation of micro businesses)
Chap 4 (determination of taxable income)—
par 4.4 (taxable income)
par 4.12 (received by or accrued to)
Chap 24 (special provisions)—
par 24.13 (small business undertakings),
Silke on South African Income Tax, A P de Koker et al—
Chap 2 (receipts and accruals)—
2.1 ('received by or accrued to')

2.2 (benefit to taxpayer)
2.4 (doubtful if Commissioner has power to assess on receipts only)

Thinktanks, etc.

Free Market Foundation, 13 Jan 2004, “South Africa should adopt a Flat Tax” (E Davie)
U.S. News & World Report, 12 Apr 2010, “Eliminate Tax Brackets and Complicated Forms with a Flat Tax” (D Mitchell)
Free Market Foundation, 31 Jul 2012, “Tip for Pravin: SA should adopt flat tax” (J Urbach)
OECD Economics Dept Working Paper No. 1344 (2016), Fournier, J.-M. and Johansson, Å, “The effect of the size and the mix of public spending on growth and inequality”
OECD Economics Dept Working Paper No. 1230 (2015), Fall, F. and J.-M. Fournier, “Macroeconomic Uncertainties, Prudent Debt Targets and Fiscal Rules”

FREE MARKET FOUNDATION

THE CASE FOR ECONOMIC DEREGULATION & DECENTRALISATION

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I. EXECUTIVE SUMMARY

The SME study presented is concerned with small and medium-sized enterprises (SMEs) and whether the Promotion of Economic Activities Bill is supported by theoretical and empirical evidence that SMEs have suffered particularly over the last ten years or so. While the analysis tentatively agrees that SMEs may often be more vulnerable to regulation and red tape than enterprises with larger balance sheets, it is also argued that a closer look is required to understand what distinguishes an SME from a large enterprise and to tackle the question whether a simplistic look at firm size does justice to the complexities of today's economic systems.

When regulatory rules and red tape go off the rails, the entire economy takes a knock. Financially strong companies might have more resources to protect their operations, but this comes at costs which could have been employed more fruitfully, for instance to procure more services from SMEs. Likewise, when sectors become deregulated or governments cut down on bureaucracy, the entire economic system benefits.

As to firm size, it must be understood that most large enterprises are commercial constructs that mainly consist of many SMEs under one legal umbrella. Most bank branches of South Africa's top four banks employ far less than a hundred employees. Supermarket chains are a collection of local stores whereby procurement power is bundled and a national brand can be built. As employees or freelancers, we are all running our own SME. There is hardly an economic difference between being on the payroll of a large company and providing the same services as a subcontractor. In some industries, branches of large companies are based on franchise contracts. Legally-speaking, all McDonald's outlets are SMEs owned by franchisees.[1]

Perhaps, the essential premise of this study is that people always work and consume at a particular place. The effects of regulatory provisions and red tape, of failing public services and corruption, are always felt by flesh-and-blood people on the ground. It is in the nature of GDP numbers, labour market statistics, or national budgets that microeconomic results get lost in the aggregate. Yet, even when statisticians dig deeper, artificial distinctions along legal criteria rarely reveal the full picture. Is the loss of income in a small town run down by an incompetent city council bigger when a small branch of a large supermarket chain closes down as opposed to the independent grocer?

This study argues that an analysis of regulation and its harmful effects must be devoted to understanding municipal governance structures and the degree of financial autonomy. It must look at those services that are crucial for every business, in particular the core infrastructure services of electricity, water, sewerage, and telecommunication, the first three of which are provided by public monopolies. Expecting municipal representatives to be accountable to their citizens when they have no local tax revenues and, worse, have all their funds allocated as grants from the national government is either naïve or ignorant.

As to promoting higher economic growth of SMEs (as well as larger enterprises), the best deregulation policy is to allow people take matters into their own hands. As we speak, resident associations have taken over the operations of water and sewage infrastructure. Such "take-overs," it is argued, are the first steps to liberate South Africa's economic system from its destructive infrastructure monopolies. In sectors where the state has created a monopoly to provide affordable universal infrastructure services to all, such mandates can be defended—provided they succeed. If not, they must be abolished. The energy, water, railway, port, and postal sectors need competition in all areas of the value chain. Perhaps, some of these entities can emulate Telkom if private capital induces the necessary commercial discipline. If not, others will operate the assets that have been financed by taxpayers after all. What can be achieved is demonstrated in the telecommunication sector, not only by mobile carriers but also by other players in the industry, such as submarine cable, fibre, data centre and other providers.

The Promotion of Economic Activities Bill proposed by the Free Market Foundation is in fact a cure for the entire economy. The best way of removing legal and bureaucratic restrictions is to make market contestable and let consumers decide what are the best offerings. Not only do local entrepreneurs often understand better what their fellow citizens need; the fact that they are a part of the local social fabric also means that a firm's success depends on

treating consumers and its employee base well. When private citizens serve private citizens without escape mechanisms such as government bailouts and grant funding, a culture of true accountability can grow.

II. STUDY OF THE RATIONALE TO REMOVE LEGAL AND BUREAUCRATIC RESTRICTIONS ON SMES IN SOUTH AFRICA

1. Scope and Structure of the SME Study

The study presented supports the Promotion of Economic Activities Bill (the Bill) proposed by the Free Market Foundation (FMF) to unleash the entrepreneurial activities that will boost economic growth and job creation in the overburdened South African economy, especially from the perspective of small and medium enterprises (SMEs).

The Bill seeks to "empower the President to suspend provisions of laws or conditions, limitations, or obligations thereunder or to grant exemption therefrom, if he or she is satisfied that circumstances exist under which the application of or compliance with those laws, conditions, limitations or obligations unduly impedes economic development or competition in the economic field, or the creation of job opportunities; and to provide for incidental matters."

The Bill states that the over-encumbrance of the economy with unnecessary and burdensome conditions, limitations, or obligations has slowed down inclusive economic growth, economic development, and job creation. Inclusive economic growth, economic development, and job creation are necessary for the realisation of the rights in the Bill of Rights in the Constitution. Any regulation legistated and executed by the state, whether through sovereign and sub-sovereign (municipal) organs or through the creation of non-market structures in the form of state-owned enterprises (SOEs), must be understood as an a priori interference with (entrepreneurial) freedom of choice.

The superior courts of South Africa have repeatedly recognised the importance of freedom of choice in promoting the constitutional value and right to human dignity. Yet, freedom is never unrestricted. In fact, the idea of complete, unrestricted freedom of choice is not freedom because absolute freedom would necessarily violate the freedom of others. In modern societies whose constitutions rest on the acceptance of economic systems based on the division of labour, the scarcity principle alone is sufficient to impose cooperative action based on market participants' voluntary agreements. Hence, the degree and limits of freedom depend on the constraints that the members of society place upon themselves. Such constraints are codified and non-codified institutions such as habits, customs, rules, laws, contracts, etc., which Geoffrey Hodgson (2006), defines as "the systems of established and prevalent social rules that structure social interaction."[3]

Since individual people's actions, however, are dedicated to one's own betterment, the means to achieve one's betterment are scarce and the understanding about how means should be employed to achieve betterment differ widely across people. The challenge is to find the structure of social interaction that is most conducive to what the members of society view as betterment while at the same time constraining or outlawing unwanted actions and results.

It was in the light of his experiences of the English Civil War (1642–1651) that Thomas Hobbes identified a brute situation of a state of nature (Homo homini lupus) that could be avoided only if the members of society grant absolute power to a sovereign entity on the basis of a social contract that provides the constitutional basis for such powers. For good reasons, however, Hobbes titled his book Leviathian, which in the Old Testament refers to a monster, into which even democratically elected governments such as the National Socialist German Workers' Party (1933–1945) or alleged social revolutions such as those in Russia (Lenin, Stalin) or China (Mao) can easily degenerate. Following Jean-Jacques Rousseau's idea of the contrat social (social contract), citizens in today's constitutional democracies strive to create bodies of rules and laws that balance the forces of freedom of choice and the unwanted

undesirable side effects of "too much" freedom or the "wrong type" of freedom.

In the 21st century, there is widespread agreement that constitutional frameworks are to guarantee that fundamental human rights are upheld and human dignity prevails. South Africa's liberation from the Apartheid regime in 1994 was a shining example of the power of democratic constitutionalism. While in the political sphere there seems to be widespread agreement on what is the basis of human freedom (albeit with many shades of grey), the case is less clear when one enters the economic sphere.

Put simply, it could be argued that it is the role of the sovereign to protect citizens from the forces of Adam Smith's invisible hand, at least to some degree. Most citizens are concerned about and want to be guarded against the uncertainties that emanante from other citizens' individual pursuits of prosperity or profit. However, the uncertainty that accompanies the pursuit of profit by entrepreneurs simultaneously generates the ideas and opportunities that ultimately lead to incremental productivity increases in the form of more knowledge, higher incomes, better education, and healthcare, which in turn create the income base and wealth on which all sovereign mandates are based.

It is the hallmark of modern economic life to embrace change. In an adaptive economic system, the "creative destruction" of existing production structures, the much-cited bon-mot by economist Joseph Schumpeter (1942), is in fact destructive only in the sense that it leads to resources, capital goods and skills being put to a new use. The intrinsic value of the production entity, Blackberry, may have fallen to zero, but the capabilities are anything but lost. On the contrary, the owners of the skills move on and use their knowledge for new purposes that people demand. To the extent that a political system, whether in its representations as incumbent government, administration, municipal bodies, or SOEs, naturally resists such changes, it cannot prevent them without harming its subjects themselves. For economic innovation and disruption—the ultimate sources of betterment—are ultimately always the result of changing consumer preferences.

Arguably, most people in today's prosperous democracies support policy proposals that rein in "the market" or market forces so as not to create hardships or destabilising economic situations that threaten their socio-economic fabric. Such policies can be implemented in two fundamentally different ways: through income transfers via taxes or through regulatory measures and active intervention. This study looks at regulation and its impact on SMEs, and the effect that the proposed Promotion of Economic Activities Bill could have on that.

Chapter 2 gives a short introduction of what "regulation" is and then reviews the institutional performance of the South African government and its entities in comparison to other countries. Chapter 3 first discusses the impact of regulation on SMEs and whether SMEs are economically more vulnerable to red tape and overregulation, followed by a discussion of the opportunities and risks of deregulation. Chapter 4 presents four recent case studies that support the claims and recommendations of this study, followed by an overview in Chapter 5 of the various approaches to deregulating economic sectors that are hampered by inefficient and extractive government agencies. The study concludes with a short summary of the results and an outlook on the way forward.

2. Regulation and Institutional Performance in South Africa

2.1. Regulation: A Brief Overview

Government regulation ("regulation") may be understood as the attempt to create the institutional framework within which economic activity and entrepreneurship flourish for the benefit of society.[5] Statically, institutions in the form of legal and regulatory frameworks serve as durable mechanisms to support economic exchange. For the purpose of this study, a distinction is made between two types of regulation and regulatory frameworks. The first type includes all regulatory frameworks that apply to the entire economy, such as labour law, occupational safety and health,

environmental law or licencing. This type of regulation gives the state the role of rule-maker and institution-builder, while the concrete economic outcome, e.g., market shares, prices, profits, is left to market competition, i.e., consumer choice and entrepreneurial innovation.

The second type of regulation applies to specific sectors, notably health, education and the network infrastructures road and railway, water, energy, and telecommunication. In these areas, government's role often turns from a rule-maker to a producer of services through state-owned enterprises and the public monopolisation of markets. In terms of the regulatory framework for specific sectors, the scope and role of regulators can vary significantly over time, space, and political systems. In some sectors, particularly those that have been privatised, regulators continue to exercise significant control over parts of the value chain of private market participants.[6]

The key difference is that the first type of regulation allows markets to be governed by price and profit signals based on private ownership and consumer choice. This is what we understand as competitive markets. Though onerous regulation and red tape can greatly constrain economic productivity and income creation, entrepreneurial success or failure still attribute to identifiable economic participants. An important implication is that non-performing entities can go bankrupt, with taxpayers' wealth not impaired by public bailouts. In a free market, there is only individual people that inject their own—that is, owned—funds to support firms in the expectation of returns. When the state runs a public monopoly, say, Eskom, the economic entity has no identifiable owner who injects her own funds. The consequence is that such entities cannot perform economic calculation as there is nobody who could formulate a return expectation. Of course, there is also nobody who could be held economically accountable for losses—the core problem of all economic activities by state entities.

The second implication is that markets regulated as public monopolies are not contestable. In other words, competition through market entry is prohibited, consumer choice is dysfunctional as there is no alternative. South Africa is a particularly gross example of the failure of SOEs that continue to burden people not only through continuous bailouts and rampant corruption. More importantly for the purposes of this study is the fact that entpreneurial ingenuity and innovative business models introduced by new market entrants do not come to fruition. The results are foregone investments, productivity increases, and employment creation. Such counterfactual losses protect governments as they are nowhere recorded. Yet, the societal opportunity costs in the form of lower living standards and long-term productivity losses are enormous. In contrast, the mobile telecommunication sector shows what can be achieved when value chains are contestable.[7]

Before we go into the detail of concrete regulatory policies, which are either applicable to industry sectors (e.g., energy, mobile telecommunication, health, or education) or to subject areas (licensing, labor, finance, or land), an overview is given of how South Africa compares to other countries in respect of its institutional quality. As a next step, the structure of South Africa's tax system vis-à-vis other countries is analysed. It is argued that we can infer the quality of a country's institutions from the structure of the tax system and the degree of accountability of political and/or public representatives to citizens.

