IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION,
DURBAN

CASE NO: 11662/13

In the matter between:

JOHN MPINI MAKWICKANA	APPLICANT
and	
ETHEKWINI MUNICIPALITY	FIRST RESPONDENT
MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE AND ECONOMIC DEVELOPMENT KWAZULU-NATAL	SECOND RESPONDENT
MINISTER OF TRADE AND INDUSTRY	THIRD RESPONDENT
OFFICER K SCHONKEN	FOURTH RESPONDENT

JUDGMENT

Date of hearing: 26 November 2014
Date of judgment: 17 February 2015

D. PILLAY J

Introduction

[1] The fourth respondent police officer impounded the goods of the applicant, allegedly for failing to produce a permit to trade as a street trader. Neither she nor the first respondent municipality account for the impounded goods. The applicant had a permit to trade on the street.

[2] On the facts alone the matter can be disposed of. However, the facts provide a convenient opportunity for street traders as a group in a poverty-stricken socio-economic class to challenge the validity of the laws and practices prevailing in the informal trading sector.

[3] The Businesses Act 71 of 1991 (the Businesses Act) and the eThekwini Municipality: Informal Trading By-law, 2014 [1] (the By-law) pertaining to the removal and impoundment of the trading goods of informal or street traders by the municipal police is scrutinised in this application. The applicant contends that the removal and impoundment of the trading goods of a trader who fails to produce a licence to trade is *ultra vires* and invalid.

[4] In relation to the By-law, the applicant contends that ss 35 and 39 are inconsistent with s 9 (equality), s 22 (freedom of trade occupation and profession), s 25 (property) and s 34 (access to courts) of the Constitution of the Republic of South Africa, 1996. And the Businesses Act, s 6A(1)(d) conflicts with the principles of legality and the rule of law in s 1(c) of the Constitution. The applicant also claims compensation for the impounded goods in the sum of R775.

[1] Government Gazette 1173 notice number 70 dated 27 June 2014.

The Parties

[5] The applicant aged 65 years is the sole breadwinner of his family of eight dependants including his wife and three grandchildren. He is also the chairman of the Traders Against Crime (TAC) a voluntary association of traders primarily from Warwick Junction in the central business district of Durban. TAC was formed in 1996 to work with the Metropolitan Police in order to combat crime frequently encountered by traders and their customers. The applicant is also the Deputy President of the Masibambasane Traders' Association (MTA) for street traders' organisations whose aim is to collectively advocate the rights of their members and concerns on matters affecting them and their businesses, including harassment from the municipal officials. The Legal Resources Centre (LRC) assists the applicant in these proceedings.

[6] The applicant applies in his personal capacity and as a representative in terms of s 38(c) and (d) of the Constitution. He represents the TAC, the MTA and street traders as a class of persons. He also acts in the public interest. A party that prefers litigation as the means of social ordering instead of resorting to use of power in a typically volatile economic sector should be afforded standing.

[7] The first respondent is eThekwini Municipality, an organ of state having executive and legislative authority within its municipal boundaries. It is responsible for implementing its by-laws. The second respondent is the Member of the Executive Council for Economic Development and Tourism who is responsible for the provincial administration of the Businesses Act.

[8] The third respondent is the Minister of Trade and Industry who is responsible for implementing the Businesses Act, the enabling legislation that spawns the By-law. The third respondent abides the decision of the court. The fourth respondent is the municipal police officer who impounded the applicant's goods. The legal

representatives for the first respondent represent her. She has not submitted an affidavit in her own right. Her affidavit is merely confirmatory and in support of the affidavit submitted for the first respondent.

[9] The applicant issued a rule 16 (A) notice to the public setting out the grounds of its constitutional challenge. Regrettably no *amicus* seeks to join the proceedings.

The Evidence And Analysis

[10] The applicant has worked in Bertha Mkhize (formerly Victoria) Street since the 1990s. Around 1996 he secured a permit to trade at the corner of Bertha Mkhize and Fish Market Streets. The applicant sold plastic and rubber sandals for adults and children. Adult sandals cost him about R18 a pair. He sold them for R25 to R30. Children's sandals cost about R15 a pair. He sold then for about R20 to R25. He bought and sold the stock for cash. Like most street traders he did not have credit facilities. His profit margin was small. In a week he earned approximately R300.

[11] Traders have to pay a fee for their permits. A street trading permit bears the photograph of the person to whom it is issued. The requirement that no one but the permit holder may trade on the street inconvenienced the applicant and other street traders seriously. They were unable to leave their goods unattended or attended by another person even temporarily whilst they went out to purchase new stock or even to feed and relieve themselves. The indignity of this arrangement was addressed in some ways when the first respondent issued permits to assistants who helped to manage the stall or table. Even though the By-law was silent on the issue of assistant permits the first respondent was able to implement this arrangement as it implemented many other initiatives favourable to street traders.

[12] On 6 August 2013 the applicant put out his table as usual before 07h00 in order to attract business from the commuters passing through the station and the market.

He left his table to attend to matters on behalf of MTA. On his return his assistant Mr Satalaza informed him that he, Satalaza, was away temporarily to purchase food from a supermarket about 20m away from his table. He had left the permits identifying the applicant and himself with the neighbouring trader. The neighbour summoned him urgently from the supermarket. On returning to the table he found the fourth respondent selecting sandals. She placed 25 pairs of new sandals into a plastic bag. She left behind old stock that had faded as a result of exposure to the sun.

[13] She noted Satalaza's details and issued him with a receipt for the impounded goods. Although she had counted 25 pairs of sandals the receipt reflected '1 x b/bag of slops'. This receipt did not inform Satalaza where the goods would be kept and how he could get them back as s 35 of By-law prescribes.[2] She also issued Satalaza with a notice in terms of s 56 of the Criminal Procedure Act 51 of 1977 ('CPA') informing him that he had contravened s 2 (h) of the eThekwini Metropolitan Municipality (Central Transition of Metropolitan Substructure Council) Street Trading By-law[3] (the 1995 By-law), citing the offence as 'illegal trading'. The notice stated that he could pay a fine of R300 on or before 18 October 2013 or appear in the Durban Magistrates' Court.

[14] On learning that his goods had been confiscated the applicant became extremely upset. As a law-abiding citizen he struggled to earn an honest living. He was aware of other traders who had also had their goods confiscated. Traders used to collect money from amongst them or borrow from 'loan sharks' at exorbitant rates of interest to help the trader concerned to pay the fine and secure the return of his or her goods.

[2] discussed below.
[3] Published under NN97 in Kwazulu-Natal Provincial Gazette 5076 of 28 September 1995.

[15] In support of the public interest nature of the application the applicant cited other incidents in which the first respondent's officials abused their powers. In *Veeron Rambali* v *Ethekwini Municipality and Others* case no. 11162/09 (unreported) the first respondent was interdicted from harassing, intimidating or otherwise interfering with informal street traders at the market and prevented officials from impounding goods without an order of court.

[16] Dhanraj Puran, another informal trader in Bertha Mkhize Street, attested to an affidavit [4] confirming that on 20 June 2013 six pockets of his potatoes were impounded because he traded at a table which extended beyond the permitted trading area. He was given a fine with the option of appearing in court on 12 September 2013. By that stage the potatoes would have rotted. A fine of R100 was more than he would have been able to outlay for the loss of six pockets of potatoes. He ignored the fine and did not attend court. He was not informed as to what became of his potatoes. If they were auctioned he was not informed of what the proceeds were and what happened to them.

[17] The failure to account for impounded goods opened the door to theft and corruption amongst police officers. In about 2010 the LRC reported a complaint of theft to the Broad Street Police Station but heard nothing further about it since. Mostly, attempts to charge the police were unsuccessful as the police often refused to accept such complaints against other policemen. So the applicant persisted.

[18] On 25 June 2014 the applicant, assisted by a candidate attorney of the LRC, noted the order of the Magistrates' Court in which it provisionally withdrew the prosecution at the instance of the state and ordered that the impounded goods be returned to the accused (Satalaza/the applicant). The candidate attorney attended with the applicant at the storage containers at the Albert Park Metro Police Station.

[4] Pleadings at 21 ; 202-203.

She informed the attendant Maxine Parry that the applicant wanted his goods that had been ‘confiscated’. The attendant replied that she was ‘very sorry’ as the goods had been ‘disposed of’. The ‘procedure’ followed was that all perishable goods impounded from street traders were stored for two days and then disposed of. Non-perishable goods were stored for three or six months and then sold on auction. As this time had elapsed the applicant’s goods were no longer available. Pressed she clarified that it was disposed of in three months.

[19] The first respondent denied that it impounded the applicant’s goods unlawfully and in the manner alleged by Satalaza. It relied on the fourth respondent’s evidence for its answering affidavit. In reply Satalaza produced an affidavit attested to by the fourth respondent in the criminal prosecution against him as the applicant’s assistant. As Satalaza pointed out, the two versions of the fourth respondent expatiated below differed materially as the underlined portions show.

[20] In the opposing affidavit the evidence of the fourth respondent was that on 6 August 2013 she was part of a major operation by the municipal police services. She was assigned to the unit operating in Bertha Mkhize Street. When she got to the table of the applicant she found Satalaza manning the tables. She asked him for the trader’s permit. Satalaza could not produce the permit. He informed the fourth respondent that the applicant had gone to the toilet. The fourth respondent advised Satalaza that she would wait for the owner, the applicant. Satalaza left the table. After a while a woman approached the fourth respondent to advise that the owner had gone to buy stock. The fourth respondent waited for about thirty minutes for the owner who did not arrive. Satalaza returned but was unable to produce the permit. He asked the fourth respondent to wait as the owner was on his way.

