

# Rights, Regulation and Bureaucratic Impact: The Impact of Human Rights Litigation on the Regulation of Informal Trade in Johannesburg

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## Date published

6 January 2017

Editor Dr A Gildenhuys

## How to cite this article

Pieterse M "Rights, Regulation and Bureaucratic Impact: The Impact of Human Rights Litigation on the Regulation of Informal Trade in Johannesburg" *PER / PELJ* 2017(20) - DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1294>

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## DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1294>

## Abstract

In contemplating the extent to which rights-based litigation is conducive to positive social change, attention ought to be paid to the bureaucratic impact of court judgments that vindicate rights against the State. As a case study of such impact, this article considers the effects of human rights litigation on the regulation of informal trade in the City of Johannesburg, where a 2013 attempt by local government to clamp down on informal trade in the central business district (CBD) led to high-profile court action. After describing and problematising the City's general approach to managing informal trade, the article focuses on "Operation Clean Sweep", which aimed to rid much of the CBD of informal traders and became the focal point of rights-based resistance. It then briefly describes the constitutional and jurisprudential framework within which the legal challenge to "Operation Clean Sweep" was to be decided, before critically discussing the judgment of the Constitutional Court in *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC), which effectively halted "Operation Clean Sweep" by interdicting the City from removing traders from their places of business. The article then proceeds to consider the aftermath of the judgment, and assesses its impact on the City's informal trade policy and urban management practices, as well as on the broader regulatory and political environment around street trade in South African cities. The article shows that the bureaucratic impact of the judgment has, at best, been mixed, and that the judgment has not been entirely successful in disrupting the legal and bureaucratic mindsets, frameworks and processes that simultaneously create, exacerbate and unsuccessfully attempt to address the "unmanageability" of street trade in Johannesburg.

## Keywords

Adjudication; rights-based litigation; bureaucratic impact; urban governance; regulation; informal trade.

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## 1 Introduction

One of the main objections typically raised against rights-based judicial review, especially in relation to socio-economic rights, is that the policy terrain is "polycentric", consisting of an intricate web of interlinked and competing interests. It is often argued that court decisions which vindicate rights disrupt and disturb this web, and may thereby have unpredictable knock-on effects far beyond the immediate context of specific litigation. Courts are therefore often cautioned to exercise significant restraint in adjudicating polycentric cases.<sup>1</sup>

A particularly volatile strand in the polycentric web is that the effect of judgments on state bureaucracies is unpredictable.<sup>2</sup> This is significant because the way in which the State complies with legal judgments against it ultimately determines the outcome of rights-based litigation for all of the people and embroiled interests concerned, and thereby also affects the general utility of rights-based litigation for society.<sup>3</sup>

It has been shown that the outcome of successful litigation against the State is dependent both on the internal environment within the bureaucracies responsible for the implementation of judgments (in that compliance with a judgment will depend both on the political will to implement it and on the bureaucratic capacity to do so) and on the external political environment within which judgments are released and received (in that the nature and extent of external political pressures upon bureaucracies will necessarily animate their response to a judgment).<sup>4</sup> The bureaucratic impact of a judgment will therefore also depend on its effect on embroiled social movements and pressure groups.<sup>5</sup>

This article conducts a case study of such bureaucratic impact in a

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<sup>1</sup> Fuller 1978 *Harv L Rev* 353-409. In the South African context see Liebenberg *Socio-economic Rights* 72-75; McLean *Constitutional Deference* 114-115; Pieterse 2004 *SAJHR* 392-395.

<sup>2</sup> See Pieterse *Can Rights Cure?* 84; Sunkin "Conceptual Issues" 52.

<sup>3</sup> See Gloppen "Social Rights Litigation as Transformation" 162-163.

<sup>4</sup> See Canon "Studying Bureaucratic Implementation" 80; Pieterse *Can Rights Cure?* 86-87; Pieterse and Van Donk 2002 *LDD* 196-197, 207; Rosenberg *Hollow Hope* 31, 34, 420; Sunkin "Conceptual Issues" 48, 53, 67-68.

<sup>5</sup> Pieterse *Can Rights Cure?* 87-88; Rosenberg *Hollow Hope* 415-419, 425.

particularly politically loaded and acutely polycentric context: the regulation of informal trade in urban areas in South Africa, with a particular focus on the inner city of Johannesburg.

Throughout the developing world, informal trade poses a headache for local governments, who have to balance their obligations to create and sustain healthy and safe urban environments conducive to economic growth and the sustainment of all urban activities,<sup>6</sup> against the fundamental socio-economic rights of traders, who are often some of the most vulnerable members of society. In South Africa, these socio-economic rights are constitutionally ensconced and justiciable, with the result that the regulation of informality in South African cities is pertinently impacted by their legal vindication.

Due to the precariousness of their businesses, their lack of political clout, and a lack of public sympathy for their plight, traders' survival interests are often subjugated to urban management concerns. This article grapples with the extent to which the legal assertion of rights to a livelihood can make a positive difference to the lives of traders in this regard, whilst nevertheless allowing for such regulation as is necessary to ensure the long-term sustainability of the urban environment.

Perhaps counterintuitively, the article focuses not so much on the plight of the traders themselves, but rather on the approach and conduct of the government that endeavours to manage them. This is in an attempt to better understand the concerns and reactions of those whose compliance with the obligations imposed by human rights ultimately determines the extent of their actual enjoyment. How sympathetic is local government to the everyday performance of socio-economic rights and to what extent do these rights animate its actions? How does it respond to legal and extra-legal attempts to assert rights against it? Can the successful judicial vindication of rights against local government make it more sensitive thereto, or does it breed hostility, thereby proving counterproductive in the long run? Most importantly, what (if any) peculiar features of litigation processes and court judgments have a bearing on the answer to these questions?

The case study conducted here focuses on successful litigation conducted on behalf of informal traders in Johannesburg's central business district (CBD), which effectively halted "Operation Clean Sweep", a particularly ill-

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<sup>6</sup> See Pieterse 2014 *SAPL* 181-184.

conceived attempt by the city's Metropolitan Council to clamp down on inner-city informal trade in the last months of 2013. Section 2 below explains the historical context of informal trade in the Johannesburg central business district and thereafter describes and problematizes the Metropolitan Council's stance toward and approach to managing informal trade in the city. Thereafter, section 3 describes "Operation Clean Sweep", the reactions to it, and informal trader organisations' ultimate resort to litigation in an attempt to ameliorate its impact. The judgment of the Constitutional Court vindicating the traders' rights is discussed in detail in section 4, before section 5 considers the City's response to the judgment, as well as its approach to regulating informal trade in its aftermath. The section further pays attention to the judgment's impact on informal traders' organisations operative in the CBD and to the manner of the City's subsequent interactions with them. In the light of what has transpired, section 6 draws conclusions about the bureaucratic impact of the litigation in this case, and attempts to distill some broader lessons for future attempts at rights-based litigation in this context.