2.2. Institutional Performance in South Africa in Comparison

For the last ten years, South Africa's economic system has not performed well when compared to other countries in the same income group of upper-middle-income countries, often labelled as emerging markets. In fact, South Africa has failed to emerge. Productivity increases have been low or even negative if population growth is taken into account. Consequently, no progress has been made in the creation of more and better paying employment. Instead, public sector wage bills have ballooned, the economy is hamstrung by dysfunctional energy, postal, and railway SOEs, and bailouts are the norm. Save for a few, South Africa's municipalities are factually bankrupt and service delivery protests have been sharply increasing lately.

All of this consumes economic resources that are not available for value-generative purposes, thereby foregoing higher living standards and employment opportunities. Corruption and tenderpreneurship have permeated all public sectors, causing high sociopolitical costs beyond the economic damage in the form of widespread political discontent and loss of confidence in constitutional values—the foundation on which a hopeful and optimistic South Africa took off in 1994.

In their widely read monograph Why Nations Fail – The Origins of Power, Prosperity, and Poverty, Acemoglu and Huntington argue that "Nations fail when they have extractive economic institutions, supported by extractive political institutions that impede and even block economic growth."[9] Combine rotten political regimes, self-serving public institutions with frail, centralised states (in the form of disempowered municipalities dependent on grants from the central government) and you have something close to a prescription for poverty, conflict, and public service failure. South Africa ticks these boxes. Acemoglu and Huntington discuss development of South Africa's neighbor Botswana as a positive example that succeeded at building institutions that could produce prosperity.

If one looks at the fundamental rights, South Africa does relatively well. In the WJP Rule of Law Index 2020, South Africa achieves a good result in most of the categories ranking on 45th out of 128 countries, well ahead of Brazil (67th), China (88th) and India (69th).[10] The index' eight core categories, with South Africa's rank in brackets, are constraints on government powers (33), absence of corruption (58), open government (30), fundamental rights (41), order and security (110), regulatory enforcement (45), civil justice (41), and criminal justice (44). These good rankings are mostly a result of the soundness of South Africa's constitution, the quality of its judiciary, and a strong civil society.

The picture worsens when considering indicators that are more reflective of the state's ability to create an institutional environment that supports people in their quest to achieve prosperity. In 2008, in World Bank's influential Ease of Doing Business (EoDB) report South Africa stood at 32nd on the list.[11] By 2020, South Africa has dropped to the 84th rank. The index rates countries on how well the regulatory environment promotes business operations and protects property rights. The sharp decline is in line with the general feeling among the South African public that bureaucracy has worsened and that service delivery has collapsed in many municipalities. In the 2020 Governance Efficiency Ranking, South Africa ranks 150th (Zimbabwe is 148th). South Africa's BRICS peers, China, Russia, India, and Brazil rank at 38th, 55th, 79th, and 137th respectively.[12] A visit of one of Gauteng's dysfunctional, chaotic home affairs branches is enough to back up this statistical data with facts.

2.3. Taxation and Accountability in South Africa vs. Other Countries

The discrepancy between the indices is only surprising on first sight because sound general constitutional rights go well together with inefficient government and overregulation, for which South Africa is a paramount example. A fundamental problem arises when large portions of individually earned income are siphoned off by the state. This does not only occur through taxes. In South Africa, it is a few million high-income earners that basically carry the entire state. Income is also distributed away from individuals through monopolising sectors in the form of SOEs and the attached increasing public wage bills.[13] In South Africa, public compensation spending went up from R154 billion in 2006/7 to R518 billion in 2018/19. Adjusting for inflation, the bill increased by 78% while the headcount "only" went up by 22%. This means that government awarded itself generous annual income increases at the expense of the general public.

Tax revenue as a percentage of GDP in expectionally high. According to World Bank data, South Africa has the 7th highest tax burden worldwide. The table below illustrates that South Africa ignores the economic realities. Only countries with high productivity and equally high median incomes, such as Denmark or the members of the European Union can afford to redistribute away substantial resources from taxpayers to public services.

Table 1: Tax Burden in Selected Countries

Tax revenue (% of GDP)

	2010	2011	2012	2013	2014	2015	2016	2017	2018
Denmark	32.74	32.75	33.45	33.82	36.50	33.92	33.30	33.40	32.17
New Zealand	26.13	25.63	26.90	26.72	26.91	27.51	27.37	27.48	28.00
South Africa	**25.04**	**25.18**	**25.59**	**26.04**	**26.54**	**27.34**	**27.11**	**26.23**	**26.51**
United Kingdom	25.36	25.84	25.07	25.07	24.89	25.04	25.41	25.62	25.59
Morocco	22.82	23.30	23.90	22.35	22.03	21.21	21.46	21.76	21.87
European Union	19.36	19.47	19.92	20.20	20.26	20.15	20.14	19.67	19.78
High income	14.68	15.07	15.28	15.66	15.81	15.90	15.84	16.19	15.66
Brazil	14.26	14.86	14.32	14.13	13.50	13.63	13.69	13.62	14.18
India	10.39	10.18	10.84	11.00	9.98	10.57	11.15	11.38	11.97
Upper middle income	**12.45**	**12.80**	**12.61**	**12.47**	**12.19**	**11.95**	**11.67**	**11.75**	**11.76**
Russian Federation	13.05	13.95	13.75	12.93	13.26	10.64	9.18	10.29	11.38
China	10.21	10.31	10.26	9.91	9.68	9.38	9.12	9.42	9.05

Source: World Bank Data

Self-evidently, the tax revenue ratio does not say anything about the quality of the services that the state produces with taxpayer money. In the case of South Africa, however, it is fair to say that in some of the key areas of public spending—education (20%), social protection (14%), general public services (14%, excl. debt payments) and health (12%)—the outcomes are all but satisfactory.

It is important to have a separate look at infrastructure, such as energy, water, and transport. Since Eskom, PRASA and the entities involved in water production and distribution are separate legal entities, only the cost of bailouts are included in the budget. Over and above taxes and higher indebtedness levels, people are burdened by service delivery collapses (PRASA), absurdly lengthy strikes (SAPO), widespread water supply failures (municipal level), lack of maintenance (sewerage), and enormous electricity tariff increases (Eskom). Also, the cost of regulatory spectrum withholding, and the failed digital migration (freeing up analogue broadcasting spectrum), have imposed costs of hundreds of billions of rands on South Africa's citizens over the last fifteen years.[15]

For governments and public administrations (incl. state-owned enterprises) to get away with high tax burdens and the associaed high public spending, they must do a good job in order to justify their mandate. It would be unthinkable for a French or German citizen to accept the Eskom travesty of double-digit tariff increases and continuous bailouts while at the same time having to endure regular load-shedding. In order to understand the ingredients and mechanisms that are characeristic of healthy civil societies as opposed to failing ones, we need to look at where people live and get services: the municipality, the village, the suburb. People consume the largest part of key services such as power, water, and ICT connectivity where they live. For this reason, the scope and quality of infrastructure service provision must be based on local needs and people's incomes, not on development plans whose underlying universal service ideas sound good but miss economic realities badly.

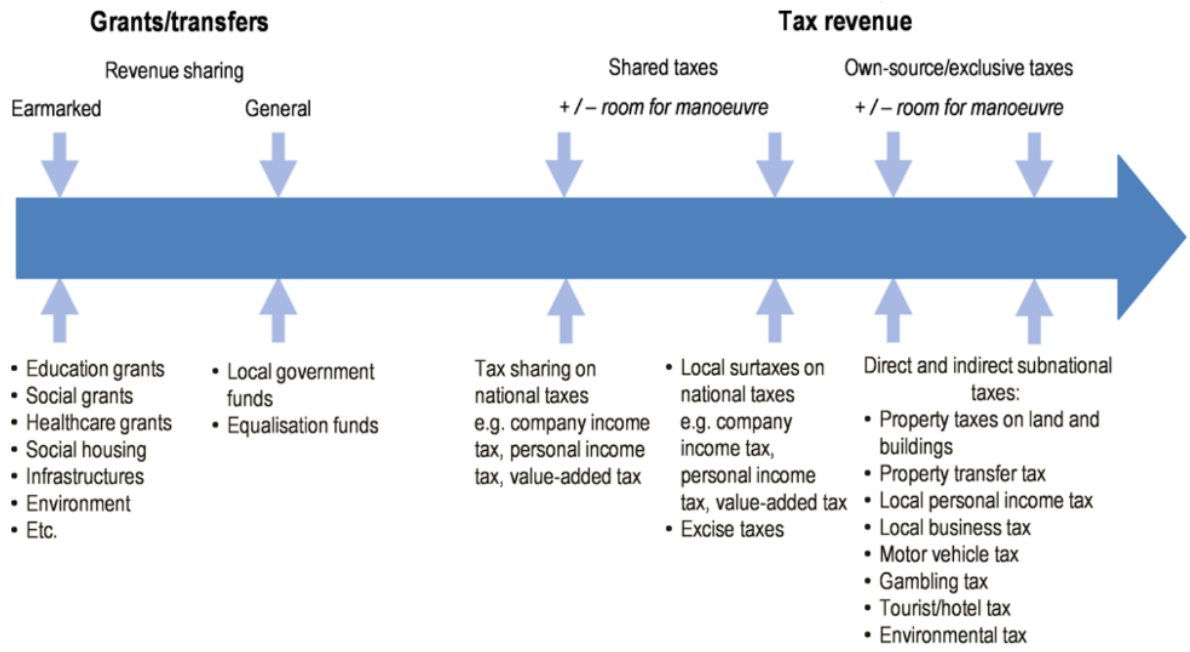
The idea to grant basic services to everybody across a state's diverse geographies and demographies is well-justifiable on ethical grounds. Alas, measures to turn such ideas into the delivery of financially viable services can only fruition to the extent that people's productivity and wealth are taken into account. Until the early 20th century, municipalities were autonomous financial entities that raised 90% of national taxes. More importantly, the municipal budget was almost entirely based on local taxes. This meant that local governments could only provide services that were underpinned by local tax income. The idea that central governments and SOEs provide universal services was born just before the Second World War. Before that time, the flow went from the bottom to the top. Local governments distributed income to central governments, for instance for military spending and administrational services.

The natural idea that political representation, and with this taxation and public spending, should always go to the lowest political unit is known in the literature as the subsidiarity principle. Subsidiarity refers to the primacy of local autonomy, as defined by the Oxford English Dictionary as "the principle that a central authority should have a

subsidiary function, performing only those tasks which cannot be performed at a more local level." The absolutely crucial point of the subsidiarity principle is that it is not linked to any specific goal of society but to the principles governing its organisation. And typically, people on the ground know best what they want, what they can afford, and how to realise their ambitions taking into account their productive capabilities and resource endowments.

The more economic decisions about the use of resources are shifted to the central levels of government, the greater the risk that public service delivery will become disconnected from local needs, which are always closely tied to people's income and productivity. The problem is more pronounced the higher the proportion of taxes levied at the central government level as opposed to local taxes, and the higher the proportion of expenditure that passes through the hands of central government and SOEs. The below graph illustrates the degree of tax autonomy:

Figure 1: The Continuum of Subnational Tax Autonomy



Source: OECD (2018)[16]

Total fiscal autonomy refers to a fiscal structure in which 100% of subnational government (SNG) revenue is raised on a local level. In contrast, total fiscal dependency is given when 100% of SNG revenue is levied at the central government level (on the left), which are then redistributed to SNGs in the form of central government grants for schooling, health, infrastructure, and so on. What the latter scenario does is to entirely destroy local financial autonomy. All socialist forms of government rely heavily on the centralisation of taxation and economic resource allocation as a very effective means of maintaining political power. The lack of local financial autonomy is the main reason for the systemic (economic) non-accountability of local government institutions. Since most municipalities are totally dependent on central government grants, a culture of accountability cannot develop.

The citizen who goes to the town hall and complains about the lack of infrastructure services is likely to be told that the municipality has not received enough subsidies from central government. The official can absolve himself from being responsible. In any case, since the civil servant is employed in the public service, he is not economically accountable. This creates the perverse situation that people may pay high taxes but receive no services in return because the central government's decision about how to allocate these taxes is decoupled from what people contribute. As a consequence, people are effectively taxed twice in many instances: they pay taxes for insufficient or costly services, e.g., security and electricity, and they pay market prices to avoid public offerings, e.g., by hiring ADT and installing roof-top solar panels.

Of course, civil servants at the municipal level face pressure, not only from citizens who expect a certain minimum service, but also from higher levels of government who expect them to find—often short-term and nonviable—solutions. One way to achieve this is to procure bulk services from SOEs, resell them locally at a margin with which municipalities subsidise other services. The mark-up on wholesale electricity is perhaps the most important revenue source of municipalities. Over the last ten years, the gap between rapidly rising municipal wage bills and wasteful expenditure, on the one side, and low growth of overall productivity and taxes, on the other, began to widen to today's unsustainable extent. As a quick fix, many local governments stopped paying SOEs, the negative economic consequences of which then reveberate through the economic system in the form of national tariff increases, bailouts, service failure, and increasing central government debt for which everybody pays or stands in.

