

August 2013

Businesses licensing bill is excessive

**Existing official powers and remedies
under current laws suffice**

Introduction

The proposed Licensing of Businesses Bill would prohibit persons convicted under certain current laws from carrying on business. This is disproportionately severe.

This document argues that the Bill is excessive. Existing official powers and remedies under those current laws are sufficient.

The document first summarises the background and outlines the current laws' existing official powers and remedies. The document concludes with the detail of the background and of these laws, identifying each law's empowering provisions.

Summary background

The draft Licensing of Businesses Bill was published in March 2013 for comment.

The Minister of Trade and Industry says his Department had considered comments received. His Department will not scrap the Bill.

The Bill would empower municipalities to order persons to stop business, if they are convicted of contravening the counterfeit-goods, customs-and-excise, tax, food-safety or immigration laws.

The Minister says we have an illicit economy, of illegal imports and trade in sub-standard products, of people who don't pay VAT, who compete unfairly with people who observe these laws.

The Minister says this harms small businesses. He says we should penalise big transgressors by excluded them from business indefinitely or for a period.

We submit that cancelling the business licence of a person already convicted of an offence is a double punishment. It will have a disproportionate effect on the business and its employees. The business would already have been sentenced to a criminal penalty.

The Minister's concerns can be met by applying the stringent punishments and remedies available under the current laws. The laws should just be effectively enforced.

Outline of current laws' existing official powers and remedies

Counterfeit Goods Act

The Act prohibits making, possessing or selling counterfeit goods.

Inspectors can seize counterfeit goods. A warrant is not always necessary.

High fines for each item of counterfeit goods are imposed, or imprisonment, or both. Fines are doubled for second offences. The Minister can by *Gazette* notice increase the maximum fines.

The goods can be declared forfeit to the State or destroyed.

Customs and Excise Act

A person commits an offence if he knowingly sells goods on which customs or excise duty was not paid (illicit goods).

Customs officers can enter premises without notice and inspect goods and records. Officers can break and enter.

Illicit goods are liable to forfeiture, wherever found. Customs officers and police can remove goods to establish if they should be forfeit.

Officers can lock up and seal any place or goods if they believe a contravention was committed. No-one is entitled to compensation for damage caused.

The penalty for irregular dealing is R20 000 or treble the goods' value (whichever is more), or five years' imprisonment, or both.

Authorised customs officers can arrest without warrant. Officers can question managers and employees at any time. The person in charge of a company's premises is also liable.

Sellers must produce proof of payment of duty. It is presumed that duty was not paid and that sellers' accounts are incorrect, unless the sellers prove otherwise.

The punishment for false disclosure is R40 000 or treble the value of the goods (whichever is more), or ten years' imprisonment, or both.

Tax Administration Act

SARS can inspect at random to determine if a person is registered for tax and is keeping records.

SARS can remove documents and articles. They can search without warrant if satisfied that destruction of relevant material may be imminent, and that a warrant would be issued if they applied and the delay getting it would defeat the object.

A person is guilty of an offence, if wilfully and without good cause he fails to submit a return or to keep records or to issue a required tax document, or if he issues a false document, or fails to answer questions put, or to pay tax.

A person convicted for non-compliance can be sentenced to a fine or imprisonment for up to two years.

It is an offence, if with intent to evade tax or obtain an undue refund, a person makes a false entry in a tax document or signs one without reasonable grounds for believing it to be true, or gives a false answer to a request for information, or keeps false accounts.

A person who makes a false statement is regarded as guilty, unless he shows as a reasonable likelihood that he was unaware of the falsity and this wasn't due to negligence.

Tax evaders can be fined, or imprisoned for up to five years.

Foodstuffs, Cosmetics and Disinfectants Act

It is an offence to sell a contaminated or harmful foodstuff, cosmetic or disinfectant, or one made by a prohibited method or in a prohibited container, or falsely described.

A person convicted is liable to a fine, or up to 6 months' imprisonment on first conviction, or both; or up to 12 months' imprisonment on second conviction, or both; or up to 24 months' imprisonment on third or subsequent convictions or both.

Employers are liable for employees' acts. Employees and agents are also liable.

Inspectors, municipal officials and the police can enter premises where a foodstuff, cosmetic or disinfectant is suspected to be made or sold and seize any foodstuff, cosmetic or disinfectant found there and any appliance, object or substance used in connection with it that appears to provide proof of contravention of a provision of the Act.

The court can declare any item used in connection with the offence to be forfeit.

Immigration Act

Anyone knowingly employing an illegal foreigner commits an offence. Employers are presumed to know the status of their employees.