## **2 The business and management of informal trading in Johannesburg**

One of the major developmental challenges facing Johannesburg as a city is the very high unemployment rate amongst its residents. Roughly 25% of all working-age adults and 31% of employable youth in the city are unemployed.<sup>7</sup> In the inner city many residents resort to informal self-employment to make ends meet, selling small quantities of consumer goods (sweets, cigarettes, tissues, fruit and vegetables, and so forth) or providing informal services (hairdressing, shoe and clothing repair, and such) on pavements and in other pedestrian areas. While a crucial livelihood strategy and forming an important part of Johannesburg's urban economy,<sup>8</sup> the proportions of street trade in the inner city pose a significant urban management challenge, with already strained urban infrastructure being simply unable to cope with the sheer amount and the various byproducts of trade, and with pedestrian movement across the city

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<sup>7</sup> Statistics South Africa date unknown [http://www.statssa.gov.za/?page\\_id=1021&id=city-of-johannesburg-municipality](http://www.statssa.gov.za/?page_id=1021&id=city-of-johannesburg-municipality).

<sup>8</sup> See Tissington *Business of Survival* 5-6; Van Rooyen and Malan 2007 *J Public Adm* 716-717. There were an estimated 18000 informal traders in the CBD in 2006. Tissington *Business of Survival* 5.

being hampered by the associated overcrowding.<sup>9</sup>

Informal trading was prohibited in the inner city of Johannesburg until shortly before South Africa's political transition in the mid-1990s, when the late 1980s collapse of racist influx control regulations was followed by the deregulation of street trade, with the provisions of the *Businesses Act 71* of 1991 allowing for the restriction of such trade only in limited circumstances.<sup>10</sup> This deregulation came at a tumultuous time for the inner city, when a combination of historical factors led to an exodus of established businesses from the CBD to newly established suburban commercial nodes, and to a concomitant influx of formerly excluded, poor (and often formally unemployed) residents from the city's peripheral black townships into the increasing number of vacant inner city buildings. The survivalist livelihood strategies of many of these residents led to an explosion of informal street trading throughout the CBD, with the attendant commotion further fuelling the business exodus and contributing to the well-documented physical degeneration of the inner city environment.<sup>11</sup>

The dilapidated state of inner-city Johannesburg became a popular focus point for pessimism over governance in the new South Africa, and its regeneration and improvement has become a central (albeit not uncontested) political priority of the city's local government, motivated not only by concern for the CBD's ability to sustain business, livelihoods, investment and the like, but also by the inner city's symbolic association with its own image.<sup>12</sup> A significant portion of the Johannesburg Metropolitan Council's well-publicised inner city regeneration efforts over the last two decades have involved "restoring order" to various features of life in the CBD, including the ordering, regulation and formalization of street trade.<sup>13</sup>

While initially overwhelmed by the sheer scale and diversity of informal livelihood practices in the inner city and responding to these in a "chaotic"

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<sup>9</sup> Van Rooyen and Malan 2007 *J Public Adm* 717.

<sup>10</sup> Section 6A of the Act is a cumbersome and convoluted provision which prescribes the circumstances under which and extent to which municipal bylaws may prohibit and restrict informal trade, as well as processes that must be followed to do so. For discussion of its initial impact in Johannesburg, see Skinner 2000 *Urban Forum* 51.

<sup>11</sup> See Murray *Taming the Disorderly City* 159; Murray *City of Extremes* 91, 103; Tissington *Business of Survival* 27, 29; Van Rooyen and Malan 2007 *J Public Adm* 717.

<sup>12</sup> See Dinath "Between Fixity and Flux" 247; Murray *City of Extremes* 137; Skinner 2000 *Urban Forum* 59.

<sup>13</sup> Dinath "Between Fixity and Flux" 242-244; Makhetha and Rubin "Inner-city Street Traders" 532; Murray *Taming the Disorderly City* 7, 16, 25, 155, 208-210; Tissington *Business of Survival* 5-6, 33-34; Van Rooyen and Malan 2007 *J Public Adm* 708.

and piecemeal fashion,<sup>14</sup> the Johannesburg Metropolitan Council was the first South African local government to formulate a coherent policy response to the "problem" of informal trade. Through various iterations, the City's policy vision has boiled down to street trade's regulation and formalisation, through the designation of areas where trade is either allowed or prohibited, the registration ("legalisation") of traders and the prescription of conditions for trade. Policy documents have generally professed a "developmental" approach to street trade, recognising its importance for the livelihoods of residents and its contribution to the economy, but trying to integrate it into the "orderly" business activities of the city, not least in order to provide an "opportunity ladder" for traders to eventually become subsumed into the formal economy.<sup>15</sup>

In terms of the 2009 *Informal Trading Policy for the City of Johannesburg*, the City's regulation of informal trade centers around the demarcation of designated areas for trade and the provision of supporting infrastructure for traders who operate there, mostly in the form of linear markets constructed by the Johannesburg Development Agency.<sup>16</sup> As to traders, the policy introduced a smart card registration system, whereby permits for trading in designated areas are effectively leased. Only traders with smart cards (representing lease agreements) are legally allowed to trade in the city.<sup>17</sup> Administrative implementation of the policy falls on the Johannesburg Metropolitan Trading Company (MTC) (which, around the same time as the events to be described in section 3 below, became subsumed into the Johannesburg Property Company), whereas the enforcement of the related municipal trading bylaws (prescribing the manner of trade and its related activities, and proscribing trade outside of demarcated areas) mainly befalls the City's Metropolitan Police, who are given the authority to dismantle "illegal" stalls (ie those outside of designated areas or operated by traders without permits) and to remove and impound wares traded "illegally" or in contravention of relevant bylaws.<sup>18</sup>

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<sup>14</sup> Skinner 2000 *Urban Forum* 54; Van Rooyen and Malan 2007 *J Public Adm* 718.

<sup>15</sup> Benit-Gbaffou *In Quest for Sustainable Models* 10, 27; Skinner 2000 *Urban Forum* 65; Tissington *Business of Survival* 17-18; 33-34; Van Rooyen and Malan 2007 *J Public Adm* 717-718. For example, see City of Johannesburg *Informal Trading Policy for the City of Johannesburg* (2009) 3-6.

<sup>16</sup> City of Johannesburg *Informal Trading Policy for the City of Johannesburg* (2009) 10-11.

<sup>17</sup> City of Johannesburg *Informal Trading Policy for the City of Johannesburg* (2009) 12-15.