The more central government policies ignore the causal economic link between local economic strength (which determines the taxable income base) and local public service delivery (represented by the quality and price of services) rendered to taxpaying citizens, the higher the likelihood of misalignment of resources and bad governance. In contrast, a financially autonomous municipality comes with two benefits. First, local governments are directly accountable to their citizens. They cannot point to central governments for not having received sufficient grant money to undertake the maintenance of water pipes or the sewer system. Second, the possibility of municipal bankruptcy protects the wealth of citizens in other municipalities from being forcibly impaired through central government bailouts.

The divergence between local tax revenues and local government expenditure is the clear symptom of an ailing economic system. It is in the municipalities where citizens experience first-hand governance failures and nonviable economic plans. Only recently have political commentators and economists turned their attention to municipalities in search of reasons for South Africa's decline. Yet, they have not yet recognised that the nature of the problem is systemic. Structural non-accountability cannot be healed by introducing better plans, better governance, better education, better IT-systems, etcetera. The financially non-autonomous nature of South Africa's municipalities is structural.

The below table shows the degree of financial autonomy of SNGs, which comprise all federal/provincial and municipal government levels. The left column depicts how much of a country's collected taxes is allocated to SNG levels whereas the middle column shows how much of the revenue available to sub-national entities—either federal/provincial units or municipalities—is raised on the respective sub-national government level. The left column illustrates the SNG units' dependency on grants and subsidies which they receive from the central government.

Figure 2: Degree of Municipal Financial Autonomy / Dependency

	Total tax revenue allocated to SNG (% of total government revenue)	Tax revenue raised on SNG level (% of total government tax revenue)	Grants & subsidies (% of total SNG tax revenue)
China	71.96	49.63	43.94
India	70.83	60.09	20.57
Russia	63.17	49.1	52.27
Switzerland	61.03	53.59	24.65
Brazil	58.61	43.99	39.68
United States	52.57	44.61	23.69
South Africa	50.22	4.84	70.26
United Kingdom	25.16	5.84	67.01
Kenya	20.59	0.9	88.75
Tanzania	18.87	1.6	89.72
Morocco	14.73	4.33	63.91

Source: World Observatory on Subnational Government Finance and Investment (2019)[17]

In the case of South Africa, 50% of total tax revenue goes to municipal entities which speaks to the economic structure and demography within a country. Countries with a low share of total taxes consumed by municipalities tend to be strongly centralised with economic power sitting in the capital or a few economic centres. It is perhaps not surprising that in vast countries such as China or India a high share of total tax revenue goes to SNGs. It is surprising, though, that the share of taxes raised on the Chinese and Indian sub-national levels reach 50 and 60% respectively, which seems to contradict the general perception of these countries' political systems as rather centralist. To the degree that this might be correct, it cannot be inferred from this to the degree of financial fiscal autonomy and accountability of municipal state authorities. In the case of China, it would have been impossible to realise the developmental leaps without a significant degree of financial room to manoeuver on the local level.

Countries where SNGs account for a high degree of total government expenditure but have a very low local tax base, SNGs are politically dependent on central government and thus lack financial autonomy. South Africa's municipalities only raise 4.8% of their revenues through local taxes, which means that basically all expenditures are allocated to SNG by central government. While heavy financial dependency on central government contradicts the principle of subsidiarity and tilts the balance of power heavily towards the nationally governing administration, it is even more concerning when revenue receipts are paid out mainly in the form of grants and subsidies. Receiving 70% as grants and subsidies, as it the case for South Africa's municipalities, turns local administrations into political supplicants that can be easily disciplined by ruling governments, which does not further the health of democratic systems. Moreover, meeting municipal budget requirements through centrally managed grant allocation schemes are determined by political critera rather than by economic scarcity and performance.

It is here where the invocations of more local autonomy, better governance, and accountability clashes against the wall of human realities. One must ask the question on which basis a municipal employee should be practically accountable to citizens when 95% of all revenues come from central government. Again, we do not need to imply bad intentions on the part of public servants and political representatives. What is implied in countries such as South Africa, however, is systemic non-accountability as a very result of the fiscal structure. What distinguishes sound civil societies from failing ones is a minimum degree of local fiscal autonomy. To repeat, where the economic link between the income of local people and the consumption of public services is severed, there cannot be economic accountability.

In his lucid historical account of the electricity market in the United States, Craig Roach (2017, 148–49) describes the phase when big, centralised states began to take over the planning of infrastructure through megaprojects as the Age of Big. And he is well aware of the danger of central planning and its inevitable standardisation:

> "America is a big, diverse nation, and diversity is a strength. The future is uncertain and different states have different views on how to mitigate risk. Much like a diversified portfolio of stocks, a diverse set of state policies assure America as a whole that someone will try all the options and that, out of this variety and innovation, the best options will emerge. Diversity also allows actions to be tailored to local needs and opportunities. There are concern that federalization may undermine the strengths of diversity."[18]

This is a lesson the South African government has yet to learn. In the case of mobile telecommunciation spectrum, a study conducted by the Free Market Foundation (FMF 2021) argues that the government's ideology of centralised power leading to top-down oriented policy frameworks is at the core of South Africa's demise.

It is not the contention of this study that the government's policy-making is devoid of good intent and the wish to improve people's prosperity. It is also not argued that corruption is a problem endemic to South Africa's government. Where there is government, there is corruption.

The argument, instead, is that government has no trust in people's abilities of knowing best how to employ their means as they deem fit. The policy stance of the ANC is a remnant of the ideas that underpinned the socialist and communist systems attached to the Soviet Union until the point in time when the Berlin Wall revealed the economic

(and human) destructiveness of such regimes. Socialist political ideology is always characterised by a strongly centralised political institutions that tends to patronise people paired with a disgust of entrepreneurship and private property.

While in countries such a China, central political control is surely strong, it is often not sufficiently distinguished between political and economic power. China's success is first and foremost a result of having embraced entrepreneurship and decentral economic activity. The electrification of Chinese rural areas, as discussed in Case Study 4.1, trusted in people on the ground to find the best ways to generate their energy based on the resources locally available—mostly hydro. Following Mao's central planning era of economic havoc and human tragedy, chairman Den Xiaoping understood that the desire for prosperity creates the local entrepreneurs who find the business models that best fit the needs and incomes of their communities.[19]

In this section, it has been argued that the institutional quality of governments is closely linked to their fiscal structure. In countries where municipalities dispose of significant own tax resources, local political representatives are more autonomous in their decision-making, implying that they are more accountable to local citizens. If local taxes are virtually non-existent, as is the case in South Africa, a better alignment between local government representatives (or public employees) and citizens can be reached the more SNGs can execute regulatory provisions or define their own set of policies within the bounds of regulatory law legislated by central government.

Generally, for the sake of fostering the economic diversity that comes when local entrepreneurs exploit local market opportunities crucial economic sectors should not be run as national public monopolies. Putting the entire electricity generation and transmission business in the hands of a state-owned company, for example, means excluding sub-national markets from value creation. The prohibition for municipalities to purchase electricity from players other than Eskom creates economic dependency and moral hazard on the part of the national monopolist. Decreeing the same national minimum wage across all provinces means to disregard widely varying income and productivity levels.

3. SMEs and Regulation

3.1. What is an SME?

The OECD defines SMEs as non-subsidiary, independent firms which employ fewer than a given number of employees, most frequently fewer than 250 employees. This is also the threshold applied by the European Union. In 2015, enterprises employing fewer than 250 persons represented 99% of all enterprises in the EU, of which 94% were deemed independent (or autonomous).[20] It is estimated that these SMEs account for 60-70% of employment across all OECD countries.

According to this definition, however, branches of large retailers, petrol stations, or banks do not belong to the group of SMEs. Hence, a Spar outlet in Mthatha, an Absa branch in Ladybrand, or a Caltex gas station in Hopetown are excluded from the group of SMEs due to their legal affiliation with a larger group of SMEs.

In fact, Spar, Absa, and Caltex are nothing more than associations of businesses under one legal umbrella with the difference that counting all employees puts them into the large enterprises group. Such legalistic definitions ignore the economic fact that the DNA of these associations is deeply SME simply because all of such companies' branches are managed as profit centres. In other words, if financials do not render a Spar outlet profitable, it will cease to operate.

3.2. The economic importance of SMEs

According to the Small Business Institute (SBI 2021), an NGO that promotes the economic and business interest of

all employing firms in the country employed fewer than 250 people and 66% are micro businesses with ten or fewer employees. Despite their role as the "engine room" of South Africa's (and all other countries') economy, the SBI feels that SMEs are treated as an economic widget by government and big business. For reasons of political rent-seeking, regulatory actions are indeed often oriented towards big business. Their large compliance departments, however, are also better equipped to fight encroachments on commercial liberty. SMEs do not have the resources to fight for their rights all the way up to the highest constitutional levels.

To the extent that this might be true, there is nothing to gain by policies that end up hamstringing larger enterprises through a flurry of local content obligations or by making business more expensive by prohibiting price differentiation when selling small quantities of goods to SMEs. It is one of the first lessons every commerce student learns that it is less costly to sell bigger quantities. The new price discrimination and buyer power provisions of the Competition Act introduced in 2020 are more likely to stop larger enterprises from selling to SMEs than foregoing margins.[21] It is one of the many examples of policies introduced by the government that might be well-meaning but end up overburdening economic activity in a flurry of regulations and red tape.

While eager to invent new regulatory provisions with dubious benefits, the government has been failing in possibly the key area of economic policy-making: the provision of basic infrastructure services on municipal level. Sharp increases in energy prices, continuous power and water outages, and dysfunctional local governments have much stronger adverse effects on SMEs than large enterprises charging market prices.

Finally, it does not matter for the local economy whether it it the Spar outlet that closes its doors or the independent grocer. First, there is nothing in economic theory to support the claim that SMEs are somehow more important—whatever "important" means—to an economic system than non-SMEs. Second, as discussed above, regulatory policies based on legalistic constructs run the risk of succumbing to untenable economic conclusions and promoting poor policy designs.

3.3. Regulation and SMEs

If regulatory policies and red tape erect costly barriers, both small and large companies will hesitate to expand. This is what happened in South Africa during the last ten years. Real GDP grew an average of 1.37% from 2010 (R2.75 trillion) to 2019 (R3.15 trillion), which turns into zero growth when the population growth rate of 1.36% on average over the same period is taken into account.[22] In comparison, world GDP measured in US$ grew by an average of 2.52%, while world population growth was 1.06% per annum.

On the face of it, one could be led to conclude that at least the situation did not deteriorate. This is wrong and at the same time illustrates the danger of economic thinking in terms of economic aggregates. During the last ten years, the government's fiscal appetite and failing SOEs impaired the wealth of all South Africans through redistributive measures that on balance were destructive of value. The financial state of South Africa's SOEs and municipalities alone are enough to support the claim.

To determine whether an economic system is moving in the right direction, two indicators are revealing.

First, in 2018/19 spending on state employees accounted for a whopping 35.4% of consolidated national expenditure according to according to an article on News24.[23] As a percentage of GDP, government wages were at 14%, compared to a global average of 10%. Public sector employees have received an average salary increase of 8% since 2010, which are even higher than those in the private sector. In an economic state of average zero per capita growth, somebody has to pay for such public splurges. In South Africa, unemployment rose from 24.7% to 28.5% between 2010 and 2019. During the same time, debt-to-GDP rose from 35% to 62% thereby impairing the wealth of South Africa's taxpayer through decreasing credit ratings, depreciating rand value, and fiscal constraints due to high interest payments.

Second, gross fixed capital formation in South Africa has dropped from 21.5% to 17.9% of GDP between 2009 and 2019. In comparison, South Africa's peers in the upper-middle-income group realised an average capital formation of 29.4% (and lower-middle-income group of 25.4%) in 2019. The fact that economic participants invest such a low (and declining) share of their income in long-term undertakings is a direct result of an unusually high tax burden and a generally adverse economic-regulatory environment. Low capital formation is particularly worrying because it is an indicator of mistrust in a country's future. Investments in long-term value generation, which would be necessary to combat the extremely high unemployment in South Africa, especially among the younger population, are simply not materialising.

Whether more SMEs or larger enterprises fail as a result of poor economic conditions and an unfavourable institutional environment, as discussed in chapter 2, does not matter to the bigger picture. Whether three branches from large enterprises close in a small town or three SMEs of the same size, both result in less income flowing through the local economy, which has a direct impact on unemployment. Indirectly, the supply chain also takes a knock, from the delivery of basic materials such as stationary and basic building materials services to income not spent in the tertiary sector of the local economy, e.g., cleaning, security, or janitorial services. In economics, these positive feedback loops are referred to as multiplier effects.

