

FRAMEWORK BY-LAW: INFORMAL TRADING IN PUBLIC SPACE

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INTRODUCTION

1. *The SALGA: Guidelines for Public Space Trading* consists of the *Framework By-law: Informal Trading in Public Space*; the *Policy Guidelines for Enabling Governance of Informal Trading in Public Spaces*; and the *Guidelines for Health, Space and Infrastructure: Towards Safe and Viable Public Space Trading*. These companion documents ideally should be read together but may also be used independently as reference material as municipalities see fit. They are intended as a tool to assist municipalities in the development of a more enabling environment, as well as an advocacy tool for traders and trader organisations, hopefully facilitating more trans-disciplinary, cross-silo, and collaborative processes.
2. This *Framework By-law for Informal Trading in Public Space* draws on the substantive work of the background research paper, policy guideline, the safe and viable public trading space guideline and the sources on which they rely, recent judgments of South African courts relevant to informal trading, an overview of existing local government regulation of informal trading, and the Covid-19 pandemic context.
3. Overall the guidelines as a whole and this Framework By-law, contribute to the following medium term outcomes:
 - *Ensuring Economic Participation and Mobility* – all people in South Africa have the right to participate in the economy, and municipalities should enable paths for economic mobility through economic support measures and options for economic diversification for economic units.
 - *Providing for Social Protection and Inclusion* – non-discriminatory public-space trading, and instituting social protection and public safety measures, especially for vulnerable populations.
 - *Strengthening Governance* – Local government exercises accountable, coherent, developmentally-oriented governance in respect of the informal sector, within an enabling inter-governmental framework.
 - *Covid-19 Pandemic Response* – make provision for relaxation of by-laws and necessary essential service provision to allow for trading continuity while ensuring occupational health and safety measures.

CONTEXT

4. The informal sector is a critical part of the South African economy. It impacts on livelihoods, gives access to many people who would otherwise be excluded from the economy, and is crucial to addressing the triple challenge of poverty, unemployment and inequality in South African cities, towns and rural areas. Local government plays a key role in regulating the informal sector, mainly through municipal policies and by-laws on informal trading.
5. The Covid-19 pandemic has had a devastating impact on the South African economy, including the informal sector. It has thrown a harsh light on structural fault lines in economic supply chains and highlighted the critical role played by the informal sector, particularly regarding food security for the poor. The pandemic will have long-lasting economic effects and the surge in formal sector unemployment has swelled the informal economy.
6. The combination of an expanding informal economy and the essential health and safety measures required to combat the Covid-19 pandemic have necessitated increased access to public space, and flexible and creative responses to promoting and enabling informal trading in public spaces. Despite the devastation caused, the pandemic provides a new lens through which to view public space and the important and integral role of public space trading in the urban environment while maintaining community health and safety.
7. Internationally, in response to the pandemic, some urban leaders are re-imagining their cities as more sustainable, resilient and pedestrianised urban spaces that are less compact and feature more breathing space, including larger sidewalks, so that the potential for rapid transmission of disease is reduced.
8. Local government is a key site of service delivery and economic development, at the centre of meeting this challenge. Its constitutional mandate includes providing services to communities in a sustainable manner, promoting social and economic development, promoting a safe and healthy environment, and encouraging community participation.
9. In addition, several South African court judgments have highlighted fault lines in municipalities' approach to informal trading. Our courts have emphasised local government's legal and constitutional obligations to informal traders, including foreign nationals, and have criticised the heavy-handed approach by some officials responsible for the implementation and enforcement of municipal by-laws.

10. In this context, there is an urgent need for municipalities to review their policies and by-laws regulating informal trading in public space.

STATUS OF THIS FRAMEWORK BY-LAW

11. This framework by-law seeks to guide the review on key themes of existing municipal by-laws regulating informal trading in public space, and to assist municipalities to make reasoned decisions on the regulatory options suitable to their context. Importantly, it deals only with selected topics that are of common interest across municipalities regarding informal trading in public space.

12. This framework by-law is not a standard draft by-law (as contemplated by sections 14(1) or (2) of the Local Government: Municipal Systems Act 32 of 2000), or a model draft by-law to be used as a template for a municipality's own by-law-making process. In reviewing their by-laws, municipalities² must take care to ensure that their revised by-laws are appropriate to local conditions and circumstances and provide a coherent and complete regulatory framework.

