



DLA CLIFFE DEKKER
HOFMEYR

COMPETITION ALERT

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REGULATORY FRAMEWORK FOR BUSINESS LICENSING – A BRIDGE TOO FAR?

The Constitution of the Republic of South Africa, 1996 (Constitution) provides that while "every citizen has the right to choose their trade, occupation or profession freely", "the practice of a trade, occupation or profession may be regulated by law". This constitutional guarantee appears to acknowledge the necessity for regulation in respect of the practice of a certain "trade, occupation or profession", as opposed to business in general. That said, the Licensing of Businesses Bill (2013) (Bill) attempts to regulate the practice of a "trade, occupation or profession", as contemplated in the Constitution.

Whether or not it is necessary for all businesses to be subjected to the additional regulatory requirements contemplated in the Bill is another question. It is interesting to note the comments of the Honourable Minister of Trade and Industry, Mr Rob Davies (Minister), in regard to the Bill. The Minister indicated that the main aim of the Bill was to "weed out illegal operators" and is reported to have also stated that existing informal traders and small businesses were subject to increasing competition from illegal traders who sell illicit goods, avoid the payment of value added tax and employ people illegally.

Although the Bill appears to be driven by a particular purpose (as alluded to by the Minister), it will, if enacted, require all businesses (whether existing or intended, whether incorporated or unincorporated or whether an organ of state or otherwise) to obtain a licence to legitimise their existence and business operations. The application for a business licence, as contemplated in the Bill, does not supplant the myriad of regulatory hurdles that a business must necessarily clear before commencing operations. Put differently, in addition to ensuring compliance with the applicable suites of regulatory requirements before starting up, businesses will require the State's permission, by means of a license, to conduct operations. A failure to adhere to the requirements of the Bill (should it become law in its existing form) could attract sanction in the form of administrative penalties and/or imprisonment. In view of the punitive implications of non-compliance, it is imperative that businesses familiarise themselves with the requirements of the Bill.

In coming into force, the Bill will repeal the Businesses Act, No. 71 of 1991 (Businesses Act), which confines licensing to a specific set of business activities such as providing meals or perishable foodstuffs, hawking and the "[p]rovision of certain types of health facilities or entertainment". This narrow scope can be juxtaposed against the intended breadth of the Bill, which applies to "any person carrying on business or who seeks to carry on business within the Republic". The extensive reach of the definition of "person" (encompassing incorporated and unincorporated entities and organs of state) as well as the broad scope of the definition of business (being "the offering of goods or services for sale to the public") effectively renders any and all kinds of entrepreneurial activity susceptible to regulation under the intended business licensing regime. It bears mentioning that all licences obtained under the Businesses Act must be converted to new licences (issued under the new legislation) within 12 months of the Bill coming into force.

The applications for licences and renewals must be made in a prescribed format and lodged upon payment of a prescribed application fee. A business licence issued pursuant to such application is valid for five years, with one possible extension of up to 6 months (and any further extension granted on good cause shown). The business license is obtained by applying to the relevant "local or metropolitan municipality", which acts as a "licensing authority" and has a range of powers, including *inter alia*:

- i. granting exemptions;
- ii. granting, transferring and renewing licences;
- iii. revoking and suspending licences; and
- iv. imposing administrative fines.

It is also required to 'establish an appropriate alternative dispute resolution authority' to handle grievances or appeals against decisions of the licensing authority.

The Bill contemplates the carrying out of wide-ranging powers by inspectors, who are either appointed by the licensing authority or deemed as such by the provisions of the Bill. These powers, a number of which are discretionary, extend to:

- i. conducting inspections (including questioning persons and inspecting and/or copying relevant documents);
- ii. the investigation of complaints submitted to the licensing authority;
- iii. ordering persons to appear before the inspector with regard to matters being investigated;
- iv. the imposition of administrative fines and other sanctions mentioned below; and
- v. the power to close any premises pending further investigation.

Under s36 of the Bill, an inspector may issue a compliance notice setting out, *inter alia*, "the details of the nature and extent of the non-compliance." If the terms of a compliance notice are satisfied, the inspector must issue a compliance certificate. However, "if a person to whom a compliance notice has been issued fails to comply with the notice, the inspector may impose an administrative fine against such a person."

In addition, an inspector may issue an administrative fine to a license-holder who "fails to produce a business license upon request' or 'has contravened the conditions of the license issued to the business or premises".

The core sanction of the Bill is a fine, imprisonment of up to ten years (although the word 'years' is omitted from the text of the draft Bill, we assume that the reference is to years), or a fine and imprisonment for, *inter alia*, "carry[ing] on business ...without a valid licence".

In addition to the penalties mentioned above, the licensing authority or the inspector may order the license holder (or any person in charge) to temporarily close a licensed premises for a period directed by the licensing authority if the authority 'is of the opinion' that, *inter alia*, the premise is not licenced.

Perhaps what is most detrimental to the sustainability and longevity of businesses is the disqualification provisions of the draft Bill, which states that the "licensing authority may not issue a license to any person who...has at any time in the preceding two (2) years been found guilty of contravening this Act...resulting in the revocation of his or her license or failed to comply with instruction or application requirements prescribed in this Act..."

The relevant question is whether the onerous licensing requirements imposed on businesses, as well as the excessively punitive sanctions for non-compliance, are necessary *vis-à-vis* all businesses, given the stated objective of the Bill (as articulated by the Minister) of clamping down on the prevalence of illegal trading. As the Bill transcends this narrow purpose, it may be criticised as overly broad in its application.

The necessity for the Bill, if any, must be balanced against the constitutionally entrenched right to choose a trade, occupation or profession freely. Moreover, the unnervingly broad powers entrusted to the licensing authority and/or appointed inspectors provide the potential for abuse of discretionary power, with detrimental effects on businesses.

While the necessity for regulation of business is not without merit, the addition of the Licencing Bill to the myriad of regulatory requirements governing commercial activity may be regarded as a bridge too far.

Although the intended legislation purports to situate itself within the four corners of the Constitution, the Licensing Bill may serve to achieve an ironically converse result – namely to undermine business sustainability and the participation of citizens in trade, an occupation or a profession.

Lerisha Naidu and Philip Williams

CONTACT US

For more information about our Competition practice and services, please contact:



Nick Altini
Director
National Practice Head
T +27 (0)11 562 1079
E nick.altini@dlacdh.com



Chris Charter
Director
T +27 (0)11 562 1053
E chris.charter@dlacdh.com



Albert Aukema
Senior Associate
T +27 (0)11 562 1205
E albert.aukema@dlacdh.com



Pia Harvey
Director
T +27 (0)11 562 1207
E pia.harvey@dlacdh.com



Susan Meyer
Senior Associate
T +27(0)21 481 6469
E susan.meyer@dlacdh.com



Petra Krusche
Director
T +27 (0)21 481 6350
E petra.krusche@dlacdh.com



Lerisha Naidu
Senior Associate
T +27 (0)11 562 1206
E lerisha.naidu@dlacdh.com



Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@dlacdh.com



Kayley Keylock
Associate
T +27 (0)11 562 1217
E kayley.keylock@dlacdh.com



Natalie von Ey
Director
T +27 (0)11 562 1333
E natalie.von_ey@dlacdh.com



Leana Engelbrecht
Associate
T +27 (0)11 562 1239
E leana.engelbrecht@dlacdh.com



Nazeera Ramroop
Associate
T +27 (0)21 481 6337
E nazeera.ramroop@dlacdh.com

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dlacdh.com

CAPETOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dlacdh.com