[21] The fourth respondent had worked for the first respondent for about two and a half years. During her time in the unit dedicated to the enforcement of the By-law she had learnt some of the ‘tricks’ used by street traders to avoid law enforcement,

e.g. claiming falsely that the owner had gone to buy stock. Based on the conflicting explanations for the applicant's absence from his table the fourth respondent decided to charge Satalaza for contravening the By-law for illegal trading. After she issued the notice to appear in the magistrates' court to Satalaza the applicant emerged. He shouted at her. Others were aggressive towards her. As a result she had to do whatever she could quickly to issue the receipt for the goods and impound them without listing each item, after ensuring that Satalaza had counted them.

[22] In her affidavit submitted in the criminal prosecution of Satalaza, the fourth respondent stated that she had asked Satalaza to count and place the shoes in a black plastic bag. Satalaza refused. She counted the shoes herself and put them in the plastic. About five to ten minutes after she wrote the summons the owner arrived bearing the permit. However, as she had already issued the summons and as the Business Support Unit had directed that if there was no permit at the table the person there should be charged even if the person bearing the permit came after the fine had been issued.

[23] Unsurprisingly, the respondents produced no corroboration for the Business Support Unit's directive that is patently arbitrary. The material contradictions between the fourth respondent's affidavits are manifest. Was she intimidated or did she have an opportunity to count the goods? If she had been intimidated it would have been serious enough for her to have mentioned it in both her affidavits. In this application she relied on the alleged intimidation as her explanation for not issuing a detailed inventory of the goods impounded.[5]

[24] In contrast, Satalaza produced a detailed affidavit in reply, describing fully how the impoundment occurred, even to the point of specifying where each person stood during the impoundment.[6] He specifically denied that the fourth respondent 'ensured'

[5] Pleadings at 107.
[6] Pleadings at 168-169.

that he counted the impounded goods.[7] Additionally, Thokozani Lukhozi, a street trader herself, corroborated him.[8] It was she who produced the applicant's permit to the fourth respondent.[9] In the result, even though the fourth respondent was shown the permit, a fact she acknowledged in her affidavit in the criminal prosecution but denied in her affidavit in this application, she nevertheless persisted in charging Satalaza. Effectively, she impounded the applicant's goods even though the applicant and Satalaza were trading lawfully. She failed to account for the goods she impounded. If it had been sold by public auction as the applicant's legal representative generously speculated, the applicant has not received the proceeds of the sale less the impoundment fee as he is entitled to.[10]

[25] As a result of these contradictions the fourth respondent's evidence lacks credibility, is unreliable and must be rejected in so far as it conflicts with the evidence of the applicant and Satalaza. Shockingly, she has said not a word about what she did with the applicant's goods that she impounded. Disappointingly, the first respondent did not disclose what steps, if any, it took to check her version and to get her to account for the impounded goods. In view of her apparent mendacity and failure to account for her conduct the applicant seeks an order directing that she pay a portion of the costs of the application personally.

[26] The first respondent also contended that the permit applicant produced did not have a valid licence for his assistant. It alleged that the assistant's permit had the photograph not of Satalaza but of a woman. It called on the applicant to produce the original licence.

[27] Satalaza took issue with the first respondent's patronising claim that it 'agreed to the street traders request to have assistants who would stand in for them'. This was

[7] Pleadings at 175.
[8] Pleadings at 194-195.
[9] Pleadings at 176-177.
[10] Section 35(8) of the By-law.

not a gratuitous benefit extended by the first respondent. The traders had to pay R50 for an assistant's permit. As for disputing the validity of the permits issued to the applicant and Satalaza, Satalaza confirmed that the current permit issued on 1 October 2013 to which the first respondent erroneously referred was issued to a woman assistant. He attached a copy of her permit. His permit issued for 1 October 2012 to 30 September 2013 was valid when the goods were impounded on 6 August 2013. On expiry, his permit was handed in to the first respondent's Business Support Unit that retained it. Consequently, neither the applicant nor Satalaza could produce the original permit requested by the first respondent.

[28] This challenge to the permits is surprising considering that the validity of any permit should have been as a matter of basic administration on the records of the first respondent and therefore within its knowledge.[11] Clearly, it is an afterthought. In so far as the first respondent does not have records of the permits it issues then it is an indication of its incapacity to administer street traders efficiently, a consideration that should inform any reform of the By-law discussed below.

[29] Given the contradictions in the evidence of the fourth respondent in this application with her version in the criminal prosecution, the applicant should succeed in his quest for recovering his goods or compensation for them.

The Context

[30] The facts above typify the abuse that street traders suffer at the hands of the first respondent's officials, as attested to by Caroline Skinner in her report titled *Street Traders in Durban – A Review of Evidence*. Both parties relied on the article by Caroline Skinner. The applicant attached an affidavit from Skinner confirming the contents of her article and her qualifications. She is an academic and the Director of

[11] The Regulations which seem to be applicable in KwaZulu-Natal as stipulated in s 6(1)(b) of the Businesses Act are those in terms of the repealed Licences and Business Hours Ordinance 11 of 1973. Regulation 30 of Regulations in terms of the Licences and Businesses Hours Ordinance No. 11 of 1973 provides: 'The issuing authority shall . . . retain the control certificate and duplicate letter in its records'.

Urban Policies Programme for the global research policy network Woman in Informal Employment: Globalising and Organising (WIEGO), and a senior researcher at the African Centre for Cities at the University of Cape Town. She has a Masters of Science in Town and Regional Planning (Development Studies) and a Social Science degree.

[31] For more than a decade she focused on Warwick Junction and the Durban inner city, interrogating the nature of the informal economy with a view to informing appropriate policy responses. In view of her qualifications, her experience and the fact that both parties rely on her article, the court has no difficulty in accepting her findings and conclusions expressed in the article. The applicant relied particularly on the following facts:[12]

a) In 1997 the first respondent commissioned a census which found that there were approximately 19 303 street traders in the city, 10 000 of whom operated in the inner city.

b) A 2003 survey found that 88 per cent of street traders were the sole bread winners in their families.

c) Following its 2009 – 2010 census the first respondent estimated that there were 49 739 street traders in the city, the majority of who averaged a profit of R300 per week and supported families of about four to five people.

d) Street traders have been harassed for over a century. The Group Areas Act and the Black (Urban Areas) Consolidation Act had disallowed African people from accessing viable trading points in the city and restricted them from trading in townships.

[12] Pleadings at 15.

e) The Natal Ordinance prevented informal traders from being within 100km of a formal business and from occupying the same spot for more than 15 minutes, after which they had to move at least 25 metres away.

f) Skinner endorsed the opinion of other academic social commentators that until the 1980s South Africa 'fashioned and refined some of the most sophisticated sets of anti-street trade measures anywhere in the developing world' with hawkers subjected to 'a well-entrenched tradition of repression, persecution and prosecution'. [13]

[32] The first respondent relied on Skinner to support the following facts:[14]

a) In 1995 and 1996 foundations were laid for integrating street traders into the city plan at Warwick Junction Urban Renewal Project which has come to be recognised as a good example of such integration.

b) Due to deregulation traders flocked to the area so that by the mid 1990's more than 4 000 street traders had occupied the area causing real concerns and perceptions that the place was a crime and grime hotspot.

c) The Warwick Junction Project was mandated to focus on safety, cleanliness, trading and employment opportunities and the efficiency of the public transport.

d) The officials of the first respondent worked with the street traders to design appropriate infrastructure to deal with potentially hazardous trade such as cooking in public places.

[13] Pleadings at 35.
[14] Pleadings at 32-50; 98-100.

e) The first respondent's police officers trained members of the TAC to alert authorities whenever action was needed and to patrol the trading areas.

f) In November 1999 a technical task team was formed to formulate an effective, inclusive, informal economic policy. The policy dealt with the management of the informal economy relating to registration, site allocation, fees for operating and the By-law. The policy anticipated the provision of basic skills training, legal advice, health education and help with accessing financial services.

[33] Indisputably, the first and second respondents have uplifted the conditions in which street traders operate. Skinner emphasises that the first respondent made great strides in protecting informal traders and ensuring that crime is eliminated in the areas in which they operate. However, she also observes that officials of the first respondent persist in harassing, intimidating and unlawfully impounding their goods. Support for the first the view that the first respondent has a tougher stance towards street traders emerges from the apparent differences between the 1995 By-law and the By-law discussed below.

[34] In this case, the context in which Satalaza was charged and the applicant was deprived of his property trigger an enquiry into s 35 to determine whether it is constitutionally compliant. The case is also in the interest of street traders as a vulnerable group and in the public interest, raising important questions of constitutional law and statutory interpretation. It is to these questions that I now turn.

Businesses Act 71 of 1991

[34] Section 6A(1) of the Businesses Act 71 of 1991 empowers local authorities to make by-laws to regulate informal traders. The applicant challenged the constitutionality of s 6A(1)(d), which provides:

> 'A by-law made under this subsection –
>
> (i) may, for any contravention thereof or failure to comply therewith, prescribe a penalty of a fine or imprisonment for a period not exceeding three months;
>
> (ii) may provide for the removal and impoundment by an officer of any goods, receptacle, vehicle or moveable structure –
>
> (aa) which he reasonably suspects is being used or intended to be used or has been used in or in connection with the carrying on of the business of street vendor, pedlar or hawker; and
>
> (bb) which he finds at a place of where in terms of a by-law under subsection (1)(a)(ii) or (iii), the carrying on of such business is restricted or prohibited or which, in his opinion, constitutes an infringement of such by-law,
>
> whether or not such goods, receptacle, vehicle or moveable structure is in the possession or under the control of any person at the time of such removal or impoundment.'