A key difference between individual SMEs and larger companies, the latter of which can be understood as a conglomeration of many individual branches and projects linked together and led by a management centre, is that they usually have a balance sheet that can withstand economic downturns for longer. Management and administrative staff of a larger legal unit are not as economically vulnerable as the owner of a local building business or the local spaza shop, at least not in the short-term. Also, larger enterprises are indeed able to exert more lobbying power and fight their way through the legal system. Yet, all of this consumes resources that could be better spent producing goods and providing services to the community. The fact that such businesses survive or win court cases should not obscure the fact that the loss of income and economic opportunity has the same (or even greater) negative multiplier effects as the closure of SMEs.

3.4. Red tape and bureaucracy: Are SMEs more vulnerable?

For the purposes of this study, red tape—or more generally public bureaucracy—is defined as regulation that does not fulfil its purpose and consequently imposes unnecessary costs on those economic participants that are subject to such failed regulation. Given that all regulation imposes costs on the economy, it is generally understood that the benefits of regulation outweigh the costs of administering it. There is no way of calculating such costs or the balance of costs and benefits. Indicators such as GDP growth (adjusted for population growth), government debt, unemployment rates, and capital accumulation, measured over longer periods of time, at least roughly represent what millions of individual economic agents perceive as an increase in the quality of life and good economic prospects. If that were not the case, such indicators would be of little use. In South Africa, the depressing state of all these indicators seems to correlate positively with the average citizen's general feeling that the situation has deteriorated.

Do SMEs suffer more from red tape and bureaucracy? Again, the answer to this question is not clear cut. If we look at the economic damage caused by red tape, it might well be the case that the investments that fail to materialise because large companies consider the regulatory environment as too onerous cause greater economic damage in terms of lost income and jobs due to the multiplier effect that reverberates through the wider economic system. And the wider economic system is the local employee and the supply chain that provide myriads of nitty-gritty local services to a newly erected production plant or a new office building.

In fact, large companies have an advantage that is particularly helpful in spurring economic growth that is rarely discussed, but should be considered by certain factions within the government and bureaucratic system in South Africa that often display a hostile attitude toward such companies. This advantage is a large company's balance sheet.

Principally, more financial resources go hand in hand with greater economic opportunities. The size of the balance sheet matters. Moreover, the crucial point in the course of this discussion is that SMEs supplying to larger companies greatly benefit from their financial strength and reputation. Having generally much less financial flexibility and slimmer capital endowments, owners of SMEs mitigate entrepreneurial risk by partnering with large enterprises and thus are much more willing to commit the financial resources required to produce goods and services.

It is a feature of today's economic systems based on the division of labour that their various participants are involved in such complex exchange relationships, that attempts to isolate economic effects or even to make statements about the economic importance of individual industries or classes of companies, are doomed to fail from the outset. But what we can possible say is that SMEs are more vulnerable to red tape in various respects. For example, if a large company's commercial team doesn't get approval to move forward with an important project, the team members may be upset, but they still get paid. Their company's financial prospects may not look so rosy, but rarely are large companies knocked out by isolated incidents of onerous regulation and bureaucracy. Moreover, large firms usually have an equally large legal team and the financial resources to challenge regulatory decisions or even litigate against them publicly.

In the mundane world of SMEs, the failure to obtain a specific permit is an existential threat. SMEs do not have dozens of projects. Their make-or-break often hinges on the success of the one project that constitutes their very business. When this business fails or does not come on there is no financial base from which to pay (their own) salary. All of this happens unnoticed by the public that only reads the news of the next mine being shut down, SAA being bailed out the nth time, or MTN litigating against a bad regulatory scheme. SMEs do rarely have the means to engage in lengthy, costly litigation exercises. The owners and their employees have no public voice, not because they have no constitutional rights but because the notion of "having a right" is irrelevant in relation to the reality of their lives. And the reality is that they have to move on and feed their families.

3.5. Deregulation

As part of the Washington Consensus that comprise a loose set of policy principles to allow for more competitive markets and less state intervention, deregulation was the twin term of privatisation. Deregulation meant privatising core industries such as telecommunication, energy, railway, and postal services that have accumulated enormous economic losses over the decades after the Second World War. In low- and middle-income countries, deregulation also meant to abstain from price regulation and open the economic system to foreign investments and imports.

In the context of the regulatory policies treated in this study, the term deregulation is exceeedingly vague. It could refer to very distinct (de)regulatory actions:

(i) to remove specific regulatory rules, for example, the need to obtain a liquor licence;
(ii) to improve the quality of specific regulations, say, by repealing the need for an established whisky seller to obtain a liquor licence for each new venue;
(iii) to lessen the scope of regulatory rules, for example, to exclude beer and wine from the liquor licence regime because beer and wine contain low quantities of alcohol;
(iv) to improve the "quality" of regulation by fine-tuning its scope, e.g., by granting exemptions from the rule in specific cases;
(v) to improve the process of regulatory decision-making, for example, by hiring more civil servants to process liquor licence applications faster, e.g., in less than a year;
(vi) to improve the internal processes of the liquor licencing authority by buying modern IT equipment and training its staff;
(vii) to improve the quality of the regulatory department's governance by conducting audits and setting up projects to introduce best-practice governance mechanisms;

(viii) to outsource the administrational process of issuing licences to a private agency which might have an incentive to process applications in a timely manner and have (functioning) IT equipment;
(ix) to decentralice the practical process of liquor licencing by entrusting municipalities (local governments) to deal with issuing licences;
(x) to decentralice the regulation of liquor altogether by letting local governments come up with the licence regime (or absence thereof) they deem fit.

To make it short, in all but a few exotic cases solution (i) is not going to happen. The regulatory equivalent of a going concern is described in item (iv). The reason is that once a regulatory domain is established, it has enormous staying power. If a specific sectoral regulation is to lose its destructive effect, then it usually happens when the very industry or product to which regulation applies ceases to exist[25] or when an industry changes fundamentally. Yet, in the latter case it happens that regulatory provisions that appeared to have been backed by some reason in fading industries are reapplied to a new industry because it happens to fall under the same sectoral definition. For South Africa's mobile telecommunication providers (MNOs), in fact for all ICT providers, ICASA prescribes the types of equipment, electronic communications facilities, and radio apparatuses for which the user does not have to obtain a permit for use.[26]

In the current world of frantic technological change in all areas of the mobile telecommunication domain it would be far more practical to give users the benefit of the doubt of knowing what equipment to implement and having no ulterior motive to use equipment that harms third parties. Equipment regulation may in fact have had some meaning in a world of public landline monopolies where national regulators were concerned with safeguarding the integrity of the network. Note that until the early 1990s, switching equipment was the telecommunication network's only crucial active component that mattered. The industry's hope that its justified criticism of the too broad scope of equipment regulation would lead to sensible regulation in a changed world was in vain.

To the contrary, in their 2017 Type Approval Exemption Notice, ICASA makes clear that under no circumstances will they consider granting the participants in the industry some autonomy of which equipment to use. The response to the industry's appeal was: (i) "There will not be any upfront exemptions granted on the basis of types of equipment at this stage"; (ii) "ICASA will, in the future, be developing a framework for the exemption of equipment operating under certain circumstances"; and (iii) "ICASA will review its current type approval regulatory framework".[27]

These three answers constitute the holy trinity of regulators' anti-deregulation defence mechanism:

- Deregulation is out of the question! But we're working on a better framework.
- In the meantime, we tell you what we want to do to make regulation better. In their notice, ICASA lists some of such "certain circumstances" in 15 bullets (stressing that this is not a closed list).
- Your regulator will review its own regulation (from time to time).

All the above does is to retain or even increase regulatory complexity. In general, one would assume that the goal of any government regulation is to create an institutional environment conducive to economic growth while keeping harm away from citizens through regulatory intervention in well-justified cases. The path proposed by ICASA in relation to licencing of equipment is an example of pointless bureaucracy. It is regulation for regulation's sake that destroys economic value and thus employment.

In the overwhelming majortiy of cases that concern onerous regulation, red tape, bad governance, and non-accountability to citizens, the appeal for deregulation is followed by the actions listed in items (iv) to (vii). The countless appeals for less regulation and red tape in the various economic domains clash against the wall of "good intentions," mostly in the form of naïve proposals to introduce "best practice". After all, who would argue against precise regulation, appropriately staffed departments, modern IT equipment, more training, regular audits, and the introduction of (this time) best-in-its-class governance mechanisms? The problem with these—on the face of it—meaningful requests is that the private industries to which regulatory measures apply are always operating on a higher quality level. This is not because they have smarter people but because it is simply what private companies

do to remain profitable: using modern technology, employing business processes of their industry peers, and introducing new governance mechanisms.

The conclusion is that it is natural that public administrations lag behind. The lagging-behind in terms of IT, staff, or governance is also not problem because such shortcomings are easily rectifiable in the course of ordinary business when governments understand and do their job. In contrast, in all cases of fundamental regulatory failure, the problem lies in the structure of regulation itself. Such structural failures are always due to the same three causes. First, the regulatory subject has moved on, for instance, a change of technology or new commercial models, so as to render existing regulatory rules inapplicable and thus harmful. Second, because the structure of a specific industry varies widely across a country's economic geography, regulatory measures that might be useful in Gauteng are harmful in Limpopo. Third, and related to the second cause, regulatory decision-makers, and in particular the administrative staff charged with enforcing regulatory rules, live in the abstract world of regulatory la-la-land. In this country, although procedurally they might meet the accountability criteria set by their regulator, practically they are not accountable because they are not economically affected by the outcomes of their decisions.

3.6. Beware of hasty deregulation

It can be counter-productive to abolish regulations even if they should not have been introduced in the first place. The reason is that economic participants factor in such rules in their commercial plans. In some cases, the structure of whole industries is determined by the regulatory framework or specific rules. An extreme case of a regulatory framework is the creation of a public monopoly such as Eskom. While even the staunchest supporter of public monopolies will concede that the current situation is unsustainable, solutions will have to be very carefully devised.

Often the survival of entire industries hinges on individual regulatory measures. Tariffs levied on imported products, say, poultry or textiles, give local producers an undue advantage over their foreign competitors. Tariffs are a subsidy imposed on local consumers. Once introduced, however, (sudden) removal can threaten the survival of entire industries, as their productivity levels and cost structures (in particular wages) are not competitive without subsidies. Removing such protective measures without giving industries the chance to adjust over a defined period of time will destroy employment.

There are some cases in which regulatory measures such as non-tariff obligations, import duties, or even import bans can be deemed fair. For example, if technical equipment and machinery do not meet the safety and quality regulations to which local producers are subject, it would be unfair to allow importers to circumvent such regulations. Similarly, an import tariff may be justified if governments in some countries or custom unions heavily subsidise certain products, such as agricultural products in the European Union, to create a level playing field for local industry.

3.7. Concluding remarks

There is no measure of what good regulation is, like a quantitative number or a quality index. Ultimately, rules serve to protect society from negative externalities caused by the actions of individuals or firms, the costs of which are borne by third parties. Speed limits, for example, laws prohibiting the discharge of chemical waste into rivers, or regulations governing the maximum driving time of truck drivers, are sensible regulations that are passive in nature and protect the health and property rights of the general public.

Very often, however, the scope of regulation amounts to active intervention in economic exchange under a patronising guise. Policies that apparently promote SMEs, for instance through local content obligations, are likely to inflict more harm than they do good, not least due to the fact that the process to fulfill such obligations takes time, is costly to implement, increases the cost base of enterprises, and consumes significant public resources to be paid by taxpayers.

Even if well-intentioned, this is a high price to pay for policies that always run the risk of being implemented for the sake of implementation, thus destroying economic value creation, while the impact on economic equality, if any, is only cosmetic. There is little evidence that the South African government's highly interventionist stance is helping to improve the economic prospects of the average South African.

The following chapter provides an overview of specific cases in South Africa where the existing regulatory framework and the failure to deregulate impose high cost on South Africans in their economic roles as consumer, taxpayer, and entrepreneur.

4. Case Studies

4.1. The electrification of china and South Africa's energy market

An analysis of rural electrification in China from 1979 to 1997 provides an important lesson. Whereas in developing countries the usual approach to achieve rural electrification has been grid extension, a different path was pursued in China when a major reform of the rural power-management system was launched. As a result, the public energy policy was transformed from central planning to a market-oriented framework, giving counties and local authorities more autonomy in investment decisions (Zhaohong and Yanling 2015).[28] In only 30% of the 2,400 rural counties does energy provision come from the grid owned and operated by the state's national power company. In the rest of China, energy provision is based on distributed self-production from local resources rather than large-scale energy companies. In 27% of counties, at least 70% of power provision relies on local generation capacity.

According to Zhaohong and Yanling (2015, 47), the decentralised power companies at the township, county, or village level not only own the distribution business but also run subtransmission systems and generation plants: "The bottom-up approach is recognized as a unique feature and a significant contributor to the overall rural electrification story." This achievement is particularly noteworthy considering that in the 1980s, when the implementation was underway, the large majority of Chinese people lived below the poverty line. The per capita income of China's rural inhabitants was at the same level as those of the poorest low-income countries. According to Lu et al. (2019), the incidence of poverty in rural China dropped from 97.5% in 1978 to 4.5% in 2016, whereas per capita income increased tenfold.[29]

The example of China illustrates that even under a regulatory framework with a nationally operated public (transmission) utility, local entrepreneurship and funding can be harnessed. In the end, plans to achieve economically viable energy solutions are unlikely to succeed if they do not rest on local entrepreneurial activity and are detached from the purchasing power of local populations. The national electrification efforts of governments—with the assistance of national development finance institutions (e.g., Development Bank of Southern Africa and the Industrial Development Corporation), multilateral development banks (e.g., International Finance Corporation and the African Development Bank), and the manifold programmes of development assistance—whose focus is on electrification as such and not on viable commercial models are doomed to fail. The even bigger harm is that all these efforts undermine local initiative and entrepreneurship. In fact, the likelihood is high that current utilities, regulators, and ministries will make the average citizen in these countries worse off. Klein (2021) conducted a study for a group of sixty-six lower-income countries with the result that there is little hope that the current institutional frameworks governing national energy sectors will do anything to improve people's situation.