<sup>18</sup> City of Johannesburg *Informal Trading Policy for the City of Johannesburg* (2009) 19-20.

While even-handed and fairly progressive on paper, the implementation of the *Informal Trading Policy* has been fraught and inconsistent. Apart from generally attempting to steer street trade towards linear markets, the under-resourced MTC has proved to be administratively ill-equipped to manage the everyday intricacies thereof. Accordingly, it has partly (and unofficially) outsourced much of this management to the private sector across the CBD's patchwork of "City Improvement Districts", while its own management efforts in the areas in between have been inconsistent. The result has been that the Metropolitan Police's bylaw enforcement efforts have become the face of street trade management across much of the CBD.<sup>19</sup> The City has also been slow with the construction of linear markets and the provision of associated trading infrastructure, with the result that the demand for trading space far outstrips the supply, and even in demarcated areas the infrastructure is often inadequate to support the activities. The traders also complain about the limited number and impractical location of the demarcated areas, which are often distant from the most passing foot-traffic. Moreover, the roll-out of the smart card and lease agreement system has been incomplete, inconsistent, inefficient and replete with tales of corruption, with the result that not all traders have been willing or able to comply with the system. Finally, the Metropolitan Police's manner of bylaw enforcement, especially against "illegal" traders, has been problematic. Tales of corruption and intimidation in the everyday course of enforcement are legion, and a great many traders complain of (often physical) harassment, extortion and the unwarranted confiscation and destruction of goods.<sup>20</sup>

While often simply ascribed to a lack of enforcement capacity and resource scarcity, these implementation problems are arguably far more structural, and relate to the manner in which law and related exercises of state power actively *produce* illegality and informality.<sup>21</sup> Rooted in the very desire to "formalise" and "regulate" street trade (which, of course, is by its nature fluid and informal), the policy framework's creation of an artificial category of "legal" (formalised, regulated) street trade, distinguishable

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<sup>19</sup> Benit-Gbaffou *In Quest for Sustainable Models* 12-13, 57-58, 65-66; Horn *Collective Bargaining* 3; Webster *"The End of the Street?"* 4, 28-29.

<sup>20</sup> On these and other implementation problems, see Benit-Gbaffou *In Quest for Sustainable Models* 20, 36-37, 60; Dinath "Between Fixity and Flux" 243-244; Makhetha and Rubin "Inner-city Street Traders" 532, 536; Murray *Taming the Disorderly City* 229, 233; Tissington *Business of Survival* 6, 19-20, 39, 55-63; Webster *"The End of the Street?"* 24-29, 45-46.

<sup>21</sup> See especially Roy 2005 *J Am Plann Assoc* 149-150; 155-156, also Benit-Gbaffou *In Quest for Sustainable Models* 15, 62-63; Schraten 2013 *Anthropology SA* 108, 111, 113-114.

from its "illegal" counterpart only through (often arbitrary and outwardly invisible) bureaucratic compliance (the possession of lease agreements and smart cards, its presence in designated areas, compliance with obscure bylaws and so forth), taints and threatens the entire informal trading sector with (at least potential) illegality and its dire, livelihood-restricting consequences.<sup>22</sup> The simultaneous limitation of opportunities for "legal" trade (through, for instance, designating only limited space for trade, issuing only a limited number of smart cards, and entering only into a limited number of lease agreements) creates scarcity and competition in an otherwise limitless marketplace, thereby fostering urgency and contestation and creating opportunities (and the need) for concealment, transgression, misrepresentation and corruption.<sup>23</sup> Much like the similarly artificial distinction between "legal" and "illegal" foreign migrants (with which the "legal"/"illegal" trader distinction volatily intersects, as briefly elaborated below), the result is a tangle of real and perceived legal compliance and non-compliance, which proves near unmanageable by however well-resourced and sophisticated an implementation system.

The internalisation and constant negotiation of this tangle by traders themselves makes for a somewhat volatile and conflicted inner-city trading environment characterised by divisions and mistrust, much as it is united by a common quest for sustainable livelihoods. Several traders' organisations, with different levels of internal formal structures and representing different subgroups of traders, are active in the CBD.<sup>24</sup> Not only do these organisations sometimes advance competing interests, but they also compete in attempts to influence the City's general approach to informal trade in the CBD. For instance, organisations representing "legal" traders often campaign for stronger law enforcement against "illegal" ones, because of resentment of the fact that "illegal" traders are able to trade at a lesser operating cost and in more business-conducive locations.<sup>25</sup> In line with the severely xenophobic attitudes prevalent amongst Johannesburg's poorer residents more broadly, South African-born traders and some trader organisations are further often hostile to (often "illegal") trade by foreign nationals, and argue that more explicit preference must be given to

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<sup>22</sup> See Benit-Gbaffou *In Quest for Sustainable Models* 11; 20, 60-63; Webster *"The End of the Street?"* 23-24.

<sup>23</sup> See Benit-Gbaffou *In Quest for Sustainable Models* 13, 20, 60-62, 83-84; Schraten 2013 *Anthropology SA* 111-114; Webster *"The End of the Street?"* 5, 35, 62, 66.

<sup>24</sup> For a detailed overview of these, see generally Benit-Gbaffou *Political Landscape*. Also see Tissington *Business of Survival* 43-47.

<sup>25</sup> See Benit-Gbaffou *Political Landscape* 6, 110-111; Makhetha and Rubin "Inner-city Street Traders" 536-537; Webster *"The End of the Street?"* 34.



locals in the allocation of stalls and the enforcement of bylaws.<sup>26</sup>

While the relationship between street traders and City management could not be described as convivial, the majority of the traders have generally accepted the need for the regulation of their industry and have tried to conduct their business in accordance with the demands of the regulatory framework. Indeed, traders have often expressed frustration at the lack of consistent and predictable enforcement of regulations and at the City's failure to comply with its undertakings in terms of the policy, especially in relation to the provision of the necessary infrastructure, support and administrative systems.<sup>27</sup>

Engagement channels between the traders and the City, while in existence and relatively functional, have fallen short of addressing these concerns and of enabling consistent and meaningful implementation of the City's trade policies and bylaws. The MTC has generally attempted to be open and responsive to traders' concerns, and to provide official channels for engaging with traders' organisations. Street traders were identified as stakeholders in the inner city (alongside, for instance, the Johannesburg Property Owners' Association, the Johannesburg Inner City Business Coalition and the Johannesburg Chamber of Commerce and Industry), and were accordingly included in the "Partnership Forum" set up in terms of the 2007 *Inner City Regeneration Charter*<sup>28</sup> and continuing under its successor, the 2013 *Inner City Transformation Roadmap*.<sup>29</sup> Furthermore, an Informal Trader Forum facilitated by the City's Department of Economic Development also met regularly, although many traders experienced this as more of a "top-down" structure dominated by the City's urban management agenda, rather than a genuine forum for dialogue.<sup>30</sup> Moreover, the manner of the City's engagement in these fora sometimes fueled and exploited existing conflict and divisions between traders' organisations, in what could be seen as a rather cynical "divide and rule" tactic insulating the City's agenda from meaningful opposition.<sup>31</sup>

Outside of these fora, attitudes towards street trade within the Metropolitan Council and the various city management agencies have generally tended to be negative. While there are important voices within the City

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<sup>26</sup> See Tissington *Business of Survival* 54-59.

