

Hobbling Business and Building Bureaucracy

The Licensing of Businesses Bill of 2013 was tabled for public comment by Rob Davies, minister of trade and industry, in the *Government Gazette* on 18th March 2013. On 17th April 2013, the Institute made a submission on the Bill to the Department of Trade and Industry. The full submission follows, while a synopsis of it is also available on our website.

Institute Submission in Full

Rationale for the Bill

According to the Department of Trade and Industry (DTI), the Licensing of Businesses Bill (the Bill) is intended to ‘promote the right to freedom of trade, occupation, and profession’. It is also supposed to ‘encourage a conducive environment that promotes compliance and sustainability of businesses’. [Section 2, Bill]

These might be the intentions behind the Bill, but in practice the proposed measure is sure to have the opposite effects.

In addition, the DTI claims that it is important for each municipality to ‘know who is conducting business’ within its area of jurisdiction, so that ‘it can curb the illegal ones that often sell dangerous and hazardous goods, or counterfeit goods’. [*Sunday Times Business Times* 14 April 2013] However, the selling of dangerous or counterfeit goods is already prohibited by other laws. In addition, it remains uncertain what benefit, if any, municipalities will in fact derive by demanding details of local business operations in the way the Bill requires.

Key provisions

New municipal obligations

The Bill applies to ‘any person carrying on business’ or ‘who seeks’ to do so. [Section 3, Bill] It requires all businesses in the country, whether formal or informal, to register with and obtain a licence to operate from their local municipality, acting as a ‘licensing authority’. [Section 1, Bill]

This obligation will impose a huge additional administrative burden on poorly skilled and overburdened municipalities, which already often struggle to discharge core responsibilities such as issuing accurate accounts to ratepayers, keeping sound financial records, and maintaining vital electricity and water distribution networks. The Bill ignores this practical constraint. Instead, it requires every single business operating, say, within the City of Johannesburg (Gauteng) or the town of Sutherland (Western Cape) to register with its local authority. [‘New bill wants all businesses to be licensed’, 20 March 2013, www.moneyweb.co.za, accessed 16 April 2013] Each municipality will thus receive a host of applications, each of which it will be expected to scrutinise and adjudicate upon within 30 days (or the further periods the Bill allows on

‘justifiable grounds’). [Sections 6 and 7, Bill] Where applications do not comply with the prescribed requirements, the municipality concerned will have to inform the applicant in writing and return the application to it with such additional instructions as it thinks fit. [Section 6(3), Bill] Municipalities will need armies of extra bureaucrats to fulfil these duties alone.

The only saving grace is that, if a municipality has not issued the licence applied for within 30 days (or any extended period that may be allowed), then ‘the application must be deemed to have been approved and the licence must be deemed as having been issued’. [Section 8, Bill] The Bill is unclear as to whether these deeming provisions will apply solely to applications which meet all requirements, or whether they will in fact extend to all applications irrespective of how incomplete or flawed they might be. At the end of the day, however, if applications are simply to be deemed to have been approved, it is difficult to know what the municipality will have gained from requiring all the businesses within its area to complete and submit their applications. All that is apparent is that a major administrative burden will have been placed on business for no obvious reason.

The DTI states that the Bill will not create ‘any additional bureaucracy’. According to Zodwa Ntuli, deputy director general responsible for corporate and consumer regulation in the department, ‘the information required is very basic – name, contact details, etc, only – and that should make the process very easy and simple’. [*Sunday Times Business Times* 14 April 2013]

However, for every business to supply even this basic data is likely in itself to be a burden. In addition, the Bill states that applicants for licences will have to apply ‘in the prescribed manner and form’, [Section 6(1)(b), Bill] which raises questions as to what additional information might in time be required. Moreover, every municipality will be empowered (in consultation with Dr Davies, the minister for local government, and the relevant MEC) to ‘make by-laws regarding licensing of businesses and any substantive or procedural matter connected therewith’. [Section 42(1), Bill] Any number of onerous requirements could be added under the authority of this blanket provision.

Additional red tape

The quantity of red tape confronting business in South Africa is already large. Big firms can more easily afford the costs of compliance but, as the Small Business Project (SBP) reported in March 2013, ‘red tape is hurting the ability of small businesses to expand’. Small and medium enterprises (SMEs) are already spending 4% of their annual turnover solely on dealing with existing red tape. In addition, even without the further burden imposed by the Bill, South Africa has fallen ten places on the ease of starting up a business in the latest overall ‘Ease of Doing Business’ Index compiled by the World Bank. [*Sunday Times Business Times* 14 April 2013]

If the Bill becomes law, the country’s ranking and international competitiveness are likely to drop further. Already, people wanting to start a business have to lodge various documents with

the Companies and Intellectual Property Commission, register for tax with the South African Revenue Service, and comply with unemployment insurance obligations laid down by the Department of Labour. [*Sunday Times Business Times* 14 April 2013] The Bill will add a further hurdle to a complex start-up process often made still more onerous by bureaucratic inefficiency.

