

**PORTFOLIO COMMITTEE ON HOME AFFAIRS**

**22 OCTOBER 2019**

**Cllr. Thembisile Nkadimeng**

**SALGA President**

**“BRIEFING ON ILLEGAL MIGRATION AND INITIATIVES TO PROMOTE SOCIAL COHESION, MANAGE ILLEGAL MIGRATION AND PREVENT XENOPHOBIA”**

1. **Background**

The issues related to migration – both internal and foreign migration, is an opportune time to reflect on how local governments need to respond to complexity while still attending to the day to day requirements of service delivery. This is also an opportunity to reflect on the kind of intergovernmental system we need to build so support local government to effectively respond to dynamics on a global and national scale, but have their impact locally.

As SALGA, we’ll use this opportunity to share some of the **experiences** and **issues** at local government and **allude** to some of the **existing** and **potential responses** required. We will conclude with **recommendations**, indicating the shifts that need to be made in order to build a responsive local government and intergovernmental system.

1. **Reflection on the Leadership Demonstrated by the DHA**

During the 5th Administration, the Department of Home Affairs (DHA) chaired the IMC on Migration which includes a Technical Task Team and an Interagency Clearing Forum, which developed a well-developed 5- pronged approach to migration.

SALGA contributed to the response to migration via this forum in the various ways, the most prominent being:

* SALGAs, **Small Town Regeneration Programme** and Regional Economic Approach contributes to transforming apartheid and colonial extractive economies, towards creating places that respond to the economies of the future.
* SALGAs, **Position Paper on the Informal Sector** (2019), which calls for Municipalities to support the informal sector, which employs over 3000 000 (2018) persons nationally, to review by-laws and policies in support of the sector, but also lobbies for national legislative reform in support of the informal sector, allowing for the registration of all informal sector workers and the devolution of all support programmes designed to support the informal sector to District and Metro level.

**SALGA Proposal**

While it must be emphasised that the IMC developed a well thought through approach to migration:-

1. The commitment by all organs of state requires renewed commitment.
2. Furthermore the **resourcing of the approach** is wholly inadequate to achieve the kind of results that could be achieved by a targeted programme levelled at the issues related to migration.
3. **Contextual Discussion: Issues at Local Government Level**

I will now share a few of the experiences at local government level. These are not exhaustive, but it will shed some light, some are positive and some impacts are challenging. They are drawn from research funded either fully or partially by SALGA in the last 5 years.

**The Local Economy**

1. *Informal retail - Spaza Shops and Regulation*

Some of the contradictions experienced at local government level were unearthed as part of the research conducted for the SALGA informal economy position paper. We, in particular, noted the following at the dialogues that led to the development of the position paper:

*‘Some residents are arguing that foreign nationals should close down their stalls and hand them over to South African residents. However, it is the same residents that rent out their garages or erect structures within their properties so that foreign nationals can operate and pay them. They even go to the extent of applying for a permit to operate a spaza shop and then give that permit to foreign nationals so that they can conduct their businesses.*[[1]](#footnote-1)’

How do we regulate a matter like this, where the informal economy is benefiting both locals and foreign nationals? The matter is not cut and dried. Certain municipalities have responded by regulating that the person operating a business within a property, such as in the case of a spaza shop, must be the owner of that particular property. This favours locals where they own the property on the one hand, but also limits potential South Africans from participating in the economy on the other, also the property owner him or herself is limited to operating the business and cannot be free to allocate the capital elsewhere.

1. *Informal retail - Street Trading and Regulation*

In the informal street trading environment, various issues can be cited, some of which are well known. Price competition in products and services, for example was raised:

*‘There is an issue of foreign nationals running barber shops charging less than South Africans and this creates issues’ (Gauteng dialogue)*

And in certain municipalities:

*‘The accusation is that the …certain foreign nationals…, they approach a South African… they make an offer to you, a financial offer of X amount of money. Sign an affidavit to surrender your stall to them and many South Africans have done that”*

This is clearly an enforcement matter, but also demonstrates that South Africans on the ground are complicit, regulation cannot root out this kind of opportunism, and it will happen whether foreigners are outlawed or not. An equitable and inclusive access to economic opportunities is required, preferably enforced by those operating in the sector itself.

1. *Employment*

Another perception is that foreign migrants ‘steal’ jobs from South Africans. The evidence shows that foreign businesses also create jobs for South Africans through direct hire. When a comparison was undertaken between South African owned and foreign owned SMMEs in Tshwane and Johannesburg it was found that:

* Only 5% of the South African businesses employed only non-South Africans and 30% employed both.
* Of the foreign migrant businesses 12% employed only South Africans whereas nearly half employed both South Africans and non-South Africans.
* In a study of cross border shopping retail business in the inner city of Johannesburg, mostly run by migrant entrepreneurs it was found that one-third of employees are South African (Zack et al, 2017).