[35] The applicant pitched his challenge to the Businesses Act at two levels:

a) Although sub-sec (i) limits the term of imprisonment to a period not exceeding three months it imposes no limit on the fine. Consequently, police officers have an unfettered discretion to determine the amount of the fine regardless of whether it is proportional to the infringement.

b) Subsection (ii) proffers no guidelines about how 'confiscated' goods should be dealt with. It gives unfair discretion to police officers to remove and impound goods of street vendors.

[36] The applicant contended that any discretion given to officials must be accompanied by clear guidelines without which s 6A(1)(d) of the Businesses Act is in conflict with s 1(c) of the Constitution in that it is inconsistent with the rule of law. He relied on *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) to submit that:

> '(I)f broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the … officials … is constrained by the provisions of the Bill of Rights and, in particular, what factors are relevant to the decision … . If rights are to be infringed without redress, the very purposes of the Constitution are defeated.[15]

I agree that the lower the position of the decision maker in the hierarchy of the administration, the greater the need for specificity of the mandate because

> 'Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable.'[16]

[37] As a general principle of legislative drafting the principal aim of penal provisions must be to fix an appropriate maximum penalty having regard to the social implications of the offence, the profit to be made from it, the possible need to impose a deterrent sentence, the likelihood of persons charged with such an offence being

[15] *Dawood* para 47.
[16] *Dawood* para 46.

able to pay a fine, and the reform potential of likely offenders. Habitually providing for imprisonment in all circumstances may be unnecessary and unsuitable.[17]

[38] Another principle is that statutory powers enabling officials to remedy contraventions, remove hazards, or ameliorate disturbing or dangerous situations should state precisely the extent of the powers and the circumstances in which they may be exercised. If it is not practical to particularise then the statute should specify that the powers should be exercised consistently with the purposes of the legislation.[18]

[39] Similarly legislation should also specify entry, search and seizure powers to facilitate trouble-free exercise of such powers. Legislation must enable members of the public to understand the extent and conditions of the powers so that they can assess whether officials act within the scope of the powers. [19]

[40] Legislation permitting seizure of property should also provide for the return of the property and payment of compensation in certain circumstances. An obvious circumstance will be if the seizure is unreasonable or the prosecution is discontinued. [20]

[41] Manifestly s 6A(1)(d) of the Businesses Act does not conform to these prescripts. The fact that it is deficient in this regard does not necessarily render it unconstitutional if the deficiency is cured in subordinate legislation.

[42] I agree with the respondents that the provisions of s 6(A)(1)(d)(i) of the Businesses Act are simply enabling and empowering,[21] a framework for further

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[17] G.C. Thornton *Legislative Drafting* fourth edition (Butterworths) at 372.
[18] Ibid at 234.
[19] Ibid at 238.
[20] Ibid at 239-240.
[21] SRHOA at 7.

legislation. The wording of the subsection is permissive and not peremptory.[22] It differs from s 25 of the Aliens Control Act 96 of 1991 at issue in *Dawood.*

[43] The applicant's concerns about sub-sec (i) not prescribing a maximum fine can be addressed adequately in a constitutionally compliant by-law. The imprisonment for up to three months indicates what the amount of the fine should be. Not stipulating the amount of the fine finds precedent under 'Offences and Penalties' in s 89 of the National Road Traffic Act 93 of 1996.[23] Whether there should be a term of imprisonment at all was not an issue for the court to decide.

[44] Regarding guidelines about the disposal of goods impounded under s 6A(1)(d)(ii), s 6(1)(b) enables the Administrator of the province to make regulations for this purpose. Therefore the two grounds on which the applicant challenges the legality of s 6A(1)(d) of the Businesses Act are unfounded.

[45] However, a point not taken by the applicant is that s 6A(1)(d) does not provide specifically for the return of the property and payment of compensation. Nor does it enable subordinate legislation to so provide. By stipulating that disposal and not the return of impounded property should be regulated the Businesses Act might be tipping the balance disproportionately in favour of the administration and first respondent. Having regard to the authorities above it might also explain the lack of accountability on the part of the first respondent and its officials especially as the 1995 By-law was also silent on the return of property. However, the By-law now provides for the return of impounded goods. Whether the By-law cures the deficit in the Businesses Act is a discussion for another day. As the applicant did not raise this ground of challenge I take it no further for now.

[22] Second Respondent's Heads of Argument (SRHOA) para 7.1.
[23] Second Respondent's Heads of Argument (SRHOA) para 14.3.

[46] Accordingly, on the submissions of the applicant I find no flaw in s 6(A)(1)(d) of the Businesses Act.

Section 7(2)(b) read with s 2 of the 1995 By-law

[47] Initially the applicant's constitutional challenge targeted the 1995 By-law, which applied when his goods were impounded. On 27 June 2014 the By-law was promulgated. The applicant persisted with its constitutional challenge to corresponding sections in the By-law. Without objection it successfully amended its pleadings accordingly.

[48] The 1995 Bylaw enacted pursuant to s 6(A) of the Businesses Act provides for impoundment for certain restrictions and prohibitions. It lists nine prohibitions against street traders in s 2(a) to (i). Roughly, sub-secs (a) to (g) can be grouped as absolute prohibitions against trading. Sub-sections (h) and (i) prohibit trading that fails to comply with legal formalities. Sub-section (h) prohibits a street trader from carrying on business as such without being in possession of proof that he has hired the stand or that the second respondent has allocated it to him. Similarly, sub-sec (i) prohibits trading in contravention of the terms and conditions of the lease or allocation of a stand.

[49] The distinction between absolute prohibitions against trading and contraventions for failing to comply with legal formalities originates in s 6A(1)(d)(ii) which, in sub-sec (aa) above authorises impoundment by an officer who reasonably suspects the goods are used in carrying on the business of a street vendor. Subsection (bb) provides additionally that such business is restricted or prohibited under sub-sec (1)(a)(ii) or (iii). Subsection (ii) lists various places at which the Businesses Act prohibits street trading absolutely, e.g. in public parks, on verges contiguous to state buildings, churches and monuments where, applying sub-sec (iii), trading causes obstruction to traffic and pedestrians; or, if the goods sold on the verge contiguous to

a building in which goods sold are of the same nature as the goods sold by the street vendor without having obtained the consent of such business,[24] or the owner or occupier of a building used as residence objects.[25] None of these prohibitions and restrictions in the Businesses Act authorise impoundment for non-compliance with the legal formalities of street trading.

[50] Section 7 of the 1995 By-Law provided for removal and impoundment for carrying on a business prohibited in terms of s 2(a) to (g). Impoundment under the 1995 By-law targeted only absolute prohibitions against street trading. As one of many contraventions or the failure to comply with the By-law, trading without proof of permission to trade fell to be an offence, punishable on conviction not with impoundment but by a fine or imprisonment not exceeding three months[26] consistent with the enabling s 6A(1)(d)(i) of the Businesses Act.

[51] Other than issuing a receipt for the impounded goods and delivering them to the 'authorised official', the 1995 By-law was silent on what should happen to impounded goods. Section 7(4) indemnified officials against liability for loss or damage to impounded goods.

Sections 35 and 39 of the By-law

[52] Section 35(1) of the By-law empowers officers to remove and impound goods of an informal trader that the officer reasonably suspects is used in informal trading which is in contravention of the By-law.[27] Section 11 of the By-law enabled by s 6A(1)(c) of the Businesses Act prohibits as an offence informal trading on municipal property without a permit. Topping the list of offences is trading without a permit

[24] Section 6A(1)(a)(iii)(ee) of the Businesses Act.
[25] Section 6A(1)(a)(iii)(ff) of the Businesses Act.
[26] S 8(1)(a) read with 2(h) of 1995 By-law.
[27] Section 35 (1).

specifically,[28] which was neither a restriction or prohibition, nor an offence under the 1995 By-law. The By-law does not distinguish between trading without a permit and trading without being in possession of proof of a permit as s 2(h) of the 1995 By-law did. The distinction between absolute prohibitions and non-compliance with formalities is lost in the By-Law. All contraventions can result in impoundment.

[53] Unlike the 1995 By-law, the By-law specifies what should happen to impounded goods. They must be kept at an address provided in the receipt issued itemising them.[29] They may be released after proof of ownership is produced in the form of the receipt issued by the officer when the goods were impounded, and upon payment of the impoundment fee.[30] Significantly the first respondent may at any time after the impoundment sell, destroy or otherwise dispose of perishable goods if they represent a health risk or nuisance.[31] The municipality may sell non-perishable goods if the owner does not pay the impoundment fee within one month from the date of impoundment.[32] If the first respondent sells the impounded goods then it must, on presentation of receipt issued as proof of ownership, pay the proceeds of the sale, less the impoundment fee.[33]

[54] The By-law distinguishes between impoundment and confiscation. If an authorised official reasonably suspects an informal trader is trading in illegal goods then those goods may be confiscated immediately. The authorised official must surrender the confiscated goods to the South African Police Service.[34]

[55] Section 39 provides that the first respondent shall not be liable for damages arising from anything lawfully done in good faith by its officials in terms of the By-law.

