South African CitiesNetwork

TOWNSHIP ECONOMIC DEVELOPMENT

in Gauteng Province

National and Provincial Law Perspectives



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GAUTENG PROVINCIAL GOVERNMENT REPUBLIC OF SOUTH AFRICA

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This series of research reports is intended to address key institutional barriers to the growth and development of township economies, particularly in relation to enablement through regulation in terms of national, provincial, and municipal law. The commitment, valued insights and important content direction from the local government practitioners, researchers, interest groups and township business owners enabled the establishment of the programme and reports.

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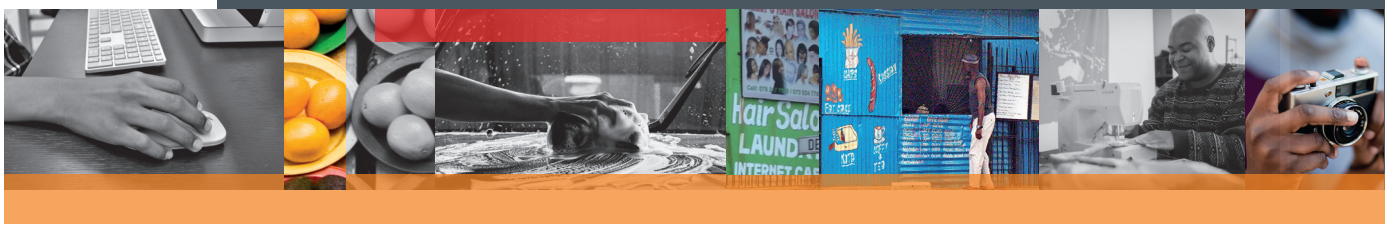
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LIST OF ABBREVIATIONS

BCLR	Butterworths Constitutional Law Report
CC	Constitutional Court of South Africa
GCR	Gauteng City Region
GPG	Gauteng Provincial Government
IDP	Integrated Development Plan
IGRFA	Intergovernmental Relations Framework Act
IUDF	Integrated Urban Development Framework
MEC	Member of the Executive Council
MTSF	Medium Term Strategic Framework
NGP	New Growth Path
RSA	Republic of South Africa
SALR	South African Law Reports
SACN	South African Cities Network
SDF	Spatial Development Framework
SPLUMA	Spatial Planning and Land Use Management Act
TEGD	Township Economic Growth and Development
UIF	Unemployment Insurance Fund

Background

This paper is part one of a three-part action research initiative by the South African Cities Network (SACN) and the Gauteng Provincial Government. It addresses key institutional barriers to the growth and development of township economies, especially those to do with enablement through regulation. Aligned with the three parts of the initiative are the initiative objectives:

- to identify the steps towards enablement that the Gauteng Provincial Government (GPG) can take in order to revitalise township economic development. These require an **overview of the authority (power) and instrumentation** regarding township economies that local and provincial government can use. The Gauteng provincial government and its municipalities may be able to co-develop a framework standard draft bylaw on township economic development;
- to **investigate a disciplining approach** to ensure that township enterprises don't have to bear the brunt of disorganised institutions, which is what is happening currently. We must determine whether a Gauteng Provincial Act that is developmental rather than just punitive can be developed to set rules for the province; and
- to **explore the options for rallying and mobilising other actors, nationally and more generally,** to inform and support enabling township economies. A national advocacy agenda under the Integrated Urban Development Framework (IUDF) has been proposed; its engagements, programmes and actions must still be determined.

The analysis in this paper focuses on the Constitution, and national/provincial legislation and policy. It is the first of two outputs of Part 1 of the initiative, and is limited to a discussion of:

- the possibilities in law for the revitalisation and enablement of township economic growth and development generally;
- the legal governance instruments potentially suitable for the revitalisation and enablement of township economic growth and development;
- the allocation between the three spheres of government of the functions and powers relevant to the revitalisation and enablement of township economic development. These must be part of the constitutional framework of cooperative government and intergovernmental relations, and take into account the urban characteristics and economic interdependencies of the Gauteng City Region (GCR); and
- the steps the GPG would be well-placed and legally empowered to take to revitalise and enable township economic development.

Research Paper 2 focuses on the existing (and potential future) municipal bylaws aimed at township economic revitalisation in Gauteng Province.

Introduction

The informal economy, and township economies in particular, are complex. They come from South Africa's history of socially engineered urban growth and marginalisation, and macro- and micro-level systems of power and decision-making. They are also affected by multiple international, African regional, national and local economic forces – ranging from high levels of unemployment and urban poverty, to the hollowing out of smaller towns, to xenophobic sentiments such as "South Africans are spectators in their own economy".

There is no clear and universally accepted definition of 'township economies'. This paper uses the (admittedly limited) definition in the Gauteng Township Economic Revitalisation Strategy (2014-2019):

> *Enterprises and markets based in the townships. These are enterprises operated by township entrepreneurs to meet primarily the needs of township communities, and therefore can be understood as 'township enterprises' as distinguished from those operated by entrepreneurs outside the townships. The term 'township' refers to old, new, formal and informal human settlements that are predominantly African, Coloured and Indian characterised by high levels of poverty, unemployment and low incomes as well as long distance from the main centres of economic activity. Township enterprises have different legal forms – for-profit and not-for-profit enterprises registered under the Companies Act, and cooperative enterprises registered under the Cooperatives Act. However, the majority of township enterprises have high rates of informality.*

This definition does not detail the extensive range of economic issues, sectors and activities that make up most of the 'township economy'. This could be a core challenge for those devising a coherent approach to township economic development. Any relevant legislation would need to define and delineate the kinds of economic activities it refers to very carefully.

According to the literature, and pointers in National and Provincial framework policy documents,[1] township economies may be enabled through a combination of government measures, targeted at:

1. improving safety, basic service delivery, accessibility and transport links, and economic infrastructure in townships;
2. ensuring consistent and predictable enforcement of applicable laws, regulations and standards;
3. improving security of tenure over township properties;
4. improving labour absorption, social and economic inclusion, and overall economic enablement;
5. improving access to information and reducing costs, complexity and inefficiency of licensing, permitting, registration, etc on township businesses, especially SMMEs; and
6. tailoring built-environment regulations (for instance around building standards, zoning, and land-use management) to the particular needs of township businesses, especially SMMEs.

The literature on the informal economy in South Africa,[2] and the inputs of stakeholders during two project workshops in 2019,[3] suggest that there may be a need for legal reform regarding thriving township economic development. Arguably, the first two items in the list above do not require any new legal or policy instruments, or any amendments to existing ones. All they need is for existing instruments to be implemented effectively and consistently across the entire urban space, including townships, by the appropriate government agents. Similarly, security of title and tenure over township properties (item 3) could be enhanced simply by minimising bottlenecks in current processes (though business licensing is more complex). Labour absorption, social and economic inclusion, and holistic economic growth (item 4) should be outcomes of the enabling of flourishing township economies, not prerequisites for enabling. This section therefore does not focus on powers, functions or responsibilities in relation to these four items. Neither does it consider neglect of 'labour law protection' in the informal economy (including township economies), nor the lack of social cohesion or socio-economic integration of foreign entrepreneurs based in townships.

Where legal/policy intervention or amendment may be required is mostly in relation to the last two items on the list (items 5 and 6), namely *improving access to information and reducing the regulatory burden on township business*, and *tailoring built environment regulation* to their needs. This is where the appropriate level of state intervention and regulation and the options for legal reform must be ascertained.

Against the background of the discussion above and the two issues mentioned, this paper focuses on:

a) the possibilities in national and Gauteng provincial law and policy for the revitalisation and enablement of township economic growth and development;
b) the instruments in national and Gauteng provincial law and policy potentially suitable for the revitalisation and enablement of township economic growth and development;
c) some of the shortcomings and strengths of the current legal and policy landscape in relation to enabling/unblocking township economies;
d) the division of government powers and functions in the crafting of new law regulating township economies; and
e) the steps the Gauteng provincial government would be well-placed and legally empowered to take in order to revitalise and enable township economic development.

The limiting effects of the law and policy framework must be identified and understood to be able to reflect meaningfully on how the same framework could be reformed to stimulate township economic development.

The state of play: the current legal and regulatory landscape in relation to enabling township economies

A preliminary review of the current legal and regulatory landscape in relation to the enablement or unblocking of township economies in Gauteng Province reveals a cluttered and fragmented law and policy framework scattered across sectors, spheres of government, and government agencies.

Given all the actors, actions and activities potentially involved in township economies, a truly exhaustive review of all the applicable legal and policy instruments is not possible. This review was thus demarcated by the Gauteng Strategy's definition of 'township economies' quoted above. It was then narrowed down to legal and policy instruments in the following three sectors, which were identified as key for township economic development at two stakeholder workshops held in 2019:

- access to information
- the regulation of township business (especially SMMEs)
- spatial and strategic planning and the built environment.

In each of these three sectors, the review comprehensively canvasses applicable national laws and policies, as well as applicable policies in Gauteng Province. Overall, the following laws and policies were reviewed:

National law:

- National Building Regulations and Building Standards Act 103 of 1977
- Businesses Act 71 of 1991
- Constitution of the Republic of South Africa, 1996
- Local Government: Municipal Structures Act 117 of 1998
- Local Government: Municipal Structures Act 117 of 1999
- Promotion of Access to Information Act 2 of 2000
- Promotion of Administrative Justice Act 3 of 2000
- Local Government: Municipal Systems Act 32 of 2000
- Local Government: Municipal Finance Management Act 56 of 2003
- Intergovernmental Relations Framework Act 13 of 2005
- Consumer Protection Act 68 of 2008
- Spatial Planning and Land Use Management Act 16 of 2013

National policy:

- Reconstruction and Development Plan (1994)
- White Paper on Local Government (1998)
- National Development Plan (2012)
- Integrated Urban Development Framework (2016)

Provincial policy:

- Gauteng Planning and Development Bill (2012)
- Gauteng Provincial Government Employment Growth and Development Strategy (2014)
- Gauteng Township Economic Revitalisation Strategy (2014-2019)
- Draft Gauteng Consumer Protection Policy (2017)
- Gauteng Province Cooperative Governance and Traditional Affairs: Strategic Plan (2017-2020)

In addition, one piece of draft provincial law – the Gauteng Planning and Development Bill (2012) – was reviewed; but there is no applicable, operative provincial legislation in any of the three sectors.

The problem of conflicting national and provincial law therefore did not arise in this review; though the possibility is discussed later in this paper, in case of future legislative measures. As for conflicts or tensions between laws and policies, the simple rule is that law trumps policy; because unlike policy, law is judicially enforceable. So it is not uncommon for progressive and permissive policies to be overruled by restrictive new or existing laws. In addition, policies are only aspirational and directional; there is no *judicial* recourse when authorities do not act in accordance with them.



So it is not uncommon for progressive and permissive policies to be overruled by restrictive new or existing laws.

The national and provincial laws and policies listed above were scrutinised on the basis of

a) their aims and objectives;
b) provisions with the potential to enable or hamper township economic growth and development; and
c) governance instruments created by law that may assist in fostering an enabling regulatory environment for township economies.

In the latter instance a distinction was made between

a) governance instruments that could be of use in their current form;
b) instruments that may have to be modified or revisited; and
c) possible new or innovative instruments that could be added to the existing legislative scheme, so as to complement township economic development in view of the scope, aims and objectives of the particular law or policy.

Notably, some instruments reviewed see municipalities as 'regulated' by national and provincial government, while others are used by municipalities (local government) to 'regulate' the activities and conduct of persons in their areas of jurisdiction. Furthermore, there is a multitude of sector-specific bylaws, local objectives set in municipal plans such as Integrated Development Plans (IDPs), and provisions in sector-specific municipal plans and policies that are part of the fragmented law and policy landscape that impacts on township economies across Gauteng Province. Relevant municipal bylaws were excluded from this review; they will be surveyed in detail in Research Paper 2.

Table 1 summarises the provisions in national and provincial laws that could potentially enable or disable township economic development (columns 2 and 3) for each sector in turn. It also lists the tools that a) are already provided for in these laws; or b) could potentially be included in these laws, considering their aims and objectives. There is a more extensive synthesis of the law and policy framework in Annexure A of this Report. While a good deal of information is captured in Annexure A and Table 1 below, further in-depth research may be required for a comprehensive systematic review to direct specific next steps and any law or policy reform process. The information captured in Table 1 is intended to make the case that the existing national and provincial law and policy listed above contain: a) provisions that may strangulate rather than stimulate township economic development, and b) governance or policy instruments that could be developed and adapted to cater for the specific needs and features of township economies.

