South African Institute of Race Relations NPC

Submission to the Department of Small Business Development

regarding the

Business Licensing Bill of 2025

28 November 2025

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1 Introduction

The Department of Small Business Development ("the Department") has invited interested persons to submit public comments on the Business Licensing Bill of 2025 ("the Bill") by 28 November 2025.

This submission is made by the South African Institute of Race Relations NPC ("IRR"), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 The constitutional need for proper public consultation

The founding values of the Constitution require "openness" and "responsiveness" on the part of the government, while Chapter Ten states that "the public must be encouraged to participate in policy-making".[1] In addition, both houses of Parliament have as an obligation to "facilitate public involvement in the[ir] legislative…processes".[2]

The constitutional need for proper public consultation is thus a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning two decades. These rulings include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*, *Doctors for Life International* v *Speaker of the National Assembly and others*, *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, and *Mogale and others* v *Speaker of the National Assembly and others*.[3]

In August 2025, moreover, in a unanimous ruling handed down in *Corruption Watch (RF) NPC* v *Speaker of the National Assembly and others*, the Constitutional Court reiterated the importance of proper public participation, saying: "The right of members of the public to participate meaningfully in democratic governance is a hallmark of our constitutional democracy. Public involvement in the legislative and other processes of all three spheres of government is not merely a fashionable accessory; it is a thread woven into the fabric of our democracy."[4]

In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: "What matters is that…a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to *have an adequate say*". This passage was quoted with approval in *Doctors for Life*, the *Land Access* case, and the *Mogale* judgment in 2023.[5]

2.1 An accurate socio-economic impact report

[1] Sections 1(d), 195(1)(e), Constitution of the Republic of South Africa, 1996 ("Constitution").
[2] Sections 59(1), 72(1), Constitution.
[3] (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); [2016] ZACC 22; [2023] ZACC 14.
[4] *Corruption Watch (RF) NPC* v *Speaker of the National Assembly and others*, [2025] ZACC 15, para. 1.
[5] Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630, emphasis supplied by the IRR; *Doctors for Life*, at para 145; *Land Access* judgment, at para 59; *Mogale* judgment, at para. 34.

The best way to ensure that the public *know about the issues* and can then *have an adequate say* is to provide them with a comprehensive and objective report on the likely socio-economic impact of a bill. This is also what the government's own policy requires.

According to the government's *Guidelines for the Socio-Economic Impact Assessment System (SEIAS)* – which were developed by the Department of Planning, Monitoring, and Evaluation in May 2015 and took effect in September that year – all new legislation in South Africa is supposed to be subjected to a comprehensive "socio-economic impact assessment" before it is adopted. The aim of the SEIA system is to ensure that "the full costs of regulations and especially the impact on the economy" are fully understood before new rules are introduced.[6]

According to the *Guidelines*, the SEIA system must be applied at various stages in the policy process. Once new legislation has been proposed, "an initial assessment" must be conducted to identify different "options for addressing the problem" and making "a rough evaluation" of their respective costs and benefits. Thereafter, "appropriate consultation" is needed, along with "a continual review of the impact assessment as the proposals evolve".[7]

A "final impact assessment" must then be developed that "provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome". When a bill is published "for public comment and consultation with stakeholders", this final assessment must be attached to it. A particularly important need is to "identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration".[8]

2.2 Compliance with the National Policy Development Framework

The government's *National Policy Development Framework* ("the *Framework*") also puts a great emphasis on "encourag[ing] the public…to participate in policy making".[9] The *Framework* was approved by the Cabinet in December 2020 and is intended to help give effect to the *National Development Plan: Vision 2030*. It seeks to improve policy development by "ensuring meaningful participation" and "inculcating a culture of evidence-based policy making".[10]

Towards this end, the *Framework* lists some of the key requirements for proper public participation. "Consultation with stakeholders should commence as early as possible," it says. All relevant stakeholders should be identified, including "those who will benefit when [existing] problems are addressed" and "those who will bear the cost of implementation of the proposed intervention". In addition, policy-makers must identify and counter all "barriers to active participation" and ensure that "consultation is infused in all aspects of the policy-making cycle".[11]

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[6] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p. 3, May 2015.
[7] *SEIAS Guidelines* p. 7.
[8] *SEIAS Guidelines*, p. 11.
[9] Ibid, p. 19.
[10] National Policy Development Framework, 2020, p. 3.
[11] Ibid, pp. 19 – 20.

According to the *Framework*, policy-makers must consider different policy options and give adequate thought to "which policy solutions would best achieve the public policy objective". They must also "inform and engage stakeholders" on "the nature and magnitude of a policy issue", along with its likely "impacts and risks". All assessments made by policy-makers, moreover, must be "informed by the best available evidence, data, and knowledge".[12]

In addition, policy-makers must be willing to adjust their proposals in the light of the evidence provided. "Policy-makers must not impose their preconceived ideas…and pre-empt the outcome of the policy consultation process. They need to be willing to be persuaded and acknowledge the input of stakeholders with a view to creating a win-win policy outcome." They must also avoid any impression that "the consultation process is staged, managed, cosmetic, token and a mere compliance issue". Instead, they must "strive to produce an outcome based on bargaining, negotiation, and compromise".[13]

Policy-makers, the *Framework* adds, must also provide adequate feedback to those who have submitted comments. Such feedback must include "rational reasons" as to why "submissions and comments…were not consolidated into the final policy document". In addition, policy-makers must "report in the SEIAS (final impact assessment: consultation section) on the results of their early engagement with stakeholders". They must explain "what stakeholders viewed as possible solutions, benefits, and costs and how these influenced the selection of the proposed policy solution".[14]

2.3 Little regard for these obligations

These important instructions to policy-makers have been disregarded in relation to the Bill. Though a SEIA report on the National Business Licensing Policy of 2025 was drawn up and approved by the SEIAS Unit in the Presidency,[15] this SEIA report was not appended to the Bill when it was gazetted for public comment. More seriously still, no SEIA report on the Bill itself has been appended to the Bill so as help the public to "know about the issues" raised by the Bill and then "have an adequate say". The *Framework*'s directions as to what must be included in a SEIA report have also seemingly been ignored.

This is a fundamental defect. The Bill has major ramifications for all businesses and hence for the economy as a whole. Its costs and consequences should have been thoroughly interrogated and fully communicated to all interested persons at the same time as public comment on the Bill was sought. These requirements needed to be met to enable a proper process of public participation in line with the Constitution. Since these requirements have not been met, public participation on the Bill is clearly flawed and inadequate.

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[12] Ibid, p. 20.
[13] Ibid.
[14] Ibid.
[15] Department of Small Business Development, National Business Licensing Policy, Government Gazette no 52914, 27 June 2025, para. v. https://18a66295-3a0f-41fb-a13d-9849edd3b2a3.usrfiles.com/ugd/18a662_af0f55798b1b4aa09a1905b6e2890e50.pdf.

3. The Content of the Bill

According to the National Business Licensing Policy, the Bill is intended to simplify and streamline business licensing. Instead, however, the Bill will usher in a complex and onerous business licensing system that will impose irrational and unnecessary burdens on businesses and further hobble an already struggling economy – to the great detriment of South Africa and all its people.

3.1 All businesses may require licences

The Businesses Act of 1991 ("the 1991 Act") repealed 18 national statutes and a host of provincial ordinances requiring businesses to obtain licences to operate. One of its key aims was to facilitate business operation by *eliminating* almost all licensing requirements. Another vital objective was to remove the discriminatory rules that had previously barred black South Africans from trading in central business districts and various other areas.

