

COMMENT ON THE DRAFT GAUTENG TOWNSHIPS ECONOMY BILL

1. Introduction

We appreciate the opportunity provided to comment on the draft Bill and do so as a collective of concerned organisations supported by legal opinion provided by Professor Marius Pieterse from the School of Law at the University of the Witwatersrand, Johannesburg.

We were initially prompted to respond to the Bill by the clause prohibiting trading in townships by foreign nationals without permanent resident status. In our view there are strong economic and moral reasons to withdraw this clause. In our view it would be deeply regrettable if a provincial government, which has gained a strong reputation for its developmental approaches, were to be known in future as the administration which deprived a vulnerable segment of our population – one disproportionately affected by the Covid-19 crisis – of economic livelihood. The arguments against this prohibition are well rehearsed in the media, and individual members of our collective will submit their own comments, drawing on existing and ongoing research into the nature of township economies. In the comments below, we restrict our argument on this clause mainly to the constitutionality of this restriction.

While we are acutely concerned with the ‘foreign national clause’, we welcome, in principle, legislation dealing with Township Economies, and believe that the Gauteng Provincial Government could provide leadership nationally in this regard. Historical townships have been seriously neglected in terms of economic opportunity since 1994, while the development of new housing estates through the government’s subsidized housing scheme has also, largely, ignored the economic dimension of building sustainable communities. There are also legal barriers to township enterprise and having a Bill which addresses these in a concerted and coordinated way is, arguably, a potentially valuable contribution.

We support the idea of a Townships Economy Act and, in fact, go further in arguing that the initiative, if appropriately conceptualised, should be upscaled to the national level. However, it is our view that the draft Bill in its current form is legally flawed, poorly written, and unworkable in terms of implementation, and so we urge the Gauteng Provincial Government to reframe and rewrite the Bill.

Given our view that the Bill requires comprehensive reconstruction we have not provided detailed comment by clause or section and have not used the template provided for comment. Instead, in the spirit of providing a constructive input, our comments are organised as follows:

- Overall comment on the legality and workability of the Bill

- General comment on each chapter of the Bill
- An outline proposal for reframing the Bill

With our constructive intent, we propose that, instead of a Bill which endeavors to superimpose itself on the existing legal and regulatory landscape, and impose a range of binding obligations on all organs of state at provincial and municipal levels, we require a Bill which will support 1) the creation of inter-governmental platforms and arrangements aimed at creating an enabling regulatory environment and resolving regulatory overlaps and disjunctures and 2) provide platforms that could help generate insight and consensus on constructive and innovative approaches for supporting township enterprise and economies.

2. Overall comment

Our overall comment is framed around four concerns.

First, the prohibition and attendant criminalization of the operation of businesses in townships by foreign nationals is plainly unconstitutional.

While the right to engage in economic activity in Section 22 of the Constitution is limited to South African citizens, and while Section 22 further allows for the legal regulation of certain trade or professions, the case-law of the Constitutional Court and Supreme Court of Appeal (in, for instance, *Affordable Medicines Trust v Minister of Health* (CC 2001) and *Minister of Home Affairs v Watchenuka* (SCA 2004)) clarified that such regulation must be rationally connected to a legitimate government purpose and may not have the effect of unjustifiably infringing on other constitutional rights.

In the specific context of employment or livelihood-generating activities by foreigners (including foreign informal traders), the relevant rights are:

The right to equality (including equality before the law and the right not to be unfairly discriminated against, which has been found to extend to foreign nationals in *Larbi-Odam v MEC for Education, North-West Province* (1998) and *Khosa v Minister of Social Development* (CC- 2004)) and,

The right to dignity which the SCA has explicitly interpreted as including the rights of foreign nationals to seek and obtain legitimate employment (*Minister of Home Affairs v Watchenuka* SCA 2004) and to generate a livelihood through informal trade (*Somali Association of South Africa v Limpopo Department of Economic Affairs* SCA 2015). The *Somali Traders* judgment is especially instructive, since it declared

unconstitutional and set aside an executive attempt at expelling foreign traders from townships surrounding Musina.