In the pages that follow, for every topic there is a text box headed 'GUIDELINE EXAMPLE' that contains suggested by-law text to deal with the thematic issue being discussed. Municipalities must apply their minds to the issues in their context and develop relevant by-laws that are suitable to local conditions and promote rather than hinder informal trading.

FRAMEWORK BY-LAW THEMES

13. Guiding principles for informal trading in public space

Guiding principles in regulatory instruments serve as a general framework for their interpretation and application. They also perform an important symbolic and educative role in the application and interpretation of the law. In the context of informal trading in public space, they seek to guide the interpretation, administration and implementation of by-laws by municipalities and their authorised officials.

² This framework by-law refers to 'municipality' as a generic term and does not distinguish between municipal councils and authorised officials. In reviewing their by-laws, municipalities should give careful consideration on whom a specific power or duty should be conferred: the municipal council, an authorised municipal official, or in some cases both.

GUIDELINE EXAMPLE

Guiding principles for informal trading in public space

- (1) The interpretation and application of these by-laws must be guided by the following principles -
 - (a) The municipality has a duty to promote social and economic development, including the duty to support and promote informal trading as a vital part of the economy;
 - (b) The municipality recognises that Informal traders have rights to trade, to dignity and to pursue their livelihoods, and has a duty to respect, protect and promote these rights;
 - (c) Within its financial and administrative capacity, the municipality must provide access to public space, infrastructure and basic services to promote and increase opportunities for informal trading;
 - (d) The municipality must involve informal traders and their representative organisations in informal trading matters; and
 - (e) The municipality must manage public space in the interests of all users, including informal traders.

14. Increasing public space for informal trading

The *Guideline for Safe and Viable Public Trading Space* points out that before the Covid-19 pandemic, most towns and cities had inadequate suitable space and amenities to accommodate everyone wanting to take advantage of the economic opportunities in public space. This has been compounded by the Covid-19 health imperative to keep people physically distanced and the dramatic increase in the demand for trading space.

Municipalities must find innovative ways to maximise public-space trading opportunities.

GUIDELINE EXAMPLE

Identifying suitable public space for informal trading

- (1) The municipality must identify suitable and sufficient public space for the purpose of informal trading, considering -
 - (a) the demand for informal trading opportunities;
 - (b) the need to accommodate new entrants to informal trading;
 - (c) the concentration of potential customers for informal trading;
 - (d) the proximity of support infrastructure and services, or the potential to provide support infrastructure and services;
 - (e) existing land-use arrangements and the need to adapt these arrangements to accommodate informal trading, where necessary; and
 - (f) the health and safety of the public.

- (2) In identifying suitable and sufficient public space for informal trading, the municipality must -
 - (a) consult informal traders and their representative organisations; and
 - (b) follow the notice and comment procedure in this by-law.

Designating trading areas and demarcating trading sites

- (1) The municipality may designate trading areas for informal trading, and demarcate trading sites within designated trading areas.

- (2) Before designating a trading area for informal trading, the municipality must
 -
 - (a) consult informal traders and their representative organisations; and
 - (b) follow the notice and comment procedure in this by-law.
- (3) A trading area designated in terms of subsection (1) may include non-municipal property, subject to the consent of the owner of the property.

Infrastructure and services at designated trading areas

- (1) The municipality must provide adequate infrastructure and services at designated trading areas, within the municipality's available resources.
- (2) The infrastructure and services contemplated in subsection (1) should include
 -
 - (a) potable water, maintenance, waste disposal and public safety services;
 - (b) sanitation and electricity infrastructure, including public lighting;
 - (c) support structures, including trading stalls with shelter;
 - (d) facilitating access to storage facilities; and
 - (e) facilitating access to childcare facilities.
- (3) The municipality:
 - (a) may charge fees for services provided at designated trading areas;
 - (b) in determining the amount of these fees, must consider their affordability for informal traders.

15. Equal protection and benefit of the law

The Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law, and prohibits unfair discrimination on any ground, including race, gender, sex, ethnic or social origin. To promote the achievement of equality, the Constitution authorises measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, and prohibits unfair discrimination.

In *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others*,³ the Supreme Court of Appeal affirmed that foreign nationals (asylum seekers and refugees) were entitled to apply for or renew business or trading licences in terms of the Businesses Act⁴ or relevant municipal by-laws, and accordingly to trade informally.

This case affirms that foreign nationals have a right to participate in and conduct informal trade, and is consistent with the approach adopted by our courts in other cases related to the rights of foreign nationals.