The governing principle under the 1991 Act is that *no licence to operate a business* is required, except in the limited circumstances set out in the Act. Hence, the only businesses for which municipal licences are needed, under Schedule 1 of the 1991 statute, are those:

- selling meals or perishable foodstuffs;
- providing certain types of health services (Turkish baths or massages, for example) or entertainment (night clubs, cinemas, theatres and the like); and
- hawking meals or perishable foodstuffs.[16]

In addition, an amendment introduced in 1993 excluded various businesses falling within Schedule 1 from having to obtain a licence. Among the businesses so excluded are those "carried on by a charitable, religious, educational, cultural or agricultural association" and which use any profits to promote their core functions. Also exempted are "social, sports and recreation clubs" which restrict the sale of any foodstuffs to their members and their guests.[17]

By contrast, the general principle underpinning the Bill is that *all "designated" business undertakings are obliged to obtain a licence* unless they are expressly exempted from this requirement. Moreover, the licences required – to be granted by municipalities under a national framework to be drawn up by the minister of small business development ("the minister") – will generally be *in addition* to those already applicable to sectors such as banking, broadcasting, construction, mining and transport operations.[18]

The National Business Licensing Policy ("the Policy") confirms that dual licensing will in principle apply. According to this Policy, the "general business license" (sic) or "license to conduct business" is to be "a license issued by a local government to allow individuals or companies to conduct business within that local government's geographical jurisdiction and [will] encompass varying sizes of businesses, either formal or informal. Separate, sector or industry-specific licenses in respect of regulated industries…(gambling, mining, telecommunications and others), may be issued at either the National or Provincial level or both and fall outside the scope of the [Policy]".[19]

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[16] Schedule 1, Businesses Act of of 1991.

[17] Schedule 2, ibid.

[18] National Business Licensing Policy, op cit, p. 69.

[19] Ibid, p. 52.

Sectors that are already heavily regulated may, however, be granted exemption by the minister under Clause 5 of the Bill (see below). However, that an exemption system is to be established under the Bill – in addition to various other systems dealing with designation, application, refusal, enforcement and the like – will exacerbate the regulatory burden on the state, the private sector and the wider economy.

3.2 Designation of business undertakings

Here, relevant clauses include the following:

3.2.1 Relevant definitions in Clause 1:

"*'business'* means the selling of goods or services to the public which requires a business license in terms of section 6 of the Act in order to conduct business".

This definition provides little clarity. The wording is also confusing, in that Section 6 deals with both the granting *and* the refusal of business licences, and Section 4 deals with the designation of the business undertakings for which licences are required.

3.2.1.1 "*'business undertaking'* means business activity, project, or small enterprise (sic) that a person or organisation initiates and carries out, often with the intention of generating profit or achieving a specific goal".

This definition is inherently vague. Under its wording, a business "undertaking" could mean a business "activity", which seems to be the meaning generally intended by the Bill. However, a business undertaking could also be a "project" or a "small enterprise". This makes for considerable confusion.

3.2.1.2 "*'designated business undertaking'* means a business undertaking that has been designated as a business undertaking requiring a business license as contemplated in section 4".

This wording is difficult to interpret, given the conflicting definitions of "business undertaking" as set out above. Can a "project" be designated in this way? Can a "small enterprise" be so designated? Since designation must be accompanied by proper public consultation, is such consultation to be implemented to determine whether a single project or a single small enterprise qualifies for designation? Consultation in these circumstances would impose considerable bureaucratic costs, which hardly seem merited.

3.2.1.3 The key provisions in Clause 4:

"4 (1) A business must possess a business licence if it carries on a business undertaking that has been designated, in terms of subsection (2), as a business undertaking that requires a business licence."

"4 (2) The Minister may, by notice in the Gazette, designate a business undertaking as requiring a business licence if the business undertaking falls within the scope of the functional areas listed in Schedule 4 to the Constitution."

Here, the Bill indicates that a business undertaking – including one comprising a "project" or a "small enterprise" – may be designated if it falls within "the functional areas listed in Schedule 4".

3.2.3 The functional areas listed in Schedule 4 of the Constitution:

The functional areas listed in Schedule 4 to the Constitution are broad. In addition, all the functional areas listed deal with *governmental* functions over which the Constitution gives concurrent legislative powers to the national government and the country's nine provincial administrations.

Some of these functional areas are clearly governmental in nature, including "the administration of indigenous forests", "language policy" and "population development". Others refer to spheres in which businesses could be engaged. Examples include "agriculture"; "casinos, racing, gambling and wagering"; "education at all levels (excluding tertiary education)"; "the environment"; "health services"; "housing"; "industrial promotion"; "pollution control"; "tourism"; "soil conservation"; "trade"; and "welfare services".[20]

In general, however, using the governmental functions listed in Schedule 4 as the yardstick for which businesses need to be licensed is arbitrary and irrational. Some examples may illustrate the oddities likely to arise. Even where businesses are involved in industrial production, they are unlikely to be engaged in "industrial promotion" within the meaning of Schedule 4. Some businesses might have developed ways to purify contaminated water, but they are unlikely to be engaged in "pollution control". Some might make a living by advising farmers on how best to protect their land against erosion, but they are unlikely to be engaged in "soil conservation" within the meaning of Schedule 4.

The purpose of Schedule 4 is to deal with the division of powers between national and provincial administrations, not set out criteria for regulating business. The Bill nevertheless states that businesses "falling within the scope" of these functional areas may be required to obtain municipal licences. This criterion for licensing is irrational, as further outlined in due course.

In addition, the Bill curtails the powers given to the provinces under Schedule 4 by giving the national minister alone the power to decide on the designation of business undertakings. Provincial administrations are thus barred from any "concurrent" decision-making. This casts doubt on the constitutionality – as well as the rationality – of this core provision in the Bill.

In addition, the Bill provides no parameters to help guide the minister in deciding on the designation of business undertakings under Schedule 4. The untrammelled discretion given to the miniser infringes the doctrine against vagueness of laws and is also unconstitutional. Moreover, this unconstitutionality cannot be cured via the public consultation process required under Clause 4(3) of the Bill.[21]

3.3 Applications for the designation of business undertakings

Under the Bill, designation may be initiated via *an application* lodged by an "industry" or "sector" association or by an "interested person". Alternatively, it may be initiated by the minister following investigation. The relevant provision is Clause 4(4), which states:

"A designation process…may be initiated by— *(a)* an application…by an industry association, sector association or interested person; or *(b)* the Minister after conducting an investigation and on any reasonable and justifiable grounds, on his or her own initiative to further the objects of Act."

[20] Schedule 4, Constiution.

[21] Clause 4(3), Bill.

This wording is confusing. Who qualifies as "an interested person"? The relevant criterion for ministerial initiation – that the minister must have "reasonable and justifiable grounds" – is vague and could be interpreted in different ways. Again, moreover, the Bill does not provide adequate parameters to guide the minister in the exercise of his or her discretion.

3.4 Exemptions from licensing

The grounds on which *the minister may grant an exemption* from a licensing requirement are also vaguely phrased.

3.4.1 Exemption for industries or sectors

According to Clause 5(1) of the Bill:

"The Minister, in consultation with the Ministers responsible for trade, industry and competition, employment and labour, cooperative governance and traditional affairs, home affairs, and provincial and local government may, from time to time, exempt certain industries or sectors from the requirement to obtain a business license, either— *(a)* upon application, in writing, by an industry association, national or provincial government department; or *(b)* after conducting a thorough investigation and on any reasonable and justifiable grounds, out of his or her own initiative.[22]

Again, the Bill fails to provide sufficient parameters to guide the minister in the exercise of his or her discretion. The sub-clause does, however, underscore the complexity of the envisaged bureaucratic process, under which the minister must obtain the agreement of all five of the ministers listed.

The basis on which exemptions may be granted to "certain industries or sectors" is entirely uncertain, for no criteria at all are included here. In addition, the reference to "reasonable and justifiable grounds" is ambiguous. Does it mean that the minister must have "reasonable and justifiable" grounds for conducting an investigation on his or her own initiative? Or that he or she must have such grounds for deciding to grant exemptions? In addition, no parameters are provided to guide the minister is assessing what might be "reasonable and justifiable" in the wide range of circumstances that will no doubt arise.

3.4.2 Exemption for particular businesses

Under Clause 5(3) of the Bill:

"Any business may seek an exemption from the requirement to obtain a business license by submitting, in writing, an application for exemption to the relevant licensing authority, which application must demonstrate that the business meets one or more of the following criteria:

a) The business operates in a sector deemed as a low-risk by the Minister, which may include— (i) a home-based business with minimal customer traffic; (ii) small-scale artisans or craftspeople operating from home; or (iii) freelancers or independent contractors working from home;

(b) the business has a proven track record of compliance with relevant regulations, evidenced by— (i) no history of regulatory violations or penalties; (ii) consistent adherence to health and safety standards; and (iii) positive feedback from regulatory inspections;

[22] Clause 5(1), Bill.