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[28] Section 37(1)(a).
[29] Section 35 (3)(a) and (b).
[30] Section 35 (5).
[31] Section 35 (6).
[32] Section 35 (7).
[33] Section 35 (8).
[34] Section 35 (9).

[56] Inconsistently with s 6A(1)(d)(ii) s 35 of the By-law does not distinguish between absolute prohibitions against street trading and contraventions arising from non-compliance with legal formalities. In contrast to the 1995 By-law, which permits impoundment for contravening certain restrictions and prohibitions,[35] s 35(1) permits impoundment for all contraventions of the By-law and any other law. The power to impound all the trader's goods for all contraventions could result in the By-law being harsher than the 1995 By-law which avoided impoundment for street traders who did not comply with the legal formalities for street trading.

[57] As mentioned above, for contraventions for which impoundment is permitted s 6A(1)(d)(i) of the Businesses Act imposes a fine or imprisonment not exceeding three months, or both such fine and imprisonment. Penalties for other contraventions are marginally higher. For instance, s 5(1) imposes a fine not exceeding R1000 or imprisonment not exceeding three months or both such fine and imprisonment for trading without certain licences stipulated in s 2(3) of the Businesses Act. Section 6(3) of the Businesses Act permits regulations to prescribe penalties not exceeding a fine of R1000 or imprisonment for three months for any contravention or failure to comply with the regulations.

[58] Inconsistently with s 6A(1)(d)(i) and the tenor of ss 5(1) and 6(3) of the Businesses Act, s 38 of the By-law imposes penalties of a fine not exceeding R5 000 or imprisonment not exceeding 1 year, or both such fine and imprisonment for trading without a permit.[36] All other offences under s 37(1) of the By-law attract a lesser penalty of a fine not exceeding R1 000 or six months imprisonment, or both such fine and imprisonment.[37] A continuing offence attracts an additional fine of R150 or imprisonment not exceeding 10 days, for each day on which such offence

[35] Section 7(2)(b) of the 1995 By-Law.
[36] Section 38(1) read with s 37(1)(a).
[37] Section 38(2) read with s 37(1).

continues or both such fine and imprisonment.[38] None of these penalties are foreshadowed in the Businesses Act, which prescribes only a fine or imprisonment not exceeding three months for all contraventions for which impoundment is authorised including trading without producing a permit.

[59] A provision in a by-law that exceeds the powers of its authorising statute is invalid.[39] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 54 the Constitutional Court (CC) reminded:

> 'It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle and they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.'

[60] Underpinning and supplementing where necessary the common law principle of *ultra vires* is the constitutional principle of legality:

> 'In relation to legislative and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.[40]

[61] The exercise of all public power must be authorised by law. In *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) the Supreme Court of Appeal remarked that the act of a municipality in changing street names was executive action. Although not administrative action it nevertheless was not immune from judicial review. Unequivocally the SCA pronounced:

> 'The fundamental principle, deriving from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative – is only legitimate when lawful

[38] Section 38(3) read with s 37(1).
[39] Cf *S v Mngadi and Others* 1986 (1) SA 526 (N).
[40] *Fedsure* para 59.

> … This tenet of constitutional law which admits of no exception has become known as the principle of legality.[41]

[62] *Prima facie* s 35(1) of the By-law exceeds the mandate in s 6A(1)(d)(ii) of the Businesses Act at least in so far as it imposes impoundment for non-compliance with legal formalities of street trading, in this instance the alleged failure to produce a permit or licence. Omitting to distinguish between absolute prohibitions and non-compliance with legal formalities may result in s 35(1) of the By-law being *ultra vires* s 6A(1)(d)(ii) of the Businesses Act. Compounding the prejudice resulting from the apparent over-breadth of s 35(1) is the higher penalties imposed by s 38 of the By-law relative to s 6A(1)(d)(i).

[63] Section 38 of the By-law seems to exceed the mandate in s 6A(1)(d)(i) of the Businesses Act. Considerably higher fines and terms of imprisonment may be imposed for non-compliance with the legal formalities of street trading. Potentially s 38 may also conflict with of ss 5(1) and 6(3) of the Businesses Act.

[64] A finding that s 35(1) is *ultra vires* s 6A(1)(d) of the Businesses Act necessarily leads to the further finding that anything done pursuant to s 35(1) will automatically also be *ultra vires*. All the subsections of s 35 concerning impoundment (excluding sub-sec (9) dealing with confiscation) will also be *ultra vires*.

[65] Confirmation of my *prima facie* findings above can be dispositive of the entire application, but for the fact that the applicant did not challenge the By-law on the ground that it was *ultra vires* its empowering statute. He attacked impoundment as a penalty for failing to produce a licence on various constitutional grounds discussed below. He cited *Fedsure* and *Democratic Alliance* in the context of his legality challenge within the 1995 By-law itself.[42] He did not challenge the validity of s 38 of

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[41] *Democratic Alliance* Para 21.
[42] Para 35, discussed below.

the By-law. Nor did he shore up differences between the 1995 By-law and the By-law. These observations came to light after the matter was argued. Hence none of the parties debated the validity of the By-law as against the Businesses Act. Neither has the first respondent had an opportunity to justify abandoning its distinction between absolute prohibitions and non-compliance with formalities, and the shift towards treating street traders more harshly post 2014 than post 1995.

[66] The validity of s 35(1) was always up for determination. Not so in the case of s 38. Although I may decide the validity of s 35(1) albeit for reasons not canvassed by the parties, s 35(1) links inextricably into s 38. Unavoidably the validity of s 38 also has to be decided. The participation of the parties in deciding these issues is indispensable to a properly reasoned outcome. Hence I take my *prima facie* my findings no further.

Applicant's Rule of Law/ Principle of Legality Challenge

[67] The fourth respondent issued Satalaza (indirectly the applicant as his employer) with a written notice to appear in the magistrates' court under s 56 of the CPA for contravening s 2(h) of the 1995 By-law for the alleged offence of 'illegal trading' and imposed a fine of R300. As discussed above, s 7(2)(b) expressly confined the power to remove and impound street traders' goods to sub-secs (a) to (g). A contravention of sub-sec 2(h) fell beyond the powers of officers to remove and impound the goods of a street trader.

[68] Typically a challenge to administrative action (which impoundment of street vendors' property is[43]) would have to follow the procedure prescribed in s 7 of Promotion of Administrative Justice Act 3 of 2000 ('PAJA').[44] That procedure was dispensable in this case because all the information relevant for determining the

[43] *Zondi* para 105.
[44] *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as Amicus Curiae)* 2014 (6) SA 123; 2014 (10) BCLR 1195 (CC) para 60.

powers of the first and fourth respondents and whether they exceeded them were fully pleaded, documented and common cause. To insist on the applicant complying with s 7 would amount to preferring form to substance.

[69] The same may not necessarily apply to the applicant's remaining administrative law challenge to the right to a hearing before administrative action is taken. Because the applicant did not launch the review in accordance with s 7 of PAJA, the respondents did not plead to this challenge and objected to it being raised. The applicant capitulated.

[70] Like the Pound Ordinance in *Zondi*, s 35 is similarly silent about notice and hearing to the owner of the removal and disposal of the property. *Zondi* applied *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC) (1996) (12) BCLR (1573) which held that a right to notice can be construed from the text of the statute.[45] The CC reminded of the relevance of notice as a prerequisite for fairness before adverse decisions are made.[46]

[71] Although s 35 does not expressly state the right to be heard before property is impounded, such a right is implicit in any administrative action.[47] Importantly, the right to fair procedure is intrinsic to the limitation or deprivation of all constitutional rights. *Zondi* observes:

> 'It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations.'[48]

[72] Deciding what form that hearing should take requires the respondents' participation. That the applicant did not specifically invite through s 7 of PAJA.

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[45] *Zondi* para 108 – 109.
[46] *Zondi* para 112 and 113.
[47] *Zondi* at 98.
[48] *Zond*i para 112.

Whether the interaction before impoundment amounted to a hearing cannot be decided without the respondents having an opportunity to respond to the applicant's challenge that he was not heard.

[73] The position after impoundment and before the applicant's property was disposed of is different. Whatever form the hearing should have been is of no moment if no hearing of any kind was given to the applicant. It is common cause or not disputed that he was not afforded any hearing at that stage. The only hearing occurred in the magistrates' court in relation to his criminal prosecution after the property was disposed of.

[74] Accordingly, I find that removing and impounding the goods of the applicant was manifestly *ultra vires* the powers of the first and fourth respondents. The fourth respondent was not authorised by the empowering provision in s 7(2)(b) of the 1995 By-law to impound the goods. Consequently, she violated s 6(2)(a)(i) of PAJA and the principle of legality embedded in s 1(c) of the Constitution. The disposal of the applicant's property without a hearing was procedurally unfair and in breach of s 6(2)(c) of PAJA.

The Constitutional Challenges

[75] My task is infinitely easier following *Zondi* and the cases cited there.[49] *Zondi* was an interdict to declare unlawful an ordinance that permitted straying livestock to be impounded. The law on impoundment of street trader's goods operates similarly as the ordinance did. In both instances, the impoundment impacted on predominantly poor landless Africans[50] whose only asset was their stock.[51] The impoundment was immediate.[52] At no stage was there intervention of a court or any independent

[49] *Zondi v MEC for Traditional Local Government Affairs and others* 2005 (3) SA 589 (CC).
[50] Ibid para 38-42.
[51] Ibid para 76.
[52] Ibid para 45.

tribunal before the property could be impounded or disposed of. Any balance remaining after fees and expenses were paid had to be paid over to the owner of the property or forfeited to the state.[53] The decision to impound and dispose of the property involved the exercise of public power constituting administrative action.[54] The context, the impoundment law and the constitutional provisions implicated in *Zondi* are similar to this case. Accordingly, I intend to apply *Zondi* to assess whether the By-law complies with ss 34, 25 and 9 of the Constitution. Section 22 of the Constitution and those issues not covered in *Zondi* find adequate authority in other decisions of the CC.