As with the licensing scheme, the prohibition on foreign involvement within (but not outside) township areas, read together with the arbitrary and ad hoc determination of “township areas” under clause 6 of the Bill, likely falls foul of the rationality standard and thereby of the constitutional guarantee to equality before the law. The prohibition also conflicts with the rights granted to foreigners (such as permanent residents, immigrants with work permits, refugees and asylum seekers) in terms of prevailing national immigration and refugee legislation.

Secondly, several provisions of the Bill unconstitutionally usurp the executive and administrative authority of municipalities in terms of sections 151(3) and 156(1)-(2) read with Schedules 4B and 5B of the Constitution.

Schedules 4B and 5B of the 1996 Constitution list functional areas which, while falling within the sphere of provincial legislative authority, are subject to municipalities’ executive and administrative authority. There is a strong line of Constitutional Court case-law (notably, *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* (2010) and *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* (2014)) that unequivocally safeguards this sphere of administrative and executive local government autonomy from provincial interference or usurpation.

A cumulative reading of these cases alongside various provisions in chapter 7 of the 1996 Constitution suggests that, while Provincial Governments may legislate on matters pertaining to such functional areas, such legislation may not amount to taking over or micromanaging the administration of the functional areas. Instead, provincial legislation pertaining to the functional areas must be general, focused on establishing norms and standards, and aimed at enabling and supporting municipalities’ authority to exercise their powers. For instance: “Local tourism” and “municipal public transport” are functional areas under municipal executive and administrative control, in terms of Schedule 4B of the Constitution. Clause 8(1) of the Bill, which institutes a licensing requirement for all township businesses in the fields of “transport” and “tourism” (among others) clearly directs the day-to-day administration of local tourism and municipal public transport and is therefore unconstitutional. Indeed, since “trading regulations” are similarly an area of municipal executive/administrative competence under Schedule 4B, the licensing scheme envisaged by clause 8 may be unconstitutional in its entirety.

Similarly, while it is constitutionally permissible to set out norms and standards in legislation and to require municipalities to align their bylaws and practices with such, the Constitution grants municipalities a substantial margin of discretion on how to go about doing this. The manner in which clause 27 of the Draft Bill simply makes all of the obligations imposed by the Bill on “provincial organs of state” binding on municipalities, even as such obligations often implicate functional areas under municipal executive and administrative control, is therefore plainly unconstitutional. In particular, the Bill errs by prescribing, through the various provisions in chapters 4 and 5 read with clause 28, specific provisions that must be contained in municipal bylaws – this is an unconstitutional intrusion on municipal executive and bylaw-making authority.

Overall, the Bill attempts to impose its provisions on the municipal sphere rather than creating an inter-governmental relations mechanism to deal collaboratively with township economies. It is because of this that the Bill is highly vulnerable to constitutional attack.

Thirdly, the Bill may undermine its own objectives

Township economies have evolved as complex ecosystems in which South Africans and foreign nationals are connected within economic networks or value chains. The researcher Vanya Gastrow explains that:

Foreign business activities are deeply embedded in township business sectors. Even the notion of a foreign township business is misleading. The vast majority of foreign-owned businesses in townships involve a mutually beneficial partnership between foreign nationals and South Africans – that of tenant and landlord. As an unintended consequence this Bill could have an overall detrimental effect on township economies.

The licensing scheme proposed by chapter 4 of the Bill undermines the objective of facilitating and promoting township economic growth by creating artificial categories of licensed and unlicensed township economic activity and thereby at best discouraging and at worst prohibiting economic activity by unlicensed establishments in a range of economic sectors. While defining enterprise to include the “informal”, the contents of the Bill could have a serious negative impact in activities which are essential to the well-being, even survival, of large segments of the township population.

By requiring licenses in order to operate a range of businesses in township areas but not outside of township areas, especially without a fixed and internally consistent definition of “township areas” and absent a clearly articulated reason for imposing this requirement, the Bill arguably differentiates arbitrarily between businesses inside and outside of “township areas” and thereby falls foul of the

rationality standard inherent in section 9(1) of the Constitution's guarantee of equality before the law. It also by inadvertently end up prejudicing categories of enterprise within townships.