GUIDELINE EXAMPLE

Applying for trading permits

- (1) Any person who wants to conduct business as an informal trader in a designated trading area may apply to the municipality for a trading permit and for the allocation of a demarcated trading site, by -
 - (a) completing and submitting the application form provided by the municipality; and
 - (b) submitting a copy of a document verifying their identity and two passport-sized photographs of the applicant.

³ 2015 (1) SA 151 SCA.

⁴ Act 71 of 1991.

(2) The municipality must -

- (a) provide application forms in English and the vernacular language most spoken in the municipality, at each municipal office;
- (b) ensure that the application form explains the steps that an applicant must take to be allocated a trading permit; and
- (c) assist applicants who need help to complete the application form.

Criteria for allocating trading permits

- (1) When considering an application for a trading permit, the municipality must give preference to applicants who are existing street traders in the designated trading area, historically disadvantaged persons, women, persons with disabilities, single parents, unemployed persons and persons entering the informal trading sector for the first time.
- (2) The municipality may not unfairly discriminate against any applicant or informal trader on the basis of their nationality.

Allocating trading permits

- (1) The municipality must allocate trading permits and demarcated trading sites in a transparent manner and within a reasonable period of receiving the application for a trading permit.
- (2) If the municipality approves the application, the municipality -
 - (a) must issue the informal trader with a trading permit;
 - (b) may allocate a demarcated trading site to the informal trader and require the informal trader to conclude a lease agreement for the trading site;

(c) may impose reasonable conditions relating to trading hours, time-sharing arrangements, trading in foodstuffs, structures that may be erected on demarcated trading sites, and the period of validity of the trading permit.

(3) The municipality may allocate a demarcated trading site to more than one informal trader on a time-share basis.

(4) If the municipality refuses the application, the municipality must notify the applicant in writing with reasons for the decision and advise the applicant of their right to appeal the decision in terms of this by-law

Register of informal traders

(1) The municipality must maintain a register of all persons who apply for trading permits and all persons who are allocated trading permits, and make the register available at the municipal offices for inspection by the public.

16. Rights and duties of informal traders

Our courts recognise that there is a general right for informal traders to make a living through trade as part of the constitutional right to human dignity. At the same time, informal traders have responsibilities to trade in accordance with legal requirements and in a manner that promotes public health and safety.

GUIDELINE EXAMPLE

Rights of informal traders

(1) Every informal trader has the right to conduct business subject to the terms of any trading permit, this by-law, or any other relevant law.

(2) Despite subsection (1), no informal trader may trade in an area that the municipality has declared as a prohibited trading area in terms of this by-law

Duties of informal traders

- (1) Informal traders must -
 - (a) ensure that their goods and equipment are placed within the boundary of the demarcated trading site allocated to them;
 - (b) ensure that they trade within the boundary of the demarcated trading site allocated to them;
 - (c) ensure that goods, equipment or any other thing used on their demarcated trading site does not pose a danger to the health and safety of any person;
 - (d) ensure that the stand or equipment used is sturdy, and that any structure erected on the demarcated trading site does not unreasonably obstruct the sight of pedestrians in the public space;
 - (e) trade in a manner that does not cause a hazard to pedestrians and vehicles;
 - (f) maintain a clean, tidy and hygienic trading site by ensuring that all refuse and litter produced in the course of trade is placed in refuse bins approved of or provided by the municipality;
 - (g) ensure, when trading involves the cooking or preparation of food, that any food, oil or other substance that drops onto the surface of the demarcated trading site is promptly removed;
 - (h) at the end of any trading day or time-sharing period allocated to them, remove all their goods and equipment from the demarcated trading site;

- (i) pay such periodic fees and charges reasonably required by the municipality;
- (j) comply with the terms and conditions of any trading permit;
- (k) familiarise themselves with the penalties for failure to comply with any term or condition of the trading permit, this by-law or any other law;
- (l) ensure that any assistant employed by the trader is properly supervised and is aware of the terms and conditions of the trading permit and this by-law.

Code of good practice for informal trading

- (1) The municipality may issue a code of good practice for informal trading, after consulting informal traders and their representative organisations.

17. Cancellation of trading permits

Municipal officials must act in a lawful, reasonable and procedurally fair manner. By-laws should provide clear guidance on when particular measures may be used by officials and should ensure that officials consider the potential negative impact of the decision on informal traders, particularly where decisions may result in great hardship. Trading permits should be cancelled only after less restrictive measures have been unsuccessful.