Table 1

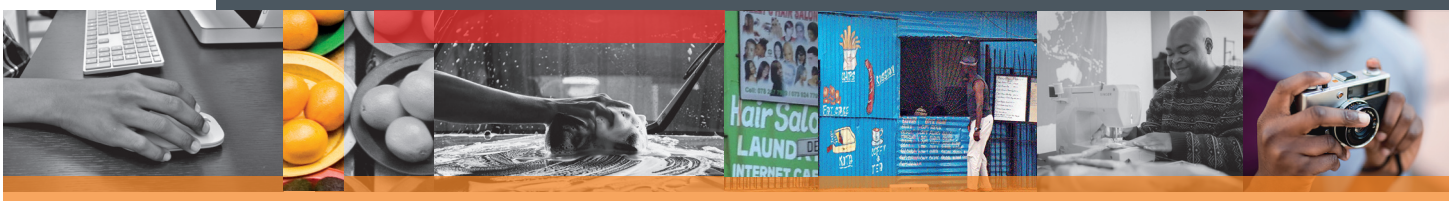
Sector-based law	Applicability	Enabling legal provisions / context	Disabling legal provisions / context	Tools (existing in national and provincial legislation / potential for inclusion)
NATIONAL LAW				
Access to information	Participants in the township economy are entitled by law to relevant information held by authorities (e.g. municipalities) and by others (e.g. private actors in the formal economy). Information is key for transparency, accountability, consistency, ease of regulatory burden, planning, marketing, clarity on the rationale for and likely impact of government decisions (e.g. outcome of municipal trading permit applications) etc.	Constitutionally entrenched right (section 32 of the Constitution of the Republic of South Africa, 1996) to information held by authorities and others, which may be necessary for the protection of other rights such as property rights and the right to choose a trade or profession. See: section 32 of the Constitution supported by the Promotion of Access to Information Act.	Legislation allows for application procedures to access information (e.g. an informal traders organisation interested in information held by another such organisation or a municipality) – procedures which may not be accessible to participants in township economies. Information ito law may be requested from informal traders etc. by authorities for regulatory purposes, e.g. in relation to informal business registration, the payment of registration fees, annual municipal fees etc. Such information may not be readily available e.g. a permanent business address.	Examples of existing instruments with potential: Legally required 'information officers' (and offices) in municipalities and provincial line functions to be informed of information required from and by those in the township economy, e.g. informal traders, street traders, etc. Municipal bylaws or policies on access to information held or required by the local authority to clarify local processes. Intergovernmental structures (across municipalities and provincial government) for collating and sharing information in relation to authorised township economic activity, participants, trends etc.
Regulation of township business (especially SMMEs)	Participants in the township economy have a constitutional right to choose their trade and occupation. But this right is qualified, and practising a trade (township business) may be regulated. Township business is often regulated ito municipal bylaws e.g. regarding trading hours, trading space, applications for authorisations to trade, standards for perishable food products etc.	Councils and the administrations of municipalities are obliged (Ch. 7 of the Constitution) to promote development in the local community, e.g. finance and infrastructure support for township businesses and SMMEs. Municipalities must undertake development-oriented planning in line with the principles of cooperative government and towards the advancement of local communities, including community members participating in the township economy. The legal framework allows for a single, comprehensive regulatory framework for spatial planning and land-use management, which is much needed due to the fragmented nature of the built environment. See: Chapter 7 of the Constitution; read with Chapter 3, SPLUMA principles and Local Government: Municipal Systems Act; and policy such as the White Paper on Local Government and the IUDF	Legal requirements hamper participants in the township economy, e.g. because of regulations, complexity, and unrealistic command and control mechanisms. Examples: Complex process to apply for trading approvals, set trading hours that may not meet needs on the street, unrealistic requirements ito the storage of trading goods etc. Without prior approval in writing no person may erect any building (e.g. a temporary structure for the sale of goods) that requires plans and specifications to be submitted to the municipality	Examples of existing instruments with potential: Intergovernmental forums and inter-municipal forums for establishing a 'one-stop shop' for streamlined trading-authorisation processes. Municipal framework bylaws that deal with one piece of local legislation involving township business (e.g. SMMEs). Provincial standard draft bylaws may be of assistance with the above. Sector-specific bylaws intersecting with specific aspects of township business such as municipal planning and municipal public transport to cater to the needs and features of SMMEs. IDPs in combination with budgets, service delivery and budget implementation plans (SDBIPs) etc. should help direct a municipality's approach to the regulation and monitoring of township economic activity. Essential standards may be set for the municipal regulation of township economic activity e.g. municipal trading plans, the charging of trading fees, etc. Regulation of township economic activity to provide for public participation processes, notice and comment procedures, etc. Provincial government (the Administrator, ito the Businesses Act) may pass regulations setting out the powers, duties and functions of the licensing authority (the municipality).

Sector-based law	Applicability	Enabling legal provisions / context	Disabling legal provisions / context	Tools (existing in national and provincial legislation / potential for inclusion)
Spatial and strategic planning and the built environment	Township economic development depends on space – to trade, to reside, to safely store goods etc. Need for measures towards: a) a built environment conducive to informal economic activity; and b) spatial justice and social and economic inclusion, as well as inclusive development. National framework law to act as a vehicle for a uniform, recognisable and comprehensive system of strategic planning, spatial planning and land-use management to promote economic unity, equal opportunity and access to government services –including for those who participate in township economic activity.	Progressive, legally entrenched development principles for spatial planning and land use e.g. in relation to past (spatial) injustices e.g. access to specific areas and mobility. See: SPLUMA (and Regulations)	Planning law responding to more formal structures and trends in the use of urban space – suitability for more informal occupancy/ use of space is often problematic, e.g. allocated trading space not necessarily serving traders or buyers/clients in townships.	Examples of existing instruments with potential: Municipal framework bylaws regulating the local built environment (including provisions for deviations and exemptions required by township economic activity). Sector-specific bylaws regulating spatial planning and the built environment that also provide for unique features of township economic activity e.g. building regulations suitable for informality and semi-permanency, trading space allocations, and the rights of informal traders ito construction and infrastructure and property developments. Standard draft bylaws passed by province to guide municipal/local framework bylaws and the sector-specific bylaws referred to above. Public participation processes for needs analyses etc. for township economic development and planning. Municipal customer management systems for communication between a municipality and participants in the township economy e.g. traders. IDPs in combination with budgets, SDBIPs etc. for priority setting and budgeting for specific township economic development projects e.g. new supporting infrastructure, etc. Spatial development frameworks (SDFs) with basic guidelines for land-use management systems and land-use schemes that make provision for the space needs of the township economy e.g. in relation to mobility, trading space etc. District-level frameworks for integrated development planning. Essential national standards and minimum standards for any municipal service or any matter assigned to municipalities (e.g. public transport, municipal health); also national norms and standards to promote social inclusion, spatial equity, urban regeneration, etc. National regulations or guidelines to regulate e.g. the detail of IDPs. Provincial monitoring mechanisms, processes and procedures. Provincial sectoral plans that may include township economic development plans. New/innovative instruments to be considered: Dispute resolution mechanisms for disputes among actors in the township economy, and between them and (local) authorities. Mechanisms for provincial monitoring and capacity-building support of municipalities e.g. for regulating township economic development, inclusive spatial planning, etc. Provincial consumer protection offices to see to the needs of consumers of the goods and services on offer in township economies.

Sector-based law	Applicability	Enabling legal provisions / context	Disabling legal provisions / context	Tools (existing in national and provincial legislation / potential for inclusion)
Policy				
Access to information	n/a	n/a	n/a	n/a
Regulation of township business (especially SMMEs)	Local economic development seen as a developmental outcome for local government – job creation and boosting local economies. Township economic development to advance inclusivity. Township economic development to advance equality.	National policy environment conducive to township economic development, seeing the informal sector as the 'survival sector'. Policy acknowledges need for local economic growth, development and investment as well as competitiveness. Simplification (not elimination) of the regulatory environment and improved competition measures. Calls for an 'active citizen' approach in decision-making affecting local communities. See: White Paper on Local Government; National Development Plan; IUDF.	Progressive policies that are township economy-friendly are not enforceable in the same way as law. Authorities are bound by law and guided by policy. Occupational and environmental health and safety concerns as well as matters of food and substance control cannot be delinked from regulation in the township economy space.	Examples of existing instruments with potential: Regulation of township economic activity to provide for public participation processes. IDPs, so-called transformation plans, spatial planning (including SDFs), and SMME policies to set priorities for township economic development and to facilitate implementation measures. Local revenue instruments such as property tax and municipal rebates as alternative regulatory instruments that may be suitable for township economic development. Spatial social compacts for agreements between actors in township economies (e.g. land-owners, traders, municipalities) and/or actors in the formal economy (e.g. businesses owners). Capital investment frameworks City development strategies Markets e.g. property markets Authorisations (licensing) Municipal policies
Spatial and strategic planning and the built environment	Acknowledgment that infrastructure is a key driver of equitable economic growth, and at the same time helps boost employment creation. Local socio-economic development and the pursuit of inclusivity and equality are policy priorities, together with the need to redress (past) injustices in relation to urban space.	Policy not very prescriptive except for its policy ideals, e.g. the pursuit of inclusivity and equality. Significant leeway for municipalities to decide on local strategies to implement policy. See: IUDF	Progressive policies that are township economy-friendly are not enforceable in the same way as law. Localisation of municipal procurement, e.g. mainly directed at the formal economy.	Examples of existing instruments with potential: Instruments (e.g. intergovernmental forums) aimed at communication around and alignment between policy ideals and enforceable national legislation (e.g. in relation to building standards and authorisation of informal trade practices). Built Environment Performance Plans (BEPPs) Precinct Plans Bylaws related to spatial planning and the built environment New/innovative instruments to be considered: Vocational education, capacity building and skills training for: township entrepreneurs in local economic hubs; and incoming actors in township economies.

Sector-based law	Applicability	Enabling legal provisions / context	Disabling legal provisions / context	Tools (existing in national and provincial legislation / potential for inclusion)
PROVINCIAL (GAUTENG)				
Law				
Access to information	n/a	n/a	n/a	n/a
Regulation of township business (especially SMMEs)	n/a	n/a	n/a	n/a
Spatial and strategic planning and the built environment	n/a	n/a	n/a	n/a
Policy				
Access to information	n/a	n/a	n/a	n/a
Regulation of township business (especially SMMEs)	Policy acknowledges the vulnerability of consumers in relation to substandard or unsafe products and the selling of counterfeit goods. Acknowledgment of the need to address the historical consequences and social and economic challenges of consumer protection. Policy envisions an 'endogenous' economy.	Gauteng provincial government determined that regulatory and administrative frameworks should not hinder the development and growth of township enterprises. Policy states that the regulatory framework for township enterprises as it relates to licensing, permits or registration "will be reviewed to ensure it is simplified, efficient and cost effective". Stated that Gauteng provincial government will support clustering of enterprises in townships, to promote inter-cooperation among township enterprises rather than cutthroat competition. Stated that Gauteng provincial government is committed to supporting all types of entrepreneurship – necessity and opportunity entrepreneurs, business and social entrepreneurs. Policy states that special attention should be paid to the identification of talent from among township entrepreneurs for enrolment in the township economy revitalisation programmes.	Policy does not explicitly recognise consumers as stakeholders in township economic development i.e. the policy may be biased towards the needs of traders and businesses involved in the township economy.	New/innovative instruments to be considered: Township economy revitalisation programmes for targeted support and capacity building. Provincial customer courts and tribunals for dispute resolution involving customers in the township economy. Provincial consumer protection offices for promotion of interests of consumers in the township economy. Venture capital investment funds (private limited partnerships) and seed funding programmes / projects to support emerging small businesses in township economies and to extend the stakeholder base. Public employment programmes in support of township economic development. Gauteng Enterprise Propeller (the Province's enterprise support agency). Procurement guidelines and e.g. the creation of a list of ring-fenced goods and services to be procured from township entrepreneurs. Active sectoral development strategies.

Sector-based law	Applicability	Enabling legal provisions / context	Disabling legal provisions / context	Tools (existing in national and provincial legislation / potential for inclusion)
		Policy vision for provincial government to work closely with training providers and mentors (public sector or private) to ensure that the level and quality of support for township economic enterprises in the province, and in some sectors, is made available to township enterprises; and further, for provincial government to prioritise a so-called re-capitalisation of Gauteng Enterprise Propeller – a government enterprise support agency – with a focus on the township economy. See: Draft Gauteng Consumer Protection Policy; Gauteng Province Cooperative Governance and Traditional Affairs Strategic Plan 2017-2020; and Gauteng Provincial Government Employment Growth and Development Strategy (2014)	.	
Spatial and strategic planning and the built environment	n/a	n/a	n/a	n/a



Shortcomings and strengths of the current legal and policy landscape in relation to enabling/unblocking township economies

The review of legislative and policy instruments in Table 1 reveals problems with the current legal and policy landscape pertaining to township economic development – and opportunities for reform. There are various ways to categorically describe the strengths and shortcomings of the current legal and policy framework. Here we identify and briefly discuss the type of provisions and instruments in the existing national and provincial legal framework that: a) seem to obstruct township economic growth and development (e.g. authorisation requirements and listed offences); and b) could be optimised to achieve the opposite (e.g. planning and financial instruments).