An illegal foreigner found where a business is conducted is presumed to be employed by the person in control of the premises.

Employers can be sentenced to a fine or a year's imprisonment, for a second conviction by up to two years' imprisonment or a fine, and for third and subsequent convictions by up to three years' imprisonment without option of a fine.

A court can order the employer to pay the expenses of deporting the illegal foreigner.

Criminal Procedure Act

After an accused is convicted but before sentence is passed, the prosecution can produce a record of his previous convictions. The court must take them into account when imposing sentence.

Background detail

Draft Bill was published for comment

The draft Licensing of Businesses Bill was gazetted in draft in March 2013 for public comment.¹ Comments had to be submitted within a month.²

The Free Market Foundation (FMF) and its affiliate the Law Review Project (LRP) both submitted comments.³ (Their comments are summarised in the Appendix.)

¹ The draft Bill was published under General Notice 231 of 2013, in *Government Gazette* 36265 of 18 March 2013.

² The website of the Department of Trade and Industry (DTI) stated that comments could be lodged with the department by 18 April 2013: 'Call for comments on the Licensing of Businesses Bill', DTI website, at <http://www.dti.gov.za/default.jsp>.

³ Both submissions are available on the FMF website, at

Department has been considering comments

In May, the Minister of Trade and Industry reportedly said his Department will not scrap the Bill. He said his Department had considered concerns received. He said that when the draft law is presented to Parliament the measure will be significantly different.⁴

Formal Bill likely being framed for tabling and enactment as law

The Minister has not withdrawn the Bill.⁵

What is the reason for this unusual Bill?

It seems that the Minister⁶ is attempting to save honest small businessmen from unfair competition from businesses which compete unfairly by breaking these laws. He would prevent lawbreakers from trading. The Minister has said:⁷

We have a significant illicit economy in this country which is damaging to the prospects of small business operators, particularly those in townships. This is the economy of illegal imports and trade in sub-standard products. This is the economy of people that don't pay VAT and all that, and they then compete unfairly with people that do observe all these requirements...

You raid somewhere, two weeks later something else pops up.

[B]ig transgressors [should incur] some penalty to exclude [them] from business operations.

Mr Davies says the revised Bill will remain fundamentally unchanged from the published draft, with regard to the government's determination to deny registration to lawbreakers. He says:⁸

[W]e want ... a negative database. People who have been found to be in transgression will be denied registration. We are looking quite carefully at the graduation of this because I think the current draft is a bit too blunt.

Essentially what we want is that big transgressors will be penalised by being excluded from business operations indefinitely or for a specific period through a judicial process.

That will be one of the penalties and if you trade when you are excluded, then you must put on an orange suit.

We have a significant illicit economy which is damaging the prospects of small business operators, particularly in townships. This is the economy of illegal imports, of trade in substandard products, of people who don't pay VAT, and then compete with people who observe all these requirements.

<http://www.freemarketfoundation.com/publications/the-free-market-foundations-submission-on-the-licensing-of-business-bill-2013>, and

<http://www.freemarketfoundation.com/publications/law-review-projects-submission-on-the-licensing-of-business-bill-2013>.

⁴ 'Business Bill to be revamped: Davies', 16 May 2013, *SouthAfrica.info* at

<http://www.southafrica.info/news/business-bill-160513.htm#.UcxoifmTiSp>.

⁵ On the contrary, now that the draft Bill has been published for comment and concerns have been considered, the next step is framing of a formal Bill proper. The Minister would then introduce the Bill in Parliament. Parliament would then be expected to pass the Bill, which thereafter would be laid before the President for him to sign into law as an Act. The Act would then be published, and would come or be brought into operation.

⁶ Mr Rob Davies is Minister of Trade and Industry.

⁷ Howzit MSN News, 16 May 2013, 'Licensing Bill to change: Davies', at

<http://news.howzit.msn.com/article.aspx?cp-documentid=255195905>.

⁸ *Business Day*, 16 May 2013, 'Licensing bill to be redrafted after avalanche of disapproval', at

<http://www.bdlive.co.za/business/2013/05/16/licensing-bill-to-be-redrafted-after-avalanche-of-disapproval>.

Businesses convicted under certain current laws would be prohibited from trading

The draft Bill⁹ would empower a licensing authority to revoke a person's licence, and prohibit him from trading, if he has been convicted of contravening:

the Counterfeit Goods Act;¹⁰

the Customs and Excise Act;¹¹

'any applicable tax legislation'¹² (presumably a reference to the Tax Administration Act¹³ dealing with compliance with tax laws such as the Income Tax Act¹⁴ and the Value-added Tax Act,¹⁵

the Foodstuffs, Cosmetics and Disinfectants Act;¹⁶ or

the Immigration Act,¹⁷ including by employing an illegal foreigner,¹⁸ or the Refugees Act.¹⁹

Bill is proposing disproportionate and excessive punishment

To cancel the business licence of a person convicted of an offence would constitute double punishment for someone who would already have been sentenced to a criminal penalty.