Fourthly, much of the Bill is incapable of consistent implementation.

In order to be implementable, a legislative instrument must clearly establish its duty-bearers. The myriad obligations detailed in chapter 5 of the Act are all imposed on "every provincial organ of state". In clause 27, the obligations are all extended also to all municipalities in the province. Yet, many of these obligations are very specific in nature (for example, to assist township based enterprises with preparing business plans (clause 13(c)), to provide buildings or premises for township based enterprises (clause 15), and to "organize trade fairs and shows" (clause 18(c))) and patently fall outside of the mandate, focus or budgets of a great of many provincial and municipal organs of state (think, for instance, of provincial departments of health or education). This falls short of basic rationality standards and renders chapter 5 unworkable.

The Bill displays no awareness of the already cluttered legislative and regulatory landscape in relation to various crucial aspects of township economies. Instead it bluntly asserts in clause 5 that its provisions trump all existing instruments and requires in clauses 27 and 28 that all municipal bylaws in Gauteng be aligned with its provisions. This adds to the fragmentation of the legal and regulatory landscape and threatens to render a range of existing municipal instruments unworkable.

3. Comments on the chapters

As indicated, it is our view that the Bill requires a comprehensive reformulation and rewriting and so we are not providing detailed comments by section and clause. We do however provide brief comments below on each chapter, following from the overall comments above.

Intention and Preamble of the Bill

- We note again our support for a Townships Economy Bill that would fulfil the intentions as stated.
- In relation to the Preamble, we refer to our comments above on the constitutionality of the prohibition of trading by foreign nationals. As indicated, the Constitutional Court and Supreme Court have clarified that the limitation of the right to engage in economic activity to South African citizens must be rationally connected to a legitimate government purpose and may not

have the effect of unjustifiably infringing on other constitutional rights. The current structure of the Preamble is therefore legally misleading.

- While the Bill should certainly promote far greater economic activity in townships, it is unrealistic and misleading to imply that all townships will become 'self-sufficient'.
- Throughout the Bill there are clauses with idiomatic, obscure or conversational terms that do not meet the requirement of legal precision. In the Preamble this includes the term 'game-changers', but there are many other examples through the text.
- There is inconsistency in the Bill: the Preamble refers to 'meaningful inclusion of the people of the township' which implies all who live in it, but this all-encompassing sentiment is contradicted by the proposed criminalisation of businesses by foreign nationals elsewhere in the Bill.

Chapter One: Preliminary Provisions

- We note the restriction of the meaning of 'black people' to persons who have, or qualify for, South African citizenship. While this definition is restricted to the context of the Bill, we note the likely offence this will cause among the broad community of black people continent-wide and beyond.
- The term 'informal' is used in the definition of 'enterprise' but is not itself defined.
- A "township" is defined to include an urban living area which has "been developed for historically disadvantaged person after 27 April 1994". However, the reservations of living areas for particular race groups ended with the repeal of the Group Areas Act, 1950, by the Abolition of Racially Based Land Measures Act of 1991. The definition is therefore open to challenge.
- While "township" is defined in this Chapter, the MEC is given the power in section 6 of the Bill to designate townships. Is it intended that the MEC may only designate areas that fall within the definition, and that not all areas within this definition will be designated? We note that since the legal consequence of definition/designation is substantial in terms of prohibitions and access to resources, this ambiguity may have significant material effect and could create significant confusion and, even, conflict.
- We note the exclusionary intent of the definition of "township-based enterprise"
- We note the contradiction in the section on Guiding Principles in the use of the language of inclusion and equality and the clear intention to exclude foreign nationals from trading.

- We note the emphasis on export-related activity and reindustrialisation which, while laudable in terms of national economic growth, bears little relation to the economic activities which support the bulk of township residents.
- In terms of the Object of the Act we note the exclusionary provisions in section 3(b) and the constant use through the section of the term “township-based enterprise” which is defined to exclude foreign nationals.
- We note that the application of the Act refers to every municipality in the province and refer to our general comments on the unconstitutional usurping of the executive and administrative authority of municipalities.
- Section 5 which deals with “non-derogation from, and conflict with, other law” is confusing and ambiguous: Section 5(1) indicated that the Bill does not derogate from any other law but section 5(2) indicates that it will prevail over any other law which deals with township economic development or township enterprises.