<sup>27</sup> Webster "The End of the Street?" 32-33, 36-38.

<sup>28</sup> See City of Johannesburg *Inner City Regeneration Charter* (2007) 53-54.

<sup>29</sup> See City of Johannesburg *Inner City Transformation Roadmap* (2013) 70-71.

<sup>30</sup> See Benit-Gbaffou *Political Landscape* 8; Benit-Gbaffou *In Quest for Sustainable Models* 27, 88; Horn *Collective Bargaining* 3-4.

<sup>31</sup> Horn *Collective Bargaining* 3.

(emanating, for instance, from the Johannesburg Development Agency) in favour of the vibrancy and economic contribution of street trade, in line with a "place-making" approach to urban regeneration and an emphasis on urban inclusivity, the majority of officials in a decision-making capacity tend to view street trade as a disorderly scourge requiring strict regulation, in line with a modernist, top-down, "broken window" approach to urban management and regeneration fixated on urban aesthetics, which has tended to hold sway within the City.<sup>32</sup> This has meant that, even in the face of the clear practical shortcomings of its restrictive, linear-market focused "solution" to the "problem" of street trade, the City has doggedly persisted therewith, while managing the "spillover" from markets mainly through bylaw enforcement in the problematic manner described above.<sup>33</sup>

In the light of the inconsistencies in street trade management across the CBD, the limited resources at the City's disposal and the policy framework's complicity in the creation of a perpetually unmanageable problem of "illegal" trade, such bylaw enforcement has more often than not taken the form of Metropolitan Police-fronted "blitzes" aiming to "stamp out" illegal trade. Criticised for being shortsighted and unsustainable, and for unacceptable accompanying levels of police brutality, these "blitzes" have unfortunately also become a stalwart of the City's approach to various other urban management issues. The reasons for this include the political expediency of being seen to be "doing something" high-profile about urban management issues and the concomitant need to make a visible (albeit inevitably short-term) impact on the urban environment within a limited budget, something which also tends to align with the performance goals of individual City employees.<sup>34</sup>

Overall, the relationship between the City and the traders that animate the streets of the central business district could at best be described as a volatile truce, always subject to disruption in the City's overarching quest

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<sup>32</sup> See Benit-Gbaffou *In Quest for Sustainable Models* 11; Dinath "Between Fixity and Flux" 248-249; Makhetha and Rubin "Inner-city Street Traders" 533-534; Murray *Taming the Disorderly City* 25, 227, 229; Tissington *Business of Survival* 6; Webster "The End of the Street?" 53. A critique of the prevailing modernist approach, epitomised for instance by "world class city" discourse, is beyond the scope of this article. Suffice it to say that targeting aesthetics without also addressing underlying structural inequalities and economic hardship is bound to be an exercise in futility. See Roy 2005 *J Am Plann Assoc* 149-150; Webster "The End of the Street?" 6, 43, 58, 66.

<sup>33</sup> Benit-Gbaffou *In Quest for Sustainable Models* 10-11, 20; Webster "The End of the Street?" 6, 51-52.

<sup>34</sup> For discussion and criticism of the City's "blitz mentality", see Dinath "Between Fixity and Flux" 245-249; Murray *Taming the Disorderly City* 227, 229, 233; Webster "The End of the Street?" 53-54.

to "restore" order and predictability to the inner city. Traders, meanwhile, make their living under fairly precarious conditions, even while many attempt, as far as is possible, to do so within the confines of regulation.

### 3 "Operation Clean Sweep"

A particularly egregious manifestation of the City's "blitz approach" to managing informality in the CBD, the so-called "Mayoral Clean Sweep," was conceived in mid-2013 as a crackdown on illegal informal trade in the inner city, which was once again perceived to be getting out of control. Planned for implementation from September 2013 onwards, the operation was mooted to involve the removal of all "illegal" traders from the city's streets as part of a broader "cleanup" operation also including a range of cosmetic improvements to the urban environment. Ideologically problematic for its grouping of "illegal" traders together with non-human forms of "dirt" to be eradicated from the streets,<sup>35</sup> the mooted Operation Clean Sweep nevertheless had the initial support not only of business and other inner city stakeholders, but also of prominent traders' organisations in the city, who had long been lobbying for stricter law enforcement against their "illegal" counterparts.<sup>36</sup>

Commencing in early October 2013, the implementation of Operation Clean Sweep was immediately under fire from various quarters, however, mostly (once again) for the brutal and violent manner in which the Metropolitan Police were carrying out the operation.<sup>37</sup> The City, in response, condemned these actions but emphasised the need to counter the "chaos" that was reigning on the streets, ostensibly because of informal trade.<sup>38</sup>

But more was to come. In a bizarre turn of events, implementing officials faced with the artificial distinction between legal and illegal traders and a seemingly disproportionate number of falsified or fraudulently issued permits and smart cards decided to deal with their resulting inability to distinguish the targets of the operation by removing *all* traders, even those

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<sup>35</sup> Beyleveld *Regulating Informal Trade in Johannesburg* 18; Webster "The End of the Street?" 53-54.

<sup>36</sup> Benit-Gbaffou *Political Landscape* 6.

<sup>37</sup> See Beyleveld *Regulating Informal Trade in Johannesburg* 18-19 and authorities cited there; also Nxumalo 2013 <http://mg.co.za/article/2013-11-01-police-proud-of-work-around-inner-city-clean-up>.