Again, this complicates regulation, as the drivers of positive outcomes for the economy and the benefits of the economy accrue to both locals and foreigners. Thus a blanket outlawing of foreign national would arguably hurt the entire informal economy.

1. *Competitiveness*

The improvement of the competitiveness of South Africans operating in the informal sector was identified in the recent Competition Commission enquiry on the Retail Grocery Market (2019).

Four areas for improvement were identified:

* Improved bargaining as a collective and procurement processes
* Reducing information assymetries to increase access to credit finance
* Business skills enhancement to improve competitiveness
* Regulation of land use and the informal sector

 **SALGA Proposals**

* **Incorporating spaza shops into buyer groups** or larger wholesale operations to realise economies of scale in purchasing;
* Provision of programmes targeted at the informal sector and spaza shop owners that are actually **accessible at local government level**, preferably District and Metro level;
* Development of consumer and business information portals to improve spaza shop and informal traders access to information about access to resources, finance and their target markets; and
* Lastly, SALGA identifies the need to create platforms for collaboration between South Africans and foreigners in order to share fundamental business skills and experiences”.

**Data and Statistics**

1. *Business ownership and immigration Status*

In 2013 the Gauteng City-Region Observatory’s representative survey (Quality of Life survey, 2013) revealed that 80% of informal businesses in Gauteng were owned by South Africans while 20% were owned by local and international migrants (Peberdy, 2016)

A 2014 Southern African Migration Programme (SAMP) study involving 618 migrants and refugees in Johannesburg found that 46% were asylum seekers, refugees or permanent residents; 20% held work permits; 12% held visitors’ permits and 12% had no documentation (Peberdy, 2016).

In a further study, partly funded by SALGA, *the Programme to Support Pro Poor Policy Development*, it was highlighted that historically the implications of immigration are typically dealt with at national level. It was also estimated that up to 5% of the country’s total population were foreign born. Also, that in South Africa’s case, wealthier provinces had an even higher rate of foreign born migrants, but interestingly in South Africa, that both small towns and peri-urban centres received high numbers of migrants.

1. *Migration trends and municipalities*

The study also showed that the rates of urbanisation in peri-urban areas, towns, and cities make planning for migration critical at local government level. Migration, in South Africa, is cyclical and people in increments, testing different locales as it were. People have livelihoods that span municipalities and even provinces and occur in cycles linked to economic opportunity and social ties. This makes planning incredibly challenging.

1. *Planning and Budgeting*

Firstly, Municipalities need real data on movements within their jurisdictions. There is no way currently that municipalities can effectively know this. Secondly, and a related issue, the budgeting process as a country, forces us to plan for the past, and not what is happening or what is likely to occur in terms of migratory patterns.

Thus data in IDPs are not used as the basis for planning or budgeting, rather the budgets determine what can be planned rather than for what the local circumstances may be. Lastly, our public participation methods, tend to force us to cater for the present, what citizens want now, rather than in the future of a town or city. Perhaps as importantly, our participation processes don’t cater for migrants, both South African and foreign born. Thus not allowing us the space to create dynamic resilient and inclusive communities.

What studies show, is the need for one common source of data that allows local governments to plan for migration. It may also indicate need for a common approach to the informal sector, one piece of legislation that regulates the registration and development support of the sector.

**Recent Jurisprudence underscoring Constitutional Principles regarding Local Government’s regulatory role in the Informal Sector**

In June 2018, **the** **Socio-Economic Rights Institute,** upon the request by of **SALGA,** concluded a review of the Jurisprudence and the underlying Constitutional Principles linked to the informal economy.

Recent legal cases involving the informal sector and government have brought to the fore the Constitutional principles that have been neglected in practice and that need to be at the centre of Local Government’s actions in relation to the sector, these principles are:

•Respect for the right to dignity (S 10)

•Respect for the rule of law (S 1(c))

•Promotion of administrative justice (S 33)

•Respect for property rights (Section 25)

1. *Right to Dignity*

The Constitutional Court and the SCA accept that there is a general right for informal workers to make a living as part of the constitutional right to human dignity. The importance of this recognition should not be underestimated. The right to dignity is both an enforceable right enshrined in the Constitution and a fundamental value underpinning all of the other rights contained in the Constitution. The Constitutional Court has referred to human dignity as the “fountain of all rights” and the “cornerstone of our Constitution.”

In the Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism (2015), Ethiopian and Somali nationals who were legally working as informal traders were forcibly prevented from trading as part of the Limpopo Department of Economic Development, Environment and Tourism “Operation Hardstick.” The traders who did not have valid trading licenses claimed that the Department refused to award trading licenses to refugees and asylum seekers.