[76] Notwithstanding the similarities with *Zondi* justification for the By-law must be considered in the context of the informal trade sector. If any conflict arises between the By-law and the Constitution and rights are limited the court will consider justification at the end after all four constitutional rights are analysed. Although the applicant seeks orders regarding s 35 of the By-law the main thrust of his challenge relates to the impoundment provisions of s 35 (1) to (8). Accordingly, I focus on impoundment. Subsection (9) which permits confiscation of illegal goods, is similarly though not identically implicated. My findings and conclusions will have to be appropriately adapted to subsection (9).

Section 34: Access to Court

[77] In *Zondi* the MEC raised the defence that the impugned provisions did not prevent the owner of the impounded animals from approaching a court at any stage during the removal and impoundment to secure the release of the animals impounded unlawfully.[55] Furthermore the impugned provisions amounted to a justifiable limitation under s 36(1) of the Constitution.[56] The CC struck down this

[53] Ibid para 49.
[54] Ibid para 105.
[55] Ibid para 57.
[56] Ibid para 57.

defence unanimously declaring[57] that impoundment amounted to self-help of the kind that it had already deprecated in *Chief Lesapo* v *North West Agricultural Bank and Another* 2000 (1) SA 409; 1999 (12) BCLR 1420 (CC) in which the court stated the following:

> 'The effect of this underlying principle on the provision of s 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.
>
> . . .
>
> Respect for the rule of law is crucial for a defensible and sustainable democracy. In a modern constitutional State like ours, there is no room for legislation which, as in this case, is inimical to a fundamental principle such as that against self-help. This is particularly so when the tendency for aggrieved persons to take the law into their own hands is a constant threat.
>
> This rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary. It is a guarantee against partiality and the consequent injustice that may arise.'[58]

[78] *Lesapo* and *Zondi* were not the only cases in which the CC struck down self-help as bypassing and usurping the powers and functions of the Court.[59] *Zondi* reiterated the CC's stance on s 34 of the Constitution as follows:

> 'Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts. As this Court said in *Lesapo*:

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[57] Ibid para 59.
[58] *Chief Lesapo* para 16 – 18.
[59] See also *First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and another* 2000 (3) SA 626; 2000 (8) BCLR 876 (CC).

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance." '[60]

[79] The CC found that on its own the power to impound was not a problem. The problem arose when the power combined with other sections to 'effectively prevent disputes that could give rise to social conflict from reaching the courts.'[61]

[80] In this case s 35(1) of the By-law has a similar effect on its own and when it combines with the power to remove and dispose of the impounded goods.[62] Section 35(1) permits an official to remove and impound goods upon the mere suspicion, reasonably held, that the informal trader has contravened a provision in the By-law. Effectively, the street trader suffers punishment and deprivation of her property before a court of law has determined her guilt. As invasive as s 35(1) is impoundment may nevertheless be a necessary measure in the informal sector to curb some contraventions. However, the difference between s 35(1) and the impoundment of livestock is that whereas trespassing livestock almost always pose a physical threat necessitating impoundment immediately to prevent harm, not all infringements of the By-law harm the public in a way that requires impoundment immediately or at all. [63] Section 35(1) is over-broad in that it permits impoundment for all contraventions without differentiating between serious absolute contraventions and less serious, formal non-compliances such as trading without producing proof of a permit that do not pose a threat to the public.

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[60] *Zondi* para 61.
[61] Ibid para 68.
[62] Ibid para 69.
[63] The difference acknowledged in the s 6A(1)(d) and the 1995 By-law between absolute prohibitions and contraventions that do not comply with legal formalities, appears not to be emulated in the By-law.

[81] What happens after the impoundment contaminates s 35(1) further. Compounding the prejudice of removing the street traders' property without a hearing is the power of the first respondent's officials to sell, destroy or otherwise dispose of perishable goods and foodstuff not fit for human consumption.[64] Like impounded livestock,[65] the property of street traders is sold without notice to the owners and the street traders and without a reserve price. Non-perishable goods are sold by the first respondent if the owner does not or cannot pay the impoundment fee within one month of the date of impoundment.[66] Wastefully, goods not sold are destroyed.[67]

[82] Concerning the sale of a debtor's property, *Zondi* reminds:[68]

> 'This protection [in s 34 of the Constitution] was held to extend to cases where there is no dispute over the underlying obligation giving rise to attachment and execution. As the Court held, "[t]hat protection extends to the circumstances in which property may be seized and sold in execution and includes the control that is exercised over sales in execution." This protection is necessary to ensure that the sale is conducted in a manner that enables the debtor to recover the value of the property sold.'

[83] Although s 35(8) entitles owners to the proceeds of the sale of goods less the impoundment fee, the first respondent failed to give notice of the sale to the applicant and to inform him when the goods were sold and that he was entitled to a refund. The applicant was entitled to an accounting if not a refund for his goods. But the attendant in charge of the impounded goods did not make even a pretence of checking any records to ascertain what happened to his goods.

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[64] Section 35(6) of the By-law.
[65] *Zondi* para 70, 45.
[66] Section 35(7) of the By-law.
[67] *Zondi* para 71; s 35(7) of the By-law.
[68] *Zondi* para 72 (footnotes omitted).

[84] Although s 35(1) confers a power to impound only, the first respondent's officials effectively confiscate the impounded goods. The right to a refund and to the return of the goods remains merely theoretical for as long as the court proceedings are not finalised before the goods are disposed of. Even though the applicant was entitled to the return of his goods after the magistrates' court had directed the first respondent to release them to him and such release became impossible once the first respondent had disposed of them, the first respondent tendered no compensation for the goods to the applicant. Only as a result of access to the court via this application did the applicant eventually elicit from the first respondent at the hearing a possible tender of compensation. The luxury of litigation is not an option for every street trader whose property is impounded.

[85] The impracticality of the scheme emerges from the delays in finalising the criminal prosecution. The magistrate withdrew the charges against Satalaza on 25 June 2014 about ten months after the goods were impounded. By that time the first respondent had disposed of them. If they had been perishable goods they would have been disposed of after two days. Notwithstanding our constellation of constitutional rights the systemic obstacles in the dispute system design deprived the applicant of an opportunity to recover his goods before they were disposed of. Having legal representation (unusual for street traders) to recover the goods did not improve his position either once the goods were disposed of.

[86] Similar delays are foreseeable if a street trader pursues an internal appeal and review in terms of s 62 of the Municipal Systems Act 32 of 2000, to which the first respondent pointed. Assuming that she is literate and knowledgeable about s 62, she lodges her appeal within the prescribed 21 days[69] and the Municipal Manager 'promptly' submits it to the appeal authority.[70] The latter must commence the appeal

[69] Section 62(1).
[70] Section 62(2).

within six weeks and decide it within 'a reasonable period'.[71] By that time perishable and non-perishable goods would have been disposed of. If a review were to follow, the resolution of the dispute could be delayed further.

[87] But for the assistance of the LRC and similar aid organisations, this right of access to courts is theoretical and illusionary for street traders generally. Puran could not pay the fine of R100 let alone engage legal representation to refute the charges. Street traders are required to be at their stands for three to five days in a week according to an arbitrary rule of the first respondent. Being away also means loss of income. The meagre income they generate goes to sustaining their large families. Employing legal assistance is not realistic. Reform of the dispute system design in the informal sector should take this into account.

[88] Just as in *Zondi*, the scheme of the impoundment provisions in the By-law precludes judicial intervention from start to finish.[72] Such a scheme 'remove(s) from the court's scrutiny one of the sharpest and most divisive conflicts of our society.'[73] Street traders are similarly situated to the African owners of livestock and all other Africans whose systematic impoverishment and powerlessness are traceable to their loss of land before and after 1913. Skinner contextualises street trading historically with land deprivation; apartheid finally perfected deprivation under the Group Areas Act and the Black (Urban Areas) Consolidation Act.[74]

[89] Disappointingly therefore the first and second respondents resurrected the same defence against the breach of s 34 challenge in this case as the MEC did in *Zondi*. The first respondent pointed to the offences in s 37 and the penalty provisions in s 38 for access to the courts via the CPA and the internal appeal in s 62 of the Municipal Systems Act above. Street vendors are not precluded from approaching a

[71] Section 62(5).
[72] *Zondi* at para 74 – 75.
[73] Ibid para 76.
[74] Skinner at 3.

court at any stage of the removal and the impoundment process to secure the release of the goods as Satalaza did to secure the release of the applicant's impounded goods, the respondents persisted disingenuously.[75]

[90] Impoundment is a necessary measure for absolute prohibitions against street trading, that is, those that are a direct and immediate threat to the public. Not all contraventions of the By-law can validly result in impoundment, as the 1995 By-law and the Businesses Act recognise.

[91] Accordingly, I find that s 35 of the By-law limit the right of access to courts in s 34 of the Constitution in so far as:

a) the impoundment and disposal of the street traders' property for alleged non-compliance with the legal formality of producing a licence or permit to trade; and
b) indiscriminate disposal of the street traders' property for non-compliance with any restriction or prohibition or contravention

are not supervised by a judicial officer or any other independent, impartial tribunal whose function includes resolving disputes between street traders and the first respondent.