<sup>38</sup> See Cox 2013 <http://www.iol.co.za/the-star/cbd-clean-sweep-1394105>; Nxumalo 2013 <http://mg.co.za/article/2013-11-01-police-proud-of-work-around-inner-city-clean-up>.

who were patently "legal", from the streets and to confiscate their wares. Amidst a widespread outcry and after tense negotiations the City entered into an agreement with legal traders, in terms of which a permit and smart-card "re-verification" exercise would immediately commence, and in terms of which "verified" legal traders would be allowed to return to their trading spots. However, throughout the following week it transpired that not even duly verified traders were being allowed back on the streets while the process was ongoing, and that the City's ultimate intention was to permanently deny permission to trade to a large number of formerly "legal traders", whereas others would be "permanently relocated". Meanwhile, a great many livelihoods were effectively extinguished, countless families were left without income, and both the informal and formal economy in the city (which were interconnected in more subtle and intricate ways than was understood at the time) took a severe knock.<sup>39</sup>

As communication between the City and traders increasingly broke down and the socio-economic impact of Operation Clean Sweep intensified, desperate traders' organisations turned to the law. The South African Informal Traders Forum (SAITF), overwhelmingly representing "legal" traders, approached the Socio-Economic Rights Institute (SERI), a legal NGO conducting litigation, research and advocacy mostly in relation to inner city housing in Johannesburg, for assistance. Deciding to proceed on behalf of all "legal" traders who had been removed by the City in contravention of its own bylaws, the Informal Trade Policy and the provisions of the 1991 *Businesses Act*, SERI proceeded to launch legal action in the Johannesburg High Court, applying for an order declaring Operation Clean Sweep unlawful and for an interim interdict requiring its immediate cessation pending the litigation.

Bafflingly, the Johannesburg High Court dismissed the application for the interim interdict, because the presiding judge felt that the matter was not urgent (and, effectively, that street trade could remain prohibited until such time as the challenge to the legality of Operation Clean Sweep was heard some months later).<sup>40</sup> This order was urgently appealed to the

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<sup>39</sup> This exposition of events follows the "background summary" provided by the Constitutional Court in *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC) paras 6-10. Also see Benit-Gbaffou *Political Landscape* 6; Nxumalo 2013 <http://mg.co.za/article/2013-11-01-police-proud-of-work-around-inner-city-clean-up>; Webster *"The End of the Street?"* 14, 16, 24.

<sup>40</sup> Order of the South Gauteng High Court (Johannesburg) in *South African Informal Traders Forum v City of Johannesburg* (GJ) unreported case number 43427/13 of 27 November 2013. Also see *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 13; Webster *"The End of the Street?"* 17.

Constitutional Court, which granted leave to appeal and heard the matter on 5 December, by which time many traders had been without income for nearly 2 months.

#### **4 The Constitutional Court judgment in *South African Informal Traders Forum v City of Johannesburg***

The Constitutional Court granted the requested interim interdict on the day of the hearing, ordering that the City was not allowed to interfere with trading by the applicants (members of SAITF, as well as other "legal" traders) at the locations that they had occupied prior to their removal in the course of Operation Clean Sweep.<sup>41</sup> In other words, the Court ordered that traders could return to their allocated stalls immediately, and could not be removed pending a final decision on the legality of the operation. The judgment thus clearly ordered that the implementation of Operation Clean Sweep, at least as far as informal traders were concerned, had to stop immediately.

The Court provided written reasons for its judgment a few months later. While acknowledging that Operation Clean Sweep impacted on a number of interrelated constitutional rights, notably the rights to dignity (understood as encompassing a right to a livelihood), freedom of trade, and the basic socio-economic rights of children,<sup>42</sup> the Court's focus in the written judgement was on the simple fact of the illegality of the City's actions. This was because there was no dispute that the City had been acting in contravention of its own policies and bylaws, as well as of the provisions of the *Businesses Act* (simply because, by the City's explicit admission, it was "convenient" for it to do so),<sup>43</sup> which means that its actions were clearly illegal and that the "legal" traders had an "undisputed right" to occupy their designated trading spots.<sup>44</sup> Given this "undisputed right", the clear and irreparable harm suffered by the traders who were left destitute by the City's illegal actions (and would remain so for at least 3 further months if an interdict were not granted), the fact that the balance of convenience clearly favoured the traders, and that no other effective remedy was available to them in the circumstances,<sup>45</sup> the Court could thus

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<sup>41</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 1.

<sup>42</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 31. Also see para 11.

<sup>43</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) paras 26-28.

<sup>44</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 25. Indeed, the Court felt that the City was so obviously in the wrong that it was unlikely that Operation Clean Sweep would ultimately be declared to have been legally permissible in the High Court. *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 28.

<sup>45</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) paras 21, 24, 29-30, 36-37.

issue a straight-forward, common-law interdict without the need to conduct a constitutional rights-based inquiry.

While sensible and understandable, this sidestepping of a more profound contemplation of traders' constitutional rights means that the judgment provided little clarity on the extent to which the implicated rights would assist traders in similar future disputes, especially in instances where the City does act within the parameters of the law, or acts only against "illegal" traders, as was its initial intention during "Operation Clean Sweep". At the time of the judgment, the state of constitutional jurisprudence suggested that constitutional protection for informal trade beyond the boundaries of the *Businesses Act* and associated bylaws might be scant. Section 22 of the 1996 *Constitution*, which guarantees the right to choice of trade, occupation or profession, is explicitly limited to South African citizens and expressly subjected to legal regulation. In *Affordable Medicines Trust v Minister of Health*,<sup>46</sup> the Constitutional Court confirmed that, unless unconstitutional for some other reason, legislative or policy-based restrictions on trade which are rationally related to a legitimate government purpose and adhere to the basic tenets of the legality principle would therefore not ordinarily fall foul of the right.

In *Minister of Home Affairs v Watchenuka*<sup>47</sup> the Supreme Court of Appeal held that, notwithstanding the limits to the right to trade, blanket restrictions on the right to seek formal employment would fall foul of the right to dignity where they have the effect of rendering someone completely destitute and unable to fend for themselves. But the impact of this ruling was clawed back by the Constitutional Court's subsequent finding, in *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*,<sup>48</sup> that restrictions on *particular kinds of* employment did not unjustifiably limit the right to dignity (and that it was therefore not unconstitutional to prohibit refugees from working as security guards, much as their other realistic employment options were limited).

While unequivocally vindicating the legal rights of the traders against the City, and more than once expressing dissatisfaction with the City's callous disregard for the law and its cynical approach to the traders,<sup>49</sup> the Court in

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<sup>46</sup> *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC). See paras 62-72, 77, 92-94, 100, 105. Also see Currie and De Waal *Bill of Rights Handbook* 468; Pieterse *Can Rights Cure?* 138.

<sup>47</sup> *Minister of Home Affairs v Watchenuka* 2004 1 All SA 21 (SCA) paras 27, 29-33.

<sup>48</sup> *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) paras 52; 54; 57; 66-67.