The Supreme Court of Appeal (SCA) accepted that some of the informal workers were in “dire financial straits”, “destitute” and “unable to buy food or support their families”. For this reason, the SCA found that disallowing informal work violates the right to dignity of persons who, having no realistic possibility of employment, would be rendered destitute in the absence of the right to work. As the court stated:

“[I]n circumstances such as this, where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated… [I]f, because of circumstances [a person] is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in work … such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to work…”

In this case, the court indicated that the rights of the traders were violated because the requirements of the Businesses Act were not followed by the municipality when foreign traders were not permitted to apply for a trading license as foreign nationals.

Furthermore, In the **South African Informal Traders Forum** (**SAITF) vs the City of Johannesburg (2013) case, the Constitutional Court** explicitly acknowledged the right to dignity and linking it to the right to work by stating that:

“[t]he ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it [informal workers] faced ‘humiliation and degradation’. Most workers, we were told, have dependants. Many of these dependants are children…”

In the **Minister of Home Affairs v Watchenuka (2003**) the Court found that refugees and asylum seekers must be allowed to find employment or self-employment, including informal work, in order to sustain themselves and avoid becoming destitute, which falls within the constitutional right to dignity. This case involved a Congolese widow, who was a qualified pharmacy technician, and who entered South Africa from Zimbabwe with her "disabled" twenty-year-old son. Prior to the Court case, she and her son were prohibited, respectively, from undertaking employment and from studying in terms of regulation 7(1)(a) of the Refugee Regulation of 2000.

In Makwickana v Ethekwini Municipality (2015), an informal trader with a permit to trade had his goods impounded and was fined as he was not at his table when the police arrived. The courts found that the trader’s right to human dignity was violated through the confiscation of goods, as the ability of the trader to earning a living and therefore his right to dignity, was violated when his goods were confiscated.

Thus both cases underscore the risks municipalities face by discriminatory action against foreign nationals and of course the human rights at stake that we as a society and global society have chosen to espouse. It also demonstrated the need for a common piece of legislation that allows a constitutional response to the informal sector and foreign nationals in a balanced manner.

1. *Respect for the rule of law (Section 1(c))*

Having respect for the rule of law means that Local Government must operate according to the applicable legal rules and ensure that all conduct related to the informal sector is guided by the law. The legal rules that are most relevant to the informal sector are set out in the Businesses Act 71 of 1991. The Business Act narrows that range of activities that require a license issued by a municipality and places limits on the way in which municipalities can regulate informal businesses. For example, if a municipality needs to limit or prohibit informal work, they must follow the procedures set out in Section 6A (2) of the Business Act. Limitation or prohibition can only take place if it is demonstrated that there are no other measures of supervision or control that will serve the municipality’s purpose and that limitation or prohibition will not force a substantial number of workers out of business

1. *Promotion of Administrative Justice (Section 33)*

Section 33 of the South African Constitution entrenches administrative justice as a fundamental human right. Just administrative action is described in detail in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and various decisions of South African courts. In order for administrative action to be ‘just,’ the decision or action by Local Government that concerns the informal sector, must be lawful, reasonable and procedurally fair. Failure to adhere to these elements may render the decision or action unconstitutional.

In Makwickana, the High Court decided that the impoundment of Makwickana’s property, was “an exercise of public power constituting an administrative action”. The basic principles and their application to Makwickana’s case are discussed briefly below.

To comply with the lawfulness standard, when impounding goods, municipal officials are required to act within the legal authority granted to them in terms of the law. In the case of informal work, this requires that municipal officials, at the very least, comply with the Constitution, the Businesses Act and the relevant municipal bylaw governing informal work.

In addition, the by-laws made by municipalities in terms of the Business Act must stay within the bounds of the authority that the Act designated municipalities to create such by-laws. In the Makwickana case the court decided that, unlike the Businesses Act, the eThekwini by-law did not distinguish between non-compliance with formalities (less serious contraventions of the by-law) and absolute prohibitions against trading (a more serious contravention of the by-law).

The court found that this inconsistency meant that both the by-law and eThekwini officials’ actions taken in terms of the bylaw were unlawful. The court stated that this was because the municipality exceeded the lawful authority granted to it in terms of the Businesses Act by adopting a by-law that failed to distinguish between more and less serious contraventions of the by-law.

• For a decision to be reasonable it must be both rational and proportional. Any unreasonable decisions that are taken by municipal councils or local government officials would be unlawful and could be set aside by a court.

• A rational decision is one in which there is a rational connection between the purpose for which the power is given and the decision.

• A proportional decision is one in which the means taken are fair and balanced given the object that is sought to be achieved.