Section 25 of the Constitution

[92] Two cases relied on by the applicant namely, *First National Bank of SA t/a Wesbank v Commissioner of South African Revenue Service and Another* 2002 (4) SA 768 (CC) para 61 reaffirmed in *Mkontwana* v *Nelson Mandela Municipality* 2005 (1) SA 530 (CC), assist in interpreting and applying s 25 of the Constitution, which provides:

[75] Second Respondent's Heads of Argument para 12.

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

[93] *First National Bank* considered the definition of 'deprived', 'deprivation' and 'arbitrary' in section 25(1). Deprivation means dispossessing an owner of all its rights, use and benefit to and of corporeal moveable goods.[76] Threats of expropriation and 'forceful bargaining' do not amount to deprivation.[77]

[94] An extensive survey of foreign jurisdictions in *First National Bank* showed that deprivation of property depended for its validity upon there being an 'appropriate relationship between means and ends', a relationship that is 'not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination'.[78] Fortified by foreign law the CC concluded that a law of general application is 'arbitrary' if it does not provide sufficient reason for the deprivation or is procedurally unfair.[79] Rationality calls for an evaluation of the purpose of the legislation, the nature of the property and the reason for the deprivation.[80] In some cases it might be no more than a mere rational relationship between means and ends; in others it might only be established by a proportionality analysis akin to s 36(1) of the Constitution.[81] *Mkontwana* expatiates:

> 'A mere rational connection between means and ends could be sufficient for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.'[82]

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[76] *First National Bank* para 61.
[77] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 43-44; 2011 (2) BCLR 189.
[78] *First National Bank* para 65, 98.
[79] *First National Bank* para 65.
[80] *First National Bank* para 65.
[81] *First National Bank* para 100(h).
[82] *Mkontwana* para 35.

[95] The instrumentality of property in the commission of an offence is not sufficient to justify deprivation of property.[83] The deprivation must also be proportional taking into account the nature of the property, the effect of deprivation on its owner and the nature and extent of other penalities.[84] Removing goods from street traders and placing them with the first respondent without the consent of the owners constitutes deprivation of property. Is the deprivation by impoundment arbitrary?

[96] To deprive street traders of their property permanently, s 35 of the By-law has to overcome additional hurdles of fair procedure, rationality and proportionality to be valid.[85] In the context of street traders procedural fairness would require notification to the owners that they are accused of a breach of the By-law before their goods are impounded and disposed of. As shown in the discussion on s 34 of the Constitution above, s 35 of the By-law does not impose any obligation upon the police to give any notice. None of the respondents pointed to any measures in place to afford street traders a hearing other than litigation after the property is impounded and usually after it is disposed of. If notice is not practical prior to impoundment, this is not so as regards notice before disposing of property. Furthermore, because notice before impoundment may not always be practical and because it is so invasive it should be reserved for the most serious violations. Whatever the purpose is if the deprivation is permanent, there must be procedural fairness however attenuated.[86] Manifestly the dispute system design in s 35 is incapable of giving effect to the right to procedural fairness before a street trader is deprived of her property permanently.

[97] The purpose of the deprivation should also be compelling. The purpose of the deprivation, in this instance to compel the applicant to produce a licence or permit, is not sufficiently compelling to render the deprivation rational in the constitutional sense of the means being proportional to the ends. A ‘restricted proportionality’

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[83] *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae*) 2007 (4) SA 222 (CC) para 48-55.
[84] *Mohunram* para 63-65.
[85] *First National Bank* para 100; *Mkontwana* para 65.
[86] *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2005 (5) 315 (CC) para 32.

standard balances the public interest with the property interests of the street traders.[87] Deprivation of their property is so invasive of their property rights that it impacts on the welfare of the street traders 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 even though the charges against Satalaza were withdrawn. For Puran, recovering his six pockets of potatoes was not possible because they would have perished and been disposed of in a few days.

[98] However, I found above that s 35 of the By-law violates s 34 of the Constitution. As will be shown below it violates other rights in the Bill of Rights. Rationality, which requires at a minimum that s 35 of the By-law be capable of achieving its intended objectives[88] is not even engaged.

[99] Accordingly, I find that s 35 of the By-law limits the right of access to property in s 25 of the Constitution in that:

a) the impoundment and disposal of the street traders' property for alleged non-compliance with the legal formality of producing a licence or permit to trade; and
b) the indiscriminate disposal of the street traders' property for non-compliance with any restriction or prohibition or contravention

are irrational and give rise to arbitrary, deprivation of property of street traders.

Section 22: Freedom of trade, occupation and profession

[100] The applicant contended that impounding goods for failing to produce a permit violated s 22 of the Constitution, which accords to every citizen the right to choose

[87] *First National Bank* para 98.
[88] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) para 67; 2004 (6) BCLR 597.

their trade, occupation or profession freely. A limitation of this right was spelt out in *S v Lawrence*, *S v Negal*, *S v Solberg* 1997 (4) SA 1176 (CC) para 34. Implicit in this right is the obligation upon traders to act lawfully. [89] Regulators and law enforcers also have obligations to pass and enforce laws that are rational and justified. Are the impoundment provisions in s 35 of the By-law consistent with the right to freedom of trade in s 22 of the Constitution?

[101] Having found that s 35 arbitrarily deprived street traders of their property it follows that such deprivation also impairs their right to trade. When goods are impounded and the impoundment becomes permanent, as it does when the goods are destroyed, perished or sold on auction, the right of informal traders to exercise their freedom to trade is annihilated temporarily and even permanently if they have no other resources to resurrect their trade. Confiscation can result in shutting down trade altogether and not merely regulating it.

[102] Accordingly, I find that s 35 of the By-law limits the right to trade in s 22 of the Constitution.

Section 9 of the Constitution: Equality

[103] The applicant contended that s 35 constitutes discrimination under s 9(3) of the Constitution on the listed ground of race and the analogous ground of socio-economic status. The purpose and effect of allowing the goods of street traders to be impounded and confiscated is particularly harsh on black people who eke out a living through trading in the streets. Street traders historically have been a vulnerable group as evidenced by the report of Skinner. Furthermore, the state 'confiscates' the goods of informal traders who trade without a licence but not the goods of other traders. So it was submitted for the applicant.

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[104] The first respondent's heads of arguments and supplementary heads of argument do not address the two grounds of discrimination relied on by the applicant. Instead, it denied that section 35 of the By-law was discriminatory because differentiating in legislation and administration is common practice in a modern state; differentiation is an element at the heart of equality jurisprudence. Counsel for the first respondent criticised the applicant for making the bald allegation that section 35 of the By-law differentiates informal traders from other forms of trading without permits without laying a factual or legal basis for a comparison between the informal and formal traders without permits.

[105] Comparison between formal and informal traders was not the main thrust of the applicant's discrimination complaint. Race and socio-economic status were his chosen grounds of discrimination. Implicitly the comparators were poor mainly African people compared to all others who were not poor. He singled out formal trading to show that the authorities favour mainstream enterprises over informal traders. Mainstream enterprises were the 'haves'; street traders were the 'have nots', a distinction made in *Zondi*[90]. The applicant was less concerned about comparators. He relied more on the impact of s 35 on historically disadvantaged black, mainly African people marginalised to the fringes of society.

[106] Comparison and the choice of comparators are tools employed in discrimination analysis. However, a cursory survey or the cases shows that the CC is selective about whether, when and what comparators it relies on.

[107] *Harksen* set up the three-stage test for discrimination in our jurisprudence.[91] The test begins with establishing difference. Not every differentiation amounts to

[90] *Zondi* para 41.
[91] *Harksen v Lane NO and Others* 1998 (1) SA 300 (SCA) para 53.

discrimination.[92] Establishing difference, choosing grounds of discrimination and identifying comparators conduce to the outcome in discrimination analysis.[93] For instance, the choice of the ground of discrimination determines where the onus lies. The minority in *Harksen* who identified marital status as the ground of discrimination when it was not listed as such in the 1993 Constitution and therefore not presumed to be unfair would have enjoyed an advantage under the 1996 Constitution when marital status was listed as a ground of discrimination and presumed to be automatically unfair, thus shifting the onus to the other party to prove that it is fair.

[108] In *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) para 19 the CC used comparison to diagonose the ground of discrimination to be citizenship. *Van Der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) was decided by the CC declining to choose marital status or any other ground of discrimination. It focused on the unfair impact of the impugned law on the affected group.[94] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) reinforced impact as follows:

> 'To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.'[95]

[109] *MEC for Education, Kwazulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) raised for the first time in the CC the question whether comparators are dispensable. As it happened, the CC found a comparator and so avoided answering the

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[92] *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) para 25-27.
[93] Chris McConnachie *What Is Unfair Discrimination? –A study of the South African Constitutional Court's Unfair Discrimination Jurisprudence* unpublished DPhil Thesis (2014) at 53, 103.
[94] *Van Der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) paras 24; 27
[95] *Hugo* para 43.

question.[96] Differentiation reared its head in the LAC in *South African Police Service v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC) at para 22. Even though the LAC found no evidence of overt differentiation in the conventional sense of *Harksen* it accepted without deciding that it is possible to discriminate when differentiation is not in issue.[97]

[110] The affirmative action analysis introduced in *Minister of Finance and Another v Van Heerden* 2004 (6)SA p139 para 39 reminds:

> 'The starting point of equality analysis is almost always a comparison between affected classes. However, often it is difficult, impractical or undesirable to devise a legislative scheme with 'pure' differentiation demarcating precisely the affected classes.