<sup>49</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) paras 26-28, 33-34, 36.

the *SAITF* matter was not entirely unsympathetic to the City's plight. It acknowledged the objectives behind Operation Clean Sweep (namely, as stated by the Court, to "rid the City of unsightly and disorderly trading areas" which allegedly "gave rise to disorderliness, criminality and obstruction of citizens' right to the proper use and enjoyment of facilities in and around trading areas") and referred to these as "laudable".<sup>50</sup> This would seem to indicate that, in line with its finding in *Affordable Medicines Trust*, the Court regarded trade-related bylaw enforcement as being rationally connected to a legitimate government purpose and that it would therefore be in order for the City to restrict traders' rights in the course of enforcing these bylaws. However, in the case of Operation Clean Sweep the Court regarded these objectives as irrelevant, seeing that the City "had gone about achieving its objectives in flagrant disregard of the traders' [legal] rights".<sup>51</sup> The Court thus signaled that it was not so much the objectives of Operation Clean Sweep but rather the manner of its implementation which it regarded as untenable.<sup>52</sup>

Moreover, the Court indicated in more than one instance that the harm of the manner of the implementation of Operation Clean Sweep lay in its failure to distinguish between legal traders (whose rights to trade were "undisputed") and illegal ones, going so far as to emphasise that "it is open to the City to use all lawful means to combat illegal trading and other criminal conduct" provided that it does not "cause harm to lawful, if not vulnerable, traders".<sup>53</sup> This underscored not only the strategic wisdom of bringing the lawsuit only on behalf of legal traders,<sup>54</sup> but also indicated that it was non-compliance with ordinary law, rather than with the Court's understanding of the implicated constitutional rights, that undergirded the granting of the interdict. The emphasis on lawfulness further meant that the Court failed to consider the impact of the City's policy framework's initial designation of certain kinds of trade as "illegal" on the rights of those whose livelihood-generating activities are effectively criminalised thereby.<sup>55</sup>

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<sup>50</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 7. See also para 32.

<sup>51</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 7. See also para 32.

<sup>52</sup> For a similar argument, see Beylerveld *Regulating Informal Trade in Johannesburg* 6, 21.

<sup>53</sup> *SAITF v City of Johannesburg* 2014 4 SA 371 (CC) para 33. Also see paras 4-7.

<sup>54</sup> Benit-Gbaffou *Political Landscape* 6-7.

<sup>55</sup> This is in line with the Court's finding in *S v Jordan* 2002 6 SA 642 (CC) paras 23-26 that the criminalisation of sex work, being rationally connected to the legitimate government purpose of promoting the "quality of life", did not infringe the right to freedom of trade.

This said, it would be difficult to characterise the *SAITF* judgment as amounting to anything other than a disdainful rejection of the manner in which the City had conducted itself during the course of Operation Clean Sweep, and an unequivocal affirmation of the dignity of street traders in the face of unwarranted and brutal exercises of State power. Furthermore, the clear and unambiguous terms of the Court's order made it impossible to evade its ultimate message: Operation Clean Sweep, at least in its current, illegal iteration, was over.

## **5 The regulation of informal trade in Johannesburg, in the aftermath of the judgment**

On the afternoon of 5 December 2013, with that morning's Constitutional Court judgment in hand, traders began to return to the streets of the Johannesburg CBD. Understandably, there were immediate clashes with the Metropolitan Police, who had not yet heard of the judgment and who thus viewed the traders' attempts to set up shop again as defiance of Operation Clean Sweep. Several traders, as well as one of SERI's lawyers, who tried to communicate the terms of the judgment to the police, were arrested and manhandled.<sup>56</sup>

Once news of the judgment made it down the Metropolitan Police's chain of command, however, there was begrudging compliance with the judgment. Over the course of the next few weeks, traders returned to the streets in large numbers. Importantly, these were not only the "legal" traders who had been the applicants in the litigation and at whom the Court's order was directed, but also the scores of "illegal" traders who had "legitimately" been removed during the course of Operation Clean Sweep.<sup>57</sup> The judgment's immediate impact thus extended far more broadly than the confines of the Court's order. Generally welcomed for its obvious humanitarian and broader social justice benefits, this unintended feature of the judgment was nevertheless a hard blow for the City, since it meant that even the (admittedly few) legitimate aspects of Operation Clean Sweep had been derailed.

For the City there was thus no other option but to return to the drawing

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<sup>56</sup> See SERI 2013 [http://www.seri-sa.org/images/SAITF\\_Press\\_release\\_5Dec2013\\_final.pdf](http://www.seri-sa.org/images/SAITF_Press_release_5Dec2013_final.pdf).

<sup>57</sup> Benit-Gbaffou *Political Landscape* 6-7. Also see City of Johannesburg *Proclamation of Restricted Trading Areas and Designation of New Trading Areas in the City of Johannesburg* (Mayoral Committee Meeting Notes: Department of Economic Development, 20 March 2014) 32.10 (hereafter "Mayoral Committee Meeting Notes").



board. The Council's Department of Economic Development took stock of the judgment and set out to frame a new policy on informal trade in the CBD, which it explicitly intended to comply with the *SAITF* judgment but also to address all of the problems that it had previously experienced with unmanaged street trade, which it still viewed as a scourge.<sup>58</sup> Remaining unflinchingly committed to the distinction between "legal" and "illegal" traders, the prohibition of trade in many portions of the CBD and the enforcement of bylaws, the Department indicated, in documents for a meeting of the Johannesburg Mayoral Committee, that both the principle and the implementation of new policy would comply with the terms of the *SAITF* judgment and with the letter of applicable laws, not least so as to enable the City to successfully defend itself against future litigation that might arise.<sup>59</sup> The Department further noted that the Constitutional Court judgment "has not precluded the City in enforcing its bylaws" and accordingly committed the Metropolitan Police to step up such enforcement within the limits of the law, including provisions such as those on the enforcement and collection of fines and on the verification of the immigration status of foreign traders in conjunction with the Department of Home Affairs, which had previously not been zealously enforced.<sup>60</sup>

The City's new "implementation framework" for its trading policy was formally adopted in May of 2014. Clearly in line with the provisions of the Businesses Act and with the *SAITF* judgment, this policy document encouragingly envisaged the accommodation of a larger number of "legal" traders than previously, and committed the City to increasing the number of areas in the CBD designated for informal trade and to providing the necessary enabling infrastructure.<sup>61</sup> Yet its underlying logic remained one of the prohibition and restriction of trade, meaning that the structural flaws of previous policy frameworks remained unaddressed.<sup>62</sup> Unsurprisingly, then, despite the pursuant designation of additional areas for street trade in early 2015, the policy's implementation as well as the Metropolitan Police's enforcement of the related by-laws remained fraught with all of the

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<sup>58</sup> Mayoral Committee Meeting Notes 3-7. Also see Webster *"The End of the Street?"* 48-49.