Ironically, the DTI has become so concerned about the existing burden of red tape on SMEs that it recently established ‘red tape reduction forums’ to lighten the regulatory load on small businesses. These forums were introduced in the aftermath of a pilot project, launched by the DTI in conjunction with various other government departments, which warned (as the *Sunday Times* reports) of the ‘wide-ranging negative economic impacts of municipal red tape on the development of SMEs’. [*Sunday Times Business Times* 14 April 2013]

Against this background, it is astonishing that the DTI should simultaneously be putting forward a Bill which will inevitably increase the burden of red tape on small business. Ms Ntuli may say that ‘the proposed law will not create additional red tape’, [*Sunday Times Business Times* 14 April 2013] but the outcome will be different.

Hawkers

The Bill expressly provides that ‘no person may carry on business or sell goods as a hawker without a valid licence issued in respect of that premise or place by the relevant licensing authority’. [Section 25(1), Bill]

According to Ms Ntuli, the Bill ‘makes provision for exemptions intended to address such issues as the rights of hawkers operating in an authorised zone’. Hence, hawkers might only be ‘required to notify the municipal authority, instead of [going through the] process of application for a licence’. [*Sunday Times Business Times* 14 April 2013] However, there is no guarantee that such exemptions will be issued, or that they will cover all the people who might need them. In addition, many hawkers are illiterate and might find it difficult to ‘notify’ the local authority of their operations, as Ms Ntuli envisages.

The further question is why the burden of the Bill should be placed on hawkers at all. According to Lawrence Mavundla, outgoing president of the National African Federated Chamber of Commerce & Industry (Nafcoc), the Bill will take informal traders back to the worst days of apartheid, when (as the *Daily Maverick* reports), ‘government bureaucrats had the power to inspect the books, search the premises, shake down the owners, and shut up the shops of “undesirable elements”’. [*Daily Maverick* 16 April 2013]

These controls were also terminated by the National Party government in the early days of the political transition, under the Business Act of 1991. This repealed or amended a number of laws which earlier governed business operation. It also expressly provided that local authorities could

not pass bylaws requiring hawkers to have licences or permits (unless they were selling foods or running businesses such as cinemas and massage parlours). [‘New bill wants all businesses to be licensed’] Perversely, the Bill seeks to repeal the 1991 statute and reintroduce a blanket system of licensing for hawkers. Says Mr Mavundla: ‘The return of licensing will be apartheid in another name’. [*Sunday Times Business Times* 14 April 2013]

Hawkers could also face extraordinary penalties for seeking to ply their trade. Under the Bill, any person who carries on business as a hawker without a valid licence will be guilty of an offence and liable to a fine (of unspecified amount), or imprisonment for up to ten years, or both. [Section 27, read with Section 25(1), Bill] Even at the height of apartheid’s suppression of black business, penalties of this magnitude were not available under the relevant rules.

Duration of licences

In general, a licence granted under the Bill will be valid for five years. It may be extended only once and then for a maximum period of six months. [Sections 10 and 11, Bill] Since five years is a relatively short period, businesses will regularly have to submit new licence applications to continue in operation.

Automatic revocation

A licence will automatically be revoked if the person holding it is found guilty of selling counterfeit goods, contravening customs regulations, or employing illegal foreigners. [Section 18, Bill] However, such conduct is already prohibited under other laws, raising questions as to why these additional prohibitions should be needed in the Bill.

Foreigners

If the Bill becomes law, illegal foreigners may battle to find jobs, for employers will be loath to take them on when this could lead to the automatic revocation of their licences (as outlined above) and the closure of their businesses. Yet illegal foreigners often have sound schooling, good experience, and a strong work ethic, enabling them to make an important contribution to South Africa’s economy. The intention of the Bill is presumably to bar them from obtaining jobs and thus open up work opportunities for locals. But many South Africans may prove reluctant to take on jobs as farm labourers or waiters, for example. The Bill could thus put jobs at risk without any corresponding benefit.