Most prominently, the current fragmented and cluttered legislative and policy landscape is an obstacle to consistent and targeted regulation of township economies. There may be a need for a dedicated and context-specific instrument that cuts across the fragmentation; but this would have to be carefully positioned, so as not to conflict with or undermine existing instruments, or add to the fragmentation.

The current national and provincial *policy* landscape acknowledges the role and importance of township economic development. The Gauteng Township Economy Revitalisation Strategy is quite explicit: "Successful township enterprises can play an important role in helping to contribute government's programme to radically transform, modernise and re-industrialise the Gauteng City Region economy by: transforming townships into sites for productive activities; contributing to socially inclusive wealth creation; and helping to foster sustainable livelihoods through active citizenship and social cohesion."

However, the assessment of the current national and provincial *legal* landscape, in contrast, reveals tension between a) malleable legal measures that could enable and promote township economic growth and development, and b) legal measures intended to strictly regulate economic activities with command-and-control-type provisions, which operate to stifle or unduly restrict township economic development. This tension is evident within each of the three thematic sectors. For instance, in relation to the regulation of SMMEs, the potential usefulness of existing instruments such as intergovernmental forums and sector-specific bylaws is stifled by rigid and formalistic provisions regarding business registration, trade licensing, health and safety requirements, nuisance, and the use of designated business space and public roads.

Because law trumps policy, these contradictions and tensions in the legal framework undermine any progressive policy intent. Whether or not a new legal instrument is introduced, it may be necessary to repeal or modify various legal provisions that currently operate to stifle township economies.

For instance, from Table 1 and Annexure A it appears that a number of command-and-control-type provisions of the Business Act and the National Building Regulations were developed for formal economic activity and a more static economic and built environment, and may require repeal or modification – for instance by creating appropriate exceptions, or by introducing flexibility or phased compliance options. Moreover, current legal requirements pertaining to the operation of a business do not appear to be sufficiently responsive to the unique needs of SMMEs. For instance, they do not make the necessary distinction between SMMEs that have employees and those that don't. Sole proprietorships in township economies are typically at higher risk of unemployment and poverty. Another example is some of the provisions of the national planning framework, which while attempting to be inclusive and redress spatial injustices, may have to be modified to explicitly cater for (and be less restrictive of) informal economic hubs and urban areas with unconventional and changing micro-scale land-use patterns in cities. Spatial barriers to entry into the informal economy would have to be identified and the law amended accordingly.



Sole proprietorships in township economies are typically at higher risk of unemployment and poverty.

Yet Table 1 and Annexure A also suggest that national and provincial laws and policies provide for various governance and policy instruments (ranging from general planning and financial instruments, to instruments intended to facilitate public input in decision-making, intergovernmental coordination and capacity building for township economic stimulation). These could be developed and used to counter (some of) those provisions that are claimed to strangulate instead of stimulate township economic development. So the applicable legal frameworks in the various thematic sectors should not be dismissed outright as being hostile to township economic development. In fact, it is quite possible to (re-)interpret and re-imagine the design and implementation of a number of existing instruments to enhance township economies.

These include: spatial and strategic municipal and provincial planning; provisions for cooperative governance and good intergovernmental relations between different municipal authorities, and between national, provincial and local authorities, as well as between municipal other actors in the township economy; national law dictating municipal IDPs and the various

sector plans for strategic vision and alignment with municipal budgets and performance management systems; municipal procurement policies, municipal property and other taxes and financial incentives; framework and sector-specific municipal bylaws (e.g. in relation to street trading); standard draft bylaws; public participation mechanisms; etc. These are general instruments, but that should not detract from the value and potential they may have for township economic development.

It may also be necessary to consider new laws or modes of regulation for township economic growth and development in South Africa, and in Gauteng Province specifically. There are areas of regulation that are not catered for in the existing legal or policy framework, and which need dedicated law/regulatory measures, for example: information sharing re township economic regulation, and the use of technology to reduce it without creating new barriers for (already marginalised) township entrepreneurs; specific sectors in the township economy, such as service providers (e.g. hairdressers) and vendors (selling e.g. food or livestock); environmental and health threats associated with township economies; the protection of the consumer participating in the township economy; etc.

There are areas of regulation that are not catered for in the existing legal or policy framework, and which need dedicated law/ regulatory measures...



Any future process of law and policy reform would have to focus on optimising the existing governance instruments (separately and in combination), as well as on revisiting restrictive legal requirements. Such a law and policy reform process would have to bear in mind: representative inputs from all stakeholder types participating in township economies; the Constitution and existing national and provincial legislation; cooperative government imperatives; and ideally, suitable foreign law and policy frameworks (e.g. from countries such as Brazil, Mexico and India).

Moreover, this paper does not explore enforcement. But in general, many municipalities struggle to implement and enforce law (bylaws) and other regulatory measures, often because of lack of capacity or information and know-how. It may be necessary to supplement legal measures with an integrated policy framework aimed at assisting municipalities with implementation and enforcement.

Crafting new law: the division of government powers and functions

So it appears that there may be some room for legislative intervention (e.g. law reform) to regulate and enable township economies effectively. For instance, currently there is no legislative instrument with a comprehensive definition of township economies; but at the same time, different features of township economies fall under disparate and poorly articulated pieces of legislation. While some of these do contain instruments that may be used or adapted to stimulate or enable township economies, others contain provisions that restrict them – often within the same sector. And some aspects of township economies are not currently regulated by any legislation.

As townships are found nationwide but differ quite significantly across regions, and many of the legal rules that affect economic activity in townships are local in character, introducing new legal instruments to stimulate and enable township economies will require careful intergovernmental cooperation, coordination, planning and support. This section attempts to make sense of how much legislative competence and regulatory authority in terms of legislative and policy interventions may be required to enable township economies. It is based on the relevant constitutional and legislative provisions, and an analysis of the leading judgments of the Constitutional Court in cases concerning the division of powers and functions among the different spheres of government, as well as by a review of applicable constitutional and local-government law academic literature.

Constitutional demarcation of legislative competence and executive authority

The Constitution divides powers, functions, authority and responsibilities among the three “distinctive, interdependent and interrelated” spheres of government. The exercise and coordination of these powers, functions and responsibilities is subject to the principles of cooperative government contained in Section 41 of the Constitution. These principles include that the spheres of government must “respect the constitutional status, institutions, powers and functions of government in the other spheres; not assume any power or function except those conferred on them in terms of the Constitution; exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and co-operate with one another in mutual trust and good faith by ... co-ordinating their actions and legislation with one another” (Section 41(e)-(h) of the Constitution).

The division of powers, functions and responsibilities is done primarily through Schedules 4 and 5 of the 1996 Constitution.

Schedule 4 contains a list of functional areas in which both national and provincial legislation is competent. Both the National Legislature and the Provincial Legislatures may pass legislation pertaining to any of these functional areas. In the

event that both legislatures pass legislation in relation to a particular functional area, the different Acts will be of equal force and effect in the provinces concerned.

Conflicts between provincial and national legislation must be solved through interpretation, firstly; courts must prefer any reasonable interpretation of the legislation that avoids the conflict and allows the provisions of both pieces of legislation (Section 150 of the Constitution). If this is not possible, Section 146 of the Constitution contains an 'override' provision which says that the provincial legislation overrules the national legislation (making it inoperative in that province), unless a court finds that a particular matter cannot effectively be regulated at provincial level, or requires national uniformity in the form of essential national norms, standards, frameworks or policies, or is necessary for compelling national policy purposes, or is aimed at preventing provincial legislation from damaging to national health, economic or security interests.

Schedule 5 contains a list of functional areas of exclusive provincial legislative competence – meaning that only provincial legislatures may legislate in these functional areas. Therefore, national legislation pertaining to these functional areas is unconstitutional and invalid. However, section 44(2) read with section 147(1)(b) of the Constitution allows for national legislation to be passed that prevails over provincial legislation, in exceptional instances. These include instances where such intervention is necessary to maintain national security, economic unity or essential national standards (including minimum standards for essential service delivery), or where it is aimed at preventing unreasonable action by provinces that might prejudice the national interest. In *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill,* and subsequent cases, the Constitutional Court interpreted these grounds narrowly and would not lightly find that national intervention in Schedule 5 matters is justified; this is to ensure respect for and preserve space for the meaningful exercise of exclusive provincial legislative competence.

Legislative competence over functional areas that are not listed in either Schedule 4 or Schedule 5 is presumed to be reserved for the national sphere, except where (national) legislation provides otherwise. This means that provinces do not have the power to pass legislation pertaining to these functional areas, and that provincial legislation that extends beyond them would be unconstitutional and invalid.

Both Schedule 4 and Schedule 5 are further subdivided into parts A and B, with the functional areas listed in parts B of both Schedules regarded as local government matters. In addition to legislative competence, local government exercises executive authority over these areas in terms of section 156 of the Constitution. This means that municipalities have "the right to administer" these functional areas, including making and administering bylaws for their effective administration.

Experts are divided over how far municipalities' bylaw-making power over Schedule 4B and 5B functionalities extends. Some argue that bylaw-making power is limited to administrative matters, and others believe the bylaw-making power is "original" and thus extends to all aspects of these functional areas, including substantive aspects. However, most experts believe the constitutional requirement for developmental local government is better served by a broad understanding of municipal law-making and policy authority, extending beyond administration to include regulating substantive matters in innovative ways that respond to municipal peculiarities. This is supported by the Municipal Systems Act, Section 11(3), which determines that municipalities exercise their legislative or executive authority through a broad range of actions, including promoting development and protecting the environment; formulating and adopting policies; implementing applicable national or provincial legislation; delivering essential services; preparing, approving and implementing budgets, and passing bylaws in relation to any of these.



The interaction between legislative competence at national or provincial level, on the one hand, and the executive authority, right to administer and bylaw-making power of local government on the other hand, is complex and contested

The interaction between legislative competence at national or provincial level, on the one hand, and the executive authority, right to administer and bylaw-making power of local government on the other hand, is complex and contested (explained further below). The regulation of multifaceted phenomena such as township economies is further complicated by the significant vagueness of definitions used and the overlap between the functional areas in the different parts of Schedules 4 and 5.

Which functional areas are relevant to enabling and unlocking township economies?

Reducing the regaulation for township businesses (especially SMMEs) and tailoring built environment regulations (e.g. around building standards, zoning and land use management) to the particular needs of township business (especially SMMEs) involves the functional areas listed in Schedules 4 and 5 of the Constitution.[5]

The following functional areas are listed in Part A of Schedule 4 of the 1996 Constitution (i.e. functional areas over which the national legislature and provincial legislatures have concurrent legislative competence, executive authority, and administrative control):

- **population development** (demographic studies, trends and statistical data form an important basis for local planning);
  public transport (the taxi industry is a major economic player in all townships, and the literature identifies transport corridors as particularly well-situated for economic development);
- **regional planning and development** (any development initiative in a metropolitan region such as the Gauteng City Region (GCR) will obviously impact on its townships, and any development initiative in townships will have a regional impact);
- **tourism** (there is a growing tourism market in several townships);
- **trade** (any policy focused on stimulating economic activity in townships will be focus on enhancing trade); and
- **urban and rural development** (townships are typically the more economically isolated parts of urban areas).

The following functional areas are listed in Part B of Schedule 4 of the 1996 Constitution (i.e. national legislature and provincial legislatures have concurrent legislative competence over them, but municipalities have the executive authority and administrative control, including bylaw-making power):

- **building regulations** (the literature says they are rigid and contextually inappropriate, which stands in the way of formalising many township businesses);
- **local tourism** (there is a growing tourism market in several townships);
- **municipal planning** (this involves zoning and land-use management; the literature calls these powers which can be wielded innovatively to respond to the particular obstacles faced by township businesses – in particular in relation to multi-use economic zones, or gradual/progressive compliance regimes);
- **municipal public transport** (transport corridors are particularly well-situated for economic development); and
- **trading regulations** (the regulation of trade in township spaces would be a central pillar of any township economic development strategy).

The following functional areas are listed in Part A of Schedule 5 of the 1996 Constitution (i.e. functional areas over which provincial legislatures have exclusive legislative competence, executive authority and administrative control):

- **liquor licences** (this will affect a range of township retail, leisure and entertainment enterprises);
- **provincial planning** (cross-cutting or inter-municipal development planning may shape the economic environment in townships); and
- **provincial recreation and amenities** (these may affect the economic viability of particular spaces).