(i) South Africa's Energy Regulation

Although the Eskom monopoly has long become a millstone around government's neck, both financially and politically, it has defended the energy monopoly tooth and nail. Yet, in the light of Eskom's constant failures to generate sufficient power to support economic growth, government has finally embraced private power producers to feed electricity into

the public transmission grid. The problem with this is that the state has to provide IPPs with a public guarantee as they cannot sell their generated energy to any other company. This creates contingent liabilities for which all South Africans vouch with their wealth. In addition, private-public partnerhip structures are attractive to government administrations to circumvent short-term taxation and debt-raising constraints by shifting liabilities in the future. The accumulation of such liabilities on the public balance sheet impairs the financial rating of the sovereign, the cost of which, again, is borne by all society.

On the generation side, the regulator continues to deny municipalities the right to source power freely. In a way, the Renewable Energy Independent Power Producer Programme (REIPPP), which is widely regarded as a succcessful example of a public-private partnership, continues command-and-control politics by assigning production rights to selected private investors at predetermined prices and quantities for which taxpayers vouch for twenty or more years. Apart from technical failure, there is no entrepreneurial risk borne by these investors. Economically-speaking, the moment wind farms or solar parks begin to generate the planned capacity, they become units of Eskom because the state guarantees the owners and operators of wind and solar production facilities a guaranteed return on equity and shields them from any risk that in private markets emanate from competition and consumer choice. This is not a model that can succeed in the long term. One reason is that exactly the same technologies, in particular solar power in combination with battery storage, will reduce or even obviate the need to consume power generated in remote regions carried over hundreds of kilometers of (public) transmission infrastructure to cities.

The technological solutions and business models of decentralised energy generation and provision via local distribution (or even peer-to-peer models) are developing as we speak. Certainly, energy is as important as telecommunication for human prosperity. In the 1980s still, it would have been preposterous claim to argue in front of regulators that telecommunication transmission networks should be open to competition. Twenty years later, there was hardly a global market where the provision of metropolitan and long-distance fibre networks, in particlar submarine fibre cables, was not subject to competition. Likewise, all mobile markets are competitive and most carriers are in private hands. The internet revolution and explosion of technological progress would have been impossible without private investments in fibre and mobile infrastructure and their intermediation based on competition.

For the purposes of people's prosperity and the creation of employment, the forces of entrepreneurial creativity and consumer choice in the energy sector have to be harnessed the same way. Whatever the argument that supports the split of the current energy market into a competitive generation market, a municipally-owned distribution grid and a transmission grid that continues to be regulated as a public monopoly, this structure is doomed to fail. There cannot be competition in energy markets when private power producers are forced to use public transmission and distribution infrastructure.

As an argument against private energy markets it is often held that such technological progress will allow the wealthy to go off the grid while the incumbent, Eskom, is left to serve the urban poor and rural regions. In the current market structure, this is exactly what will happen. The problem, however, is not that 10% of people move off the grid. The problem is that 90% of the people continue to be served by a monopolist. Why would technological progress and entrepreneurs not create the solutions and commercial models that serve 90% of the market? After all, it was mobile prepaid technology that led to the breakthrough of mobile voice as a mass market service of what was considered to be a luxury product reserved to a wealthy elite until the mid-1990s.

Pederson et al. (2017, 39) makes an important point about the role of new technologies:

> "Rural electrification as a market place for private mini-grid developers and the emergence of private mini-grid firms in Kenya within the past five to six years have been highly reliant and conditioned by the digital transformation that has happened in the country within the past decade. High penetration rates of mobile phones, mobile payment solutions (M-PESA) and high-quality mobile coverage in rural areas, combined

with technological advances in solar PV technologies and cost reductions, are the main drivers behind these new business models."

It is a feature of all services subject to mass-market demand—and electricity certainly is—that it creates the entrepreneurial dynamics required to realize economies of scale. Decentralised generation and local grid technology have the potential to create such economies of scale required to create affordable and reliable services suited to the needs and income levels of lower-income population.

(ii) Policy implications:

They key point made in this section is that technology solutions and new business models are not a phenomenon of large public companies. Such companies might come up with the technological innovations and produce the equipment shipped worldwide. The implementation and/or operation of such technology is largely done on a local basis by small or medium-sized enterprises that understand the local markets they operate in. In the case of installations of solar panels and battery storage solutions, an enormously diversified market of SMEs have already emerged despite the regulatory shackle that limits the generative capacity. Only photovoltaic plants smaller than 1MW supplying to a single customer or owner of the generation facility (or for self-consumption on the same property on which the generation facility is located) are exempted from from the requirement to seek a license from the regulator.[31]

For on-grid PV plants, for instance, those that deliver to power consumers via municipal distribution grid, the same 1MW threshold applies. The economic damage of this threshold cannot be overestimated as it essentially destroys any possibility to achieve scale economies.

In 2019, energy minister Gwede Mantashe gave permission for the regulatory body, the National Energy Regulator of South Africa (Nersa), to licence 500MW of small-scale embedded generation (SSEG) projects, sized between 1MW and 10MW, without the need for ministerial sign-off. This was a first step in the right direction. However, it has been immediately recognised that the 10MW cap is technologically arbitrary and economically pointless because it excludes exactly those projects that could have the potential to alleviate the constraints of the current dysfunctional and costly energy monopoly. Only after a period of embarrassingly irrational attempts to defend the 10MW cap, government finally gave in. In the end, it was President Ramaphosa who in 10 June 2021 announced the increase of the embedded generation threshold from 1MW to 100MW.[32]

But here's the rub: Licence exemptions only apply to production facilities that do not involve local government (provinces and municipalities) or supply to local government. While it was confirmed that any plants developed to power mines, factories and office buildings would also be allowed to wheel electricity through municipal and Eskom transmission and distribution networks and sell surplus electricity to nonrelated buyers, generation projects would still need to obtain a grid-connection permit to be agreed with Eskom and municipal authorities and register with Nersa. According to Ramaphosa, those permits will be much quicker to obtain than licenses.[33]

The obvious threat of a need for obtaining permits is that Eskom and municipalities loyal to government could block projects that compete with Eskom's offerings on the retail and wholesale level in municipal markets. Note that the energy ministry hindered municipalities in the Western Cape to procure power from IPPs despite having the financial and technical capability to do so. This amounts to the national government forcing Western Cape citizens to pay expensive tariffs for unreliable electricity, although they could receive better services.[34] Perhaps in anticipation of such economically harmful and immoral policies, Ramaphosa stated: "Municipalities will have discretion to approve grid-connection applications in their networks, based on an assessment of the impact on their grid."

This statement perhaps reflects the central point of good government policy, namely standing up for "the right thing," which at the same time sets the scene for the policy support that private producers and public entities, in particular municipalities which is where peoplelive and work, can expect before they commit to investment projects to create functional and competitive energy markets. Laws and regulatory codes are smoke and mirrors if there is no concrete

determination on the part of government to open up investment opportunities for private market participants and to enable public entities to procure services from private producers on a competitive basis.

It appears that those factions in the government that are concerned with raising the living standards of people succeeded to convince investors and progressive municipalities that they will help to keep the genie of "bureaucracy and petty power politics"[35] in the bottle. A few weeks after Ramaphosa's announcement, the eThekwini municipality (Durban) became the first in the country to release a request for information for the supply of 400MW of private power generation.[36] Cape Town and Johannesburg have since announced similar plans. It is likely that smaller municipalities will follow suit. After all, a dynamic market of private power generation combined with the establishment of decentralised local grids and innovative energy distribution models hold the key to unleash innovation and free up resources currently wasted to support a dysfunctional Eskom. Municipal consumers and SMEs in particular will benefit from such liberated markets.

4.2. South African Post Office

The good thing about free markets is that entrepreneurs can exploit opportunities driven by their profit motive. A public mandate cannot replace the innovation drive and creativity of entrepreneurship. Quite often, private entrepreneurs step in the light of failing public entities as is the case with the South African Post Office (SAPO). SAPO has notoriously unreliable and bad quality service paired with shabby offices where IT-system downtimes as its norm. Extended periods of strikes and bailouts by default are just two cherries on the top. Since reliable postal services are a key requirement for all economic systems, the failure of the public monopoly meant that private entities step in. Sometimes the sheer need for a service creates such strong entrepreneurial incentives that a sizable private sector emerges, either without adjustments to the prevailing regulatory framework or even in contradiction to the existing regulatory rules. Consumers of such services benefit greatly, but firms are at risk of having their business wiped out by lawmakers using the regulatory framework.

Private couriers in South Africa currently face this threat. The SAPO has announced its intention to head to court to block courier companies from delivering packages weighing 1 kg and less. In terms of the Postal Services Act 124 of 1998, SAPO has the exclusive right to provide delivery services for all letters, postcards, printed matter, small parcels, and other postal articles up to and including 1 kg. This would mean that iPhones and medications had to be delivered by SAPO (which in practice might lead to the result that all parcels delivered through private couriers would exceed 1 kg, for instance by buying a stone in which the iPhone serial number is engraved).

In a ruling in 2019, ICASA found that PostNet had contravened the Postal Services Act by transporting and delivering such packages. However, private courier PostNet approached the Gauteng High Court for interim relief against ICASA's desist order, arguing that that stopping the delivery of packages under 1 kg will cause significant and irreparable harm to their business and to South African consumers. This is one of the many examples where South African consumers need judges to protect them against the harmful consequences of regulation.

In fact, one has to ask why SAPO does not succeed in delivering packages at the same quality and price levels. In many other countries, former postal monopolies coexist on competitive terms with private industry while at the same time fulfilling a univeral service mandate. Mostly, this mandate consists of ensuring a minimum degree of postal services in rural regions. In Germany, for example, courier DHL has been bought by incumbent Deutsche Post AG. However, for such entrepreneurial drive to unfold public industries first need to be privatised. To prevent a widespread cliché, the privatisation of a former public monopoly does not mean that the state immdiately ceases all economic interest or would be unable to implement universal service mandates. Telkom is an example of how a run-down SOE can be transformed into a stable going concern. The South African government and the Public Investment Corporation still hold slighty above 50% of the shares which they could sell in the future.

Irrespective of such considerations and the economic need for reliable postal services, ICASA spokesperson Paseka Maleka made clear in a letter to the editor of Business Day (4 May 2021) that "ICASA's mandate is to implement

what the law requires, and we are doing exactly that." This is reminiscent of what the protagonist Josek K. experiences in Franz Kafka's novel The Trial, who tries in vain to find out why he was sentenced to death while the bureaucratic machinery takes its merciless course, ending with his execution. The role of Franz K. in the SAPO-case is assumed by the South African consumer who plays no role in the legislator's zeal to execute regulatory law for the sake of it. The hope, however, is that South African judges will continue to step into the breach in their role as guardians of ordinary consumers and small businesses.

4.3. Burger King

The Competition Commission has recently prohibited private equity investment fund ECP Africa's proposed acquisition of Burger King South Africa and Grand Foods Meat Plant from Grand Parade Investments (GPI, an empowerment entity listed on the JSE). It stated that the merger would lead to a significant reduction in the shareholding of historically disadvantaged persons (HDPs) in the target firm, from more than 68% to 0%.

"The commission is, therefore, concerned that the proposed merger will have a substantial negative effect on the promotion of greater spread of ownership, in particular to increase the levels of ownership by HDPs in firms in the market as contemplated in the Competition Act. Thus, the proposed merger cannot be justified on substantial public interest grounds."

This decision is ludicrous for various reasons. First, shareholdings are not indicative of value but of legal participation rights. Many of the BEE vehicles created may show high ownership level of HDPs but in most cases their shares have no or negative economic value. In the case at hand, however, the former HDPs have the chance to sell their interest. This leads us to the second reason. The decision is patronising and self-serving. Notwithstanding that GPI's shareholders might have very good ideas about what to do with the proceeds of the sale, the government prefers to lock them up in their status as historically disadvantaged. They cannot get rid of their history, but must remain disadvantaged for the sake of political cosmetics. This is disempowerment.