GUIDELINE EXAMPLE

Cancelling trading permits

- (1) After a hearing, the municipality may cancel a trading permit if it is satisfied that -
 - (a) the informal trader or their assistant has repeatedly traded in a manner that causes a hazard to the general public or creates a danger to other informal traders;

- (b) the informal trader has failed to comply with material terms of this by-law or their trading permit on three separate occasions, and after receiving a written warning in respect of the first and second failures;
 - (c) the informal trader or their assistant has repeatedly failed to produce the trading permit issued in terms of this by-law despite being issued two warnings and a fine;
 - (d) the informal trader secured the trading permit through misrepresentation or fraud; or
 - (e) the informal trader has repeatedly failed to pay the fees or charges required by the municipality, despite the municipality exploring alternative arrangements in terms of this by-law
- (2) The municipality may not cancel a trading permit unless it has given the informal trader or their assistant (which service is deemed to be service on the trader) 2 written warnings within a period of 6 months that -
- (a) describes the conduct that constitutes non-compliance with this by-law or with a material term and condition of the trading permit;
 - (b) calls on the trader to comply within 7 days; and
 - (c) specifies the penalties that attach to such non-compliance.
- (3) If a trader gives notice of intention to cease trading or the permit is cancelled by the municipality, then that trading opportunity must be re-allocated in terms of this by-law.

18. Restricting or prohibiting informal trading

The Businesses Act ⁵provides for municipalities to restrict or prohibit informal trading in certain places, but only after taking into account the impact on informal traders. Municipalities may only relocate or evict informal traders under limited circumstances.

GUIDELINE EXAMPLE

Declaring restricted or prohibited areas

- (1) After consulting affected informal traders and their representative organisations, the municipality may declare any place to be an area in which informal trading is restricted or prohibited.

- (2) Before the municipality does so it must -
 - (a) consider the effects of the declaration on existing informal traders in the area;
 - (b) consider whether better supervision or control of informal trade in the area will make the declaration unnecessary;
 - (c) consider whether the declaration may drive existing informal traders out of business;
 - (d) comply with the applicable provisions of the Business Act 71 of 1991.

⁵ Where a municipality drafts a By-Law in terms of the Constitution, or any other Act, the principles underlying the provisions in this Framework By-Law may be applied after careful consideration to its relevance and application to local contexts.

- (3) The municipality must make and display signs, markings or other devices indicating the restriction or prohibition, and the locations and boundaries of areas where informal trading is restricted or prohibited.

Relocating or evicting informal traders

- (1) The municipality may not relocate or evict any informal trader unless the municipality has declared the place in which they trade as a restricted or prohibited area in terms of this by-law.
- (2) Any relocation or eviction of informal traders must comply with the following principles -
 - (a) relocation must be avoided as far as reasonably possible, unless there is a clear and urgent need to relocate the informal traders in question;
 - (b) the affected informal traders or their representative organisations must be involved in the planning and implementation of an alternative demarcated trading area;
 - (c) the livelihoods of affected informal traders must be restored, in real terms, to pre-relocation or pre-eviction levels;
 - (d) informal traders may not be relocated from natural markets where informal trade has been taking place for over 30 years.

19. Institutional co-ordination and alignment

Informal trading often falls under a range of municipal departments, leading to a lack of coordination and unfocused municipal strategy. Municipal departments often work in silos with contradictory policies and misaligned practices, resulting in informal traders becoming the victims of governance and capacity shortcomings.

There is also a lack of alignment between different municipal legislative instruments such as informal trading, public space, traffic and transport and environmental health by-laws. Other municipal by-laws are often restrictive of or hostile to informal economic activity.

There is also little co-ordination of policies, by-laws and practices between neighbouring municipalities regarding informal trading.

GUIDELINE EXAMPLE

Co-ordination and alignment of policies, by-laws and practices

- (1) The municipality must -
 - (a) align its policies, by-laws and practices to ensure coherent and consistent promotion of informal trading by the municipality;
 - (b) ensure effective coordination of its departments and other administrative components to promote a coherent and consistent municipal strategy regarding informal trading and the consistent enforcement of by-laws; and
 - (c) coordinate its activities with neighbouring municipalities, while addressing local circumstances and conditions and promoting local innovation regarding informal trading.
- (2) The municipality must establish a coordinating forum consisting of senior municipal officials representing all relevant municipal departments or components whose activities impact on informal traders, to promote the alignment and coordination contemplated in subsection (1).
- (3) The municipality must review and amend any integrated development plan adopted in terms of the Local Government: Municipal Systems Act 2 of 2000, to ensure that spatial planning in the municipality supports and promotes informal trading.