Foreigners wanting to operate as hawkers will also be obliged to obtain business licences. However, they will be barred from doing so unless they already have a valid business permit, issued under the Immigration Act of 2002, or a refugee permit granted under the Refugees Act of 1998. [Section 6(1), Bill] Writes Jonathan Crush, honorary professor at the University of Cape Town: ‘This means that every cross-border trader and informal entrepreneur from neighbouring countries will first have to apply for a business permit in their country of origin and guarantee

that they have R2.5m to invest in South Africa before they can get a licence to trade.’ [BDlive, 15 April 2013]

The consequences are likely to be serious, he adds. The Bill will stifle entrepreneurship and the informal economy, both of which are already inadequate by international standards. In addition, foreign traders currently provide employment to large numbers of local people. ‘Make it impossible for them to operate, as the Bill clearly intends, and many South Africans will be thrown out of work, contributing further to unemployment,’ he warns. [BDlive, 15 April 2013]

In addition, the Bill requires municipalities to ‘promote the establishment of community-based organisations, business organisations, or non-governmental organisations that will assist [them] in monitoring...implementation’. [Section 43, Bill] Writes Professor Crush: ‘This sounds suspiciously like an attempt to get South Africans on board to assist the police in identifying and rooting out foreign traders.’ [BDlive, 15 April 2013] This could encourage xenophobia, when the urgent need – given the May 2008 riots in which 62 people were killed – is to reduce it instead.

‘Fronting practices’ and their prohibition

In the apartheid era, white South Africans sometimes helped their black compatriots bypass Group Areas restrictions on black people doing business in ‘white’ areas by applying for the necessary business permits in their own names. Mindful perhaps of this experience, the Bill seeks to bar any repetition of this kind of ‘fronting’.

The Bill thus defines ‘a fronting practice’ as including one ‘where a person applies for a licence on behalf of any other person or for the use of any other person’. [Section 19(1), Bill] It also makes it clear that any South African seeking to help a foreign trader establish a business by applying for the necessary licence in his own name will be guilty of an offence. Penalties for such transgressions will include a fine (of unspecified amount), imprisonment for up to ten years, or both. [Section 27, Bill] Such penalties are extraordinarily severe.

Other penalties

Any person who fails to produce a licence on request will likewise be subject to a fine, a jail term of up to ten years, or both. The same penalties will also apply to any person who: [Section 27, read with Section 25(3), (4) and (5), Bill]

- refuses an inspector access to premises;
- fails to provide him with documents or other information;
- falsifies (or alters) a licence;
- fails to comply with a compliance notice; and/or
- provides any ‘misleading’ information or false document.

Given the penalties for any failure to produce a licence on request, difficult questions will arise as to how businesses with deemed licences will be able to prove that they do indeed have authority to operate. (Under Section 8, licences will be deemed to have been issued if the municipality has failed to decide on an application either within the normal 30-day period for adjudication, or within such extended period as may apply, see *New municipal obligations*, above.)

Enforcement

The Bill allows policemen, customs officials, traffic officers, and ‘any person designated by the minister’ to function as an inspector. [Section 31, Bill] All inspectors are empowered to monitor compliance, investigate complaints, ‘question any person’, inspect documents, or ‘order any person to appear’ before them. [Section 32, Bill]

An inspector may also issue a compliance notice to a person he believes ‘on reasonable grounds’ to be carrying on business in contravention of his licence conditions. Such a notice must give ‘details of the non-compliance’ and the remedial steps required, and state the penalty that could be imposed. If the matter is not remedied, the inspector ‘may impose an administrative fine’ on the person he believes to be in breach of the law. [Section 36, Bill]

That person may, however, appeal against the compliance notice to a ‘dispute resolution authority’ established by a local authority to ‘deal with grievances or appeals’. [Sections 37 and 29, Bill] Such an authority is unlikely to have the independence necessary for the impartial adjudication of disputes. The Bill thus seems to contradict the Constitution, which gives ‘everyone’ the right to ‘have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’. [Section 34, Constitution of the Republic of South Africa, 1996]

Inspectors are also unlikely to use compliance notices – with the possibility of appeals against them by alleged offenders – when the Bill gives them more immediate enforcement rights. Under the Bill, an inspector is also empowered to ‘enter any premises where [he] reasonably suspects that a business is being conducted’. [Section 33, Bill] No prior search warrant is required, it would seem. In addition, an inspector may: [Sections 34 and 35, Bill]

- demand the production of the necessary business licence;
- question any person found on the premises;
- remove and confiscate any goods (in return for which he ‘may’ issue a receipt); and
- issue ‘an administrative fine’ to a licence holder who fails to produce a business licence upon request or has contravened the conditions on which his licence has been issued.