(c) the business contributes significantly to local economic development, which may include—(i) providing employment opportunities in underserved areas; (ii) supporting local supply chains and vendors; or (iii) engaging in community development initiatives;

(d) the business is a non-profit organisation or charity that qualifies as tax-exempt under relevant tax laws;

(e) the business is a start-up or small enterprise that requires temporary relief from licensing requirements to establish itself, provided it meets specific conditions set by the licensing authority; and

(f) any other relevant considerations as determined by the Minister, provided that they are consistent with the objectives of this Act.

The Bill seems to regard "low-risk" businesses as those which are "home-based", even though many other businesses may also be "low-risk". What "low risk" means is also uncertain, as the Bill provides no clarity as to what kind of risk is in issue. Moreover, the "low-risk" test is intrinsically uncertain. Inevitably, different officials will reach different decisions at different times as to which which businesses are sufficiently "low-risk" to merit exemption. Their decisions are thus likely to be inconsistent and arbitrary.

In addition, whether businesses contribute "significantly" to "local economic development" will often depend on factors other than those listed in the Bill. Again, the choice of the criteria to be taken into account is arbitrary, while the wording used is vague. Inevitably officials will interpret these criteria in different ways at different times. This contradicts the doctrine against vagueness of laws and undermines the rule of law.

The same objections apply to the other criteria listed in these sub-clauses. In addition, there is no reason why non-profit organisations – and especially those which have already voluntarily registered under the Non-Profit Organisations Act of 1997 – should need to obtain a business licence. By definition, their objectives are not to trade for profit but rather to provide services to society on a non-profit basis. All non-profit organisations should thus be excluded from the operation of the Bill.

3.5 Application for registration as a business licence holder

This clause – Clause 6 of the Bill – deals with both the granting of business licences and their refusal.

3.5.1 Issuing of business licences

Under Clause 6(1) of the Bill, "a licensing authority may, on application by a person [in "actual and effective control" of a business] issue a business license authorising a business to carry on a designated business undertaking within the licensing authority's area of jurisdiction".

Under clause 6(3), the applicant must apply "in accordance with any applicable national laws" as well as "provincial legislation and municipal by-laws".

Clause 6(3) is ambiguous. Does it mean that the applicant must apply in keeping with any *procedural* requirements for the granting of licences laid down in any national, provincial or municipal laws? Or does it mean that the applicant must also demonstrate compliance with any *substantive r*equirements contained in such laws? Ambiguity of this kind contradicts the

doctrine against vagueness of laws. It could also make for an extraordinarily complex application process.

3.5.2 *Limited grounds for refusing business licences*

Clause 6(4) of the Bill sets out the circumstances in which an application for a business licence may be refused. According to this clause:

"A licensing authority *must issue a business license applied for* in terms of subsection (3), unless—

(a) the business premises does not comply with any applicable prescribed requirements relating to town planning, the safety or health standards or any other requirements applicable to that type of business; or

(b) the licensing authority is not satisfied that the person in actual and effective control of the business is a suitable person to hold a business license, having regard to— (i) any criminal convictions involving fraud, dishonesty, public health, or safety violations; (ii) previous conduct directly related to the management or operation of a business, including prior regulatory breaches or license revocations; or (iii) documented evidence of fraudulent activities, material misrepresentation, or conduct that poses a risk to public health, safety, or the integrity of the business licensing system."

Much of the wording in Clause 6(4)(a) is vague and difficult to apply in a consistent manner. Businesses with premises that comply with town planning requirements and also with health and safety standards could still be denied licences if their premises do not comply with "any other requirements applicable to that type of business". What does this wording mean? And how are businesses to assess whether their premises comply with these requirements or not? How too are officials to ensure consistency in the way they apply such vague criteria? Clearly, this wording used is too uncertain to comply with the rule of law and is unconstitutional.

Similar considerations apply to the wording of Clause 6(4)(b). Take, for example, sub-clause (iiii) under which a licence may be refused if the person in effective control of the business has previously displayed "conduct that poses a risk to…the integrity of the business licensing system". Much the same questions arise. What does this wording mean? How are officials to interpret it, or to ensure consistency in the way they do so? Again, the wording is too vague to comply with the rule of law and is unconstitutional.

3.5.3 Period for which a business licence remains valid

According to Clause 6(7) of the Bill:

"(7) A license issued in terms of subsection (4) is valid for the period stipulated on the license, which period may not exceed five years.

However, under Clause 6(8), "A licensing authority may, on application by a license holder, by way of endorsement on the license…*(b)* extend the period referred to in subsection (7)"."

In general, licences will thus remain valid for a mere five years. Many may also be granted for shorter periods. This will add enormously to the bureaucratic burden of the Bill and the costs of its implementation to both the private sector and the state. It also means that municipalities – most of which are already struggling to fulfil core functions such as the distribution of electricity, the reticulation of water and sanitation, the management of solid waste, and the

maintenance of municipal roads and other vital infrastructure – will have to devote a considerable part of their resources to repeated rounds of business licensing and renewal. There is also a risk that the Bill will generate unfunded mandates for municipalities, unless significant additional tax revenues are allocated to them to finance their expanded licensing obligations.

The Bill is silent as to what is to happen to businesses that have applied for renewal but have not yet received it when their current licences expire. Are then then to cease operating until their licences come through? What is to happen to their employees in these circumstances? Or their customers?

That some businesses will be able to obtain extensions of licences under Clause 6(8) that are denied to others will also make for arbitrary and unreasonable decision-making that is in conflict with the rule of law.

In addition, there is a considerable risk that the Bill will encourage even more corruption than South Africa already suffers. Municipal officials may act as gatekeepers, denying a business licence unless a bribe is paid; or granting a business licence illegally where a bribe has been provided; or slowing down the approval process unless a bribe is forthcoming. Yet corruption levels in South Africa are already high, while the police seem unable to curb existing abuses. They will thus have little capacity to prevent the additional corruption the Bill will facilitate.

3.6 Open-ended and uncertain application requirements

Under Clause 7 of the Bill, the minister has considerable discretion to introduce additional application requirements, over and above those set out in the Bill. Clause 7 provides:

"(1): The Minister must issue regulations through the Government Gazette pertaining to the application requirements which must be in line with all relevant National Legislation, Provincial legislation and Municipal By-Laws."

Under this wording, it is impossible to predict what additional requirements for business licences may be brought in by ministerial regulation. It may also be difficult for the minister to ensure that his or her regulations are "in line" not only with "all relevant national legislation" but also with "all relevant…provincial legislation" and "all relevant municipal by-laws".

What legislation might be "relevant" is also impossible to tell. The meaning of "in line with" is ambiguous too, for it could require a procedural conformity or a substantive equivalence. The reference to "all" legislation in all three spheres of government is inordinately broad as well.

In addition, the underlying purpose may be to empower the minister to demand compliance by many more businesses with onerous black economic empowerment (BEE) requirements, as further outlined in *section 3.7* below. If this is indeed the case, then full upfront disclosure of the likely costs and consequences of expanding BEE in this way is essential for proper public consultation. However, this has not been provided.

3.7 Special rules for small businesses, designated trading areas and foreign nationals

3.7.1 Preferential licensing for small businesses

Clause 15 of the Bill provides:

"(1) A licensing authority may make by-laws to provide for preferential business licensing for small businesses.

(2) Preferential licensing for small businesses may include— *(a)* processes to facilitate easy and quick approval of business licenses for small businesses; *(b)* assistance to the applicant in the application process; *(c)* a shortened and simplified application process; *(d)* a simplified and shortened renewal process; *(e)* lower application fees; and *(f)* the waiver or suspension of fees.

This clause in the Bill applies solely to "small businesses". However, this term is not defined in the Bill. Instead, the Bill defines a "small enterprise" as "having the meaning assigned to it in section 1 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996)".

The Bill indicates that the preferences to be granted to small businesses are solely of a procedural kind. Under clause 15(2), "preferential licensing" for small businesses is thus to include "easy and quick approval" of applications, along with "a shortened and simplified" application or renewal process and "lower application fees".