Chapter Two: Designation of Township Areas

- We refer to the ambiguities referred to under the comments on Chapter One that are created by having a definition both a definition of townships and provision for the MEC to designate township areas. Is the intention of the Bill to designate some townships and not others and, if so, why, and what would be consequence be in terms of spatial equity?
- Noting that, since it is not possible to designate outside the definition, the MEC could not designate areas with vulnerable enterprise such as informal settlements.
- We wish to note also that although there is a unitary definition of ‘townships’, they are not all the same. We need well contextualised approaches that take account of different problems and potentials.

Chapter Three: Economic Activities Reserved for Citizens of or Persons with Permanent Residency Status

- We refer to our overall comments on the unconstitutionality of provisions which preclude foreign nations without permanent residency from trading.
- We note the confusion in the chapter over which schedule or annexure lists the economic activities from which foreign nationals are excluded (7(2) refers to column 3 of Table A of Schedule 2, while section 7(4) refers to column 6 in the Table of Part A of Schedule 1)

- Notwithstanding the apparent confusion in the writing, we are concerned that the draft Bill was released without populating Table A. We are informed that the intention is for recommendations to be made during the public participation process on which businesses should be reserved for South African citizens or permanent residents. We note that this approach makes commenting on the Bill difficult but, more seriously, it leaves considerable uncertainty over a matter which is critical important to the future of many enterprises and individuals within townships.
- Section 7(3) provides a long list of factors that the MEC must consider when deciding to amend the list of economic activities from which foreign nationals are prohibited. It is hardly clear how these factors relate to a decision over whether foreign nationals should be prohibited from trading in a sector. In any event, the factors are so general and all-encompassing that it is not clear how the MEC will take all in account when making such a decision.
- We note with concern that section 7(5) criminalises trade by foreign nationals in a (still to be prescribed) set of economic activities sector; a heavy-handed, punitive and likely counter-productive approach to existing economic activity.

Chapter Four: Regulation of Township-based Enterprises

- We find it difficult to understand the purpose of this chapter in relation to the overall objectives of the Bill. While the Bill intends to support enterprises, the effect may be to depress township economies by effectively criminalising a large segment of township enterprises. There are likely to be knock-on economic effects: for example, research in Gauteng suggests that people born outside South Africa comprise an important component of backyard dwelling tenants, a sector generating substantial rental income. Research also shows that foreigners operating in the informal economy are twice as likely to employ people as South African informal operators.
- Instead of making it easier for township enterprises to gain legal recognition, it appears to raise the bar. Some compliance requirements appear onerous while punishment for non-compliance seems disproportionate. The Bill appears to leave informal enterprises even more exposed and excluded from support than before. We note that South Africa is a signatory to Recommendation 204 of the International Labour Organisation on the “Transition from the Informal to the Formal Economy” and, with its narrow approach to formalisation, the Bill is apparently in contravention.

- The Bill refers generally to “appropriate licensing” and does not seem to be based on an adequate understanding of the multiple forms of licensing and permission, or of the interface between licensing and land use management. The lack of specificity in the chapter leaves the chapter open to constitutional challenge. For example, many of the existing licensing requirements in functional areas under municipal control in terms of Schedule 4B of the Constitution, including “local tourism”, “municipal public transport” and “trading services”, are municipal competencies and so the licensing scheme in clause 8 may be unconstitutional.
- It is unclear how this Bill can make provisions in relation to licenses which are issued in terms of other pieces of legislation – that is, in respect to the display of licenses and the penalties for not doing so.
- We note also that the need for a licence for a business to operate creates opportunities for some of those who grant or enforce licences to accept bribes, and this may undermine the intention of the Act.