<sup>59</sup> Mayoral Committee Meeting Notes 10. Also see Webster *"The End of the Street?"* 48-50.

<sup>60</sup> Mayoral Committee Meeting Notes 10.

<sup>61</sup> Benit-Gbaffou *Political Landscape* 3-4. Also see City of Johannesburg 2014 [http://joburg.org.za/index.php?option=com\\_content&view=article&id=9059:22052014-joburg-council-approves-the-informal-trading-implementation-framework&catid=217:press-releases-2013&Itemid=114](http://joburg.org.za/index.php?option=com_content&view=article&id=9059:22052014-joburg-council-approves-the-informal-trading-implementation-framework&catid=217:press-releases-2013&Itemid=114).

<sup>62</sup> Benit-Gbaffou *In Quest for Sustainable Models* 11, 82-83; Webster *"The End of the Street?"* 50.

same problems experienced before, with some indications that the *SAITF* judgment had actually had the effect of increasing police officers' hostility towards traders.<sup>63</sup>

The judgment further did not alter the City's "blitz approach" to managing trade and other instances of informality, though subsequent blitzes did appear to have an increased basis of legality. For instance, in early 2015 the City launched "Operation KeMolao" [Operation "it is the law"], involving a number of blitz-like removals of traders at intersections. While decried by social justice advocates,<sup>64</sup> this operation, which was carried out in strict adherence to relevant road traffic bylaws, went legally unchallenged.

Within Johannesburg's local government, then, apart from small concessions towards a more progressive, "place-making" approach to trade management in internal policy documents, the only lesson clearly learnt from the *SAITF* judgment was the obvious one: that the City should operate within the confines of the law when acting in pursuit of its policy objectives. Certainly, the attitude of most officials towards informal traders has at best not changed and, at worst, has hardened, while there remains an unaltered commitment to accomplish all previous policy goals with as little consideration for the interests of individual traders as before, although now within the limits of the law (meaning that efforts are now for a large part also more resistant to legal challenge). Given the *SAITF* judgment's lack of engagement with the substantive constitutional legitimacy of the City's policy objectives and its fixation on adherence to the legality principle, this was perhaps to be expected.

As to the traders, the judgment certainly energised the *SAITF* and increased its clout in the eyes of other traders and traders' organisations in the city. It also appears that traders' organisations have become better organised in the wake of the litigation and are increasingly aware of the extent to which rights and the law can be used, through partnering with organisations such as the SERI, to further their aims. Most significantly, traders organisations in Johannesburg report that City officials are treating them with more respect, albeit begrudgingly, and appear to be taking their views more seriously in the course of interactions.<sup>65</sup>

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<sup>63</sup> See Benit-Gbaffou *Political Landscape* 79-80; Myambo 2014 <http://www.theconmag.co.za/2014/10/08/joburgs-street-traders-swept-into-a-corner/>; Webster "The End of the Street?" 50.

<sup>64</sup> See Webster 2015 <http://mg.co.za/article/2015-04-16-clean-sweep-of-the-poor-is-not-constitutional>.

<sup>65</sup> See Benit-Gbaffou *Political Landscape* 7, 110-112.

However, this increased respect has been accompanied also by increased circumspection on the part of City officials, and by a measure of a breakdown in trust between them and the traders' organisations. In particular, the City appears to resent the SAITF's relationship with the SERI, against whom there is significant hostility across all official governance structures in Johannesburg.<sup>66</sup> The judgment also negatively impacted the already beleaguered communication channels between the City and the traders. Former engagement structures such as the Informal Traders Forum were abandoned after the judgment,<sup>67</sup> and the City now negotiates with traders only within the formalized confines of legally required consultation processes. In the course of these, it has been reported that the City now insists on always having its lawyers present and is far less open to negotiation and compromise over its day-to-day management of informal trade than was previously the case.<sup>68</sup> The result is that traders' organisations feel that their input into the formulation of the 2014 trade implementation framework and subsequent policy initiatives has been superficial at best, and that they have largely been sidelined when it comes to the execution of policies.<sup>69</sup>

The *SAITF* litigation and judgment has thus clearly further politicised the external environment of informal trade in Johannesburg. On the one hand, the formal negotiation power of traders' organisations within this environment has been visibly enhanced and their rights-consciousness, as well as their readiness to resort to legal avenues to enforce their rights, has been increased. On the other hand, city officials have hardened their stance to traders in return, and have extended their "to-the-letter-of-the-law" approach to managing street trade in the aftermath of the judgment with a similar approach to engaging with traders, to the ostensible detriment of participatory democracy in the city.

Whereas *SAITF* did little to shift the overall bureaucratic approach to informal trade in Johannesburg, two subsequent judgments from elsewhere in the country have arguably added constitutional impetus to calls for such a shift. First, in *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and*

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<sup>66</sup> See Charlton "Public Housing in Johannesburg" 189. This hostility stems from the SERI's regular resort to litigation against the City in challenging evictions from inner-city buildings in pursuit of inner city regeneration.

<sup>67</sup> See Benit-Gbaffou *In Quest for Sustainable Models* 87-88; Horn *Collective Bargaining* 5.

<sup>68</sup> Benit-Gbaffou *Political Landscape* 7-8, 114.

<sup>69</sup> Benit-Gbaffou *Political Landscape* 8, 194; Webster *"The End of the Street?"* 10, 28, 53.

*Tourism*<sup>70</sup> the Supreme Court of Appeal found that the Limpopo Provincial Government's implementation of the so-called "Operation Hardstick" (which was eerily similar to Operation Clean Sweep in its intention to stamp out illegal trade, but was accompanied by a bureaucratic refusal to award trade permits to foreign nationals, hence rendering all foreign informal traders in Limpopo "illegal" and thus subject to removal) was "unacceptable and contrary to constitutional values".<sup>71</sup> Elaborating on its earlier judgment in *Watchenuka*, the Court found that the refusal of trade permits to foreign nationals effectively rendered them destitute by precluding them from engaging in self-employment, and thereby infringed their right to dignity.<sup>72</sup> While (like *SAITF*) the *Somali Association* judgment endorses the regulation of informal trade in conformance with prevailing laws, it does suggest that the effective criminalization of essential livelihood-sustaining practices through the inflexible implementation of a regulatory framework may be constitutionally problematic.