However, larger businesses are just as important as small ones. Larger enterprises commonly make vital contributions to the economy – and also to all South Africans – through the investments they make, the jobs they provide, the revenues they contribute to the fiscus, the innovations they foster, the employee training they provide and the consumer needs they help fulfil. Contributions of this kind bolster economic growth, increase productivity, expand opportunity, and help raise living standards. In addition, the tax contributions of larger businesses are particularly important in funding government spending. In 2022, for example (as reflected in the most recent tax statistics available), roughly 1,050 large companies – which together make up 0.09% of the 1.2 million companies registered for tax in South Africa – paid 72% of all corporate income tax. They contributed no less than R237 billion of the R328 billion collected that year.[23] If tax receipts from larger businesses decrease under the impact of the Bill, this will make it harder for the government to sustain public sector wages as well as a host of important goods and services. Moreover, the proper role of government is to help all businesses to prosper – not to provide special licensing rules for some enterprises that are denied to others.

In addition, an unspoken aim underpinning the Bill is to use its licensing provisions to expand the implementation of BEE. This aim is reflected in the National Business Licensing Policy, which highlights the importance of "differentiation and redress measures,…such as the Preferential Procurement Policy Framework Act ["the PPPFA"]…and the Broad-Based Black Economic Empowerment Act" ["the BEE Act"].[24] These laws, says the Policy, "establish a comprehensive setting from which to draw, and inform the incorporation of transformation in business licensing policies". The Policy also speaks of the need for the "targeted empowerment" of previously disadvantaged groups through national measures that include "general business licensing".[25]

However, preferential public procurement and other BEE rules have brought little redress to the great majority of black South Africans. Instead, they have enriched a small black elite while hobbling the economy and preventing upward mobility.

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[23] https://www.sars.gov.za/about/sars-tax-and-customs-system/tax-statistics/.

[24] National Business Licensing Policy, p. 9.

[25] Ibid, pp. v, 23.

Preferential procurement under the PPPFA has allowed BEE firms to charge inflated prices for the public goods and services they are contracted to provide. These BEE price "premiums" are sometimes pegged at the levels authorised by this Act: 25% for contracts below R50m and 11.1% for those worth more. In practice, however, BEE premiums often far exceed these limits. Examples include a R40 million price tag for a new public school that should have cost R15m, and a price tag approaching R1m for knee guards available from supermarkets at a cost of R4,000.

The Treasury has declined to acknowledge how much BEE premiums have added to the cost of public procurement since 2000, when the PPPFA came into force. However, the IRR estimates that authorised and illegal BEE premiums are currently costing the fiscus R150bn a year on a total procurement budget of R1.2 trillion. The cumulative cost of BEE premiums over 31 years is thus likely to be enormous.[26]

In addition, a June 2025 research report by the Solidarity Research Institute ("SRI") and the Free Market Foundation ("FMF"), both civil society organisations, highlighted other costs of BEE to the economy and hence to all South Africans, including the black majority. The SRI/FMF report put annual BEE compliance costs at between R145bn and R190bn, amounting to between 2% and 4% of GDP. It estimated that BEE had reduced GDP growth by 1.5% to 3% a year and hence by R5 trillion since 2007. It pointed out that higher growth would have increased tax revenues by R1.15 trillion a year, which would have reduced soaring public debt and the high costs of servicing that debt. It assessed the jobs lost to BEE each year at between 96,000 and 192,000, giving a total of 3.8 million to 4 million jobs over the years. It indicated that the unemployment rate could have come down to 17% without BEE, which would have provided millions more people with livelihoods and real opportunities for upward mobility.[27]

BEE might be *intended* to provide redress for past injustice, but its *outcomes* have been very different. Far from helping the great majority of black South Africans to get ahead, it has in practice harmed them greatly by adding significantly to unemployment, poverty and intra-black inequality.

Hence, if the Bill does indeed aim to use its new business licensing regime to compel many more businesses to comply with BEE, this must be stated upfront. The relevant rules must also be included expressly in its provisions. In addition, the economic costs of expanding BEE in this way must be set out in full in a comprehensive and objective SEIA report.

This SEIA report must be attached to the Bill so that the public can "know about the issues" – and then "have an adequate say" on whether they support this expansion of BEE and the further economic damage it is sure to bring. In the absence of such a SEIA report, however, the current public consultation process must be recognised as fundamentally flawed.

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[26] Crouse, G, *The IRR's Blueprint for Growth: Cut VAT and BEE*, Institute of Race Relations, 2025. https://irr.org.za/reports/the-irrs-blueprint-for-growth/the-irr-blueprint-for-growth-2025/2-the-irrs-blueprint-for-growth-2-cut-vat-and-bee.

[27] Solidarity Research Institute, "Shocking report: BEE is bringing SA economy to its knees", *Media Release*. https://aanlyn.solidariteit.co.za/publieke/artikel/shocking-report-bee-is-bringing-sa-economy-to-its-knees/en; "BEE costs South Africa R1.15 trillion in tax revenue per year", *Daily Investor*, 29 July 2025. https://dailyinvestor.com/finance/95822/bee-costs-south-africa-r1-15-trillion-in-tax-revenue-per-year/.

3.7.2 Designated trading areas for small enterprises

Clause 16 of the Bill empowers municipalities to designate specified areas within their boundaries for trading by small businesses alone. This provision is likely to prevent larger enterprises from moving into such areas – or even to stop them from continuing to operate in these localities.

Clause 16 provides:

"(1) The licensing authority may, after consultation with the MEC of the relevant province, the Minister and the Minister responsible for spatial planning and land use, make by-laws to—

(a) designate any specified area within its jurisdiction to be a trading area for the exclusive participation of small enterprises;

(b) define the boundaries of the exclusive trading area;

(c) alter the boundaries of any exclusive trading area;

(d) determine that any exclusive trading area ceases to be reserved for small enterprises; and

(e) determine how the designated trade and commercial areas and zones may be supported through various interventions, including, but not limited to— (i) reduced municipal rates and fees; (ii) financial incentives and grants; and (iii) advice and training for small enterprises."

This provision in the Bill seems primarily to be aimed at barring bigger businesses from operating in the 530 or so townships in which some 11.6 million South Africans live.[28] Many of these township residents (according to the 2024 *Township Customer Experience Report*)[29] regularly shop at "spaza" shops or small convenience stores often attached to people's homes. (The equivalent township report for 2023 put the number of spazas at 200,000, while its 2021 predecessor said that spaza shops contributed 5.2% to South Africa's GDP and employed about 2.6 million people.)[30]

For many years now, various spaza owners have complained about both foreigners (see *section 3.7.3* below) and big supermarket chains moving into township areas and attracting custom away from them. Shoprite, for example – which is currently the biggest listed retailer of fast-moving consumer goods (FMCG) in South Africa[31] – was one of the first large companies to

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[28] Blakeley, S, 'Townships of South Africa: History, location and tourism', Study.com: https://study.com/academy/lesson/south-african-townships-overview-history-locations.html#:~:text.

[29] Rogerwilco, '2024 Township CX Report: Insights for brands navigating South Africa's township economy', 20 November 2024: https://www.bizcommunity.com/article/2024-township-cx-report-insights-for-brands-navigating-south-africas-township-economy-588000a.

[30] Rogerwilco, Survey54, 'The 2023 Township CX report', June 2023: https://www.rogerwilco.co.za/sites/default/files/2023-06/Township-CX-Report-2023.pdf; for somewhat different figures on the size of the spaza sector, see Goba, N, 'Battle for township market heats up as Shoprite and Boxer fight for dominance', *Business Day*, 9 January 2025: https://www.businesslive.co.za/bd/companies/retail-and-consumer/2025-01-09-battle-for-township-market-heats-up-as-shoprite-and-boxer-fight-for-dominance/ and Mkentane, L, 'Locals to benefit from proposed changes to Gauteng township economy law', *Business Day*, 31 July 2025: https://www.businesslive.co.za/bd/national/2025-07-30-locals-to-benefit-from-proposed-changes-to-gauteng-township-economy-law/.

[31] Goba, N, "FMCG retailers opened about 10,000 stores in five years amid industry boom", *Business Day*, 17 February 2025: https://www.businesslive.co.za/bd/companies/retail-and-consumer/2025-02-17-fmcg-retailers-opened-about-10000-stores-in-five-years-amid-industry-boom/.

introduce stores in township areas under its Shoprite and OK brands. Pick n Pay did much the same with the introduction of its Score Supermarkets and Boxer Superstores. [32]

According to journalist Ray Mahlaka, writing in the *Daily Maverick* in 2019, these big retailers were encouraged to move into the townships because consumers there were "progressing into the middle income group". The shift was also spurred on "by the development of shopping malls in townships, which were largely occupied by the big four supermarket retailers as anchor tenants that sold perishable, fresh produce and convenience food items."[33]

As Mr Mahlaka adds: "Shoprite and Pick n Pay have long argued that their entry into townships has provided consumers with more choice, convenience, and lower prices as the giant retailers can use their merchandise buying power from suppliers and negotiate discounts that can be passed down to consumers. Both retailers have argued that townships were neglected before their arrival, with residents having limited formal shopping options."