Third, the decision destroys economic value-creation and employment. The business case that supported the request for the merger's approval included investments of at least R500 million for the establishment of new Burger King stores throughout South Africa and an increase of the number of permanent employees by 1,250 HDPs. This together with a range of other commitments, such as procurements from BBBEE-accredited suppliers and the implementation of a BBBEE ownership share scheme, did not convince the Competition Commission. Business Unity South Africa (Busa) commented that the commission has implicitly favoured ownership criteria over job creation and growth.[37] It appears that the extremely high unemployment numbers and the very low investment levels must reach ever more threatening levels before the South African government will consider leaving BEE-la-la land.[38]

4.4. The case of bankrupt Maluti-a-Phofung Municipality

In the end, consumption and employment are always local. Our life-critical services are consumed physically at a specific location. This holds even for virtual data services. Without a broadband connection, Netflix or Facebook do not work. The two services that are most instrumental to achieving economic prosperity and human dignity are reliable and affordble access to water and electricity. It is sad that the South African government and its local r epresentatives fail their citizens in a particularly gross fashion on delivering both these services. In an article in The Economist (5 June, 2021), the correspondent described his difficulties in finding the right words for the graft in South Africa as follows:

> "At times it can be hard to find the right metaphor for the dysfunction of the South African state. But then, on a recent morning, your correspondent found himself in the middle of a broken sewage works, knee-deep in excrement."

The article chose the Maluti-a-Phofung Municipality which incorporates Kestel, Harrismith, and Qwaqwa. The structure

of failure can be found most of South Africa's other municipalities. Yet, this particular locality boasts the highest debt owing by any municipality in South Africa to Eskom, currently standing at R5,57 billion as of 1 December 2020.[39] On the homepage of the city of Harrismith, the situation is described as follows:

> The FF Plus says that the Maluti-a-Phofung local municipality in the Free State is one of the biggest failures in the province, and serves as proof that the ANC is not capable of governing any municipality sustainably.
>
> The party says the municipal manager, Futhuli Mothamaha, increased the chief financial officer, Jeremiah Baleni-Mazinyo's, as well as his own salary by R440 000 and R 563 000 per year respectively within the first month of service. About 1400 municipal workers' salaries were also increased by 28% during the Covid-19 period whilst the municipality remained largely closed.
>
> The FF Plus says that no municipal accounts for this municipality were delivered between 2017 and 2019, and the enormous loss of income contributed to R 5 300 000 000 in Eskom debt. In addition, about R 167 000 000 is needed to increase the delivery capacity. These power problems have apparently already resulted in foreign investors withdrawing projects worth R 540 000 000.[40]

As one of roughly one fifth of South Africa's 257 municipalities, it was placed under administration.[41] This means that they are financially bankrupt and operationally dysfunctional, which does not come as a surprise given the looting described in the above quotation. According to Auditor-General Kimi Makwetu's local government audit results for the 2018-19 financial year, out of the 257 municipalities in the country, only 20 have been awarded clean audits.[42] Thirteen of the municipalities with clean audits are in the Western Cape. The report found that municipalities have lost a total of R32 billion in irregular expenditure, fraud, and corruption.

As an explanation of the results, Makwetu is quoted as saying that the reason for most of the adverse findings is a lack of controls among some local government role players:

> "If you look at many of the municipalities that we analysed, because they didn't apply proper controls, they run out of cash and to pay for the things they did last year. They wait for the equitable share of this year, when controls are not in place financial health risk accelerates. You get to a point where you are not able to pay for your staff."

In other words, people only do their job when they are properly controlled. Certainly, the control element is an important aspect of functioning principal-agent relationships between tax and rate-payers as service recipients and local governments as providers of such services. The error in the thinking of Makwetu, however, lies in overlooking the fact that control procedures can never replace the one fundamental dimension of all socio- economic relationships: accountability. It is implied in the mandate of every service provider, who acts on behalf of paying service recipients, that two crucial dimensions of accountability are both functional: intrinsic accountability and economic accountability.

The dimension of intrinsic accountability simply means that the agent delivering the service feels pride in doing as best a job as possible so as to justify her compensation. The intrinsic side of accountability might express itself in assuming political responsibility for solving citizens' concerns, using tax proceeds wisely, and keeping municipal finances afloat. Work ethos is an important part of the much-quoted Prussian civil servant.

In private business, however, people are also economically accountable. The owner of a business has to bear the consequences of losses. While employees are not directly economically accountable for the losses of his employer, her income (and possibly bonus) and career trajectory is dependent on good performance and reputation.

In other words, institutional structures where intrinsic and economic accountability are fundamentally decoupled are poised to fail. The fact that there is no economic accountability is the reason for the grand and widespread failure of South African municipalities. On the particular case of Maluti-a-Phofung, a regional ANC representative responded

to the critique by opposition parties as follows:

> It is the sole responsibility of the ANC to be on the side of the people. Other political parties, as opposition, they will raise their views, but as the ANC, we are not concerned about the views of the opposition. We are concerned about the living conditions of our people. That is where our concern is.

This quote reveals a fundamental ignorance of what democracy means and what the role of opposition is. Furthermore, the ANC is not embarrased at all to assume political responsibility. After all, it's the ANC's sole responsibility to be on the side of the people. This shows the problem with political accountability: ANC representatives may intrinsically feel that they are the only ones who are on the side of South Africans. Yet, the very South Africans have learned by now that such empty hogwash does not transform in functional local governance for the benefit of people.

The conclusion is that functional accountability requires political accountability to be tied to economic accountability. In South Africa, there is no economic accountability for the failures of government. The fiscal losses and bailouts resulting from government failures attribute solely to the taxpayer. In this respect, all public entities are non-economic in nature.

Again, the reader might ask what this has to do with the subject of this study: SMEs. At the beginning of this sub-section, the claim was made that all employment is local. This is a slight exaggeration given the degree of division of labour in modern economies. Yet even the employment of an Amazon or Facebook employee sitting in his home office, say, in South Africa or Brazil, is local to the extent that he can only do his job if water, electricity, and data connectivity are reliable. All services crucial for everyday living such power, water, sewage, refuse, road and transport, but also security, health, and education, are fundamentally local in its consumption profile.

It is this locality that provides a strong reason for involving local entrepreneurs and firms. Typically, they have a better understanding about both the concrete needs of consumers but also about the local economy. Managing infrastructure services as national monopolies always runs the risk of disregarding local specifics.

An even more important point is that local service providers are closer to their own people. If such service providers are directly paid by the consumers of their services and not via municipal constructs that siphon off revenues from the consumers while not paying the service provider, no accountability prevails. This is exactly what happened in many of South Africa's municipalities that have stopped paying Eskom but continue to cash in from consumers.

5. Policy Recommendations for Deregulation

5.1. Understanding the systemic lack of accountability

The problem with current centralised political systems is that their wide-ranging mandates are legislated from the top down to the bottom. In the same way, budgets are allocated from the top, where the tax policies are devised and tax proceeds accumulate on the accounts of government treasury, to the bottom, via grants. Taxes have become a crucial tool for governments around the world to keep local authorities and public administrations politically in line.

The days when municipalities were directly accountable to their residents because taxes were collected locally are long gone. The concept of subsidiarity, which as a core principle guided the clear separation of public functions between municipal and national policy-making, has been degraded to a folkloric element. It is still present, though hidden, in the constitutions of Western countries where local governments on municipal or (city) state level used to assume virtually all public functions until the early 20th century.[43] In those times, local authorities levied taxes in line with economic opportunities and citizens' demand for public goods and services. It was on a local level where the

foundations of today's prosperity levels in Western Europe have been laid in the 17th, 18th and 19th centuries.

In South Africa, it is the alleged participatory rights of provincial and municipal government levels that are constitutional folkore. While in many European countries, a sizable local tax base gives cities and districts some degree of financial autonomy and, consequently, imparts some degree of economic accountability on local government representatives, there is no such thing in South Africa. South African municipalities' near total dependence on government grants turn them into mere recipients of central order. The citizen asking the local ANC councillor whether he should not expect the delivery of core services for his tax deductions will see the local government represenative shrugging his shoulders and pointing his finger in the direction of Pretoria.

5.2. Guiding principles of registration and licencing

So far, the discussion has focused on the lack of financial autonomy of municipalities which translates directly into the absence of economic accountability vis-à-vis local citizens.

Similar problems exist with respect to regulatory law-making and execution. All the described case studies document the systematic curtailment of municipal or provincial rights through national regulation. To the extent that it is useful to have legal frameworks applicable on a national level, this does not mean that practical legislation cannot differ. More importantly, the execution of regulations should fall into the domain of municipal bodies. This would not only promote greater degrees of accountability. It would also induce a much-needed competitive element into South Africa's ossified public sector.

As a matter of principle, municipalities and/or provinces should assume power over all matters of business registration. As a matter of principle, registration should be all that a business needs to start operating. Registration procedures should be independent of the person's status in terms of financial endowment, origin, residential status (e.g., citizens, permanent residents, immigrants) and incur no cost. As citizens need an ID and a proof of residence to procure certain services, most supply-chain partners will require a registration permit before conducting business with another entity. Business registration should be understood as a means of mitigating entrepreneurial risk, not as a political cudgel to lure supposedly illegal firms into formality.

It is important to understand that under the conditions of a purely private exchange regime based on voluntary, bilateral contracts between people and companies, there is simply no one who could grant licences that prohibit others from entering the market. Licences granted by sovereign authorities have to be sharply distinguished from bilateral contracts as a well as from certificates. Certificates play a key role when transaction parties need more than promises and contracts to gain trust in a particular business partner or transaction. Certifications serve as standardised proof of quality, which would be costly to obtain if the same level of information had to be obtained through individual due diligence. Two of the key certificates are educational degrees and statement of financial solvency.

While certifications serve to facilitate business bilaterally, licencing is tantamount to an active market intervention—mostly in the form of prohibitions to enter a market. The renewable energy example described in Case Study 1 represents a case of a public licencing system that creates barriers to market entry. Judged by common sense, there is no reason to impose any generation threshold or to dictate to municipalities how to deal with issues of energy generation, transmission, or consumption. The original licencing sin was, of course, the creation of a state monopoly. Without Eskom there would be no reason to prohibit anybody to source power freely. Likewise, without a postal monopoly there would be no regulator who could withdraw "licences" from market players whose services are desperately needed.

The granting of licences must be strictly limited to cases where the conduct of a particular business requires additional certification justified by public safety and public health and security concerns, e.g., firearms licences. Any trade

licencing, e.g., based on geographical or other criteria, should be repealed due to its inherent protectionist and discriminatory nature. Likewise, any licencing that seeks to regulate the number of businesses along sectoral or geographical lines should be repealed. Any refusal by public authorities to grant licences or registration permits on grounds of "public interest" must be supported by a court order, which can only be granted after both parties – the authority and the licence/permit applicant – have had an opportunity to make representations to a neutral arbiter adhering to time-tested standards of evidence.

In the important area of housing and building-related regulation in South Africa, it is not acceptable that "no home built, be that new or an upgrade, will be approved by any local council authority unless the home building plans have been submitted by a registered professional with the South African Council for the Architectural Profession (SACAP)."[44] Principally, processes certifying the quality of buildings standards are an important pillar of a functioning economy, not least because the financial industry's products such as house bonds and insurances are premised on such quality assurance. Nevertheless, it is more than questionable that the state, represented by municipal councils, tie the granting of building permits to certifications by one statutory body, thus creating a de facto monopoly. Such constrictions create bureaucracy and scope for rent-seeking while limiting diversity and competition of ideas.

The widespread and diverse needs for trustworthy certifications and equally trustworthy processes for their issuance, can be met by public or private entities subject to competition. Except for absolutely sovereign tasks such as the issuance of IDs, birth certificates, or passports, the needs of people should determine concrete certification procedures and direct which entity is best suited to issue that certification. However, if public authorities are unable to provide such documents within an acceptable timeframe or under acceptable conditions (e.g., no 8-hour wait in front of Home Affairs branches), citizens should have the right to obtain these services from alternative providers.[45]

This sub-section concludes with four principles of citizen-oriented, marked-based regulation:

- Principle 1: The domain over all existing registration and licencing procedures shall strictly sit with local municipal councils.
- Principle 2: All trade licences of entities along geographical or industry-specific lines shall be repealed.
- Principle 3: The issuing of all public certificates and the practical execution of certification procedures shall be allowed to be carried out as far as possible by competing private players (subject to compliance with necessary data protection requirements).
- Principle 4: With regard to key documents issued by sovereign authorities, citizens must be granted the right to obtain important documents from alternative providers if the procurement of documents from public authorities exceeds the limits of reasonableness with regard to, e.g., issuing times, collection times, red tape.

5.3. On the misguided idea that informal businesses should be formalised

As to registering and establishing a business, the process in South Africa is quite straightfoward. Via the homepage of Companies and Intellectual Property Commission, a private company can be registered online for R125. At the same time, entrepreneurs have to register with the South African Revenue Service. The matters become more complicated when employing people at a fixed salary, which is one of the key reasons for SMEs to avoid formalisation. And here's the rub: Studies concerned with creating better regulatory conditions for informal enterprises implicitly assume that formalisation is the way to economic success and that informal businesses are in need of support to thrive.

As an example, in the recommendation section of their study "New Perspectives on Informality," the Small Business Institute proposes to "develop a compelling reason for, and simplified path to, formalization" and "educate and train people to be employable and to run business." It is unfortunate that the authors want to develop a reason for informal entrepreneurs to be trained to become employable. In other words, the implication is that the informal entrepreneur is not employable and does not know how to run a business. In hardly any other area does the host of charitable economists and policy advisors—unintentionally, but all the more clearly—show their contemptuous attitude towards their object of study as clearly as they do towards the informal sector.