These powers are extraordinarily wide-ranging. Moreover, that a policeman, traffic officer, or ordinary member of the public appointed by the minister as an inspector should be able to issue

an administrative fine (of an unspecified amount) contradicts the constitutional right of access to court. It also contradicts key principles of due process and administrative justice.

Such powers also lend themselves to abuse. Warns Professor Crush: ‘Already many traders in the informal economy complain that their main business problem is police harassment and extortion. The Bill would provide an enabling environment for these kinds of abuses to intensify by dramatically expanding the powers of the police over vulnerable entrepreneurs whose only recourse will be to pay the bribes demanded to be left alone.’ [BDlive, 15 April 2013]

Business registry and reporting requirements

Every municipality (as well as the provincial department to which it reports, see below) will be obliged to keep ‘an up-to-date central registry of all licensed businesses’. [Section 38, Bill] Keeping such registries up to date at all times will in itself be an enormous task.

In addition, every municipality will be obliged to compile and submit ‘a consolidated report’ to the provincial MEC for local government ‘at least twice a year, or as required’. This report must ‘take the form of a business registry of all licensed businesses and any other prescribed information’. [Section 39, Bill]

The MEC, in turn, must report to the minister of trade and industry as well as to the minister responsible for local government, and must also do so ‘at least twice a year or as required’. In doing so, the MEC must collate all the information submitted to him by all the municipalities within his province, and then provide the ministers with ‘a consolidated report in the form of a business register of all the licensed businesses’ operating in that province. [Section 40, Bill]

Contrary to the assurances provided by Ms Ntuli that no extra bureaucracies will be created (see above), these obligations in themselves are enough to guarantee the burgeoning of new bureaucracies at local, provincial, and national levels.

Ramifications of the Bill

Contrary to its ostensible purpose, the Bill will not ‘promote the right to freedom of trade, occupation, and profession’. Nor will it ‘encourage a conducive environment that promotes compliance and sustainability of businesses’. [Section 2, Bill] Instead, the Bill will truss up all businesses, both large and small, in yet more onerous red tape. Its impact will fall most heavily on SMEs, which lack the resources to deal with still greater administrative obligations. The Bill will also help to stifle the informal economy, which currently provides a livelihood to millions of small-scale entrepreneurs and their employees. [South African Institute of Race Relations, 2012 *South Africa Survey*, p329]

Contrary to DTI assurances, the Bill will indeed spawn new bureaucracies, for these will be needed to consider and grant licence applications, maintain registries, and write reports. It will thus increase the already high costs of the public service without bringing any compensatory economic benefit. The Bill will also place a huge additional administrative burden on all municipalities – many of which are already unable to discharge their core responsibilities.

In addition, the Bill will introduce excessive penalties, including imprisonment for up to ten years, for those who fail to produce a licence on request, hawk goods and services without a licence, or try by ‘fronting’ to help foreigners go into business here.

The Bill will foster corruption and the extortion of bribes. It will also undermine the rule of law by allowing inspectors to issue ‘administrative fines’ in contravention of constitutional guarantees of due process, administrative justice, and access to court.

In addition, the Bill will take up the time of policemen who ought instead to be concentrating on combating much more serious crimes. It is likely to promote xenophobia, while cutting consumers off from the better goods at cheaper prices that foreign traders often bring.

Writes Professor Crush: ‘The Bill is a fundamental attack on key aspects of South Africa’s vibrant and growing informal economy, which provides a livelihood for many people. One of the less subtle objectives of the Bill is to make it so difficult for non-citizens to operate small business in South Africa that they will go home. If they stay and contravene the legislation, their property and goods will be seized and they face the prospect of a heavy fine or imprisonment or both. A quicker way to criminalise hard-working small-scale entrepreneurs is hard to imagine.’

Conflict with the National Development Plan

The National Development Plan (NDP), approved by the Cabinet in August 2012, sees 90% of the 11m new jobs it seeks between 2010 and 2030 as arising from small businesses. It therefore calls for regulatory reform to encourage ‘mass entrepreneurship’ and a more enabling environment to facilitate the creation and expansion of small businesses.

Instead, the Bill creates major additional bureaucratic hurdles for small businesses, in particular, to surmount. In doing so, it poses a great threat to job creation, especially in the small business sector the NDP sees as vital to the attainment of its goals. The Bill thus contradicts the NDP, which is supposed to have an ‘overriding effect’ on all the ruling party’s policy choices. This conflict, in itself, provides sufficient reason for the DTI to withdraw the Bill in its entirety.