In 2016 Pick n Pay launched a programme to convert various spaza shops owned by entrepreneurs in townships into franchise stores (though these would not necessarily bear the Pick n Pay name). Its aim, it said, was to "help a small number of independent store owners compete more effectively and serve their local customers better." The stores in question would retain their independent ownership, it added.[34]

Shoprite has a similar concept, writes Mr Mahlaka. "Under its discount retail brand, USave, Shoprite [has been] rolling out Usave eKasi stores, which are between 100m^2 and 200m^2 in size and are built in shipping containers. The first container store was opened [in 2017] in Spruitview, Gauteng, while [in 2019] Shoprite…operated 27 Usave eKasi stores across SA." [35]

Many spaza owners were dismayed at these developments, for their own operations began to lose much of their earlier custom. This in time prompted an inquiry by the Competition Commission, which released its final (657-page) report on competition in the grocery retail market late in November 2019.

Having spent four years investigating the dominance of South Africa's four big supermarket retailers – Shoprite, Pick n Pay, Woolworths and Spar – the commission reported that these big companies were helping to drive spaza shops and independent retailers in townships out of business.

Said the commission: "[T]he entry of the national supermarket chains [the big four] into township areas has shifted the competitive landscape in those areas. The observed decline or exit of spaza shops and independent retailers, especially in rural towns, can partly be attributed to this change." (The report also noted that "there ha[d] been a decline in the number of small

[32] Mahlahka, R, "Retail giants face having township wings clipped", Daily Maverick, 17 December 2019. https://www.dailymaverick.co.za/article/2019-12-17-retail-giants-face-having-township-wings-clipped/.

[33] Ibid.

[34] Ibid.

[35] Mahlahka, R, "Retail giants face having township wings clipped", Daily Maverick, 17 December 2019. https://www.dailymaverick.co.za/article/2019-12-17-retail-giants-face-having-township-wings-clipped/

independent grocery retailers operating in non-urban areas following the entry of national supermarket chains.")[36]

The Bill's provisions regarding the designation of certain trading areas for "the exclusive participation of small enterprises" seem to have been included in response to the 2019 findings of the Competition Commission. They may also reflect more recent concerns on the part of local spaza owners that the current trend – of big retailers acquiring small spaza shops – will result in those retailers "totally dominating" the spaza market.[37]

The Bill seems to assume that excluding big retailers from township areas – or even perhaps ejecting those already in operation there – will be in keeping with its "principle of redress". According to this principle, "business license policies and procedures at all spheres of government must address the inclusion of persons and areas that were previously excluded, with the emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation."[38]

However, excluding large retailers from township areas is likely to harm residents by cutting them off from the benefits of competition and the advantages of scale. In addition, as *Business Day* reported in January 2025, many spazas have found value in developing links with major suppliers such as Shoprite, which offers them on-line shopping and free delivery services.[39] Others have benefited from franchise agreements that help them source and expand their stock – and that assist them with the training and technology needed for more efficient operation.[40]

Excluding larger businesses from operating in township (or other historically disadvantaged) areas on the basis of their size could also be in breach of the constitutional right to trade under Section 22 of the Bill of Rights. In addition, if large retailers are in time compelled to withdraw from their existing township outlets, this could undermine their property rights (unless adequate compensation is promptly paid). It would also also send out a damaging message that South Africa is not in fact open for business. This could further inhibit investment, restrict growth, and curtail employment to the detriment of all South Africans.

In terms of governmental capacity, the complex challenges involved in designating township trading areas as solely available to small businesses could overburden many municipalities. Already, as earlier noted, most are dysfunctional and are battling to fulfil their existing core functions. In addition, the challenges involved will not stop at the decision to designate townships in this way. Many municipalities will also have to defend their designations against legal challenges, or ensure that the restrictions they have imposed are adequately enforced.

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[36] Mahlahka, R, "Retail giants face having township wings clipped", Daily Maverick, 17 December 2019. https://www.dailymaverick.co.za/article/2019-12-17-retail-giants-face-having-township-wings-clipped/.

[37] Ntingi, A, 'Hotly contested township markets', News24, 17 July 2020. https://www.news24.com/business/finweek/opinion/hotly-contested-township-markets-20200717.

[38] Clause 9(a)(ii), Bill.

[39] Goba, N, "Battle for township market heats up as Shoprite and Boxer fight for dominance", *Business Day*, 9 January 2025. https://www.businesslive.co.za/bd/companies/retail-and-consumer/2025-01-09-battle-for-township-market-heats-up-as-shoprite-and-boxer-fight-for-dominance/.

[40] Ntingi, A, "Hotly contested township markets'" News24, 17 July 2020. https://www.news24.com/business/finweek/opinion/hotly-contested-township-markets-20200717.

3.7.3 Foreign nationals

Under clause 8 of the Bill, a foreign national may obtain a business licence only if he or she has a valid visa or business permit or is a recognised asylum seeker or refugee. Clause 8 puts it thus:

"(1) If the applicant for a business license is not a South African citizen, the applicant must hold— *(a)* a valid visa or permit authorising him or her to operate a business in terms of the Immigration Act; or *(b)* an asylum seekers visa or refugee visa in terms of the Refugees Act. (2) Notwithstanding subsection (1), a license granted to a non-citizen is only valid for the period that the non-citizen is authorised to operate a business in the Republic, as evidenced by a valid visa or permit granted in terms of the Immigration Act or the Refugee Act."

All countries have the right to control immigration and to require that those entering the country and settling within it should be authorised to do so. In practice, however, South Africa has long failed to secure its lengthy land and sea borders. Hence, millions of illegal immigrants have not only entered the country but have also settled in it for long periods. In addition, many of these immigrants have long been earning a living by operating spaza shops and/or providing other goods and services. This has evoked considerable opposition from many local spaza owners and other entrepreneurs, who fear the competition that these foreigners have brought.

In the words of Andile Ntingi, journalist and CEO of GetBiz, many thousands of spaza shops are now "operated by immigrants, mainly from Somalia, Ethiopia, Pakistan and Bangladesh". These immigrants have also come to "dominate non-grocery markets such as hardware stores, bottle stores, auto spares, vehicle maintenance workshops, hair salons, panel beaters, internet cafés and many other businesses commonly found in townships and rural areas." In most of these markets, "black South Africans have been muscled out", he adds. [41]

The Bill is thus a belated attempt to enforce immigration rules which an increasingly dysfunctinal government has failed for decades to implement. If business licences are now to be required – and then denied to the many illegal foreigners who have long been running spazas and other businesses in township areas – this will cause enormous hardship to the foreigners affected. Many may also complain, with good reason, that their property and other guaranteed rights have been infringed. Though the right to trade under Section 22 of the Constitution is limited to citizens, significant legal challenges could well be mounted in other spheres. Affected foreigners may also be able to invoke the licensing principles set out in the Bill, which require not only redress for past injustice but also an emphasis on efficiency and good administration (see *section 3.8* below).

Black South Africans could also be negatively affected by the forced closure of the businesses of illegal immigrants. The foreign dominance of which Mr Ntingi complains has often been achieved through increased efficiencies and economies of scale that local entrepreneurs cannot easily emulate. Once immigrant shops are closed, many consumers may find themselves confronted with fewer choices and higher prices in local shops.

3.8 Principles of business licensing

The Bill sets out three principles of business licensing, all of which must be taken into account.

[41] Ibid.