The following functional areas are listed in Part B of Schedule 5 of the 1996 Constitution (i.e. provincial legislatures have exclusive legislative competence over them, but municipalities have executive authority and administrative control over them, including bylaw-making power):

- **control of public nuisances** (may be of particular significance in multi-use economic zones);
- **control of undertakings that sell liquor to the public** (this will affect a range of township retail, leisure and entertainment enterprises);
- **fencing and fences** (street trading is often enabled by structures that involve public space demarcation);
- **licensing and the control of undertakings that sell food to the public** (this will impact on restaurants and street food outlets, for instance);
- **local amenities** (these may affect the economic viability of particular spaces);
- **markets** (obvious economic nodes);
- **noise pollution** (may be of particular significance in multi-use economic zones);
- **public places** (may be the centres of economically viable nodes);
- **street trading** (the dominant form of informal economic activity in many townships; the restrictive, inappropriate and inconsistent enforcement of street trading bylaws is a major economic inhibitor in townships); and
- **traffic and parking** (regulation in economically dense township zones may pose particular challenges).

The following functional areas are listed neither in Schedule 4 nor in Schedule 5 of the Constitution (and are thus under the exclusive legislative, executive and administrative control of the national sphere). This is an incomplete and open-ended list:

- **consumer protection** (any regulation of commercial activity in townships impacts on the rights and interests of consumers);
- **labour relations** (any regulation of commercial activity in townships impacts on the rights and obligations of employers and employees);
- **occupational health and safety** (if this does not overlap with “health services” in Schedule 4 – context-appropriate health and safety standards are essential for workers and customers in township workplaces);

- **immigration** (cross-border trade makes a significant and essential contribution to township economies, and is interconnected with the rights of international migrants and business people active in townships); and
- **community safety and security** (crime is a major impediment to economic activity in townships).

Definitional vagueness and overlap

Only a few of these functional areas relevant to enhancing township economies appear to be clearly demarcated: building regulations, control of public nuisances, licensing and control of undertakings that sell food to the public, noise pollution", public places, refuse removal, and traffic and parking. All of these happen to be under the executive and administrative control of local government (albeit with residual legislative competence in the provincial or national legislatures, as the case may be), and relate to everyday urban management functions traditionally performed by municipalities.

Some additional functions appear to be straightforward, but are made complicated because they are duplicated across schedules, often rather artificially. There are overlaps between 'public transport' (Schedule 4A) and 'municipal public transport' (Schedule 4B); 'tourism' (schedule 4A) and 'local tourism' (Schedule 4B); 'provincial recreation and amenities' (Schedule 5A) and 'local amenities' (Schedule 5B). There is a real need to clarify the demarcation of and interaction between executive and administrative authority between municipalities, on the one hand, and provincial and national authorities on the other. Overlaps such as these imply that more than one sphere of government may be empowered to act in relation to any particular functional area, and that the exercise of authority in one sphere may impact the exercise of authority in another sphere. In *Maccsand v City of Cape Town,* the Constitutional Court stated that such overlaps are inevitable and in principle unproblematic. Uncertainties, overlaps and potential clashes in specific contexts should ideally be sorted out by cooperation and dialogue between organs of state from the different spheres. But in an era of increasingly politically divided legislative and executive authority, we need far more detailed legislative structures for intergovernmental relations.

Two further clusters of overlapping and reinforcing functions are more directly implicated by township economies. The first is a cluster of overlapping trade-related functionalities: 'trade' (Schedule 4A), 'trading regulations' (Schedule 4B); 'markets' (Schedule 5B) and 'street trading' (Schedule 5B). As unlocking township economies will require some amendments to the 1991 Businesses Act (a piece of national legislation), standardisation and elaboration of informal trade policies and bylaws (administered by municipalities), as well as contextual legislative provisions targeteding SMMEs operating in townships, this knot needs to be disentangled. There are mostly Schedule 5 functionalities in this cluster, so provincial legislatures are arguably best placed to clear up these intersections specifically for township economies, through targeted legislation.

Secondly, there is a cluster of planning and development-related functionalities: 'regional planning and development' (Schedule 4A); 'urban and rural development' (Schedule 4A); 'municipal planning' (Schedule 4B) and 'provincial planning' (Schedule 5A). Unlike the trade cluster, these have been contested between the different spheres, resulting in some clarification through court decisions and the Spatial Planning and Land Use Management Act of 2013 ('SPLUMA').

In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*, the Constitutional Court attempted to separate out the (local government) function of 'municipal planning' from the other items in the cluster. They stated that the common understanding of 'municipal planning' is the "control and regulation of the use of land", including "the zoning of land and the establishment of townships" (see paragraph 57 of the judgment). The Court remained vague about the meaning of the other items in the cluster, except for indicating that "provincial planning" takes place on a different scale, and pertains to issues that have an impact between municipalities (paragraphs 55-56); and that "urban and rural development" is not a broad enough term to encompass the features of municipal planning highlighted by the Court, meaning that municipalities exercise sole executive authority over those features (paragraph 63) – authority is not shared. It is up to individual municipalities to decide which instruments would be appropriate to stimulate trade or economic development in particular contexts.



It is up to individual municipalities to decide which instruments would be appropriate to stimulate trade or economic development in particular contexts.

Finally, there is room for specific national or provincial legislation to address intergovernmental relations, and to apportion legislative and executive authority and responsibility for specific cross-cutting objectives, such as stimulating and enabling township economies. A dedicated 'township economic development' act could clarify a range of cross-cutting competencies and responsibilities for township development specifically; it could lay down norms and standards to reduce the fragmentation of the regulatory landscape for township economies, and usefully cross-reference or adapt existing instruments – such as those identified in Table 1 above as being potentially useful in stimulating township economic development.

SPLUMA was a direct response to the *Gauteng Development Tribunal* judgment. It contains a detailed (though frustratingly technical) provision on demarcating municipal, provincial and national competencies and responsibilities for

spatial planning. Section 5 of the Act centres on who is responsible for creating different spatial planning instruments. It empowers and urges national government to draft, ensure and review the implementation of a national spatial development framework (SDF) and supporting policies. Provinces must draft and implement provincial SDFs and supporting policies. And municipalities must draft, adopt and implement IDPs, which must include municipal SDFs and land-use schemes. All municipal instruments must be compatible with the relevant provincial and national frameworks. Furthermore, both the national government and provincial governments are told to "plan for ... the efficient and sustainable execution of ... legislative and executive powers insofar as they relate to the development of land and the change of land use" (sections 5(2)(c) and 5(3)(b)). Municipalities are responsible for "the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest" (section 5(1)(c)).

Clearly, more definitions need to be clarified. Also, there is room for targeted provincial legislation regarding township economic development. But it is clear that many of the planning-related functions relevant to township economies (specifically zoning, and everyday land-use management) should be classed as 'municipal planning'. And some of the ways in which these functions are exercised in townships may fall under 'urban development'. If you add authority over building regulation, street trading, markets, control of food and liquor sales and so forth, municipalities clearly exercise executive and administrative control over most built-environment regulations relevant to township economies. This means that municipal bylaws, and the way municipalities implement them alongside national or provincial legislation, is crucial to the success of any broader policy for unlocking township development.

Overall, clearly we need a systematic review of how functional responsibilities and legislative competencies are divided up between the different spheres of government. The current overlaps and vague definitions invite conflict between the different spheres, make it difficult to locate responsibility and accountability, and significantly complicate achieving complex and cross-cutting policy goals such as stimulating and enabling township economies.

The current overlaps and vague definitions invite conflict between the different spheres

Ideally, this sort of review would result in appropriate constitutional amendment. But this is a difficult and politically fraught process, and may be unrealistic. Since many of the problems lie in the interaction between similar functional areas listed respectively in the A and B parts of Schedules 4 or 5 – both of which award legislative competence to provinces – another option may be for provinces to determine the interaction and delineation of authority between provincial governments and municipalities by using their provincial constitutions. According to section 143 of the 1996 Constitution, provincial constitutions may provide for legislative or executive structures that are different from those provided by the national Constitution – as long as they do not award power to provinces outside of Schedules 4 or 5. So it would be possible for provincial constitutions to apportion legislative and executive authority, responsibility and accountability for the functional areas in parts A and B of Schedules 4 and 5 between provincial governments and their municipalities. This would be based on the social, economic and functional context in each province, and be supported by the provisions governing intergovernmental relations, support, capacity building and communication.

Additionally or alternatively, the nested model of intergovernmental interaction that SPLUMA has created for the spatial planning sector could be copied by similar national or provincial legislation in the trade and economic regulation sector, and used for other overlapping functionalities (such as transport, tourism and amenities). Township economies would not be the only beneficiaries. Broader trade and economic development-related initiatives in provinces would benefit from legislation that clarifies functional competence and appropriately apportions functional responsibility and accountability between provinces and municipalities, and that provides guidance to municipalities as to which instruments would be appropriate to stimulate trade or economic development in particular contexts. Examples are the regulation of SMMEs across a province, or the regulation of informal trade both inside and outside townships.

Interplay and tensions between municipal, provincial and national powers, functions and responsibilities

The discussion above makes it clear that township economic development must be addressed through a mixture of measures taken by all three spheres of government. As far as possible these should be coordinated and aligned, potentially through framework legislation or a dedicated intergovernmental forum.

Given the (often vast) differences between townships in different parts of the country, national regulation of peculiar features of township economies may be inappropriate. There are a significant number of functional areas relevant to township economic development listed in Schedule 5 of the Constitution; therefore, provincial regulation may be better. But there is also significant diversity between provinces, and particular townships have economic peculiarities. All this means that more often than not, municipalities are the bodies best placed to respond to the challenges of township

economic development. Generally, national or provincial legislative and policy instruments should thus endeavour only to enforce overarching principles, norms and standards, and leave the hands-on regulation of township economies to the municipalities.



… there are significant functional similarities and economic interdependencies between many Gauteng townships …

Gauteng Province may be an exception, as it comprises a virtually uninterrupted urban agglomeration; in many respects, the entire province is functionally and economically integrated. For historical reasons, townships in Gauteng are often located along or either side of municipal boundaries, meaning that they tend to be the physical points where municipalities intersect. Accordingly, there are significant functional similarities and economic interdependencies between many Gauteng townships, which makes a strong case for consistent inter-municipal regulation. This would require a more detailed provincial strategy for township economic development.

But such a provincial strategy would happen in a regulatory space already full of national and municipal instruments. There may be instances where elements of a provincial strategy for township economic development require national legislation, or where provincial legislative instruments for a provincial strategy conflict with existing national legislation. Moreover, executive and administrative authority, as well as the attendant bylaw-making authority for several of the functional areas central to it, will be scattered between the various municipalities of the province.[6] This would significantly complicate a provincial strategy.

So if we want to develop a provincial legislative instrument dedicated to township economies, we must consider the interplay between national and provincial legislative competence; and the intersection of this competence with municipal executive and administrative authority.

The national/provincial interface

Firstly, provincial legislation aimed at enabling township economies cannot pertain to functional areas not listed in either Schedule 4 or Schedule 5 of the Constitution. This is because the provincial legislature would not have the constitutional competence to pass the legislation, making it invalid. Provincial government would also be powerless to address any aspects of national legislation in the functional areas which frustrate township economies, except that they could request the national legislature to amend the legislation.

From the discussion above, it appears some changes to national legislation and regulations pertaining to functional areas listed in Schedule 4 may be required to effectively enable township economies – notably, to certain provisions of the Businesses Act, and of the National Building Standards Act and its accompanying regulations. If the national legislature refuses to effect such changes, this may hamper the effectiveness of any provincial strategy to enable township economies.

Obviously, it would be preferable to reach a solution to such an impasse through intergovernmental dialogue and cooperation. But failing this, and assuming the impasse pertains to the regulation of a functional area in Schedule 4 of the Constitution, it would be possible for the provincial legislature to pass legislation that conflicts with the relevant provisions of national legislation – and for this provincial legislation to overrule the national legislation in the province concerned. The obvious risk is that the national legislation may be found to prevail instead, which would render the relevant parts of the provincial legislation inoperative and could threaten the implementation of an overall provincial scheme. Also, from an implementation and compliance perspective, it would be far from ideal to have a number of intersecting legislative instruments regulating one particular functional area – especially if the instruments conflict with each other.

The provincial/local interface from the perspective of provincial government

The most important principle pertaining to the constitutional ring-fencing of municipal executive and administrative authority over the functional competencies listed in Schedules 4B and 5B, is that *such authority does not extinguish the legislative competence of the national or provincial legislature*. Therefore, the provincial legislature may still pass legislation pertaining to these functional areas, even where this legislation would operate in a space where there are also municipal bylaws or other local government policies or practices. Indeed, section 156(3) read with section 151(4) of the Constitution determines that a municipal bylaw which conflicts with national or provincial legislation is invalid – as long as the national or provincial legislation in question does not impede municipalities' powers or functions. This is affirmed by sections 3(2) and 4(1)(b) of the Municipal Systems Act of 2000. However: provincial and national governments may legislate on Schedules 4B or 5B functions, but only as long as their legislation does not impede the executive or administrative authority of municipalities (i.e. policy implementation, and the related decision-making authority).