- (4) The municipality must review and amend any disaster management plan prepared in terms of section 53 of the Disaster Management Act, 2002, to include measures to reduce the vulnerability of informal traders.

20. Capacity building and public awareness

Municipalities must facilitate training of municipal officials, informal traders and representative informal trading organisations in order to build the needed capacity and knowledge base to protect, develop and promote informal trading.

GUIDELINE EXAMPLE

Capacity building and public awareness

- (1) The municipality must –
 - (a) ensure that municipal officials responsible for implementing or enforcing this by-law or any other by-law impacting on informal traders are properly trained on the lawful exercise of their powers and the performance of their functions, the rights of informal traders, the management of informal trade in public spaces, and dispute resolution;
 - (b) provide capacity building training to informal traders and their representative organisations on urban management matters, such as waste management, safety and security on the street, environmental health and safety, and financial management;
 - (c) promote public awareness regarding the role of informal trading in the economy, the municipality's policy to promote informal trading and the rights of informal traders.

21. Dispute resolution mechanisms

The courts have criticised informal trading by-laws on the basis that they fail to provide meaningful dispute resolution mechanisms to appeal and challenge the decisions of officials charged with implementing by-laws. In *Makwickana v eThekweni Municipality and others*,⁶ the court commented on the dysfunctionality of the dispute system design and how this frustrated attempts at the peaceful resolution of conflict.

The courts have called for a functional, accessible and expeditious dispute system design. Municipal by-laws should therefore include accessible and speedy dispute resolution mechanisms.

While section 62 of the Municipal Systems Act provides for appeals by persons whose rights are affected by decisions made by a municipality, the applicable time periods and appeal authorities contemplated by the section are not conducive, accessible and speedy dispute resolution.⁷

GUIDELINE EXAMPLE

Written notice of decisions and reasons

- (1) The municipality must notify any informal trader in writing of any decision of the municipality that has legal consequences for the informal trader.
- (2) The notice must inform the informal trader that they have the right to request reasons for the decision and the right to appeal against the decision, within the time limits set out in this by-law.
- (3) Any informal trader who is aggrieved by a decision of the municipality may request reasons for the decision within 10 days after receiving notice of the decision. The municipality must furnish reasons in writing within 10 days of receiving the request.

⁶ 2015 (3) SA 165 (KZD).

⁷ Section 62(6) of the Municipal Systems Act provides that the provisions of the section do not detract from any appropriate procedure provided for in any other applicable law.

Appeals

- (1) An informal trader who is aggrieved by a decision of the municipality may appeal the decision to an appeals committee in terms of this by-law.
- (2) The aggrieved informal trader must lodge the appeal with the municipality within 10 days of receiving written reasons for the decision and specify the grounds for the appeal.
- (3) The appeals committee must dispose of the appeal within 30 days of the notice of appeal being lodged.

Urgent appeals

- (1) An aggrieved informal trader may apply for the appeal to be heard urgently by specifying in writing why the appeal is urgent and why the ordinary appeal process would not provide adequate redress.
- (2) The appeals committee must consider the application urgently; and if it decides that the appeal is urgent, it must give directions on the urgent appeal process, including urgent time limits.

Appeals committee

- (1) The municipality must establish an appeals committee to consider and decide appeals lodged in terms of this by-law.
- (2) The appeals committee must consist of at least 3 members, with the following composition -
 - (a) one member nominated by the municipality;
 - (b) one member nominated by informal traders or their representative organisations;

- (c) one member who is experienced in legal matters, agreed to by both the municipality and informal traders or their representative organisations;
 - (d) any additional member or members agreed to by the municipality and informal traders or their representative organisations.
- (3) The appeals committee must appoint a chairperson and deputy chairperson from its members. In the absence of the chairperson, the deputy chairperson performs the chairperson's duties.
- (4) The appeals committee may co-opt any person with expertise or knowledge that may assist the appeals committee. The co-opted person may advise on any matter on which their expertise or knowledge is sought, but may not participate in the decision of the appeals committee.
- (5) The appeals committee must endeavour to reach unanimity on its decision, but if this is not possible, must decide the appeal by majority vote.
- (6) The quorum for the appeals committee is 3 members, including either the chairperson or deputy chairperson.