Under the principle of redress, "past unjust business licensing and permitting policies and other development imbalances must be redressed". In addition, as earlier noted, "business license policies and procedures at all spheres of government must address the inclusion of persons and areas that were previously excluded, with the emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation."[42]

However, under the "principle of efficiency and suitability", other (and potentially conflicting) considerations apply. Under this principle, "business licensing [must] optimise the use of existing resources and infrastructure", while "decision-making procedures [must be] designed to minimise negative financial, social, economic or environmental impacts". In addition, "business licensing application procedures [must be] efficient and streamlined, [with] timeframes [that] are adhered to by all parties." Moreover, in wording that could prove particularly helpful to businesses resisting being barred from continued operation in township areas, "business licensing procedures and criteria [must] minimise administrative compliance burdens and avoid creating regulatory burdens and constraints".[43]

The principle of "good administration" must also be upheld. According to the Bill, "the consideration of licensing applications includes fair and transparent processes that afford interested and affected parties the opportunity to provide inputs on matters affecting them". In addition, "applicable provisions and procedures [must be] clearly articulated and transparent to members of the public".[44]

The second and third principles ought to have significant influence on the wording of the Bill and to provide important safeguards against bureaucratic over-reach and other abuses. Thus far, however, they have simply been ignored in the drafting of the many opaque and unduly onerous provisions in the Bill.

3.9 Enforcement of the Bill

3.9.1 Appointment and search-and-seizure powers of authorised officers

Under Clause 18 of the Bill, municipalities "may" appoint "authorised officers", who are to have extensive powers to enforce the Bill. Such officers will be empowered to "conduct inspections [and] monitor and enforce compliance". They will also be able to "investigate complaints" submitted to the municipality and "order any person to appear" before them. In addition, they will be empowered to question people, inspect documents and – under a particularly draconian provision – "close any premises pending further investigation".[45] The opportunities for extortion and corruption that these clauses provide are obvious.

Authorised officers will also be able to enter premises, demand the production of business licences, and inspect all business undertakings. In addition, states the Bill, "an authorised officer, who reasonably suspects that a business is being conducted without a business license, or in contravention of the conditions on their business license, may, without a warrant, confiscate and remove any goods from the premises of a business that, on reasonable grounds,

[42] Clause 9(1)(a), Bill.
[43] Clause 9(1)(a), (b), Bill.
[44] Clause 9(1)(c), Bill.
[45] Clause 18, 19(2)(a) to (h), Bill.

are being utilised in a manner that contravenes this Act or any relevant by-law or legislation that relates to business licenses".[46] Again, the impetus to corruption that these powers will provide is obvious.

Under clause 20(4), authorised officers will also be empowered to enter a private dwelling – without a warrant authorising this – if they have "reasonable grounds to believe" that a search warrant would be issued in the circumstances; and that "the delay in obtaining such a warrant would defeat the object of the search".[47]

This language echoes that in the Criminal Procedure Act of 1977, which empowers trained police officers to enter private homes without warrants when they are investigating serious crimes such as murder and rape. Here, however, the "crime" in issue is the possible failure to obtain or comply with a operating licence by a business whose activities are otherwise lawful. This represents a major – and unwarranted – derogation from the right to privacy guaranteed by Section 14 of the Constitution.

3.9.2 Compliance notices, administrative fines and internal appeals

According to the Bill, an authorised officer may also "issue a compliance notice" to any person believed "on reasonable grounds" to be "carrying on business in contravention" of the Bill. This compliance notice may specify "any steps that are required to be taken and the period within which those steps must be taken; and…any penalty that may be imposed". A compliance notice remains valid until an "internal appeal authority" has either issued a compliance certificate (confirming that the contravention has ended) or has set aside the notice.[48] In addition, "if a person to whom a compliance notice has been issued fails to comply with the notice, an authorised officer may impose an administrative penalty against such a person in terms of [Clause] 23" of the Bill.[49]

Under clause 23, "an authorised officer may impose an administrative fine…on a person for failure to comply with a compliance notice". The maximum administrative fines that may be imposed are R500 for a first failure to comply, R5,000 for a second failure, and R10,000 for a third failure.[50]

That authorised officers are to be empowered to issue administrative penalties – without recourse to the courts – means that these partisan officials will effectively be allowed to act as investigators, prosecutors and judges in such matters. By contrast, the Companies Act of 2008 – under which all companies must register with the Companies and Intellectual Property Commission (CIPC) and submit considerable information to it – does not allow the CIPC to issue administative fines for non-compliance. This makes for a far more appropriate division of investigative and decision-making powers. As the Centre for Development and Enterprise, a civil society organisation, has commented in its submission on the Bill: "It is frankly bizarre to

[46] Clause 20, 21(1), Bill.
[47] Clause 20(4), Bill.
[48] Clause 22, Bill.
[49] Clauses 22, 23, Bill.
[50] Clause 23, Bill.

consider that inspectors appointed by municipalities to inspect otherwise-legal businesses should not have similar checks and balances on their enforcement powers."[51]

The Bill is silent as to how an internal appeals authority should be constituted. All that it says in this regard is that "any person whose rights have been materially and adversely affected by any decision taken by the licensing authority in the exercise of its powers, may appeal such decision to the internal appeal authority within a period prescribed by the licensing authority." [52]

3.9.3 Offences and penalties

Offences under the Bill include "failing to produce a business licence on request"; "operating a business without a business licence"; "obstructing" authorised officers in the performance of their duties; "making use of an invalid or false business license"; providing "misleading or false" information in applying for a business licence; and "operating a business without the required visa or permit, where applicable".[53]

Those convicted of offences under the Bill are liable, on a first conviction, to "a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment". Second convictions are punishable by fines and imprisonment for up to 12 months, or both. Any subsequent conviction may be punished via a fine or imprisonment for up to 24 months or both.[54] These clauses will have a chilling effect on new business formation in a country already suffering from a 32% unemployment rate.

3.9.4 Judicial review and administrative versus criminal fines

Administrative fines, as earlier noted, may be imposed by authorised officers without a court order. By contrast, criminal fines may be imposed only after a person has been convicted of an offence under the Bill. However, the payment of an administrative fine may be postponed if the person to whom a compliance notice has been issued appeals against it to the relevant internal appeals authority, as "the execution of the…notice is [then] suspended until the finalisation of the appeal".[55]

The Bill also states that "No person may apply to a court for the review of a compliance notice…until that person has exhausted his or her remedies" under the Bill.[56] This in keeping with the general rule in South Africa that internal remedies – which allow administrative authorities to correct their own errors and thus offer swift and cheap solutions – should be pursued to their conclusion before the courts can be asked to embark on a review. However, if the internal appeals process proves to be slow, biased or unable to change the decision that has been made, the aggrieved party may invoke the right of access to court under Section 34 of the Constitution and seek judicial review before the internal appeals process has been finalised.

[51] Centre for Development and Enterprise (CDE), Submission to the Department of Small Business Development, November 2025, para. 7.3.
[52] Clause 25, Bill.
[53] Clause 26, Bill.
[54] Clause 27, Bill.
[55] Clause 24, Bill.
[56] Clause 24, Bill.

An administrative decision is open to court review on the basis that it violates the Promotion of Administrative Justice Act (PAJA). This requires evidence that the decision in issue is procedurally unfair, unlawful, or unreasonable – or that it was taken by an official without the necessary authority.

4. Unconstitutionality of the Bill

The Bill is prima facie unconstitutional on both procedural and substantive grounds.

4.1 Inadequate public consultation

The Department's failure to conduct a comprehensive SEIA assessment of the Bill – and to append this SEIA report to the Bill in gazetting it for public comment – has undermined the right to proper public consultation. This in itself is a serious procedural flaw, as the public has been denied an adequate opportunity to "know about the issues" raised by the Bill and to have "an adequate say" on it.

4.2 Vague provisions and untrammelled ministerial discretion

As previously described, many provisions in the Bill are so broadly phrased and uncertain in their meaning that different officials are sure to interpret them in different ways at different times. This contradicts the doctrine against vagueness of laws. It also renders many core clauses of the Bill unconstitutional for this reason alone, apart from their other shortcomings.

In addition, the discretion given to the minister is frequently too broad. It is also often untrammelled, in that the Bill provides few, if any, guidelines or parameters to help guide or limit the minister's discretion. Yet the Constitutional Court has previously struck down such unfettered discretionary powers on the basis that:[57]

- they are inconsistent with the rule of law, which requires legal rules to be reasonably certain so that citizens may know what the law is and how to comply with it;
- they infringe the doctrine of the separation of powers, under which Parliament must itself decide on the relevant rules through the legislation it adopts, not hand the task to the executive; and/or
- they undermine the protection of fundamental rights, such as the right to citizenship or the right to trade. Here, the Court has ruled that, where a discretionary power limits a fundamental right, the legislation itself must set the boundaries of that limitation, not leave this to officials to decide. Such a limitation must also be justifiable under Section 36 of the Constitution, which requires the application of a proportionality test.