Secondly, in *Makwickana v eThekweni Municipality*<sup>73</sup> the Durban High Court found that the City of Durban's trade bylaws were unconstitutional to the extent that they allowed for the impounding and confiscation of "legal" traders' goods without due process.<sup>74</sup> The eThekweni municipality was accordingly ordered to pay compensation to a permit-holding informal trader whose wares had been impounded and subsequently disposed of by the police.<sup>75</sup> While again accepting and affirming the legitimacy of the regulation of informal trade,<sup>76</sup> the Court found that bylaws had to be enforced in a manner that was least restrictive of traders' rights, and that they had to provide for engagement and dispute resolution mechanisms.<sup>77</sup>

Perhaps inspired by the *Makwickana* decision, the SERI announced in late 2016 that it had instituted a damages claim to the tune of R120 million against the City of Johannesburg to compensate traders illegally removed during Operation Clean Sweep for the value of the goods illegally

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<sup>70</sup> *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2015 1 SA 151 (SCA).

<sup>71</sup> *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2015 1 SA 151 (SCA) para 44.

<sup>72</sup> *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2015 1 SA 151 (SCA) paras 38, 40-44.

<sup>73</sup> *Makwickana v eThekweni Municipality* 2015 3 SA 165 (KZD).

<sup>74</sup> *Makwickana v eThekweni Municipality* 2015 3 SA 165 (KZD) paras 72, 75, 92, 100-106, 115-116, 121-125; 135. The bylaws were held to be irrational and to discriminate against traders based on their race and socio-economic status.

<sup>75</sup> *Makwickana v eThekweni Municipality* 2015 3 SA 165 (KZD) para 149.

<sup>76</sup> *Makwickana v eThekweni Municipality* 2015 3 SA 165 (KZD) para 120.

<sup>77</sup> *Makwickana v eThekweni Municipality* 2015 3 SA 165 (KZD) paras 135, 139-145.

impounded and for loss of income.<sup>78</sup>

## 6 Conclusion

Few would contest the fact that the *SAITF* judgment had a much needed, instantly positive effect on the lives of informal traders in Johannesburg, whose ability to make a livelihood it quite literally and immediately restored. As such, it is a textbook example of the protectionist effect of rights-based litigation at its best – putting a stop to a flagrantly illegal abuse of public power against a vulnerable and marginalised section of society. As such, the outcome of the case underlines that, for all its potential drawbacks, judicial intervention in the implementation of policy has the clear advantage of being able to cut through layers of bureaucratic red tape, internal politics and official opposition to ensure that rights and the law are immediately upheld.<sup>79</sup>

Moreover, *SAITF* clearly illustrates that the direct and indirect benefits of litigation often extend beyond the specific applicants in a matter and can be felt beyond the confines of a particular case. The judgment has certainly advanced the cause of both "legal" and "illegal" traders in Johannesburg and other South African cities by at the very least indicating that their concerns ought to be taken seriously and their legal rights respected when conceiving of and implementing policies aimed at their "management".

*SAITF* was, of course, an easy case to contest. Due to the City's patent and wayward disregard for the law it was an almost sure win, resulting virtually automatically from a straight-forward application of statutory and common law, without any real need for the court to engage in the intricate balancing of the rights of the traders against the City's urban management objectives. The question remains, however, whether rights-based litigation would have been able to assist the traders as powerfully had the rule of law been observed by the relevant authorities.<sup>80</sup> In this respect, the significant margin of regulatory discretion awarded by the *SAITF* Court to the City, as well as the Court's apparent endorsement, in principle, of the City's urban management objectives, appears to indicate the contrary.

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<sup>78</sup> SERI 2016 <http://www.ser-sa.org/index.php/latest-news/553-press-statement-informal-traders-claim-r120-million-for-damage-caused-by-operation-clean-sweep-3-october-2016>.

<sup>79</sup> On this positive effect of rights-based adjudication, see Dixon 2007 *IJCL* 402-403; Liebenberg *Socio-economic Rights* 40-41, 74.

<sup>80</sup> Beylerveld *Regulating Informal Trade in Johannesburg* 7.

Indeed, the understandable elevation of the legality principle in *SAITF* and related case law serves to obscure, and arguably entrench, the complicity of the law and attendant regulatory frameworks in *producing* "illegality", by unquestioningly endorsing various legal restrictions on trade. As a result, much as it has enhanced the observance of the rule of law and has indirectly softened the impact of trade regulation in Johannesburg by increasing the opportunities for legal trade, the *SAITF* judgment has done little to guide the City towards adopting a more enabling regulatory framework that departs from the premise that livelihood-generating practices are generally legitimate and constitutive of human dignity.<sup>81</sup> To the extent that this limitation of the judgment flows from the restrictive formulation of the right to choice of trade in the 1996 *Constitution*, subsequent case law suggests that reliance on the right to dignity in future litigation directed at challenging the criminalisation of essential livelihood strategies through the substance of trade regulations might bear more fruit.

Moreover, much as the *SAITF* litigation has powerfully asserted traders' interests and forced the City to accommodate them, at least in the short term, this article has also shown that a resort to litigation may counterproductively impact on the future relationships between parties in situations (such as that in the present case) where they have to continue to interact with one another above and beyond the terms of an individual court order. In this respect the *SAITF* judgment appears at once to have enhanced the participatory clout of traders (in that it has forced the City to take their future demands more seriously) and to have undermined it (by hardening the local government's already unfavorable stance against street traders and by causing it to involve them in policy decisions affecting them only to the extent that is legally required to do so).<sup>82</sup> It would also appear from the aftermath of *SAITF* that, where a regulatory margin of discretion is awarded, government officials are bound to persist with prior approaches to implementation to the extent that this is possible without actively transgressing the dictates of a judgment.

Overall, the narrow, legal focus of the *SAITF* judgment predictably leaves many questions unanswered. In particular, the judgment sheds no light on the extent to which traders' rights to earn a livelihood (which enjoy only indirect protection under the *Constitution*) restrict the manner and extent to

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<sup>81</sup> Also see Benit-Gbaffou *In Quest for Sustainable Models* 84-85; Webster *"The End of the Street?"* 6-8, 43, 58, 66.

<sup>82</sup> For a similar argument, see Beyleveld *Regulating Informal Trade in Johannesburg* 20.

which cities may limit informal trade in the first place. More fundamentally, it at best fails to disturb and at worst insulates the manner in which the notion of legality itself contributes to the marginalisation and exclusion of vulnerable residents in South Africa's post-apartheid cities. While the directive that local government must adhere to the rule of law when pursuing urban management objectives was both to be expected and to be welcomed, its substantive content very much remains open for everyday contestation.

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## List of Abbreviations

CBD	Central Business District
Harv L Rev	Harvard Law Review
IJCL	International Journal of Constitutional Law
J Am Plann Assoc	Journal of the American Planning Association
J Public Adm	Journal of Public Administration
LDD	Law, Democracy and Development
MTC	Metropolitan Trading Company
SAITF	South African Informal Traders Forum
SAJHR	South African Journal on Human Rights
SAPL	SA Public Law
SERI	Socio-economic Rights Institute