Appeal procedure

- (1) The chairperson must notify the aggrieved informal trader of the date, time and place of the appeal hearing, and the opportunity to present evidence and argument at the hearing.
- (2) The aggrieved informal trader may appear personally or may appoint a legal representative, paralegal or any other person to appear on their behalf.
- (3) The chairperson -
- (a) must preside at the appeal hearing;

- (b) may call upon any person to present evidence, to produce any document or other property in their possession or control, or to be questioned.
- (4) The aggrieved informal trader and the municipality may give evidence before the appeals committee, give evidence by way of witnesses, and produce documentary or any other evidence.
- (5) The appeals committee must -
 - (a) conduct the appeal hearing in an inquisitorial manner to ascertain the relevant facts;
 - (b) deal with the substantial merits of the appeal with the minimum of legal formalities; and
 - (c) decide the appeal fairly and quickly.
- (6) If the appeals committee is of the *prima facie* view that a matter may be resolved in a less restrictive or burdensome manner, it must canvass the views of the parties as to the viability of such resolution before making a decision.

Appeal decisions

- (1) The appeals committee must consider the appeal, having regard to -
 - (a) the evidence presented by the appellant and the municipality;
 - (b) the guiding principles in this by-law;
 - (c) whether the decision of the municipality was fair and equitable, in the circumstances;

- (d) how the decision will affect the aggrieved informal trader's ability to trade; and
- (e) whether less restrictive or burdensome alternatives could be adopted to resolve the matter.

(2) The appeals committee may -

- (a) uphold the appeal;
- (b) dismiss the appeal; or
- (c) direct that the appeal be resolved in any other manner it deems appropriate.

(3) The appeals committee must notify the aggrieved informal trader and the municipality of its decision with written reasons within 10 days of the appeal hearing.

(4) The decision of the appeals committee takes effect and binds all parties from the date that they receive notice of the decision.⁸

Mediation

- (1) The municipality and any aggrieved informal trader may at any time agree to refer any dispute between them for mediation by an independent mediator.

22. Meaningful engagement and public participation

Municipalities are obliged to encourage the involvement of communities and community organisations in matters of local government, and to provide meaningful opportunities for the community to engage with critical decisions and processes. Municipalities must

⁸ Larger municipalities should consider establishing local and central appeal committees.

establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality.

In the context of informal trading, municipalities should enable meaningful, structured engagement with informal traders and their representative organisations.

GUIDELINE EXAMPLE

Informal trading stakeholder forums

- (1) The municipality must establish one or more informal trading stakeholder forums⁹, for the purposes of:
 - (a) meaningful engagement with informal trading stakeholders on any matter concerning informal trading;
 - (b) promoting a co-operative relationship between the municipality and informal traders; and
 - (c) consulting on specific matters provided for in these by-laws.
- (2) An informal trading stakeholder forum must consist of -
 - (a) authorised representatives of membership-based organisations representing informal traders in the municipality, including organisations representing foreign nationals where applicable;
 - (b) one or more senior officials of the municipality with the necessary authority, knowledge and expertise;
 - (c) at least one municipal councillor;

⁹ Larger municipalities should consider establishing more than one stakeholder forum to accommodate local informal trading areas and sectors.

- (d) any other interested or affected person or persons appointed by the municipality; and
 - (e) any other person or persons appointed by agreement between the members referred to in paragraphs (a) and (b).
- (3) The authorised representatives of membership-based organisations representing informal traders must constitute at least 50% of the members of an informal trading stakeholder forum.
- (4) The members of an informal trading stakeholder forum may be assisted by technical advisors on matters requiring specialised knowledge.
- (5) Where applicable, senior officials of the municipality serving on a forum must be drawn from all relevant municipal departments or components whose activities impact on informal traders.
- (6) An informal trading stakeholder forum must function in accordance with rules adopted by the municipality after:
- (a) consulting membership-based organisations representing informal traders in the municipality; and
 - (b) following the notice and comment procedure in this by-law.
- (7) The rules of an informal trading stakeholder forum must provide for the appointment and terms of office of members, the appointment of a chairperson or chairpersons, the replacement of members, meeting procedures and frequency, minutes, the establishment of committees, and any other matter required for the effective functioning of the forum.
- (8) The minutes and resolutions of an informal trading stakeholder forum must be:
- (a) submitted to the municipal council and the executive committee of the municipality where applicable; and

(b) published on the municipality's official website or made available for inspection by the public at the offices of the municipality.

(9) The members of an informal trading stakeholder forum may not receive any remuneration or allowances from the municipality by virtue of their membership, but may be compensated by the municipality for out-of-pocket expenses.

(10) The municipality must provide the assistance necessary for an informal trading stakeholder forum to perform its functions effectively.