Chapter 5: Promotion and Development of Township-Based Enterprises

- This chapter is the first explicitly developmental chapter in the draft Bill and refers to many positive interventions for the promotion of township economies. The broad categories of intervention in this chapter are arguably appropriate (e.g. financial assistance, development of infrastructure, capacity building) and there are many specific actions referred to which do need to happen.
- The one area where the proposed interventions could be strengthened is in relation to the support for the digital technology in township enterprise. With the COVID pandemic there has been a massive digital migration over a short period of time, with many businesses selling online, supporting homebased work practices, and using digital platforms for meetings. Targeted support for township enterprise to enter this space would be a further positive intervention, in addition to those already elaborated in the Bill.
- Although there are many positive aspects, the chapter is fundamentally flawed in terms of the structures and capabilities for implementation. It does not define its duty bearers, instead requiring all organs of state (defined to include all organs of municipal government) to undertake all activities in the long list provided in the chapter. The chapter imposes impossible burdens on departments and entities which would be required to initiate and fund activities that have nothing to do with their mandates. As an example, the provincial departments of health

and education would be required to set aside buildings for township economic enterprises. By tasking all entities with these responsibilities, the Bill sets up sets up immense challenges in terms of institutional coordination.

- The Bill also creates potential complications for budgeting. Has the Bill been costed both generally and in relation to each organ of state, with consideration also to opportunity costs?

Chapter 6: Gauteng Township Economic Development Fund

- The broader debate here is whether the Bill should specifically set up a new fund for township enterprise or whether it should draw on existing funds for SMME support in South Africa and Gauteng, co-ordinating the flow of funding streams from across the spheres of government into the support of township enterprise. We appreciate the different positions on the matter and suggest that the debate be revisited in the revision of the Bill.
- The exclusion of informal enterprise is likely to exacerbate vulnerability and inequality within the township enterprise sector. While the intention of the Bill may be to formalize enterprise, the realities of the townships (where around 90% of enterprise is still informal- GPG Townships Survey) suggest that informality will be a feature of the township landscape for a long time to come.
- The recent past has highlighted the high risks of impropriety associated with the establishment of state-owned financial institutions. If established, placing the fund directly under the control of the GEP may not be an adequate safeguard. Instead, if such a fund is established, we recommend a Board with wide representation, including from civil society, which is subject to high levels of transparency and scrutiny.

Chapter 7: Municipalities

- As indicated in our general comments, the Bill unconstitutionally usurps the executive and administrative authority of municipalities. As indicated clause 27 simply imposes all the obligations on provincial organs of state onto municipalities even when it is the municipalities which are constitutionally responsible for the function.
- The Bill effectively imposes many new responsibilities and functions on municipalities, many of which are struggling to perform existing functions.
- Clause 28 of the Draft Bill confuses and conflates municipal bylaws with proclamation of standard draft by the Provincial MEC in terms of section 14 of the Municipal Systems Act (2000).

Municipal bylaw-making authority can legitimately be steered by laying down norms and standards in provincial legislation, and then by promulgating standard draft bylaws under the Municipal Systems Act in order to provide municipalities with a template for complying with the norms and standards, on the understanding that municipalities cannot be forced to adopt standard draft bylaws and may choose to exercise their original bylaw-making authority differently in deciding for themselves how to comply with the norms and standards. Clause 28 instead seems to oblige municipalities to pass model/standard draft bylaws (which is unworkable since a standard draft bylaw is a suggested “template” bylaw passed by a provincial MEC, not by a municipality) and further appears to prescribe the content of municipal bylaws by requiring them to give effect to obligations stipulated in chapters 4 and 5, rather than to norms, standards and principles.

- We note that Schedule referred to in clause 28 is missing which makes further comment on this chapter difficult.

4. Opportunities for a reconstructed Townships Economy Bill

As we have indicated, we support the idea of legislation which would assist in linking historical townships, and settlements developed after 1994 through the state subsidy scheme (i.e. ‘RDP housing’ and mixed income BNG developments), more strongly into the mainstream of the urban economy. While it unrealistic to imagine that these areas will become “self-sufficient”, far more is needed to achieve greater spatial and economic integration, and better balance of residential and economic activities, and supportive social and physical infrastructure.