The Constitutional Court has been uncompromising: it strikes down provincial legislation that vests decision-making authority over Schedule 4B or 5B matters in provincial bodies or officials. For instance, the Court declared that it was unconstitutional for provincial planning tribunals to be given the power to decide on development applications (case:

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal), and for provincial officials to overturn municipal planning decisions on appeal (case: *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council,* and a string of subsequent decisions). The Court's view is that provincial or national legislation pertaining to functional areas in Schedules 4B and 5B must lay down norms, standards, common procedures and monitoring frameworks, in line with the constitutional requirements that through legislative or other measures, national and provincial governments must "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions" (Section 154(1)). They must also exercise executive authority and oversight in a way that "sees to the effective performance by municipalities of their functions" (Section 155(7)).

It seems that national or provincial legislation in the functional areas listed in Schedules 4B and 5B is more likely to stand up in the Constitutional Court if it is enacted with the explicit goal of empowering and supporting municipalities to regulate these functional areas effectively, and if it oversees and monitors the effectiveness of this regulation. So, legislation which aims to clarify provincial and municipal functional powers and responsibilities (for example, demarcating the authority of provinces and municipalities in relation to planning, trade or cross-cutting elements of township economic regulation) and/or which lays down standards for municipal bylaws and policies in relation to overlapping functional areas (for instance to ensure more uniform municipal governance of township economies across a province), would generally survive – as long as it does not prescribe in too much detail how standards should be achieved, or limit any functional decision-making power from municipal officials or processes. For example: provincial legislation can lay down principles for municipal building regulation bylaws and decisions; say, to render them more consistently conducive to township economic development. But it cannot dictate the outcome of individual building inspection or permission decisions, or allow such decisions to be taken by provincial bodies or officials. The need for such principles will typically accompany a need for province-wide standardisation. The value of provincial legal principles is that they can forge a consistent approach to certain matters, e.g. township economic development.

Furthermore, remember that provinces or national government may assign functional competencies to municipalities, over and above those in Schedules 4B and 5B. Indeed, Section 156(4) of the Constitution expects that functions in Schedules 4A and 5A should be assigned to municipalities where functional areas can be administered more effectively by local government, and where municipalities have the capacity to administer them. So an important purpose of township-economy-targeted provincial legislation may be to assign certain Schedule 4A or 5A competencies (for instance, regarding public transport or trade in townships) to municipalities, to supplement their Schedule 4B and 5B powers in an effort to stimulate township economies. Obviously, provincial or national legislation assigning Schedule 4A or 5A capacities to municipalities may be more prescriptive over how these powers are to be exercised than for legislation pertaining to Schedules 4B or 5B.

To summarise:

- Legislative provisions pertaining to a functional area listed in Schedule 4B or 5B of the Constitution are constitutionally compliant only where they are general; supportive of municipal executive and administrative authority; and do not impede municipalities' ability to exercise their powers.
- Accordingly, provincial legislation may stipulate principles, norms, standards, minimum requirements and monitoring processes pertaining to functional areas in Schedules 4B or 5B, but may not regulate the implementation of these in detail or confer any relevant decision-making authority on provincial bodies.
- Municipalities should have sufficient discretion over how to comply with relevant norms, standards and requirements. Saying what ought to happen is constitutionally allowed. Prescribing how it ought to happen, or taking control, is usually not.
- Provincial bodies may not take decisions falling within the administrative or executive competency of municipalities. Also, generally they may not veto, overturn or second-guess such decisions.
- Provincial legislation is constitutionally acceptable if it is aimed at facilitating cooperative governance in relation to a particular subject; at clarifying responsibilities over overlapping or vague functional areas; at assisting and empowering municipalities to fulfil their designated role in relation to a subject; and at monitoring that municipalities fulfil this role effectively.
- Provincial legislation may assign authority over competencies in parts Schedules 4A and 5A to municipalities; they may freely prescribe the exercise of such assigned powers; and they may freely regulate such powers at an appropriate level of detail.



Municipalities should have sufficient discretion over how to comply with relevant norms, standards and requirements.

The provincial/local interface from the perspective of local government

As most functional areas relevant to enabling township economies are under the control of municipalities, it is useful to summarise what the discussion above means for municipalities keen to enable township economies:

When it comes to matters in Schedules 4B and 5B, municipalities should be able to formulate policies and pass, amend or repeal bylaws on their own initiative; they need not wait until empowered to do so by the 'upper' spheres of government. Bht these spheres may assist by developing model and standard draft bylaws.

The substantive content of such bylaws and policies must adhere to the principles, norms and standards laid down in national or provincial legislation. Bylaws and municipal policies that conflict with national or provincial legislation are invalid (if the national or provincial legislation is constitutionally compliant).

Further, municipal policies or bylaws may engage with aspects of township economies pertaining to functional areas in Schedules 4B or 5B of the Constitution, over and above national or provincial legislation, as long as the relevant municipal policies or bylaws do not conflict with the relevant national or provincial legislation.

It is up to municipalities how to effect the norms, standards and minimum requirements laid down by national or provincial legislation in the functional areas of Schedules 4B or 5B. This can be done through one or more bylaws; through different provisions scattered through many bylaws; by exercising executive powers over and above the confines of bylaws (e.g. through the formulation and implementation of municipal policies or processes); by adopting standard draft bylaws in whole or in part; etc.

Steps the Gauteng Provincial Government would be well-placed and legally empowered to take in order to revitalise and enable township economic development

Promulgation of provincial framework legislation

The discussion above shows the potential of framework legislation in relation to some aspects of enabling township economies. It has also provided clarity on the power of provincial legislatures to pass legislation pertaining to different features of township economies. Such legislation should clarify the functional responsibilities of provincial and local government in relation to enabling township economies, lay down principles, norms and standards applicable to township economic development, and require local government bylaws in the province to be aligned with such principles, norms and standards.

SPLUMA is a useful structural template for provincial legislation in this context – not because of the relevance of its content to unlocking township economies, but because SPLUMA was enacted precisely to provide clarity on the demarcation of functions and responsibilities in a cluster of vague and overlapping functional areas straddling not only national and provincial legislative competence, but also national, provincial and local executive and administrative authority:

- SPLUMA clearly communicates its intentions re functional overlaps. It articulates the substantive goals it seeks to achieve, and sets out the different overlapping functional areas in Schedules 4 and 5 of the Constitution that are implicated by these goals. It also indicates that municipalities have a leading executive and administrative role to play in achieving its goals, and it intends to empower and enable them accordingly – while simultaneously facilitating cooperative governance among the three spheres. Similar intentions are stipulated in the "objectives" provision of the Act (Section 2).
- Much of SPLUMA's introductory chapter is devoted to clarifying the division of roles and responsibilities among the three spheres of government, in relation to overlapping functional areas. This makes the vague and overlapping constitutional scheme more workable, and gives each sphere of government a sense of the extent of its powers, functions and responsibilities, encouraging cooperative governance.
- SPLUMA's role-clarification provisions are followed by a detailed and substantive list of guiding principles to be observed by all spheres of government, as well as a provision empowering the relevant minister to lay down norms and standards.
- SPLUMA's "principle" provisions are followed by elaborating on structures through which the upper spheres of government will render support to other spheres, particularly municipalities.
- The remainder of SPLUMA consists of processes and appropriate guidelines for compliance with relevant minimum standards to be observed in the course of these processes. All relevant processes clearly respect municipalities' executive authority, and are aimed at enabling municipalities to play their role efficiently.

A similar scheme would well serve provincial legislation aimed at targeting township economic development, because it could coordinate the exercise of legislative and executive powers between provincial and local governments without transgressing relevant constitutional boundaries. Municipalities would be able to pass or align bylaws (e.g. street trading bylaws) in accordance with the principles, norms and standards in the provincial legislation.

Promulgation of standard draft bylaws (framework or sector-specific)

One way national or provincial governments may support municipalities' performance of executive and administrative functions is through proclaiming standard draft bylaws. This may be especially appropriate where certain goals in a provincial strategy for enabling township economies are best achieved through municipal bylaws, but the municipal bylaws in the province are not adequate to further the norms, standards and principles in framework legislation. For instance, there may be significant discrepancies between municipal bylaws in relation to a particular aspect of the township economy (such as street trading, informal businesses, or zoning), where the bylaws of some municipalities are substantively out of step with relevant standards, or where some municipalities simply lack bylaws pertaining to the issue.

Standard draft bylaws can be templates or examples of the kind of regulation that provincial or national government would like to see for a particular issue. They are useful tools for assisting municipalities in thinking through their own bylaws, especially since several municipalities reportedly lack the capacity to formulate bylaws of their own.

Section 14 of the Municipal Systems Act says that the Minister or Provincial MEC responsible for local government may make standard draft bylaws on any matter (including the internal operations of municipal business), with no restrictions on substantive content. Such bylaws can therefore be as substantively detailed or prescriptive as they like; it would be completely up to municipalities to decide to what extent to mimic a standard draft bylaw. No part of a standard draft bylaw has any force in a municipality if it has not been passed by the municipal council concerned

Since the adoption of standard draft bylaws is completely optional, their proclamation does not impede municipalities' functions or powers in any way.

Alignment of the Gauteng Spatial Development Framework 2030 with township economy development objectives to inform and guide municipal IDPs and SDFs

The Local Government: Municipal Systems Act gives only a skeleton outline of what a municipality's IDP should contain. The IDP is the "principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality". The IDP is a critical governance instrument. It binds: a) the municipality in the exercise of its executive authority; and b) all other persons, to the extent that those parts of the IDP that impose duties or affect the rights of those persons have been passed as a bylaw (Section 35 of the Act). One core component of an IDP is "the council's development priorities and objectives for its elected term, including its local economic development aims". The Local Government: Municipal Systems Act further obliges municipalities to align the council's development strategies with any national or provincial sectoral plans and planning requirements. The IDP must also reflect the SDF of the municipality, which must include basic guidelines for a land-use management system for the municipality. It follows that the IDPs of the municipalities in Gauteng must be aligned with provincial plans and legislation.



The IDP is the "principal strategic planning instrument which guides and informs all planning and development …"

If Gauteng Province's SDF incorporates and reflects the township economic development objectives of the province, municipalities will have no choice but to align with these objectives in their own IDPs.

Establishment of dedicated intergovernmental relations forums and implementation protocols

The Intergovernmental Relations Framework Act (IGRFA) states that the premier of a province must ensure the coordination of intergovernmental relations in the provincial government with national government and with municipalities in the province (Section 37 of the Act). It also provides for a Premier's Intergovernmental Forum to discuss and consult on matters of mutual interest; e.g. matters of province-wide township economic development, and the co-ordination of provincial and municipal development planning to facilitate coherence (Section 18 of the Act). Although such a forum is not an executive decision-making body, it may adopt resolutions or make recommendations. There may also be intergovernmental technical support structures, for formal technical (expert) support to an intergovernmental forum. Particularly relevant for present purposes is the adoption of 'implementation protocols': the Act provides that where the implementation of a policy – e.g. a township economic development policy – depends on the participation of organs of state in different governments, those organs of state must coordinate their actions as required in the circumstances. They do so by entering into an implementation protocol. Any organ of state may initiate this process, and the implementation may typically be coordinated by an appropriate intergovernmental forum.

The Gauteng provincial government should establish an intergovernmental forum focused on township economic development in and across the different municipalities in the province, and (for example) conclude an implementation protocol to adopt principles for decision-making regarding informal trade and municipal authorisation requirements.

Tailoring and the consideration of other (under-utilised or non-existing) provincial-level instruments to guide, support and steer township economic development

Table 1 mentioned a few instruments currently in national and provincial legislation which may be able to support township economic development in Gauteng. More research may be needed to explore these in detail. Those most needed include: information offices at provincial and local government level; meaningful public participation and notice and comment processes; municipal customer management systems; provincial- and municipal-level dispute resolution structures; provincial monitoring of policy or project implementation; provincial consumer protection offices; spatial social compacts; vocational training for participants in the township economy; township economy revitalisation programmes for the targeted support of municipalities and actors involved in township economic development; provincial customer courts and tribunals; venture capital investment initiatives; provincial procurement guidelines for procurement from township entrepreneurs; and optimisation of the Gauteng Enterprise Propeller for the active promotion and targeted support of SMMEs involved in township economies.