Notice and comment procedure

(1) The municipality must publish, in at least 2 newspapers circulating within its jurisdiction and on its official website, any proposals regarding public space that may be identified as suitable for informal trading; the designation of trading areas; the declaration of areas where trading is restricted or prohibited; and the levying of rentals, fees and charges.

(2) Such proposals must be accompanied by reasons or motivations as may be necessary; while in relation to the proposed rent, fees and charges, the municipality must publish a statement of how these are calculated.

(3) Interested and affected persons must be invited to make written comment on the proposals within a period of 30 days of publication. After the expiry of the period of 30 days, the municipality must consider any comment received, and if necessary, revise the proposals in question.

(4) In order to ascertain whether the proposals are reasonable, any interested and affected person may request the municipality to furnish such further information or explanation with regard to the proposals as they may reasonably require.

(5) In addition, the municipality must consult with informal traders and their representative organisations.

23. Distinguishing between more and less serious contraventions

In *Makwickana v eThekweni Municipality*, the court took issue with by-laws that failed to distinguish between more and less serious contraventions of the by-law. The court found that this inconsistency meant that both the by-law and the actions of officials taken in terms of the by-law were unlawful.

Municipal by-laws governing public space trading should distinguish between serious contraventions and less serious failures to comply with the by-law, and should provide for a range of measures that officials could use to encourage informal traders to comply with the by-law. These measures should range in their severity and impact on informal traders, and may include warnings and smaller fines for minor infractions (e.g. not being able to produce a copy of a permit or lease agreement), progressively heavier fines for repeat offenders, or in the case of serious infractions (e.g. trading in a way that poses a threat to the public), the impounding of a trader's goods.

GUIDELINE EXAMPLE

Offences

- (1) A person is guilty of an offence if he or she -
 - (a) trades in an area where informal trading is prohibited; or
 - (b) contravenes the terms of a trading permit.

- (2) A person is guilty of a continuing offence if that person continues with an offence after -
 - (a) notice has been served on that person in terms of this by-law; or
 - (b) that person has been convicted of such offence.

Warnings and fines

- (1) The municipality may issue a written warning to any person who trades in a way that contravenes his or her trading permit, any provision of this by-law, or any other law.

- (2) In the event of a person continuing to contravene or repeating a contravention in respect of which 2 written warnings have already been issued, an authorised official may issue such person with a fine not exceeding R500, and a further fine not exceeding R10 for every day such contravention continues after notice has been served on such person in terms of this by-law.

Removal and impounding of property of informal traders

- (1) The municipality may not remove and impound moveable property used by an informal trader to carry on trade, unless the property -
- (a) poses an imminent danger to the health and safety of the public; or
 - (b) has been abandoned.
- (2) For purposes of subsection (1), the municipality may regard as abandoned any moveable property found in a public space that does not appear to be under the control of any person.
- (3) If the municipality impounds the property of a person in terms of subsection (1), the municipality must -
- (a) complete a full inventory of the impounded property;
 - (b) immediately store the impounded property in an area designated by the municipality for the storage of impounded property;
 - (c) in the case of subsection (1)(a), provide the person with a signed copy of the inventory, which must include information on how the person can reclaim their property and what will happen to their property if they do not collect it and pay the impoundment costs;
 - (d) in the case of subsection (1)(b), display a signed copy of the inventory in a conspicuous manner at the municipal offices, where it can be examined by the public.

- (4) An informal trader whose property has been impounded in terms of subsection (1) may reclaim their property –
 - (a) in the case of subsection (1)(a), by presenting the copy of the inventory and paying the impoundment costs;
 - (b) in the case of subsection(1)(b), by presenting proof of ownership of the property to the satisfaction of the municipality and paying the impoundment costs.
- (5) The municipality must release the property on the same day that the owner of the property reclaims it.
- (6) The municipality may sell perishable goods that have been impounded at any time after impoundment. The municipality may destroy the goods if their condition renders them unfit for human consumption.
- (7) The municipality may sell non-perishable goods that have been impounded if the owner does not reclaim them and pay the impoundment costs within 2 months from the date of impoundment, and if the impoundment is not subject to an appeal in terms of this by-law.
- (8) If the impounded property is sold by the municipality in terms of subsections (6) or (7) and the trader presents the copy of the inventory, the municipality must pay the owner the proceeds of the sale less any outstanding impoundment costs.

24. Accountability of municipal officials

The courts have criticised the harassment and intimidation of informal traders by some municipal officials. In *Makwickana v eThekweni Municipality and others*, the court stated that unless officials are oriented to be empathetic towards street traders, the risk of powerful officials mistreating powerless, poor people is real.