4.3 Unjustified limitation of the right to privacy

Section 14 of the Constitution gives "everyone the right to privacy", which includes the right "not to have their…home searched, their property searched or their possessions seized".[58] Clause 20

[57] *Dawood and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another* [2000] ZACC 18; 2001 (1) SA 29 (CC); *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); *Democratic Alliance v Minister of Home Affairs and Another* [2023] ZACC 17.

[58] Section 14, Constitution of the Republic of South Africa, 1996.

of the Bill, as noted in *section 3.9* above, nevertheless empowers authorised officers to enter and search private dwellings without first obtaining a warrant if they have reasonable grounds to believe that a warrant would be issued – and that the delay in obtaining it would defeat the object of the search.

Though the Criminal Procedure Act gives the same powers to police officers investigating serious crimes, authorised officers acting under the Bill will be dealing with the relatively minor issue of whether a business – which is otherwise operating lawfully – has obtained a licence and is complying with its terms.

The power to enter a private dwelling without a warrant is a considerable limitation on the guaranteed right to privacy. Whether this limitation can be justified under Section 36 of the Constitution depends on all the surrounding circumstances. Warrantless searches of private homes may be justifiable where trained police officers urgently need to search a dwelling as part of an investigation into a serious crime. However, to permit authorised officers to do the same under the bill when their task is simply to assess compliance with a business licence cannot easily be justified – and especially not when "less restrictive" ways of determining compliance can easily be found.[59] (Under the current 1991 Act, for example, a business must be instructed in writing to produce its licence and given a period of 14 days in which to do so.[60] Similar provisions in the Bill would be more appropriate, and more in line with what the Constitution requires.)

4.4 Irrational provisions with no legitimate governmental purpose

The Bill is irrational in empowering the minister to designate the business undertakings that require licences on the basis that they "fall within the scope of the functional areas listed in Schedule 4 to the Constitution". Schedule 4, as earlier noted, deals with areas in which national and provincial governments have concurrent legislative powers. Hence, Schedule 4 has nothing to do with business activities that might pose risks to society. In addition, by making "trade" (and a host of other listed areas) the foundation for requiring business licences, the Bill effectively requires tht all business activities in South Africa must be licensed. There is thus no rational connection between the means used in the Bill (business activities falling within Schedule 4) and a legitimate governmental objective (preventing harm to consumers).

Various Constitutional Court judgments are relevant here. In 1999, in *New National Party* v *Government of the Republic of South Africa*, the Court ruled that, for legislation to be valid, "there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose".[61] The Bill does not satisfy this test because the scheme it uses (reliance on the functional areas listed in Schedule 4) will inevitably cast the business licensing net so widely as to include many enterprises that pose no risk to society or are already adequately regulated. In this situation, the licensing requirement is arbitrary, rather than purposive.

[59] Section 14, read together with Section 36, Constitution.
[60] Section 2(8)(b),(9)(b), Businesses Act of 1991.
[61] *New National Party* v *Government of the Republic of South Africa and others* [1999] ZACC 5, para 19.

In 2012, moreover, in *Democratic Alliance* v *President of the Republic of South Africa*, the Court found that "both the process by which the decision is made and the decision itself must be rational". Said the court: "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends." Hence, "everything done in the process of taking decisions constitutes means towards the attainment of the purpose".[62] Here, however, the Department's decision-making process has not been rationally related to the achievement of a legitimate governmental purpose. Instead, it has opted – without adequate reasons – for very broad provisions under which all trading activities must be licensed, even though many of them pose no harm to the public or are already adequately regulated.

An irrational decision may also undermine the rule of law, the supremacy of which is identified in the Constitution as a founding value of South Africa's democracy. The leading case here is *Pharmaceutical Manufacturers' Association of South Africa: In re Ex Parte President of the Republic of South Africa*, decided in 2000. Here the Constitutional Court found that the exercise of all public power must comply with the Constitution and hence also with the rule of law. Hence, a decision that is objectively irrational – such as the Bill's use of Schedule 4 as the trigger for business licensing – is arbitrary and unconstitutional.[63]

4.5 Unjustifiable limitation of the guaranteed freedom of trade, occupation and profession

Section 22 of the Bill of Rights gives "every citizen the right to choose their trade, occupation or profession freely". It also allows "the practice of a trade, occupation or profession to be regulated by law".[64] A citizen's right to choose or to practice their trade or profession, as the Constitutional Court stated in 2005 in *Affordable Medicines Trust* v *Minister of Health*, is thus protected. In this situation, the government's "exercise of legislative and executive power" must start by meeting the rationality test. However, "if the exercise of power limits any [guaranteed] rights, it must [also] pass the section 36(1) test".[65] Such a test requires a proportionality assessment of whether, among other things, "less restrictive means" could be used to achieve the governmental purpose in issue.[66]

In the *Affordable Medicines Trust* case, the court drew a distinction between the right to "choose" a trade or occupation and the right to "practise" it, finding that the right to choose a trade merits greater protection and is clearly subject to a proportionality test. However, it also acknowedged that a given regulation could in fact affect both the right to choose and the right to practise a trade or profession. Hence, the court went on, "where, objectively viewed, the regulation of the *practice* of a profession impacts negatively on *choice*, such regulation must be tested under section 36(1)". Reinforcing this point, the court added: "Parliament may not unconstitutionally limit the right to practise a profession under the guise of regulating it. Where

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[62] *Democratic Alliance* v *President of the Republic of South Africa*, [2012] ZACC 24, paras 34, 36.

[63] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and others*, [2000] ZACC 1, paras. 85 – 90.

[64] Section 22, Constitution.

[65] *Affordable Medicines Trust and others* v *Minister of Health and another*, [2005] ZACC 3, para 91.

[66] Section 36(1)(e), Constitution.

the regulation of the right amounts to a limitation of that right, such a limitation will [also] have to be tested under section 36(1).[67]

In the *Affordable Medicines Trust* case, the introduction of licences for the dispensing of medicines from specified premises was upheld because it advanced the legitimate governmental purpose of giving the public access to safe medicines. By contrast, the licensing requirement in the Bill is far too broad to meet this test. In addition, since the Bill limits the right to "choose" a trade, occupation or profession, it will also have to pass the proportionality tests contained in Section 36. However, the Bill is unlikely to do so as its licensing regime will clearly extend to many business undertakings that pose no risk to the public or are already adequately regulated.[68]

4.6 Encroachment on municipal powers

The Constitution gives the local sphere of government considerable autonomy in various spheres. Under section 156(1), "a municipality has executive authority in respect of, and has the right to administer,…the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5". Part B of Schedule 4 lists "trading regulations" as one such matter, while Part B of Schedule 5 lists "the licensing and control of undertakings that sell food to the public" as well as "street trading".

In addition, Section 151(3) of the Constitution gives a municipality "the right to govern, on its own initiative, the local government affairs of its community,…as provided for in the Constitution". Also important is Section 151(4), which bars the national and provincial governments from "compromising or impeding a municipality's ability or right to exercise its powers or perform its functions". This prohibition is strengthened by Section 154(1), which requires the national and provincial governments to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions".[69]

These provisions are further buttressed by Section 154(2), which requires proper consultation on any "draft national or provincial legislation that affects the status, institutions, functions or powers of local government". This consultation must take place "before [a draft bill] is introduced in Parliament or a provincial legislature, as the case may be". Such consultation is required, not only with "organised local government", but also with "municipalities" and other interested parties. Under section 164, moreover, a "matter concerning local government may be prescribed by national legislation" only if that matter is "*not dealt with in the Constitution*".[70]

Under these provisions, municipalities have executive authority over trading regulations, as well as street trading and the licensing of undertakings selling food to the public. The Bill nevertheless brushes aside the autonomy that municipalities have been given in these areas. In demanding that municipalities must instead comply with the national policy devised by the minister, it encroaches on municipal powers and is inconsistent with the Constitution.

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[67] Ibid, para 94.

[68] *Affordable Medicines Trust and others* v *Minister of Health and another*, [2005] ZACC 3, paras. 91, 92, 94.

[69] Section 151(3), 151(4), 154(1), Constitution.

[70] Section 154(2), 164, Constitution, emphasis supplied by the IRR.