Passing a provincial constitution

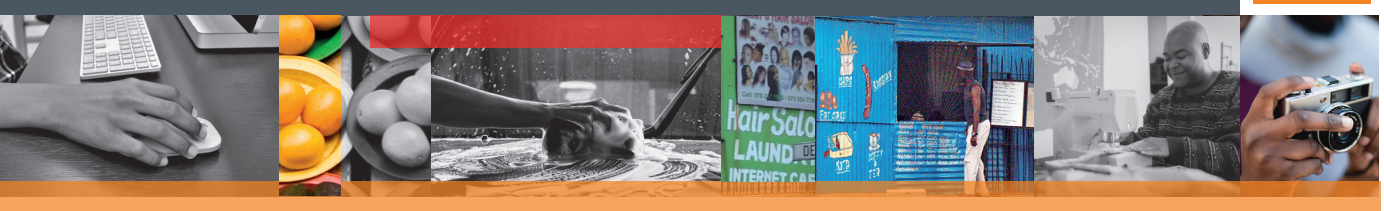
A provincial constitution which appropriately demarcates and allocates functional authority, competence, responsibility and accountability over items in Schedules 4 and 5 of the national constitution between the provincial government and the different municipalities in the province would go a long way towards eliminating much of the overlap, potential conflicts and unclear mandates in the current system. It would also clarify and lend focus to the developmental mandate of local government in the province. A provincial constitution could also put in place the intergovernmental relations, support and financing mechanisms that might be required not only for the development of Gauteng's township economies, but also for various other aspects of economic development in a uniquely urban province.

Conclusion

This paper has considered: a) the current legal and regulatory landscape in relation to township economies, relevant to the Gauteng provincial government and the municipalities in the province; b) the shortcomings and strengths of the current legal and policy landscape in relation to enabling township economies; c) the division of government powers and functions in the crafting of law regulating township economies; and d) the steps the Gauteng provincial government would be well-placed and legally empowered to take to revitalise and enable township economic development. The discussion was confined to specific issues pertaining to township economic growth and development to which "the law" may be able to respond; for many of the challenges, a purely legal response is neither suitable nor desirable – for instance, enforcement capacity in local government, widespread political commitment to township economic stimulation, and xenophobic sentiments among both city dwellers and authorities. Any future legislative steps will have to be carefully considered against the background of the complex make-up of township economies in South Africa, and in Gauteng specifically. It is likely that any law revision and reform process will trigger issues of constitutional permissibility and have unintended consequences in terms of the protection of some actors' rights, at the expense of the rights of others. Any law revision and reform exercise will also have to involve as many relevant public sector stakeholders as possible, while bearing in mind that township economies are susceptible to political, societal and economic change.



Any future legislative steps will have to be carefully considered against the background of the complex make-up of township economies in South Africa, and in Gauteng specifically.



NOTES

1 See for instance, Harrison, Todes and Watson (1997); Scheba and Turok (2019); and also, in general, the Integrated Urban Development Framework (IUDF) (2016), the Gauteng Employment Growth and Development Strategy (2005) and the Gauteng Township Economic Revitalisation Strategy (2014-2019).

2 See for example Pieterse (2017); SERI/SALGA (2018).

3 Workshops jointly hosted by the South African Cities Network (SACN), the Gauteng provincial government and the South African Research Chair in Cities, Law and Environmental Sustainability (CLES) on 15 May 2019 at Busy Corner Imbizo Shisanyama (Thembisa), and on 31 May 2019 at Soweto Hotel and Conference Centre, Kliptown (Soweto).

4 The applicable legislation is more extensively analysed and referenced in Addendum A.

5 Functional areas to do with essential service delivery (water, sanitation, refuse removal and electricity) are not discussed here. Obviously these are crucial to township economic development, but they would not require particular intervention (apart from enhancing access to services, which is adequately provided for in the existing legislative and policy framework).

6 This section does not deal with how competencies between metropolitan, district and local municipalities are divided up internally, as they are all similar in terms of provincial legislative and executive authority.

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Promotion of Administrative Justice Act 3 of 2000.
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ADDENDUM A

NATIONAL & PROVINCIAL LAW AND POLICY OVERVIEW: PROVISIONS RELEVANT TO / IMPACTING ON TOWNSHIP ECONOMIES IN GAUTENG

National legislation

Constitution of the Republic of South Africa, 1996

Aims/objectives

The supreme law of the land reflecting the principles, values and design of the South African government, including the division of governing authority.

Potential enablers

- Constitutional emphasis on human dignity, equality and the advancement of human rights and freedoms.
- Examples of rights and duties in the Bill of Rights that directly affect the township economy include: the right for a person to choose his or her occupation; the right to just administrative action and access to information; and the right not to be deprived of one's property, except through law.
- The national, provincial and local spheres of government are interrelated and interdependent. Together they must secure the well-being of the people of the Republic. A sphere must not assume any power or function except those conferred on it by the Constitution, and must perform so that it does not encroach on the integrity of government in another sphere.
- Each legislative authority of a province has the power to pass a constitution for its province.
- The legislative authority of a province also has a right to pass provincial legislation for matters within their functional areas (listed in Schedules 4 and 5 of the Constitution), including matters expressly conferred on the province by national legislation. For the purposes of stimulating township economies, these functional areas would include: consumer protection, tourism, trade, pollution control, the environment, liquor licences, and provincial recreation and amenities. Public participation is encouraged in matters of the provincial legislature, including budget and the allocation of funds.
- The local government sphere consists of municipalities, which govern the local government affairs of their communities. National and provincial government may not impede a municipality in exercising its power or performing its function. The object of local government includes encouraging community involvement in local economic development initiatives. Local government is expected to structure and manage its administration (including its financial resources), for the needs of society and to promote social and economic development. Local government is also expected to participate in provincial and national development programmes.
- Schedules 4B and 5B list the functional areas of competence of local government. Local government has executive authority on these matters, including building regulations, childcare facilities, local tourism, markets, trading regulations and street trading. A municipality may make bylaws on matters that are within its competence for the effective administration of its functions.

Existing instruments

- Provincial acts and constitutions
- Municipal bylaws

Local Government: Municipal Systems Act

Aims/objectives

- Serves as framework national local government law.
- Provides for the core principles, mechanisms and processes to enable municipalities to move progressively towards social and economic upliftment of communities.

- Sets out how local government should exercise and perform its executive and legislative functions in a system of cooperative government.
- Sets out a framework for national and provincial government to support and monitor local government, to progressively build local government into a development agency capable of integrating the activities of all spheres of government for the upliftment of communities.

Potential enablers

- **Definitions** to bear in mind in considering possibilities for the revitalisation and enablement of township economic growth and development:
    - A basic municipal service in relation to the services that may be needed by those involved in township economic activities (both providers and consumers);
    - 'Development' is sustainable development, including the economic upliftment of the community (the stimulation of township economies, which speaks to (developmental) local government);
    - 'Property' is immovable property registered in the name of a person, or a right registered against immovable property in the name of a person; and
    - A 'ratepayer' is a person liable to pay the municipality rates on property in the municipality, any other tax, duty or levy imposed by the municipality, and fees for a service provided (meaning participants in township economies may also have to see themselves and be treated as 'ratepayers').
- Township economic growth and development is to be understood in the context of the statutory provisions on cooperative government: municipalities "must exercise their executive and legislative authority within the constitutional system of cooperative government envisaged in Section 41 of the Constitution" and "national and provincial spheres of government must … exercise their executive and legislative authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority". A municipality also "has all the functions and powers conferred or assigned to it ito. the Constitution" and "the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers." A municipality may exercise its authority in several ways, including by: developing and adopting policies, plans, strategies and programmes and passing bylaws, by promoting and undertaking development, and by implementing applicable national and provincial legislation as well as its own bylaws. The MEC for local government in a province (e.g. Gauteng) must establish mechanisms, processes and procedures to:
    - Monitor municipalities as they manage their own affairs and exercise their powers and functions;
    - Monitor the development of local government capacity in the province; and
    - Assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.
- The council of a municipality has the *right* to exercise the municipality's executive and legislative authority, to do so without improper interference; and to finance the affairs of the municipality, by charging fees for services rendered.
- The council and administration of a municipality have the *duty* to provide municipal services to the local community in a sustainable manner and to consult with the community about the level, quality etc. of municipal services; and to promote and undertake development in the municipality. The administration must also be responsive to the needs of the local community, and must establish clear relationships and facilitate cooperation and communication. A municipality also has a general duty to give effect to the provisions of the Constitution, and to promote the development of the local community, e.g. through the provision of financially and environmentally sustainable services.
- The local community also has rights and duties. They have the *right*: to contribute to the decision-making processes of the municipality; to prompt responses to communications (including complaints); to be informed of council decisions affecting them; and to have access to municipal services, provided that their *duties* are complied with. Community members must be capacitated to participate in a meaningful way. When exercising their rights they have the duty to comply with the processes of the municipality (e.g. to promptly pay service fees, rates on property and other municipal taxes); to respect the rights of other members of the local community; to allow municipal officials reasonable access to their property for the performance of municipal functions (e.g. food control); and to comply with the municipal bylaws.
- The Minister "at the request of organised local government representing local government nationally, and after consulting the MECs for local government and organised local government may by notice in the Government Gazette, make standard draft bylaws concerning any matter, including standard draft rules and orders" for which municipalities may make bylaws. Similarly, on the request of organised local government, an MEC for local government of a province (e.g. Gauteng) may make standard draft bylaws. Such standard draft bylaws are applicable to a municipality only "to

the extent [of] and subject to any modifications and qualifications adopted by the council of that municipality". Further, the repeal of a standard draft bylaw after it has been adopted by a municipality does not affect the continuation of that bylaw in that municipality. The legislative procedure for municipalities introducing and adopting their own bylaws is prescribed in the Act. The procedure and requirements also apply when a municipal council incorporates provisions of national or provincial legislation, or standard draft bylaws.

- Municipalities must undertake development-oriented planning towards achieving the constitutional objects of local government and the realisation of a number of constitutional rights of local communities. Municipal planning "must be aligned with, and complement, the development plans and strategies of other affected municipalities and other organs of state" (e.g. provincial government) so as to give effect to the constitutional principles of cooperative government. Municipalities must participate in national and provincial development programmes. An organ of state (e.g. provincial government) initiating legislation requiring municipalities to comply with planning requirements must consult with organised local government before the legislation is introduced. Further, each municipal council must adopt a plan for the development of the municipality which must link plans and proposals for the development of the municipality, and be compatible with national and provincial development plans. For example, an IDP must include the municipality's "development priorities and objectives for its elected term, including its local economic development aims" and the council's development strategies, which must be aligned with any national or provincial sectoral plans. A spatial development framework (SDF) is one of the core components of the IDP.
- Municipal councils must implement a tariff policy on fees for municipal services. But provision may be made "for the promotion of local economic development through special tariffs for categories of commercial and industrial users"; and the extent of any subsidisation should be fully disclosed. A tariff policy may differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas and other matters. The same applies to the municipality's credit control and debt policy. For the levying of rates and other taxes and the charging of fees for municipal services, a municipality must establish "a sound customer management system" to create a positive and reciprocal relationship between persons liable, the municipality, and where applicable, a service provider.
- The Minister may establish essential national standards and minimum standards for any municipal service, after consultation with the Minister of Finance, organised local government, the MECs for local government, and any Cabinet member(s) responsible for regulating that service. The Minister must: take into account municipal capacity to comply, and differentiate between different kinds of municipalities according to their respective capacities.

Existing instruments

- Standard draft bylaws
- Municipal bylaws
- Integrated development plans
- District level 'frameworks' for integrated development planning
- An SDF with basic guidelines for a land-use management system for the municipality

Existing instruments that could be modified

- Public participation mechanisms (e.g. an updated and user-friendly municipal website)
- National and provincial development programmes
- Municipal development strategies
- Provincial sectoral plans
- National regulations or guidelines for IDPs, and the criteria municipalities must take into account when planning, drafting or reviewing IDPs
- (Differential) municipal tariff policies and bylaws
- (Differential) municipal credit control and debt policies and bylaws
- Municipal customer management systems
- (Differential) essential national and minimum standards

New / innovative instruments to consider

- Provincial IDP support and alignment processes
- Dispute resolution mechanisms to resolve conflict between municipalities and community members
- Mechanisms for provincial monitoring and capacity building support of municipalities
- Innovative interpretation of the list of ways in which municipalities exercise their legislative and executive authority

Promotion of Access to Information Act

Aims/objectives

- To give effect to the constitutional right of access to any information held by the State (e.g. provincial and local government), and any information that is held by another person and that is required for the exercise or protection of any rights (e.g. health, environmental or property rights); and to provide for connected matters.
- To foster a culture of transparency and accountability in public and private bodies, by giving effect to the right to access to information; and to actively promote a society in which the people of South Africa have effective access to information, to enable them to more fully exercise and protect all of their rights.