[111] *Zondi* at para 90-91 acknowledged the interconnectedness of purpose and effect:

> 'A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. … The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional. This will be the case where, for example, the legislation has a discriminatory impact on a particular racial group.
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> Of course purpose and effect are interrelated.'

[112] *Harksen*[98] concluded:

> 'The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'[99]

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[96] Paras 164-165.
[97] *Barnard* at para 22.
[98] *Harksen v Lane NO and Others* 1998 (1) SA 300 (SCA).

Impact analysis applied in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) 2001 (1) SA p1 and *Moseneke And Others v The Master And Another* 2001 (2) SA 18 (CC) without mentioning comparison or comparators.

[113] In short, the CC selectivity about whether, when and what comparators it relies on injects flexibility in the nascent stages of our jurisprudence, a welcome difference from Canada.[100] In its formative jurisprudence the Supreme Court of Canada used comparators as an indispensable tool, at times with unsatisfactory results. *Withler v Canada* 2011 (1) SCR 396 para 54-66 responded to the critics and weaknesses inherent in insisting on comparing the claimant group with a mirror comparator group by abandoning this approach in favour of a flexible approach to conclude:

> 'A rigid template risks consideration of irrelevant matters … or overlooking relevant considerations...'[101]

[114] Particularly pertinent to this case is *Pretoria City Council v Walker* 1998 (2) SA 363 (CC). Race was the listed ground of discrimination thus shifting the onus to the Council to prove that the discrimination was not unfair. The Council had used different utility tariffs for black and white residents and exempted black defaulters from legal action for non-payment of utilities. Arising from the choice of race as the ground of discrimination the comparators were, on the one hand, mainly black residents of historically black townships, and on the other hand, mainly white residents in historically white municipalities. The minority persisted that the differentiation was based on

> 'objectively determinable characteristics of different geographical areas, and not on race.' [102]

The majority disagreed saying:

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[99] *Harksen* para 54.
[100] Catherine Albertyn *Substantive equality and transformation in South Africa* 2007 SAJHR 253; Chris McConnachie above.
[101] *Withler* para 66.
[102] *Walker* para 105.

> 'To ignore the racial impact of the differentiation is to place form above substance.'[103]

In the South African context race discrimination, often indirect as in *Walker* and in this case, cannot be ignored. The CC had to respond to race as the chosen ground of discrimination.[104] Another ground of discrimination the CC could have recognised was the relative socio-economic status of the black townships to the white suburbs.

[115] Street traders are such because of their socio-economic status. Not only Africans and other black people are street traders. White street traders may also be discriminated on the ground of their socio-economic status. Facially the By-law is racially neutral. However, apartheid layered poverty over race. The degree of coincidence or intersectionality of race with socio-economic status results in the greatest impact being on Africans.[105] As the population group with the largest component of poor people the impact is deeper and more expansive than on any other race group. Race and socio-economic status are cemented together tightly though not inextricably. Democracy and affirmative measures have helped to unravel the bond progressively. However, race and socio-economic status continue to intersect. As street traders their discrimination is ostensible and direct on the grounds of their socio-economic status. However, subversively and indirectly race remains an additional ground of discrimination in appropriate instances. Recognising socio-economic status as the direct and primary ground includes everyone who is poor and a street trader, irrespective of race, gender, ethnic origin, age or any other potential ground of discrimination. Recognising race acknowledges that for black people and Africans in particular discrimination is doubly compounded.

[116] In *Zondi* the CC found the provisions entitling landowners and voters to access to damages for trespassing was 'manifestly and fundamentally racist in its purpose and

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[103] *Walker* para 33.
[104] *Walker* para 6.
[105] Joanne Conaghan *Intersectionality and UK equality initiatives* 2007 SAJHR 317;

effect'; they amounted to discrimination on the listed ground of race.[106] With this finding it did not go further to consider whether the impoundment itself also had a discriminatory purpose and effect, which is an issue this court has to decide in this case.

[117] Against these authorities the impact of s 35 of the By-law must be investigated to determine whether it discriminates against street traders on the pleaded grounds of race and socio-economic status as a result of their historical disadvantage as poor black people.

[118] The By-law aims specifically to regulate street traders differently from other traders. The preamble reads:

> 'Whereas the council recognises the key role that informal trading plays in poverty alleviation, income generation and entrepreneurial development and, in particular, the positive impact that informal trading has on historically disadvantaged individuals and communities'.

[119] It outlines its altruistic aim of promoting social and economic development. To this extent the By-law amounts to a remedial measure[107] to facilitate opportunities that street traders would not otherwise have in the conventional commercial world. However, countervailing considerations of public health and safety compel the first respondent to restrict street trading in various ways. Issuing licences to street traders is the primary means of controlling street trading. Prescribing when, where and what may be traded are also standard means of regulating the sector.

[120] The social context in which the scheme of the By-law applies is one in which:

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[106] *Zondi* para 96.
[107] Ibid at 30.

> 'poverty and illiteracy abound, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.'[108]

[121] Although the CC had made these observations in 1996 and earlier in *Zondi*,[109] Skinner's account in *Street Traders in Durban – A Review of Evidence* confirm that they remain valid today. According to Skinner street traders in the Durban Metropolitan area are primarily indigent black Africans. They often face harassment and victimisation at the hands of the police. The police take away their permits, steal their stock and sometimes teargas and physically abuse them. Policy improvements after 1994 have since regressed as a result of the failure to pass constitutionally sound policies.[110]

[122] Self-evidently my findings above in relation to other contraventions of the Constitution and my reasons for them inform my discrimination analysis. The effect of s 35 is to deny street traders access to courts in terms of s 34 of the Constitution, to deprive them of their property permanently without compensation or accounting in contravention of s 25 of the Constitution, and to prevent and impede them in exercising their right to trade in terms of s 22 of the Constitution. Cumulatively and individually the limitation of these rights compounds the prejudice upon a race and socio-economic group already adversely impacted by poverty.

[123] It was submitted that s 35 of the By-law imposed fines for a criminal act and was therefore no different from fines imposed under the National Road Traffic Act 93 of 1996.[111] The obvious difference between drivers and owners of vehicles on the one hand and street traders on the other hand is that the former are not usually acknowledged as being economically vulnerable as the latter are. Furthermore,

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[108] *Mohlomi v Minister* of *Defence* 1997 (1) SA 124 CC para 14.
[109] Zondi para 51.
[110] Skinner at 16-17.
[111] Second Respondent Heads of Argument (SRHOA) at 19.3.

drivers do not have their vehicles impounded for failing to produce their licences. They are merely issued with a fine. Contrary to the respondents' expectations this comparison goes to support the applicant's stance that issuing a fine and not impoundment is a more appropriate remedy.

[124] The power of the first respondent to remove, impound and dispose of informal traders' goods in s 35 of the By-law discriminate against street traders as members of a depressed socio-economic class and not any other group. Street traders are such because their socio-economic status or race or both are barriers to better opportunities. Effectively, the impoundment provisions compound their historical disadvantages. Notwithstanding the altruistic aims of s 35 of the By-law and although it is facially neutral its effect is to discriminate directly and indirectly against poor and mainly African people.

[125] Accordingly, I find that s 35 of the By-law amounts to discrimination under s 9 (3) of the Constitution.

Applicant's section 39 attack

[126] Section 39 of the By-law reads:

> 'The municipality shall not be liable for damages or compensation arising from anything lawfully done in good faith by it or any authorised official or employee thereof in terms of this By-law.'

This indemnity is similar to others that usually feature in legislation involving state action.[112] It is a necessary provision to enable the State to perform its functions

[112] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) para 20; *Carmichele v Minister Of Safety And Security And Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 42-49.

without the risk of liability under the common law. However, *Carmichele* urged that the Constitution imposes obligations on the courts to develop the common law. [113]

[127] In passing I note that s 39 appears to be another instance of the By-law being more austere than its predecessor. The 1995 By-law which read as follows, was limited to loss arising from impoundment:

> 'Clause 7(4) neither the council nor a councillor, official, officer or employee of the council shall be liable for any loss or any damage to any goods removed or impounded in terms of this section.'

Accordingly, I find that s 39 of the By-law is a limitation on constitutional rights such as the s 11 right to life, the s 12 right to security of person, the freedom to trade, the right to property and possibly even the right to equality.

Justification

[128] Given the intersectionality of constitutional rights, justification of limitations on all the rights is considered together. Are the impoundment provisions justifiable limitations[114] of the rights in ss 34, 25, 22 and 9 of the Constitution?

[129] *Zondi* pointed out that once the livestock was impounded the need for immediate action passed.[115] Consequently there was no reason why the courts should not supervise the execution. [116]

[130] On the question of whether execution and disposal of the stock amounted to a justifiable limitation under s 36(1) of the Constitution *Zondi* again emphasised:

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[113] *Carmichele* para 33-41.
[114] Section 36 of the Constitution.
[115] *Zondi* para 81.
[116] *Zondi* para 83.

> 'The right of access to courts is an aspect of the rule of law. … [which] is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the State and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to "a court or, where appropriate, another independent and impartial tribunal or forum".'[117]

[131] Street traders should not be as restricted as the owners of trespassing livestock. Unlike trespassing animals that are an inherent danger to humans and other property, non-compliance with the legal formalities of street trading such as trading without producing a permit are not such immediate threats. There is no justification for impounding the goods of street traders for non-compliance with the legal formalities of street trading.