4.7 Unconstitutionality of black economic empowerment rules

A key purpose of the National Business Licensing Policy of 2025 – and hence of the Bill as well – is to "incorporate…transformation in business licensing policies" via laws such as the Preferential Procurement Policy Framework Act ("PPPFA") of 2000 and the Broad-Based Black Economic Empowerment Act ("BEE") Act of 2003. However, the provisions of these statutes conflict with key clauses in the Constitution.

The racial targets that the BEE Act requires cannot be fulfilled without the continued use of apartheid-era race classifications and the overt preferencing of black South Africans over their white, coloured, and Indian counterparts. Yet this is prima facie inconsistent with the Constitution's founding value of "non-racialism", as well as its express prohibition of unfair racial discrimination by both the state and private persons.[71]

Also relevant is Section 195 of the Constitution, which recognises a need for "broad representivity" in "public administration". However, "broad" representivity is different from the strict arithmetical quotas reflected in the BEE Act and its accompanying codes of good practice. In addition, by confining the need for broad representivity to "public administration", the Constitution makes it clear (under the *expressio unius est exclusio alterius* principle of statutory interpretation)[72] that a similar level of representivity is not required in the private sector.[73]

The Constitution's provisions on BEE preferential procurement are likewise confined to state entities and so do not apply to business. In addition, state entities have a choice as to whether to apply BEE preferences or not. Sub-section 217(1) states that all public procurement must be "fair, equitable, transparent, competitive, and cost effective", while sub-section 217(2) adds that this requirement "does not prevent" state entities from applying the preferences set out in the PPPFA. Since the latter clause is permissive, rather than mandatory, state entities are not obliged to pay BEE premiums on their procurement contracts. Where they choose to do so, they must nevertheless ensure that their procurement is still "fair", "competitive", and "cost-effective".[74]

Many commentators have long assumed that BEE is implicitly authorised by Section 9(2) of the Constitution, which allows the taking of "legislative…measures designed to…advance [those] disadvantaged by unfair discrimination" and "promote the achievement of equality". However, as the Constitutional Court ruled in the *Van Heerden* case in 2004, race-based remedial measures are valid only if they satisfy three tests: they must (1) target the disadvantaged, (2) help advance them, and (3) promote equality.[75]

The Constitutional Court has never properly applied these tests in adjudicating on BEE. Were it to do so, however, BEE rules would fail on all three grounds. First, BEE does not target the disadvantaged, for it helps only a relative elite (the most advantaged 15% within the black population) and not the great majority of poor black people. Second, BEE has failed to

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[71] Sections 1(c), 9(1), (3)-(5), Constitution of the Republic of South Africa, 1996 ("Constitution").
[72] According to this principle, if one thing is expressly included in a provision, but another thing is not, this means that the other thing is not intended to fall within the provision.
[73] Section 195(1), Constitution.
[74] Section 217 (1)-(3), Constitution; Public Public Procurement Policy Framework Act (PPPFA) of 2000
[75] *Minister of Finance and another* v *Van Heerden*, 2004 (6) SA 121 (CC).

"advance" the black majority, which has instead been greatly harmed by BEE requirements that deter investment, limit growth, and add to unemployment. Third, BEE has failed to "achieve equality", for it enriches the few even as it keeps the great majority of black South Africans unskilled, unemployed, and mired in destitution.[76] This also explains why the Gini coefficient of income inequality is higher now (at 67 in 2024) than it was at the end of the apartheid era, when it stood at 57.[77]

The "transformation" objectives that underpin the Bill – and which its business licensing system is intended to advance – are thus unconstitutional. Hence, any ministerial regulations that may in time be adopted to compel all businesses to comply with the PPPFA and BEE Acts, as part of the Bill's new licensing regime, will likewise be unconstitutional. A key aim underpinning the Bill thus cannot be achieved without breaching the founding value of non-racialism and the various other constitutional provisions earlier described. This provides yet another reason for abandoning the Bill, which is also unconstitutional in a host of other ways.

5 The way forward

As IRR CEO John Endres has written, "a healthy economy in a well-resourced country like South Africa should grow at 4% to 6% per year... That was the rate achieved by many comparable countries in Asia, Latin America, and parts of Africa during their take-off periods. South Africa, by contrast, has been stagnating. The World Bank records that from 2010 to 2019 our economy grew at an average of only 1.7% per year, barely above population growth. Between 2014 and 2019, the average was even lower, at just 1%. And since the COVID [lockdown], growth has fallen further. In 2022 it was 1.9%, in 2023 it was 0.8%, and in 2024 it slowed to 0.5%."[78]

South Africa's growth rate cannot rise without much more fixed investment in the factories, equipment and infrastructure needed to boost productivity. But the country's fixed investment rate has averaged a lowly 15% of GDP for many years and fell further (to 14%) in 2024. By contrast, the world average stands at 26.5% of GDP per annum, while successful emerging markets have fixed investment rates of between 25% and 35% a year.[79]

Paltry fixed investment and low growth rates have curtailed the number of jobs that can be generated and led to a massive mismatch between demand and supply. As the Centre for Development and Enterprise has pointed out, South Africa's labour force grew by 42% between 2008 and 2025, but employment rose by only 15%. "That means nearly 1,000 South Africans joined the unemployment queue every single day for 17 years."[80]

In 1994 the official unemployment rate was 23%. Today it stands at 32%. On an expanded definition, which includes people too discouraged to keep seeking jobs, the rate rises to 42%.

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[76] Steward, *Tightening the Screws*, pp2-3

[77] Endres, J, 'Pulling up instead of trickling down: an alternative to BEE', Daily Friend, 27 September 2025: https://dailyfriend.co.za/2025/09/27/pulling-up-instead-of-trickling-down-an-alternative-to-bee/

[78] Endres, J, 'Pulling up instead of trickling down: an alternative to BEE', Daily Friend, 27 September 2025: https://dailyfriend.co.za/2025/09/27/pulling-up-instead-of-trickling-down-an-alternative-to-bee/

[79] Endres, 'Pulling up', ibid; see also Centre for Risk Analysis, 'The DA challenges race-based laws', Risk Alert, 27 October 2025: https://riskalert.cra-sa.com/risk-alert/the-da-challenges-race-based-laws.

[80] Bernstein, A, 'SA's jobless problem dwarfs all others', Politicsweb.co.za, 14 October 2025: https://www.politicsweb.co.za/opinion/sas-jobless-problem-dwarfs-all-others.

In total, on this expanded definition, some 12.6 million people out of a workforce 25 million strong are unemployed.[81]

Adds Dr Endres: "For young people the situation is catastrophic. Among those aged 15-24, unemployment is over 60%. That means that most young South Africans have no realistic prospect of a job."[82] Yet, without employment, the born-free generation has little prospect of ever escaping from destitution, let alone climbing the economic ladder to prized middle-class status.

If South Africa is to start matching the average 4.5% growth rates evident in its emerging market peers, it will have to attract far more direct investment, both local and foreign. To achieve this, it will have to implement major refoms in many policy spheres. It will also have to boost business confidence by slashing red tape and removing the many regulatory obstacles to doing business here.

Against this background, the Bill is one of the worst interventions that could possibly be made. Far from encouraging investment, growth and jobs, it will send a message to all enterprises, both large and small, that the business environment in South Africa is even more hostile and adverse to private enterprise. Far from reducing red tape, as President Cyril Ramaphosa has pledged to do, the Bill will usher in a new layer of licensing regulation that is mostly unnecessary, generally serves no legitimate governmental purpose, and is likely to be plagued by inefficiency and corruption.

There is also no good reason to jettison the Businesses Act of 1991, which has served the country well. In terminating almost all licensing requirements, that Act not only removed earlier discriminatory restrictions on black enterprises but also demonstrated a strong commitment to reducing red tape and making it easier to do business in South Africa. That approach needs to be retained – especially with the current growth rate so low and the unemployment rate so high

The Bill is economically damaging, politically unwise, and often constitutionally invalid. It should simply be jettisoned, while the 1991 Act – with its minimal business licensing requirements – should be retained.

South African Institute of Race Relations NPC **28 November 2025**

[81] Maluleke, R, "Quarterly Labour Force Survey (QLFS): Q3, 2025", PowerPoint presentation,Statistics South Africa. https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q3%202025.pdf.
[82] Endres, 'Pulling up', op cit.