Municipalities should adopt mechanisms to hold accountable those officials who conduct themselves in an unlawful manner, and should compensate for damages suffered by informal traders arising from the unlawful conduct of officials.

GUIDELINE EXAMPLE

Accountability of municipal officials

- (1) The municipality must adopt a code of conduct for municipal officials responsible for implementing or enforcing this by-law or any other by-law impacting on informal traders.
- (2) Any person who is aggrieved by the conduct of a municipal official responsible for implementing or enforcing this by-law or any other by-law impacting on informal traders may lodge a complaint in writing with the municipality, specifying the grounds for the complaint.
- (3) The municipality must investigate the complaint and provide the complainant with the result of the investigation in writing within 10 days of receiving the complaint.
- (4) The municipality must -
 - (a) keep a register of all complaints lodged in terms of subsection (2);
 - (b) make the register available for inspection by the public at the offices of the municipality; and
 - (c) submit a periodic report to the municipal council, the executive committee where applicable, and the informal trading stakeholder forum on complaints lodged in terms of subsection (2) and the result of investigations into the complaints.

- (5) The municipality must take appropriate steps against any municipal official who contravenes the code of conduct.
- (6) The municipality is liable for any loss or damage suffered by an informal trader arising from the unlawful conduct of any municipal official.
- (7) A municipal official is personally liable for any loss or damage suffered by an informal trader arising from the official's unlawful conduct in bad faith.

25. Flexible regulatory instruments

Municipal by-laws can authorise a range of flexible regulatory instruments to promote different aspects of informal trading. By way of example, instruments could include codes of conduct for municipal officials responsible for informal trading, codes of good practice for informal traders, health and safety guidelines, and guidelines for designated trading zones and markets. These instruments can be adopted or issued or amended without amending the by-law, provided that the required consultations have taken place with interested stakeholders.

These kinds of instruments can be used to innovate, and to address changing conditions and circumstances as they evolve.

GUIDELINE EXAMPLE

Codes of conduct, codes of good practice and guidelines

- (1) The municipality may adopt codes of conduct and issue codes of good practice or guidelines -
 - (a) that are consistent with this by-law;
 - (b) concerning any matter that may facilitate the application of this by-law;

(c) after consulting the informal trading stakeholder forum or forums; and

(d) after following the notice and comment procedure stipulated in this by-law.

26. Crisis intervention mechanisms

The Disaster Management Act¹⁰ provides the means for municipalities to prepare local disaster management plans, for the declaration of local states of disaster, and for mechanisms to deal effectively with declared local disasters. Based on their experience of the Covid-19 pandemic, municipalities need mechanisms to intervene, in the interests of preserving the livelihoods of informal traders and public health and safety, when a crisis arises that may not amount to or be declared a local state of disaster.

GUIDELINE EXAMPLE

Crisis intervention mechanisms

- (1) In any emergency which threatens the livelihoods of informal traders or the health and safety of the public, and after consulting the informal trading stakeholder forum or forums, the municipality may issue directions -
 - (a) to relax the application and enforcement of these by-laws to allow for informal trading continuity, while ensuring appropriate health and safety measures;
 - (b) to provide temporary alternative and accessible arrangements for the registration of or issuing of trading permits to informal traders;
 - (c) to ensure the availability and accessibility of municipal officials to advise and assist informal traders;

¹⁰ Act 57 of 2002.

(d) to release available resources of the municipality to deal with the emergency, and mitigate its impact on the livelihoods of informal traders and on the health and safety of the public;

(e) to provide temporary alternative arrangements for the control and management of designated trading areas;

(f) to provide for the temporary evacuation of informal traders from a designated trading area to a suitable alternative trading site;

(g) to provide for any other matter which may be necessary to mitigate the impact of the emergency on the livelihoods of informal traders and the health and safety of the public.

(2) Directions issued in terms of subsection (1) lapse 3 months after they are issued.

(3) After consulting the informal trading stakeholder forum or forums, the municipality may withdraw the directions or extend the directions for one month at a time before they lapse.

CONCLUSION

Municipalities face a substantial challenge in reviewing and revising their by-laws to meet the challenge posed by the long-lasting health and safety and economic impacts of the Covid-19 pandemic. This framework by-law seeks to guide the review on key themes, and to assist municipalities to make reasoned decisions on the regulatory options most suitable to their local conditions and circumstances.