When the Legislature designates a set of remedies to combat a specified crime, the remedies are normally intended to be effective and exhaustive. The requirement of proportionality is an imperative imposed by constitutional disdain for excessive punishment.²⁰

Cancellation of a business licences would have a disproportionate effect, on the business owner as well as on his employees.

The Bill is excessive. The existing official powers and remedies under the current laws are sufficient.

⁹ Bill cl 18(1)(c).

¹⁰ Counterfeit Goods Act 37 of 1997.

¹¹ Customs and Excise Act 91 of 1964.

¹² Bill cl 18(1)(d).

¹³ Tax Administration Act 28 of 2011.

¹⁴ Income Tax Act 58 of 1962.

¹⁵ Value-added Tax Act 89 of 1991.

¹⁶ Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Bill cl 18(1)(e).

¹⁷ Immigration Act 13 of 2002.

¹⁸ The Immigration Act defines an 'illegal foreigner' as a foreigner who is in the Republic in contravention of the Act.

¹⁹ Refugees Act 130 of 1998.

²⁰ See *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as amicus curiae)*, 2007 6 BCLR 575, 2007 4 SA 222, (CC) paras [118]–[137], decided in connection with the statute governing civil forfeiture of assets reasonably believed to have been an instrumentality of a an offence.

Detail of current laws' existing official powers and remedies

Counterfeit Goods Act

Criminalises selling of counterfeit goods

This Act²¹ comprehensively prohibits the making, distribution, possession, exposing for sale, or sale, of counterfeit goods.²² A person who performs one of these prohibited acts commits an offence.²³

Inspectors can enter any place and seize suspected counterfeit goods

If an inspector has reasonable grounds to suspect that such an offence has been or is likely to be committed, or to believe that an act of dealing in counterfeit goods has taken or is likely to take place, he has the power to enter any place or vehicle and seize any suspected counterfeit goods found and remove them, and take whatever steps may be reasonably necessary to terminate the act of dealing.²⁴

Inspectors can seal off the place or vehicle involved in dealing in counterfeit goods

An inspector can take steps reasonably necessary to terminate any act of dealing in counterfeit goods being performed at the place or vehicle, and to prevent the future recurrence of the act. These include seizing and removing all goods in question found there, and sealing off the place or vehicle.²⁵

Inspector can act without warrant if delay would defeat the object

An inspector should normally act on the strength of a warrant issued by a judge or magistrate.²⁶

But the inspector can without warrant enter any place or vehicle and exercise these powers of seizure and removal, if on reasonable ground he believes that the warrant will be issued to him if he were to apply for it and the delay that would ensue by first obtaining the warrant would defeat the object or purpose of the entry, seizure and removal.²⁷

²¹ Counterfeit Goods Act 37 of 1997.

²² Section 2(1). This states in full:

2. (1) Goods that are counterfeit goods, may not—

- (a) be in the possession or under the control of any person in the course of business for the purpose of dealing in those goods;
- (b) be manufactured, produced or made except for the private and domestic use of the person by whom the goods were manufactured, produced or made;
- (c) be sold, hired out, bartered or exchanged, or be offered or exposed for sale, hiring out, barter or exchange;
- (d) be exhibited in public for purposes of trade;
- (e) be distributed—
 - (i) for purposes of trade; or
 - (ii) for any other purpose to such an extent that the owner of an intellectual property right in respect of any particular protected goods suffers prejudice;
- (f) be imported into or through or exported from or through the Republic except if so imported or exported for the private and domestic use of the importer or exporter, respectively;
- (g) in any other manner be disposed of in the course of trade.

²³ Section 2(2)(a). A person also commits an offence if he knew or had reason to suspect that the goods were counterfeit, or failed to take reasonable steps to avoid the act from being performed: s 2(2)(b).

²⁴ Section 4(1).

²⁵ Section 5(1)(a) and (b)(i).

²⁶ Sections 4(2) and 5(1) read with s 6(1).

²⁷ Section 5(2).