The court in Makwickana therefore concluded that the decision to impound Makwickana’s goods violated the requirements that an administrative action should be lawful, reasonable and procedurally fair. All three findings – unlawfulness, unreasonableness and absence of procedural fairness – are alone sufficient to oblige a court to set the decision aside and declare it unlawful. The court therefore set aside the decision to impound Makwickana’s goods and declared it unlawful. It is important for municipal councils and local government officials to always be aware of the need for administrative decisions to be lawful, reasonable and procedurally fair.

1. *Respect for property rights (Section 25)*

The right to property is contained in section 25 of the Constitution. Section 25(1) of the Constitution reads:

“No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”

In the context of informal work, the impoundment of informal workers’ goods may sometimes affect their right not to be arbitrarily deprived of property.

In the Makwickana case, Makwickana was permanently deprived of his impounded sandals (his property). According to the court, the deprivation of property will be arbitrary if it does not take place for a “compelling” and legitimate governmental purpose. This means that the reason for the impoundment or deprivation must be compelling and legitimate. The court also found that the reason for the impoundment or deprivation must be balanced against the interests of the informal worker.

When the court did this in relation to the deprivation of Makwickana’s sandals, it found that there was not a compelling reason for depriving Makwickana of his goods because the effect that the deprivation had on him was incredibly serious:

“Deprivation of … property is so invasive of [street workers’] property rights that it impacts on the welfare of the street workers and their large families. For most the impounded goods are their only assets and means to a meal. Impoundment is therefore serious irrespective of the commercial value of the goods. Deprivation also impacts on their identity and dignity as people with property, however little that is. On the facts of this case the deprivation was permanent, without notice and without compensation.”

For the court this meant that the by-law was “irrational and [gave] rise to arbitrary deprivation of property of street workers”, because it allowed law enforcement officials to impound informal workers’ good (even for less serious offences such as non-compliance with legal formalities or the possession of a permit) and it allowed officials to indiscriminately dispose of workers’ goods.

In the Somali Association case, the police did not provide the informal traders whose stock was confiscated with itemised lists of confiscated stock, which meant that when traders paid their fines, their stock could not be returned to them, violating their constitutional right to property.

***SALGA Proposal****:*

Based on the Constitutional principles emphasised in the Jurisprudence, SALGA proposes that:-

1. Local Government develop policies and by-laws that uphold Constitutional with regard to the informal sector, these are:
* **The right to dignity**: all peoples in South Africa have the right to work, to earn a living in order to avoid destitution
* **Respect for the rule of law**: Municipal conduct (policies, laws, actions) must be guided by the Constitution and relevant laws, where applicable, such as the Businesses Act 71 of 1991.
* **Promotion of administrative justice**: Administrative justice requires municipalities to take decisions in a manner that is substantively reasonable and procedurally fair.
* **Respect for property rights**: The deprivation of property can only be lawful if it is not-arbitrary, that is, authorised by law, procedurally fair, and implemented for sufficient reason.

**Social Cohesion and Local Government**

What is really required is not only merely the promotion of rights of certain groups, although that is necessary. Building dynamic communities based on accountability and participatory systems that respond to all members of society and can grow an inclusive economy. The violence we see today happens where power and legitimacy is contested often outside of constitutionally representative and accountable government (Landau, 2019). This is why responsive local government is needed to respond to migration and the associated challenges therein.

‘As much as government needs to recognize that asylum seekers and refugees have a right to support themselves’…, each local government has a responsibility to know what is going on in its jurisdiction. That ‘knowing’ is the basis for accountable participatory planning.

Even with the limitation of local government regulatory framework, the onus is on local government to find a developmental solution. That is why we argue for budgeting system built on the data and needs in communities.

 **SALGA Proposals**

1. Working with members and other stakeholders to create a common understanding and response to social cohesion at the Local Government level;
2. Conduct national dialogues at local government level between émigré communities and locals in the pursuance of social cohesion.

1. **Recommendations**

In conclusion, while the issues are numerous; ranging from regulating the economy, to data, accountability systems and building social cohesion. It is the proposal of **organised local government** that the following be considered by the Portfolio Committee:

1. A national pronouncement regarding South Africa’s policy regarding migration and its stance toward foreign nationals within the country, creating the environment for:-
	1. local government to build participatory cohesive social systems in conjunction with all organs of state, at the provincial or national spheres;
2. The collection and dissemination of population data at more frequent intervals, at least 5-yearly, which allow for;
	1. A revised budgeting process, catering for planning that takes into account the actual needs at local level, but allowing for municipalities to respond to larger dynamics such as migration trends impacting at regional level; and lastly;
3. A resuscitation of the Border Management Authority Bill in order to implement a coherent border management system which will begin to prevent some of the issues that occur at Local Government level
4. The development of a national piece of legislation which directs and governs all three spheres of government in their role in registering, gathering data, and developing responsive strategies in support of the informal sector.
1. SALGA Position Paper, Research Report, Limpopo Dialogue, 2018. [↑](#footnote-ref-1)