In our view, the work in preparation for the Bill had a promising start. As concluded in the research papers pertaining to legal perspectives on Township Economic Development prepared for the Gauteng Provincial Government and South African Cities Network by the South African Chair on Cities, Law and Environmental Sustainability (CLES) in 2019, and early 2020, the Gauteng Provincial Legislature is well-placed and legislatively empowered to pass legislation aiming to stimulate township economic development by, for instance by:

- Clarifying intergovernmental relations pertaining to various aspects of township economic development;
- Specifying and improving particular provincial legislation and administrative procedures that are known to inhibit township enterprises;

- Creating the institutional forums involving the province and other public entities (national departments, SOEs and municipalities) to work towards improving particular legislation, bylaws and procedures within their purview that are believed to inhibit township enterprises;
- Co-ordinating existing local, provincial and national funding streams in support of township enterprise;
- Clarifying definitional uncertainty over the roles of provincial and municipal governments pertaining to overlapping constitutional competencies relevant to township economic development [The most glaring example of this is the overlap between regulatory authority over “trade” (a provincial legislative competence) and “trading regulations, markets and street trading” (municipal executive competences). There are similar overlaps in relation to, for instance, transport (the provincial competence “public transport” and the municipal competence “municipal public transport”) and tourism (the provincial competence “tourism” and the municipal competence “local tourism”)];
- Reconciling the provincial competence of “urban and rural development” with the municipal competence of “municipal planning”, especially in relation to the built environment hurdles to township economic development identified in the literature and partially addressed by SPLUMA;
- Cutting across the significant fragmentation in instruments regulating various aspects of township economies at national, provincial and especially municipal level;
- Identifying and endeavoring to address hurdles to township economic development in prevailing national and municipal instruments (such as building regulations and zoning bylaws);
- Laying down norms, standards and principles for township economic development.

Very few of these goals are consistently pursued in the current version of the Bill. Instead, the Bill endeavors to superimpose itself on the existing legal and regulatory landscape (clause 5), to impose a range of binding obligations on all organs of state at provincial and municipal levels (chapter 5) and to subvert municipal governance to its requirements (chapter 7). It does this instead of proposing inter-governmental platforms and arrangements aimed at creating an enabling regulatory environment and at resolving regulatory overlaps and disjunctures, and platforms that could help generate insight and consensus on constructive and innovative approaches for supporting township enterprise and township economies.

Finally, we reiterate our support for a Bill that would assist in correcting historical imbalances and distortions. Townships were colonial and apartheid creations and a post-apartheid government should take positive measures to reverse the legacy by facilitating commercial, industrial and other economic activity. While it is highly unlikely that townships will become self-contained local economies (very few parts of an urban agglomeration ever are) a lot more could be done to retain and circulate resources within townships; support people's efforts in 'creating their own jobs' through entrepreneurial activity; and, more generally, improve the value and diversity of these historically low-income neighbourhoods.

While there are other parts of the city that were also damaged by apartheid and require supportive interventions, and while legislation alone cannot reverse the injustices of the past, there is a strong rationale to go ahead with a Townships Economy Act. It is a rationale that is strengthened by the effects of the COVID-19 on vulnerable households and enterprise.

It is our sincere hope that the Gauteng Provincial Governance will take up the opportunity to rewrite the Bill and that the Act, once promulgated, would constitute the first step towards a wider process of institutional and regulatory reform. We hope also that these comments, although critical of the Bill in many respects, will be received in the constructive spirit in which they are offered.

This submission is endorsed by (in alphabetical order):

Ahmed Kathrada Foundation

Centre for Urbanism and Built Environment Studies (CUBES), School of Architecture and Planning, University of the Witwatersrand

Cities Support Programme, National Treasury

Dean, Faculty of Commerce, Law and Management, University of the Witwatersrand

Gauteng City Region Observatory (GCRO)

Lawyers for Human Rights (LHR)

National Organiser, Civic Tech Innovation Network (CTIN)

Socio-Economic Rights Institute of South Africa (SERI)

South African Research Chair in City-Region Economies, University of the Free State

South African Research Chair in Spatial Analysis and City Planning (SA&CP), Wits University

Professor of Urban Governance, School of Governance, Wits University

Professor of Urban and Regional Planning, School of Architecture and Planning, Wits University
Women in Informal Employment: Globalizing and Organizing (WIEGO)

Dated: 03 November 2020