Potential enablers

- **Definitions** to bear in mind in considering possibilities for the revitalisation and enablement of township economic growth and development:
    - 'Public safety or environmental risk' means harm or risk to the environment or the public associated with: (a) a product or service available to the public; (b) a substance released into the environment; (c) a substance intended for human or animal consumption; (d) a means of public transport; or (e) an installation or manufacturing process, or substance which is used in that installation or process.
    - 'Public body' means any department of state or administration in the national or provincial sphere of government or any municipality; or any other functionary or institution exercising a public power or performing a public function in terms of any legislation.
    - A 'municipality' for purposes of "relevant authority" refers to the mayor, the speaker or any other person delegated by Council.
- Community members have the right to access to public documents held by authorities such as provincial government or municipalities. Some conditions and requirements apply.
- Provincial government and municipalities have the right to access to information held by private individuals or businesses. Some conditions and requirements apply.
- Municipalities are to have information officers to assist with the implementation of the Act, and to render assistance to requesters of information.
- Provision is made for the mandatory disclosure of information in the public interest, if it would reveal evidence of a substantial contravention of the law; or an imminent and serious public safety or environmental risk; if the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision.

Existing instruments

- Prescribed access to information processes

Existing instruments that could be modified

- Office of the information officer in the relevant provincial and local governments

Promotion of Administrative Justice Act

Aims/objectives

- To give effect to the right to administrative action that is lawful, reasonable and procedurally fair.
- To give effect to section 33 (3) of the Constitution.
- To promote good administration and good governance.

Potential enablers

- Creation of a culture of accountability, openness and transparency in public administrators, exercisers of public power and performers of public functions. Thus, the decisions taken regarding matters such as trading licences by a legal authority must be transparent.
- Administrative action that materially and adversely affects rights or legitimate expectations must be lawful, reasonable and procedurally fair.
- Where an administrative decision to be made will materially and adversely affect the public, the decision-maker must hold a public inquiry prior to making the decision.
- Allows for the right to institute legal proceedings for the judicial review of an administrative action where such a decision has materially and adversely affected any person.
- Prescribes the Regulations and code of good administrative conduct that provide for the identification of the basic rules of administrative justice applicable to public administrators.

Existing instruments

- A tribunal (an independent and impartial body established through bylaw or a similar instrument)
- Notice and comment procedures

National Building Regulations and Building Standards Act

Aims/objectives

- To promote uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities, and to prescribe building standards.

Potential enablers/disablers

- **Definitions** to bear in mind in considering possibilities for the revitalisation and enablement of township economic growth and development:
    - A 'building' includes any other structure for the convenience of human beings or animals; the manufacture, processing, storage, display or sale of any goods; the rendering of any service; the treatment of waste; the growing of any plant; any wall, swimming bath, swimming pool, reservoir or bridge, or any other structure connected to it; any fuel pump or any tank used in connection with it; any part of a building; any facilities or system, or part or portion of it incidental to a building, for the provision of a water supply, drainage, sewerage, storm water disposal, electricity supply or other similar service.
- The Act contains provisions disabling actors in township economies. For example, for the erection of a building, and (a) connections to electricity supply, water supply, sewer and storm water drainage systems; (b) provision for parking of more than 100 vehicles; and (c) service by the local authority's fire brigade, an owner must supply the local authority concerned with sufficient details to enable the local authority to provide any connection, road traffic control and fire brigade service which may be required; or to give notice to the owner that it cannot provide any such service. Further, without prior approval no person may erect any building for which plans must be drawn up. If any building is erected so that it will not be in the interest of good health; will be unsightly or objectionable; will be a nuisance to the occupiers of neighbouring properties; will reduce the value of neighbouring properties; is erected on a site subject to flooding, or does not drain properly, or is filled up with refuse or material liable to decompose, then the local authority may prohibit the person erecting such a building. Any person who fails to comply shall be guilty of an offence and liable to a fine.

Existing instruments

- Building regulations, notices etc.

Existing instruments that could be modified

- Building requirements

New/innovative instruments to consider

- An amended definition of 'a building' that takes the township reality into account
- Building requirements suitable for the needs and risks in townships
- Grounds for exemption

Businesses Act

Aims/objectives

- To regulate business in South Africa in the interests of economic development.
- To provide mechanisms for issuing business licences, and restrictions for businesses that operate without a licence.
- To promote cooperation between provincial and local government in the regulation of businesses for local economic development.

Potential enablers / disablers

- **Definitions** of potential relevance:
    - 'Business premises' include any land, structure or vehicle (taking into account informal economy businesses).
- An Administrator may designate a local authority as a licensing authority in the province. Local authorities are empowered to issue business licences in terms of the Act.
- The Administrator (of provincial government) may make provincial regulations, including:

- Setting out the powers, duties, and functions of the licensing authority (local government).
- Control of street vendors, including impounding any goods, receptacles, vehicles or movable structures. However, these actions should comply with the law and be enforced in line with the constitutional right to property; the excessive exercise of these powers may hinder the revitalisation of the informal economy.
- Prohibiting business in any other place (such as outside someone's business premises, selling a similar product) except locations designatde for such business – municipalities should play a role in providing adequate infrastructure for the township economy.
- Setting out the powers of local government to make bylaws regulating the informal economy, and imposing provisions.

Existing instruments

- The licensing of businesses
- Bylaws
- Law enforcement
- Building regulations

Existing instruments that could be modified

- Bylaws

New/innovative instruments to consider

- Public participation
- The use of technology
- Tax incentives

Consumer Protection Act

Aims/objectives

- To promote a fair, accessible and sustainable marketplace for the benefit of all consumers.
- To foster consumer behaviour by granting access to information on products and services that is reliable and truthful during marketing, advertising and sales. It aims to ameliorate the disadvantages of vulnerable groups in accessing goods and services, while protecting consumers from misleading business practices.

Potential enablers

- Promotion of public consumer participation in decision-making processes regarding the township marketplace and consumer interests, and enabling municipal governments to be sufficiently well informed to address needs in specific townships without using a blanket approach.
- Promotion of access to consumer information on products and services, enabling consumers to make informed choices. Local government must ensure that goods and services offered in the township marketplace are good quality, not hazardous, and competitively priced.
- Recognising the importance of consumers in the informal economy, and promoting consumer interests, including providing mechanisms for resolving consumer disputes. Establishing consumer protection authorities at national, provincial and local level, and encouraging them to work together in their respective areas of competence or jurisdiction to achieve the purpose of the Act.
- Emphasising the role of the provincial consumer protection authority, which the Gauteng provincial government can easily work with in terms of the norms and standards required to improve consumer protection in the informal economy. Provincial government can work with this authority in conducting research, increasing knowledge of the consumer market, and promoting public awareness of consumer protection matters (Section 96).
- Providing registration of business names. In the informal economy this may enhance the competitive provision of goods and services (Sections 80 and 81), promoting fair advertisement and fair competition, especially among food and entertainment outlets.

Existing instruments

- Dispute resolution and a complaints mechanism
- Provincial Consumer Protection authorities (to facilitate the mediation and conciliation of disputes between business and consumers in the province)
- The National Consumer Commission

- Budget, finance and auditing
- Public education

New/innovative tools to consider

- Use of technology for quality control

Spatial Planning and Land-Use Management Act

Aims/objectives

- Objectives derived from the Preamble are to acknowledge and address:
    - racial inequalities in South Africa, segregation, and the prevalence and proliferation of unsustainable settlement patterns;
    - the fragmented legislative framework that governs the national and provincial spheres of government, in light of the laws applicable to homelands and self-governing territories, which created fragmentation, duplication and unfair discrimination.
    - the exclusion of rural areas from inclusive spatial planning and development.
    - the poor integration of legislation on informal and traditional land-use development processes that fail to integrate these areas into formal systems of spatial planning and land-use management.
    - the need for spatial planning sufficiently supported by infrastructure.
    - the need for spatial legislation that gives effect to the constitutional rights and imperatives in Sections 24, 25, 26 and 27 of the Constitution.
    - the need to support inclusive development and promote infrastructural investment.
    - the need for legislation for a comprehensive system of spatial planning and land-use management to promote economic unity, equal opportunity and access to government services.
    - the need to promote social and economic inclusion.

Potential enablers

- Addresses past spatial injustice and imbalances in development through the improvement of access to and the use of land.
- Promotes the inclusion of previously excluded persons and areas, especially informal settlements, former homelands, and areas generally characterised by widespread poverty and deprivation.
- Gives previously disadvantaged communities access to land for development purposes.
- Incrementally upgrades informal settlements.
- Establishes norms and standards applicable to the informal economy:
    - The norms and standards must reflect the national policy, national policy priorities and programmes relating to land-use management and land development.
    - The norms and standards must promote social inclusion, spatial equity, desirable settlement patterns, rural revitalisation, urban regeneration and sustainable development.

Existing instruments

- Spatial development frameworks (national, provincial, regional and municipal)
- Incremental upgrading of informal areas
- Integrated Development Plans
- Land-use schemes
- The Municipal Planning Tribunal
- Ministerial oversight

Intergovernmental Relations Framework Act

Aims/objectives

- To regulate relations between the national, provincial and local spheres of government.
- To ensure that government provides efficient, transparent, accountable, coherent governance which secures the well-being of all its people and promotes the realisation of the Bill of Rights.
- To provide a framework for the three spheres of government to alleviate poverty and promote the development of the people.
- To empower the Minister to monitor the implementation of policy and legislation, and to realise national priorities.

Existing instruments

- The President's Coordinating Council
- The national intergovernmental forum
- The Premier's intergovernmental forum
- Other provincial intergovernmental forums
- The interprovincial forum
- A district intergovernmental forum
- An inter-municipal forum

Local Government: Municipal Finance Management Act

Aims/objectives

- Sound management of the financial affairs of municipalities through establishing norms and standards.

Potential enablers

- The supply chain management policy on procuring goods and services, and disposal of assets.
- The supply chain management policy giving effect to fairness, competitiveness, cost-effectiveness and transparency.

Existing instruments

- Supply chain management policies

National policies

White Paper on Local Government (1998)

Aims/objectives

- To set out a vision of developmental local government centred on working with local communities to find sustainable ways to improve quality of life and promote local socio-economic development.
- To acknowledge the need to address entrenched patterns of urban inequality in South Africa's history, and the need for local economic investment and competitiveness.

Potential enablers

- Local government has a duty to provide vision and leadership, and to integrate, coordinate and leverage investments from the public and private sectors. Local government therefore has a mandate to provide an environment conducive to promoting township economic growth and protecting consumers.
- Cooperative government: provincial government plays a central role in enabling local economic growth, through performing (a) a strategic role, to develop a vision and framework for integrated economic development; and (b) a fiscal role, to monitor the financial status of municipalities.
- Cooperative government: working within the national programmes and initiatives of the Department of Trade, Industry and Competition, local government must boost local economies and enhance local competitiveness.
- Local government can create jobs and boost the local economy through reviewing existing policies and procedures to promote local economic development.
- Provincial and local government must ensure financial management can be used to support local economic infrastructure.

Existing instruments

- Public participation
- Integrated Development Plans
- Budgeting, credit enhancement and financial management
- Reporting and monitoring
- Local revenue instruments such as taxation (e.g. property tax)

New / innovative tools to be considered

- The use of technology to improve management and compliance.
- The development of modern infrastructure.

Reconstruction and Development Plan White Paper (1994)

Aims/objectives

- To promote integration and development.
- To promote inclusive, people-driven governance that advances urban, rural, rich and poor.
- To meet basic needs and build the infrastructure to provide access to modern and effective services such as electricity, water, telecommunications, transport, health, education and training.
- To develop human resources.
- To build the economy.

Existing instruments

- Economic policies for an enabling environment that will link growth, reconstruction and development.
- Fiscal policy and budget geared to the aims and objectives of the RDP.
- Planning frameworks for the forms of reconstruction envisaged in the RDP (Chapter 6).
- The RDP Fund set up in terms of the RDP Fund Act of 1994, to change budgeting processes, and to direct government expenditure towards capital investment not consumption.
- Economic policies (investment policy, economic growth prospects, industrial policy, trade policy, competition policy, small- and medium-sized enterprises policy, labour market and human resource development, welfare, tourism etc.)
- National Economic Development and Labour Council as a mechanism of consultation, co-ordination, engagement, and negotiation by key stakeholders.

National Development Plan (2012)

Aims/objectives

- To fight poverty and deprivation.
- Building a united, non-racial, non-sexist South Africa.