[132] Just as impounding of livestock is open to abuse by landowners and works hardships against African stock owners[118] so too does the impoundment of street traders' stock. Neither control the price at which their stock is sold on auction. For both, in most cases, the property is their only asset or livelihood. Access to cash and credit from banks to pay impoundment fees and exorbitant fines is non-existent or not available on affordable terms. And so the cycle of poverty continues throughout the generations.[119]

[133] Impoundment in s 35 of the By-law amounts to self-help by the first respondent's officials. Self-help and abuse of power do not justify the limitations on the rights in ss 34, 25, 22 and 9 of the Constitution of the street traders specifically of those who fail

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[117] *Zondi* para 82.
[118] *Zondi* para 84.
[119] *Zondi* para 84.

to produce a licence. Whilst impoundment may be justified in the circumstances recognised in s 6A(1)(a)(ii) and (iii) of the Businesses Act, disposing of the impounded goods without notice and accounting cannot be so. Impoundment could also trigger self-help by the street traders if the dysfunctionality of the dispute system design frustrates their attempts at peaceful means of resolving conflict.

[134] Impounding the goods is not the only way in which street traders can be compelled to trade lawfully. There are less restrictive measures to limit the rights of street traders such as imposing fines, progressively heavier for repeat offenders, without annihilating their rights altogether. The limitations in s 35 of the By-law are disproportionately harsh in relation to the nature of offences that amount to non-compliance with legal formalities.

[135] Provisions similar to s 39 of the By-law are premised on officials acting honourably and in the public interest. Anything done by the state must be lawful and in good faith for the indemnity to operate.[120] The conduct of the fourth respondent with the first respondent apparently endorsing her lack of accountability does not inspire confidence that the first respondent's officials act honourably at all times towards street traders. Proving bad faith and unlawfulness on the part of the impounding officer is a near impossibility when the police refuse to even accept complaints against their colleagues. The nature of the sector is such that unless officials are oriented to be empathetic towards street traders, the risk of powerful officials mistreating powerless poor people is real. Under these conditions an exemption from liability for damages and compensation is an unhealthy disincentive to act fairly, reasonably and empathetically towards street traders. Notwithstanding the flagrant violation of s 195 of the Constitution, which obliges public services to be professional, ethical and accountable the first respondent remained inert. If the respondents wish to retain s 39 of the By-law they must not only bring s 35 in line

[120] *Carmichele* para 49.

with the Businesses Act but also remedy the attitude of the first respondent's officials to eliminate flaws in the implementation of the By-law.

[136] Individually and cumulatively the limitations on constitutional rights have the effect of repressing street traders to remain a poor and an economically oppressed class. This discriminatory effect is inconsistent with the altruistic aims articulated in the preamble to the By-law, the Businesses Act and the constitutional values of dignity, equality and freedom.

[137] Accordingly, I find that:

a) s 35 By-law unjustifiably limits ss 9, 22, 25 and 34 of the Constitution.
b) s 39 of the By-law is unjustified and unlawful for as long as s 35 remains unjustified and unlawful.

The remedy

[138] Our dispute system design is such that it proffers only litigation as the state sponsored means of resolving disputes about constitutional matters, leaving it to the courts in cases like *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) and *Occupiers of 51 Olivia Road*, *Berea Township and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) to direct litigants to 'engage meaningfully'. Engagement occurs after much costs and acrimony has been incurred. This application is a consequence and reflection of the deficiency in our dispute systems design. It exposes the scheme of the By-law as being incapable of giving effect to important constitutional rights and values.

[139] Compelling a different dispute system design is the nature of the informal sector. In the light of binding precedents from the CC in *Zondi* and other cases compulsory

facilitation or mediation could have resolved the applicant's claim for compensation and kick-started a process of meaningful engagement about the impoundment provisions. In *Occupiers of 51 Olivia Road* the CC encouraged meaningful engagement before litigation.[121] After litigation commenced it remained the best option for the parties to address the dysfunctional aspects of impoundment and the legitimacy of the penalties. Why no meaningful engagement occurred in this dispute must have its roots in our adversarialism cultivated by litigation being the only form of state sponsored dispute resolution.[122]

[140] The dispute system design should also seek to reduce the administrative burden of preserving, disposing and accounting for impounded goods. In the case of the applicant's goods the first and fourth respondents failed to account for them altogether. This raises questions not only about the purpose and effect of the impoundment provisions but also about the first respondent's capacity to administer them in a constitutionally compliant way.

[141] Counsel for the first respondent included in his bundle of authorities the London Local Authorities Act 2012 (the London Act) to support his submission that street trading is similarly regulated in London. This is not accurate. The London Act provides in elaborate detail for notice and hearings before a court of law before property seized is disposed of or returned.[123] In the case of street traders in eThekwini the first respondent has to determine what form the notice and hearing in each instance would take. Notice and a hearing (if any) before impoundment will

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[121] Para 53.

[122] Jerold S Auerbach *Justice Without Law Resolving Disputes Without Lawyers* at 4:

> 'In every society there is a wide range of alternatives for coping with the conflict stirred by personal disputes. Litigation is only one choice among many possibilities, ranging from avoidance to violence. The varieties of disputes settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wished to avoid or encourage conflict, supress it, or resolve it amicably. Ultimately the most basic values of society are revealed in its dispute settlement procedures'

[123] See e.g. ss 10, 14, 15, 16 of the London Act.

predictably be considerably more attenuated than notice and a hearing before execution.

[142] Although my findings and conclusions pertain to impoundment specifically in s 35(1) to (8), they also implicate confiscation of illegal goods in subsection (9) in some respects. However, trading in illegal goods is an absolute prohibition. Whether goods are illegal could be an issue for which access to court should be allowed before a street trader is permanently deprived of his property and the right to trade. Any reform of the By-law should adapt my findings and conclusions appropriately to apply to the confiscation of goods.

[143] Any reform of the By-law towards a functional dispute system design should factor in capacity constraints. The applicant's proposal that for the contravention of failing to produce a licence or permit and other less serious, formal infractions the impoundment provisions be deleted and substituted with a fine could reduce the administrative burden of removing, preserving and disposing of impounded goods. Capacity constraints on street traders to secure legal representation and to litigate before their goods are disposed of, compels a more accessible and expeditious dispute system design.

[144] The facts in this case show that the remedy for eliminating the flaws in the implementation of s 39 of the By-law lies in the first respondent managing its officials effectively. Failing to account as the fourth respondent did and contradicting herself on affidavit must be treated as misconduct and possibly criminal offences such as perjury and theft of the impounded goods. Without a firm hand on officials who misbehave, conflict with street traders will persist as respect for law enforcers wanes.

[145] The order I make aims at facilitating meaningful engagement and enabling the parties to return to the court for assistance to overcome deadlocks during their engagement on the issues raised in this judgment. Amending the By-law to curtail the power of officials to impound and confiscate property, to substitute impoundment with fines and to bring judicial or similar independent scrutiny to bear on the conduct of officials soonest could prevent abuse of power.

[146] Regarding costs, the applicant sought costs against all the respondents who opposed the application. Costs fall within the discretion of the court.[124] Usually in a constitutional matter no order for costs ensues.[125] However, the nature of the defences and the conduct of the fourth respondent call for a special order for costs. Notwithstanding the obvious violation of s 6(2)(a)(i) of PAJA the first and fourth respondents opposed the order for the return of the applicant's goods firstly on the ground that the release of the goods was moot once the magistrate had directed that it be returned to the applicant. Secondly, they raised the technical defence that the applicant was using a process in aid[126] without laying a foundation for enforcing a judgment of another court.[127] Thirdly, notwithstanding the precedents emanating from the CC the first respondent persisted in regurgitating defences that the CC had struck down previously. These defences arise against a backdrop of officials failing to account for the impounded property of a poor street trader in breach of their public accountability obligations under s 195 of the Constitution. Inaction against the fourth respondent makes the first respondent complicit.

[147] Although the respondents were partially successful the applicant succeeded in its main challenge, which was not the validity of s 6A(1)(d) of the Businesses Act but s 35 and 39 of the By-law.

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[124] *Zondi* para 133.
[125] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).
[126] *Dreyer v Wiebols and Others* 2013 (4) SA 498 (GSJ).
[127] First Respondent's Heads of Argument (FRHOA) para 1-4.

The Order

[148] In the result the following order ensues:

a) The decision and act of the fourth respondent as representative of the first respondent of removing and impounding the applicant's goods on 6 August 2013 was unlawful and is set aside.
b) Compensation in the sum of R775.00 (seven hundred and seventy five rand) being the value of the impounded goods plus interest at the prescribed rate is awarded to the applicant to be paid jointly and severally by the first and fourth respondents, the one paying the other to be absolved.
c) Section 35 of the eThekwini Municipality: Informal Trading By-law 2014 promulgated in Government Gazette 1173 notice number 70 dated 27 June 2014 (the By-law) is declared unconstitutional, invalid and unlawful.
d) Section 39 of the By-law is declared unconstitutional, invalid and unlawful.
e) The declarations of unlawfulness in (c) and (d) above are suspended until 31 May 2015 or such further date as the parties may agree, pending the reform of the By-law.
f) The parties are given leave to apply on the same papers, supplemented in so far as is necessary, for further relief consequent upon any matter arising from this judgment.
g) The first and fourth respondents shall pay the applicant's costs jointly and severally, the one paying the other to be absolved.
h) The second respondent shall bear its own costs.

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D. Pillay J

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