What the authors of the study miss is that informal businesses have a place in the economy precisely for what they are. The people running informal businesses might not develop new DNA sequencing techniques, but they should be given the benefit of the doubt that they understand their business and provide valuable services to their mostly local customer base.

> "Government (the Department of Small Business Development in particular) should consider opening digital support centres in townships, small towns and rural areas: Instead of delivering costly business support services through traditional, classroom coaching, government could have a huge impact in helping to modernise the informal economy by rolling-out digital support centres in localities such as townships, small towns and rural areas - just by providing the basic infrastructure to crowd in the private sector as well as other key departments engaged in science, technology and innovation."

It's as simple as that: Just let the state create the basic infrastructure and crowd the private sector in. The track-record of government agencies on their own digitisation should be warning enough.

Any additional mandate given to public agencies in fact crowds out the private sector through its tax effect. That said, entrusting the state, of all people, with its demonstrably abysmal entrepreneurial track record, with opening digital support centres to push people into the private sector may be the surest way to keep businesses in informality.

From an economic perspective, it has to be understood that informality simply means that businesses elude state authorities with regard to taxes, rules and regulation. In any case, most informal entrepreneurial activities are far below any tax threshold. And most offerings are such that they naturally elude regulatory frameworks. As an example, in South Africa domestic workers pay no taxes. Their employers may register them with the Unemployment Insurance Fund, which is where formalisation stops. Of course, the state can implement a national minimum wage for domestic labour. But who cares? If the salary is two or three hundred rand below the threshold, workers could take their employers to court. But there are hundreds of people—especially immigrants—who would fill the job immediately.

To avoid any misunderstanding: Providing people with a minimum income to enable them to live in dignity is the right idea. However, great caution must be exercised when transforming good ideas into law. The cost of living varies greatly from region to region and individual needs depend on household size and the number of people contributing to the income. In the household of a large family, for example, even a very low additional income can make or break the education of the children. In other words, a minimum wage, which is noble in principle, might rob a family of a small (under minimum wage) income if it forces a household to let go of its domestic worker. No matter how small that wage might have been, it was what kept the family afloat, and the minimum wage took it away.

With increasing prosperity, economic dynamics change. It is an empirical truth that the participants in rapidly progressing emerging economies naturally move towards formalisation. With better education and rising income levels, people are beginning to invest in their social security, especially unemployment, pension, and health insurance, which are perhaps the services that best represent the notion of formality. These benefits are often provided by the state, usually with the aim of ensuring that all income groups have access to a guaranteed minimum standard of benefit. The better the state succeeds in providing minimum cover for social security, the more willing people are to register for such services.

In conclusion, formalisation is not an end in itself. At the macroeconomic level, increasing formalisation is usually an indicator of economic success and prosperity. From the individual perspective, it can be different. An institutional environment in which bureaucracy is trimmed down to the bare necessities, taxes are moderate, all economic sectors are open to entry and tax money is not wasted on bailing out bankrupt SOEs are minimum conditions of economic progress across all sectors and income groups.

5.4. Positive examples of market liberalisation and deregulation in South Africa

If you do a Google search for "deregulation" or "success of deregulation" for South Africa, two topics come up: the liberalisation of the aviation industry in the 1990s and the emergence of private power generation from the 2010s. Industries that are crucial for economic development, such as road and rail transport, water and wastewater supply, electricity transmission and ports, are still run as public monopolies where possible competition is prohibited.

In contrast, South Africa's agricultural sector is widely market-based and highly diversified. On their country profile of South Africa, the United States agency, the International Trade Administration, judgment about the agricultural sector is: "This is the best prospect industry sector for this country."[46] It contributed around 10% to total export earnings in FY 2019. South Africa is ranked at 11th place on the list of the top 25 agricultural countries in the world (being the 5th largest producer of cereals). This is no coincidence for two reasons. Firstly, South Africa has world-class farmers and agricultural knowledge supported by one of the best global financial industries. Second, the atomistic structure of agricultural production, transport, trade, and sales, provides a natural shield against sectoral policies, overreaching regulatory regimes, and the capture of the market by tenderpreneurship and corruption schemes devised by political cadres.

South Africa has a range of world-class industries, in particular the financial sector and the private health system. Both are eminently competitive and innovative, with medical aid provider Dicovery combining the best of both worlds and Capitec demonstrating that market entry is possible. The fact that these services are still unaffordable for most South Africans is difficult to accept. However, as this is the economic reality, the political system must deal with it constructively instead of pursuing politically inspired quick fixes. It is very unlikely that a ban on private provision and the creation of subsidised public provision in its place will lead to viable solutions. To the extent that the recently contemplated ideas to create a National Health Insurance by prohibiting Low-Cost Benefit Options (LCBO) for low-income consumers is paved with good intentions, it seems to be the sure road to ruin, given the dismal track record of South African SOEs.

Perhaps the best recent example of an innovative service that has revolutionised an entire industry is mobile-based ride-hailing introduced by Uber. The private taxi industry was so bad that people preferred to risk their lives (and that of others) by driving intoxicated instead of calling a taxi. Uber was the service South Africa has been waiting for, which is demonstrated by the fact that it was the first country outside of the United States to have three cities operating. It is also an example of the economic truism that companies attract their own competition through their success. With an estimated market share of 25%, Bolt has become a credible competitor by the end of 2019.[48]

5.5. Better policy-making through SEIAs and RIAs?

After a concise criticism of the "disabling environment" that the government of South Africa has created, it is surprising to read that according to the Small Business Institute "the priority job at hand is to fix the economy" falls to government. The authors have great faith that obligatory socio-economic impact assessments (SEIA) and "transparent and methodological regulatory impact assessments (RIA)" in conjunction with more parliamentary oversight and a reduction of red tape will boost economic growth. The question of which mandates the state should take on at all is not addressed. The idea seems to be that the combination of ex ante SEIAs and ex post RIAs will distill what government mandates works and which not.

This is a dangerous road to travel for two reasons. First, there is no calculation methodology to verify the success or failure of a public undertaking. Public entities are driven by budget criteria that are not indicative of value creation. Public economic entities are not subject to profit and loss goals that refer to equity provisions of flesh-and-blood people. Even if the financial statements of SOEs give the appearance of being a normal company, they are not

because there is nobody with "skin in the game." This means that there is no equity provider who could be accountable for losses of equity (i.e., investment failures). This also means that it is impossible to formulate an equity target because, economically speaking, there is no owner. Note that a public company belongs to the public—that is, is belongs to all and thus to nobody. This is the root of the economic accountability problem inherent to all SOEs. Whatever the outcome at the end of the year, the SOE's staff and the politicians in the ministries bear no personal responsibility for the economic consequences of the failure.

Secondly, even if one believes that such SEIAs and RIAs are helpful in ensuring at least some degree of accountability, they miss the critical point that deciding in which areas private market participants should govern matters and where the public should take on a mandate is primarily a political, not an economic, decision. This means that a democratic discourse must take place in which the representatives of the state are obliged to present credible reasons for their interventionist proposals. Since all economic action is future-oriented and thus uncertain, an assessment of costs and benefits cannot and must not replace the fundamental discussion about the proposed benefits and potential dangers of expanding public mandates.

As an example, in the "National Integrated ICT Policy White Paper" of 28 September 2016, the Department of Communications and Digital Technologies, then Department of Communications, advanced the proposal that mobile telecommunication spectrum "needs to be governed in line with a paradigm shift towards the non-exclusive assignment of highly contested spectrum." This was correctly interpreted by industry to say that MNOs must hand back to the regulator the spectrum they had been assigned and had been using exclusively. Consulting and research firm Africa Analysis stated that government's White Paper essentially amounts to the "nationalisation of spectrum in South Africa" and that implementing the ideas in the White Paper would "lead to loss of confidence in investing in the infrastructure market."

The public outcry and immediate opposition from the operators forced Minister Siyabonga Cwele to publicly revoke the proposal. Just imagine, politicians have seriously entertained the idea of nationalising the core resource of one of South Africa's most successful industries, thus depriving operators of the basis for their business planning. Such a proposal cannot be countered with an impact analysis. What is needed is a policy discussion that makes the public aware of the enormous economic impact of such ideologically inspired, intellectually half-baked ideas.

5.6. Concrete approaches that help municipalities and SMEs

This study argues that the best policy to promote business and employment is to create a conducive local institutional environment and ensure the provision of infrastructure services that are crucial for any business and indeed for daily life. Since life always takes place at the local level, tailor-made solutions are very often developed locally. Since in South Africa's municipalities basic infrastructure services are all provided by public monopolies, local entrepreneurs are prohibited from legally entering the market. Law begins to turn against citizens when they are forced to pay taxes without receiving anything in return. Only with civil courage can a way out be found.

(i) Service delivery protests and tax withholding

There is a simple rule in everyday business: No service, no payment. Many ratepayers' associations have begun to withhold taxes. This is perfectly legitimate avenue to "incentivise" the otherwise unaccountable public council structures and could pave the way for viable long-term solutions.

(ii) Resident association Take-overs

One of such solutions is resident associations taking-over key infrastructure services such as sewage, water networks, or refuse collection from nonperforming government entities. Such take-overs can emerge from residential grassroot initiatives and pave the way to stabilise operations. When in Harrismith grassroots outfit Water Heroes did the city's

job and repaired hundred of pipes and collected rubbish, the city was clean.[50] It is important, however, to turn such spontaneously evolving structures into formal entities that operate professionally. No matter the degree of failure, for local councils such movements constitute a polical embarassment and—possibly more relevant—a threat of their income. Hence, resident undertakings must secure court orders to establish and safeguard the operations of newly evolving entities.

Backed by a High Court ruling in December, the Kgetlengrivier Ratepayers' Association has officially taken over water and sewage provision from the failing Kgetlengrivier Local Municipality in the North West Province. This is a landmark judgment as it gave the association the green light to take over if the municipality fails to supply water sustainably to residents.[51] Not surprisingly, the provincial municipal workers union, Samwu, has protested for fear of duplicate job positions to be paid by the municipality (not understanding that their council position would not be needed anymore if the private operations establishes itself in the long term).

The government, meanwhile, has a decidedly comfortable as well as elementary view of things, as documented by MEC for Local Government Mmoloki Cwaile: "We will never agree that the constitutional mandate of the municipality should be hijacked by the communities."[52] In other words, in the world of politicians, government has the mandate for mandate's sake, not because citizens have the right to receive a service for their taxes. This sentiment is echoed by the Department of Cooperative Governance, which stated that it is not in line with government laws to hand over assets to private entities (even if these people are residents of the municipality). This might indeed be correct based on current law. But law is—and must never be—an end in itself if it is to be on the side of citizens. Indeed, the natural state of order is that private individuals have ownership and control of assets because public entities and their personnel are not and cannot be held economically accountable.

Undeterred by such matters of principle, it is not surprising that a recent court ruling ordered the Ratepayers' Association to hand back all infrastructure under its control.[53] The Department of Cooperative Governance says it has put plans in place to assist the municipality, e.g., by establishing the provincial and district streams committee and by including multiple role-players such as the municipal infrastructure support agency and the department of water and sanitation to succeed with a turnaround. It is to be seen whether committees and plan announcements will be followed by action.

(iii) Cut out failing or needless intermediaries

In respect of Case Study 4.5., the proposal made by Eskom to manage the electricity affairs of the Maluti-a-Phofung Municipality (and possibly others) is meaningful. It would be even more meaningful to assign the billing responsibility for end-consumer services to a third-party provider under the supervision of the energy ministry or the regulator. This would prevent city councils from falling short on their payment obligations to Eskom.

The most meaningful attempt to achieve accountability in the energy (and all other infrastructure) sectors, however, is to break the monopoly and allow private energy companies to operate in all areas of the value chain. This would allow consumers and firms to directly sign up with their preferred service provider. It would also force municipalities—and the central government—to rethink the unviable fiscal structure.

(iv) Re-establish municipalities as entities accountable to their citizens

Two steps are necessary to ensure accountable public action. First, municipalities must be re-established as ordinary legal entities that can go bankrupt. It follows, secondly, that debtors must be able to seize assets of failing entities and assign property rights to players that inject private funds to establish a going concern. This is how it works in everyday life when private entities do business. There is no reason why municipal entities should be exempt from this common-sense rule. Indeed, the timeless principle that law must apply equally to both citizens and to government agitates in favour of dropping the exemption. To the extend that the state fulfills social obligations in the form of concessionary services to poorer sections of the population, it can compensate the provider directly or issue transfers to the recipients.

There is no doubt that the overwhelming majority of current public employees understand their subject matter area and will be eager to work in environments driven by merit and performance. It will be liberating for most of city council's and their entities' staff to be managed according to best-practice principles applied in private business, not least because it will improve people's knowledge and their employability.

(v) Creation of SEZs and IDZs

Finally, the ideas of creating Special Economic Zones (SEZ) and Industrial Development Zones (IDZ) also have the potential to promote investment and job creation for an area, which however will not fly without sound municipal services and infrastructure.[54]

The Western Cape has successfully used SEZs to boost local economies and job creation, something that has eluded the Free State due to the conditions in the Maluti-a-Phofung Local Municipality.[55] Yet, placing too high hopes on such public institutional constructs are unwarranted. In fact, the acknowledgement that the overall fiscal-regulatory structure is not conducive to economic development is implied in the idea of SEZs and IDSs. To the extent that such constructs are makeshift solutions to circumvent the wider problems of the fiscal-regulatory structure they may, if successful, have the power to act as pacesetters for a broader deregulatory movement.