Potential enablers

- Recognises the need to urgently address pressing needs, particularly the high levels of unemployment, especially among the youth.
- Understands that South Africa must shift from the passive-citizenry approach, where citizens merely receive services from the state. A new approach would require including the socially and economically excluded, where people are active participants in their development, and government works with the people in developing their lives.
- An active-citizen approach requires:
    - The active effort and participation of people to ensure their well-being and development,
    - Redressing the injustices of the past.
    - Faster economic growth and higher investment and employment. Leadership must be recognised as essential to development, and infrastructure is important for fast economic growth and higher employment; it also promotes inclusive growth, by providing citizens with the means to improve their own lives and boost their incomes.
    - Both the public and the private sector playing an important role in building infrastructure.
    - A competent and capable government.
    - Leadership in all sectors of society. Given the scale and ambition of the task (to create jobs and reduce poverty), all sectors of society must provide leadership and vision. This also requires strengthening the link between the private and public sectors.
- Recognises that South Africa needs a more inclusive, rapidly-growing economy, in which the results are shared. Retail and business service sectors are the biggest employers in the informal economy.
- In order to stimulate the informal economy, government must invest in understanding how it works and the survivalist strategies of the poor in it. South Africa must move away from the global view that the informal economy is unsophisticated. The NDP acknowledges that government has provided minimal support to the informal economy, which means township economies are unable to retain local consumer spending power or attract investors.
- Spatial social compacts: the NDP supports developing social compacts as a way of mediating interests and providing a platform for future action.
- Social security measures: the NDP creates an inclusive social protection system that addresses all areas of vulnerability and is responsive to those who are most at risk. Currently, social security measures exclude those in the informal economy, failing to cover their retirement, unemployment or compensation for injury.

- Acknowledges the need to create social security mechanisms to cover the risks associated with informal employment. Social protection for participants must focus on five key functions:
    - Protection: protecting lives and reducing levels of deprivation.
    - Prevention: acting as an economic stabiliser to help people avoid deeper poverty and reduce their vulnerability to natural disasters, crop failure, accidents and illness.
    - Promotion: enhancing the capabilities of individuals, communities and institutions to participate in all spheres of activity.
    - Transformation: addressing inequality and vulnerability through a change in policies, laws, budget allocation and redistributive measures.

Integrated Urban Development Framework (IUDF)

Aims/objectives

- To guide the development of inclusive, resilient and liveable urban settlements influenced and informed by Sustainable Development Goal 11 and the strategic goals in the African Union's Agenda 2063.
- To achieve 'spatial transformation' by steering urban growth and development towards a sustainable growth model of compact, connected and coordinated cities and towns.
- To advocate the effective management of urbanisation to increase the concentration of an economically active population, which translates into higher levels of economic activity, greater productivity and higher rates of growth.
- To call for recognition of the interdependence between urban and rural spaces.
- To acknowledge the potential link between township economic growth and increased exposure to risks.
    - Greater dynamism is needed in the informal and small business sectors to raise the productivity and incomes of urban consumers and address unemployment.
    - 'The urban dividend' describes an optimal situation where the increasing concentration of an economically active population translates into higher levels of economic activity, greater productivity and higher rates of growth.
    - The potential of urban areas is maximised through the alignment and integration of investments in the following "primary drivers of urban development":
        - ← transportation
        - ← human settlements
        - ← infrastructure networks
        - ← various land-use regulations and effective governance.
    - Shifting jobs and investments towards densely populated peripheral townships.

Potential enablers

- New Growth Path (NGP) that hinges on nine policy levers, including:
    - Integrated urban planning and management (for coherent development and a more "rational use of urban space", looking at the realities of daily life in townships) (Policy Lever 1).
    - Integrated transport and mobility (a vital component of economic infrastructure investment which supports economic and social development and strengthens rural-urban linkages) (Policy Lever 2).
    - Integrated urban infrastructure (resource-efficient, provides for universal access and "more inclusive economic growth", extensive and strong enough to meet industrial, commercial and household needs) (Policy Lever 4).
    - Efficient land governance and management (land value to remain stable and increasing, without being mono-functional (e.g. strictly residential), which must actually be addressed to promote spatial transformation) (Policy Lever 5).
    - Inclusive economic development. (The NGP is the backbone of South Africa's economic policy, and inclusive economic development aims at towns and cities "that are dynamic and efficient, foster entrepreneurialism and innovation, sustain livelihoods, enable inclusive economic growth, and generate the tax base needed to sustain and expand public services and amenities") (Policy Lever 6).
    - Effective urban governance. (including managing intergovernmental dynamics, within the city and with the province and neighbouring municipalities, regarding fiscal, political and accountability imperatives) (Policy Lever 8).

- The NGP emphasises the importance of creating employment nationally by seizing the potential of "new economies" through technological innovation, investing in social capital and public services, and focusing on spatial development.
- Premiers, with the MECs responsible for local government, are key role players in intergovernmental planning in provinces. The plans of the different spheres should be aligned to municipal long-term plans, SDFs and IDPs. Premiers and MECs should direct resources to create "coherent centres of planning at provincial level" that support investment and development in municipalities.
- SDFs must be developed based on proper understanding of urban economies and socio-spatial trends.
- Most relevant for township economic development is Policy Lever 6, with its focus on "inclusive economic development" and the objective of "cities and towns that are dynamic and efficient, foster entrepreneurialism and innovation, sustain livelihoods, enable inclusive economic growth, and generate the tax base needed to sustain and expand public services and amenities". Policy matters include:
    - Municipalities, not provincial or national government, should take on a leadership role.
    - The lack of "an enabling environment for economic productivity and growth will compromise the possible positive economic gains from agglomeration economies and innovation in urban centres".
    - Inclusive economic development results in more (and more profitable) small and large enterprises, the backbone for economic growth and prosperity; people with self-respect who develop new skills and social networks as they participate in productive work; communities uplifted through improved skills and services; more work and livelihood opportunities; and elevated national living standards.
    - Municipal economic policies and development strategies "are often dominated by wishful thinking and piecemeal initiatives", while national and provincial development does not always take into account the economic plans and capabilities of municipalities, which means missing opportunities to harness and leverage "concentrated capacity and investment".
    - The informal sector "is a training ground for nurturing future enterprises"; cities can assist informal traders to grow and diversify, and texperiment with community-based enterprises and the social economy to develop their skills, provide useful services, and support livelihoods.
    - Entrepreneurs face particular hurdles doing business: varying regulatory and efficiency levels in local municipalities and other public agencies. Typical obstacles include excessive red tape, a lack of reliable economic infrastructure, low service standards, deficient urban management, and poor spatial quality. Also, local conditions (e.g. lack of safety and high rate of crime) are a direct deterrent to household and private sector investment, and negatively affect informal, small and township businesses and neighbourhoods. Macro regulatory frameworks present broader constraints to local economic development.
    - The informal sector tends to be dismissed as undesirable, marginal and survivalist, and so "of little economic consequence". Thus, cities are more inclined to "restrict" than "help grow and diversify the activities of informal traders". The IUDF suggests policies should accommodate informal economic activities, supported by a planning system that does not see the sector as a problem, or formalisation as the only solution.
    - Economic development needs serviced land, physical and telecommunications infrastructure, labour, skills, and efficient administration of building and environmental regulations.

Existing instruments

- Planning instruments (spatial and strategic)
    - Integrated Development Plans
    - Spatial Development Frameworks
    - Land-use Management Frameworks
    - Built Environment Performance Plans
    - Precinct Plans.
- Capital investment frameworks.
- City development strategies.
- Taxation.
- Mechanisms for cooperative government.
- Markets e.g. property markets.
- Bylaws.
- Authorisations (licensing).
- Zoning.
- Municipal policies.
- Building regulations.

New/innovative tools to be considered

- Technological innovation.
- Partnerships with the private sector.
- 'Economic intelligence' – information bases, research and data for developing robust understanding of the space economy, awareness of the economic impacts of state behaviour, and in-depth knowledge of the local economy.
- Sector forums (manufacturing, business services, property development, informal enterprises etc.).
- Learning forums (e.g. an annual 'state of the city economy summit').
- Intermediary agencies to manage relationships and provide specialised support services for particular sectors.
- A 'common economic agenda' in a municipality.
- Targeted economic development strategies.

Gauteng Provincial Legislation

Gauteng Planning and Development Bill (2012)

Aims/objectives

- To provide for the planning and development of land use in Gauteng Province, the regulation of municipal land use, the establishment of a municipal appeal tribunal, and related issues.

Existing instruments

- Integrated Development Plans
- Land use schemes

Gauteng Provincial Policy

Draft Gauteng Consumer Protection Policy (2017)

Aims/objectives

- To help address the historical consequences and social and economic challenges of consumer protection. The Province still faces some challenges in regulating consumer protection.
- To recognise the contributions to the economy of provincial suppliers and service providers by creating employment and generating revenue. However, the harm sometimes caused to vulnerable consumers has significant economic and social costs, exacerbated by consumers' limited access to justice.
- To address the fact that consumers have become more vulnerable to substandard products flooding markets, including counterfeit goods. Business has largely failed to recognise consumers as important stakeholders in the economy; consequently, consumers are exposed to unfair advertising and selling mechanisms, a lack of access to sale and purchase information, unfavourable deals and contract terms, post-purchase harassment and denial of fair settlement terms, and unfriendly customer service.

Potential enablers

- **Definitions** to bear in mind in considering possibilities for the revitalisation and enablement of township economic growth and development:
    - 'Consumer' in the national Consumer Protection Act refers to:
        - any person to whom any commodity is offered, supplied or made available by another person or supplier;
        - any natural person who makes available any investment by another person or supplier; and any other person so declared.
        - Consumer protection is a function of provincial and national government together (Schedule 4 of the Constitution).
        - Acknowledges that consumer rights mean little if consumers cannot achieve quick and effective redress, and if those rights are not effectively enforced.

Existing instruments

- Provincial Consumer Court (Office of the Consumer Protector)

Existing instruments to be modified

- Provincial consumer protection offices
- National Consumer Commission
- Education and awareness
- Monitoring and enforcement
- Research and advocacy
- Provincial cross-border cooperation
- A provincial consumer tribunal

New / innovative tools to be considered

- The amended definition of 'consumer' as proposed in the Gauteng policy.

Gauteng Province Cooperative Governance and Traditional Affairs: Strategic Plan 2017-2020

Aims/objectives

- To guide local government as municipalities pursue their constitutional transformational mandate: promoting intergovernmental collaboration and local economic development.
- To promote the integration of disadvantaged social groups into local development initiatives.

Potential enablers

- Provincial government intervention to unlock, enable and drive local economic growth and township economies through the Township Economy Revitalisation strategy and Radical Economic Transformation.
- The Radical Economic Transformation policy recognises that infrastructure is a key driver of equitable economic growth, and also boosts employment creation.
- Promotes the creation of opportunities for local industrialisation, and the participation of the youth, persons with disabilities, and women in local economic development. This is enabled through vocational education, capacity building, and skills training to township entrepreneurs in local economic hubs. Participants are encouraged to participate in infrastructure development and property maintenance.
- The strategy recommends localising procurement and supplier rotation for purchases to promote local economic growth, as an incentive to revitalise the local economy.
- The strategy recognises the need to modernise the economy through the Green Agenda Programme for sustainable development. Local government must ensure the informal economy is modernised and sustainable to ensure economic growth, aligned with the National Development Plan.

Existing instruments

- Public participation
- Budget, finance and auditing

New/innovative tools to be considered

- Expanding the registration of township entrepreneurs on a supplier database to ensure economic growth.
- Localising procurement.

Gauteng Provincial Government Employment Growth and Development Strategy (2014)

Aims/objectives

- The first priority of the Gauteng Medium Term Strategic Framework (MTSF): to create decent work, and ensure sustainable livelihoods.
- To build a strong and inclusive economy.
- To promote an 'endogenous economy', a 'green/environmentally-friendly economy' or an 'inclusive economy' with these targets:
  - ← increased economic growth,
  - ← decreased unemployment rate, and
  - ← decreased poverty rate.

Potential enablers

- Policy vision for:
    - The Gauteng provincial government must encourage the informal sector as an income-generating stream. This must take nothing away from the formal economy (including formally recognised SMMEs), which also needs support.
    - The Gauteng provincial government must support the informal economy. Financial support includes venture capital investment funds (seed funds) for developing innovative businesses.
    - Non-financial support includes addressing the need for education, skills, infrastructure and access to government services as a long-term intervention, supporting endogenous growth through community-led local economic development, encouraging innovation, and research in and development of the economy.
    - GEGDS has identified the core functions of a provincial government with respect to economic development, including the identification of new economic activities in support of inclusive economic growth. To perform these functions, the Gauteng provincial government must clear economic bottlenecks that hamper economic development. But provincial government's function is limited to identifying opportunities for economic development and clearing bottlenecks. Local government must foster a relationship between the private and public sectors, and create and implement strategies for the advancement of LED.
    - The Gauteng provincial government must strengthen the capacity of key role-players in LED, especially local communities, to ensure their meaningful participation in LED initiatives and assist local government in achieving its LED objectives.

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