6. The Way Forward: Conclusion of the SME Study

The best way to create a conducive regulatory environment not only for SMEs but for the economy as a whole is to limit government mandates to areas where they fulfil a sovereign function clearly distinct from the private sector. Of course, voters mandate the government to ensure that the low-income population receives a minimum level of services in the areas of education, health, social security, etc. This, however, does not mean that such services must be provided by government agencies or SOEs. In many cases, transfer payments to the beneficiaries are a better solution. As far as the provision of core infrastructure services is concerned, the mobile sector and its surrounding ecosystem has demonstrated the superiority of private entrepreneurship. Since a significant portion of people's income is spent on electricity, water and transport, the best deregulation policy is to let people decide for themselves what they want to buy and from whom.

Through their decision to invite private generators of renewable electricity first to feed into the Eskom grid and now also to generate up to 100MW for self-consumption government did exactly this. The industry shows tremendous momentum already. Many start-ups are popping up as we speak, funded by domestic and international capital providers. When, inevitably, private players start building and procuring their own transmission and distribution networks in the upcoming years, and municipalities will turn to procure power and transmission capacity from any supplier, hundreds of billions of rands of investment will not only relieve South Africans of a dysfunctional utility – it will also relieve the government of a heavy burden and allow it to focus on its core tasks.

Deregulation is rarely about big-bang revolutions. It is about mundane politics oriented towards the average citizen and firm, the overwhelming majority of which are small, that is, they have fewer than twenty employees. Government does its job by limiting its regulatory interventions to concrete cases of market failure, say, river pollution or financial fraud, instead of devising grand policy plans. South Africa has neither the resources to afford Scandinavian welfare systems nor does it have the funds to continuously bail out loss-making SOEs.

The ANC in particular will have to come to terms with the fact that the high hopes it placed in its own ability to create prosperity for all South Africans through active policy-making via SOEs and national development plans have proved unrealistic. It must bury its grand plans and trust that the people are capable of achieving their goals through their own efforts. For ANC leaders this means lowering their sights, which might be close to a political-psychological 180-degree turn. Yet, it is the only way to support the people in realising higher incomes and creating more jobs. A way to start this

process is to grant municipalities and its councils more financial autonomy in order to reintroduce a sense of political and, above all, economic accountability.

More than two and a half millennia ago, Chinese Taoist philosopher Lao Tzu (604 BC - 531 BC) formulated a guiding principle of human action that is particularly relevant in the context of regulatory regimes that encroach on individual freedom and suffocate economic activity:

> "To attain knowledge, add things every day. To attain wisdom, remove things every day."

Generally, wise regulatory policies must not be understood as a task of establishing sophisticated rules that follow the criteria of procedural or economic justice according to the opinion—a term routinely conflated with knowledge—of a few policymakers. Wise policymaking means removing regulatory frameworks and repealing regulatory mandates where their benefit cannot be clearly established. As a matter of principle, the onus of proof for the need to restrict individual liberty rests with politicians and bureaucrats, and no one else.

III. ENDNOTES

[1] A big part of McDonald's success is that it owns the land and buildings at most of its locations.
[2] Please refer to the appendix.
[3] Hodgson, Geoffrey (2006). 'What Are Institutions?' Journal of Economic Issues 40 (1): 1–25. https://doi.org/10.1080/00213624.2006.11506879.
[4] Schumpeter, Joseph A. 1942. Capitalism, Socialism and Democracy. New York: Harper and Brothers.
[5] This study does not deal with the manifold types of market-based, bottom-up regulatory frameworks that emanate as a consequence of bilateral agreements and societal consent. All common law frameworks developed in spontaneous ways. The institutional environment is as much evolving as a "spontaneous order" as are new ways of economizing, which is a point that Nobel Prize laureate FA Hayek (1960; 1988) stressed in various of his works such as "The Constitution of Liberty" and "The Fatal Conceit."
[6] Regulator ICASA owns electromagnetic spectrum, the key resource for providing mobile telecommunication services. The cost imposed on South African consumers through regulatory failure is discussed in the SEIA on South African spectrum politics (2021).
[7] See FMF's (2021) SEIA study on South African spectrum politics.
[8] Based on methodology of the World Bank (data base). South Africa, however, belongs those countries with an extremely unequal distribution of income. While in terms of GDP per capita, South Africa ranks on position 92
[9] Acemoglu, Daron, and James A Robinson. 2012. Why Nations Fail: The Origins of Power, Prosperity, and Poverty. Crown Books.
[10] https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.
[11] Ease of Doing Business (2020) International Bank for Reconstruction and Development/The World Bank.
[12] https://solability.com/the-global-sustainable-competitiveness-index/the-index/governance-capital.
[13] And not to forget taxation by issuance of central bank money, which hits the poor the hardest through inflation, and increasing contingent liabilities by way of government guarantees, which present a mortgage on the future taxpayer base.
[14] https://www.iol.co.za/business-report/economy/sa-wage-bill-at-r630bn-is-higher-than-the-global-norm-as-a-percentage-of-gdp-463ab0b6-97c4-4c6a-84fd-2885a4eef729.
[15] See the SEIA (2021) on South Africa's spectrum politics: https://www.respondnow.biz/v4/uploads/1960_invitation/Spectrum%20SEIA-FMF%20-%20FINAL_clean_update.pdf.
[16] OECD (2019): Multi-level Governance Studies, Making Decentralisation Work
A Handbook for Policy-Makers https://www.oecd-ilibrary.org/sites/53013b71-en/index.html?itemId=/content/component/53013b71-en
[17] Data extracted from: https://www.compareyourcountry.org/subnational-government-finance-and-investment/en/
[18] Roach, Craig R. 2017. Simply Electrifying: The Technology That Transformed the World, from Benjamin Franklin to Elon Musk. Benbella Books.
[19] The so-called Great Leap Forward devised by Chairman Mao to catapult China from an agrarian into the industrial era, was the most destructive economic growth program in human history causing an estimated deaths of an estimated 15 to 30 million people in the late 1950s and early 1960s. See: Li, Wei Tao Yang, Dennis (2005). The Great Leap Forward: Anatomy of a Central Planning Disaster. Journal of Political Economy, Vol. 113, No. 4, pp. 840-877
[20] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Statistics_on_small_and_medium-sized_enterprises.
[21] https://www.wylie.co.za/articles/new-price-discrimination-and-buyer-power-provisions-are-now-law/.
[22] Based on World Bank data: https://data.worldbank.org.
[23] https://www.news24.com/fin24/economy/12-numbers-that-put-the-public-wage-debate-in-context-20200304.
[24] The problem is that some beer is quite alcoholic. The strongest beer in the world available on the market is the Schorschbock 57%, an Eisbock from German brewer Tscheuschner, who secured the world record with it in 2011.
[25] Which, of course, does not make the regulatory rules go away. In respect of the regulations applicable to horse-drawn carriages in the city of Palm Springs, Municipal Code 5.40.290 of year 2003 stipulates in Section 2(A),:

"The horses must be properly cleaned, with no offensive odors or caked dirt or mud." http://www.qcode.us/codes/palmsprings/view.php?topic=5-5_40-5_40_290.

[26] This is known as Type Approval Regulation, governed by Section 35(2) of the South African Electronic Communications Act, 2005.

[27] https://www.mondaq.com/southafrica/telecoms-mobile-cable-communications/588326/icasa-states-its-regulatory-position-on-equipment-type-approval-exemption.

[28] Zhaohong, Bie, and Lin Yanling. 2015. 'An Overview of Rural Electrification in China: History, Technology, and Emerging Trends.' IEEE Electrification Magazine 3 (1): 36–47.

[29] Lu, Yonglong, Yueqing Zhang, Xianghui Cao, Chenchen Wang, Yichao Wang, Meng Zhang, Robert C Ferrier, Alan Jenkins, Jingjing Yuan, and Mark J Bailey. 2019. 'Forty Years of Reform and Opening up: China's Progress toward a Sustainable Path'. Science Advances, 5 (8): eaau9413.

[30] Pedersen, Mathilde Brix, Ivan Nygaard and Walter Wehrmeyer. 2017 Rural electrification through private models: the case of solar-powered mini-grid development in Kenya: Exploring the hybrid nature of private business models and the interplay between new players and existing structures in the Kenyan rural electrification regime. https://core.ac.uk/download/pdf/86557499.pdf.

[31] Schedule 2 of the Electricity Regulation Act as per the amendments effected on 10 November 2017.

[32] https://www.engineeringnews.co.za/article/ramaphosa-moves-to-tackle-growth-sapping-electricity-crisis-by-increasing-licence-exemption-cap-on-distributed-project-to-100-mw-2021-06-10.

[33] https://www.bloomberg.com/news/articles/2021-06-10/south-africa-allows-more-private-power-generation-to-ease-crisis.

[34] Previous attempts by the City of Cape Town to get the right to procure power from IPPs have been blocked by imposing a ministerial determination to do so. In August 2020, while South Africa was hit by rolling blackouts ("loadshedding"), the North Gauteng High Court in Pretoria indefinitely postponed the application by the City of Cape Town. Such disheartening rulings make it all too clear to be wary of naïve hopes that the judiciary will solve problems for which the government itself lacks the moral determination.
https://www.news24.com/fin24/economy/eskom/blow-for-city-of-cape-towns-plans-to-buy-power-as-court-refers-matter-back-to-govt-20200811.

[35] Ibid.

[36] https://www.timeslive.co.za/news/south-africa/2021-07-11-durban-becomes-first-city-in-sa-to-seek-private-power-deal/.

[37] https://www.engineeringnews.co.za/article/busa-expresses-concern-over-commissions-rejection-of-burger-king-sale-2021-06-08/rep_id:4136.

[38] Merriam-Webster (online dictionary) defines la-la land as follows: "a euphoric, dreamlike mental state detached from the harsher realities of life." This is not to invalidate the many meritorious actions taken by the government to reduce historical injustices and disadvantages. In the cases discussed in this study, however, the government is well advised to trust in the competence of people who know best what they are doing, whether in their role as consumer, entrepreneur or shareholder.

[39] https://www.polity.org.za/article/da-welcomes-lifeline-for-bankrupt-maluti-a-phofung-municipality-2021-01-14.

[40] https://harrismith.com/concerns-over-maluti-a-phofung-municipality-collapse/.

[41] https://www.dailymaverick.co.za/opinionista/2020-10-06-the-decline-and-fall-one-in-five-municipalities-in-a-state-of-collapse/.

[42] https://www.sabcnews.com/sabcnews/only-20-out-of-257-municipalities-awarded-clean-audits/.

[43] The notion of subsidiarity is enshrined as a core principle in the German constitution and in the European Treaty of Rome. A definition of the subsidiarity principle formed part of the amendments to the Maastricht Treaty in 1992 and is laid out in Article 3b. The treaty states that "decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity."

[44] https://www.privateproperty.co.za/advice/property/articles/the-definitive-guide-to-house-plan-approval-permissions/7166

[45] To the extent that policymakers try to dispel such requests by emphasising national security concerns, the public interest and similarly opaque reasons, it is important to stress that the only raison d'être of public offices is to serve their citizens. If they do not serve their citizens, their raison d'être ceases to exist instantaneously. The "outsourcing" of identity card applications and their collection to commercial banks is a good example of how the state can streamline procedures while retaining sovereign control, e.g. through central database access. It would be highly advisable to extend the use of these more efficient and better-equipped offices to foreign citizens applying for an ID in order to spare them all-day (sometimes futile) waits in front of the dilapidated buildings of Home Affairs.

[46] https://www.trade.gov/knowledge-product/south-africa-agricultural-sector.

[47] http://news.agropages.com/News/NewsDetail---35595.htm.

[48] https://www.reuters.com/article/bolt-safrica-idUSL8N28E4AU.

[49] However legitimate this claim is considered to be on the basis of common sense (or natural law, for that matter), it is not legal in the sense of codified constitutional law. The state is the only "business" entity that can take money from citizens, in the form of rates and taxes, without giving anything in return—and mostly without breaking the law. If judges rule in individual cases that public actions have been unconstitutional, it has no economic consequences for individual public representatives. This is the definition of systemic unaccountability.

[50] The Economist, June 5th, 2021.

[51] https://www.sabcnews.com/sabcnews/kgetlengrivier-residents-group-takes-over-water-sewage-provision/.

[52] https://www.sabcnews.com/sabcnews/kgetlengrivier-residents-group-takes-over-water-sewage-provision/.

[53] https://www.sabcnews.com/sabcnews/kgetlengrivier-municipality-take-back-charge-of-sewage-and-water-plants/.

[54] See for an overview on SDZs and IDZs: http://www.thedtic.gov.za/sectors-and-services-2/industrial-development/special-economic-zones/.

[55] https://www.polity.org.za/article/da-welcomes-lifeline-for-bankrupt-maluti-a-phofung-municipality-2021-01-14.