Acts performed by an inspector without warrant must be confirmed by a magistrate or judge, on the application of the inspector brought in ten court days afterwards.²⁸

R5 000 fine per item of the goods, or three years' imprisonment, or both

A person convicted of distributing, possessing, exposing for sale, or selling counterfeit goods is punishable, in the case of a first conviction, with a fine in respect of each article involved in the act of dealing to which the offence relates of up to R5 000 per article, or imprisonment for up to three years, or both such fine and term of imprisonment.²⁹

Second offence: R10 000 fines for each item, or five years, or both

In the case of a subsequent conviction, he is punishable with a fine in respect of each such article of up to R10 000 per article, or imprisonment for up to five years, or both.³⁰

The Minister of Trade and Industry³¹ can by notice in the *Government Gazette* increase the amounts of the maximum fines.³²

The court convicting a person of dealing in counterfeit goods can declare the goods to be forfeited to the State or order that the goods and their packaging, and, where applicable, any tools used by or on behalf of the convicted person for the production of those or any other counterfeit goods or for the unlawful application to the goods of any intellectual property right, be destroyed.³³

Customs and Excise Act

Requires duty to be paid

This Act³⁴ lays down that the applicable duty must be paid on imported goods, excisable goods and surcharge goods.³⁵

False disclosure is an offence

A person who makes a false statement or uses a document containing a false statement is guilty of an offence, unless he proves that he was ignorant of the falsity and that this was not due to negligence.³⁶

Concealment is an offence

A person who fails to advise the customs authorities of any change in particulars in any invoice or document, which would increase the duty on the goods concerned, is guilty of an offence.³⁷

A person carrying on any business must keep books, accounts and documents about his transactions, produce them on demand, and submit such particulars of his transactions as the Commissioner may require.³⁸ Failure to comply is an offence.³⁹

²⁸ Section 5(4)(a).

²⁹ Section 19(1)(a).

³⁰ Section 19(1)(b).

³¹ Section 1(1) 'Minister'.

³² Section 19(4)(a).

³³ Section 20(1).

³⁴ Customs and Excise Act 91 of 1964.

³⁵ Section 47(1), read with s 1(1) "duty".

³⁶ Section 84(1).

³⁷ Section 86(a).

Punishment for false disclosure or concealment is R40 000 or treble the value of the goods, whichever is higher, or ten years' imprisonment, or both

A person committing one of these offences can be sentenced to a fine of up to R40 000 or treble the value of the goods concerned, whichever is the greater, or imprisonment for up to ten years, or both.⁴⁰

Irregular dealing in goods is an offence

Anyone who deals or assists in dealing with any goods contrary to the provisions of the Act commits an offence.⁴¹

Anyone who makes any arrangement with a supplier or manufacturer of goods to be imported into or manufactured in the Republic, or the supplier or manufacturer's agent, with the object of defeating or evading the Act, commits an offence.⁴²

A person is guilty of an offence if he has on his premises or in his custody or control, or sells or disposes of, any illicit goods knowing them to be illicit.⁴³ Illicit goods are goods in respect of which a contravention of the Act has been committed.⁴⁴

Anyone who knowingly has in his possession any goods liable to forfeiture under the Act commits an offence.⁴⁵

Punishment for irregular dealing is R20 000 or treble the goods' value, whichever is higher, or five years' imprisonment, or both

A person found guilty is liable on conviction to a fine of up to R20 000 or treble the value of the goods, whichever is the greater, or to imprisonment for up to five years, or both.⁴⁶

Illicit goods are liable to forfeiture

Goods in respect of which any offence under the Act is committed are liable to forfeiture, wherever and in whomever's possession found.⁴⁷

In a criminal prosecution the court passing sentence may also make an order regarding any unpaid duty or charge, and enforce forfeiture.⁴⁸

Principals are liable for things done by their agents

Every importer, manufacturer or other principal is, for the purposes of this Act, responsible for any act done by an agent acting on his behalf.⁴⁹

³⁸ Section 101(1) and (2).

³⁹ Section 86(h).

⁴⁰ Sections 84(1) and 86.

⁴¹ Section 83(a).

⁴² Section 83(c).

⁴³ Section 80(1)(a).

⁴⁴ Section 1(1) "illicit goods".

⁴⁵ Section 83(b).

⁴⁶ Sections 80(1) and 83.

⁴⁷ Section 87(1). See also s 84(1) and s 86 regarding forfeiture.

⁴⁸ Section 94(a).

⁴⁹ Section 98.

An agent is liable for the customs duty payable by his principal

An agent appointed by any importer, manufacturer or other principal and any person who represents himself to any officer as the agent of a principal and is accepted as such by the officer, is liable for the fulfilment of the obligations, including payment of duty and charges, imposed on the principal by the Act and to any penalties or amounts incurred in respect of the matter.⁵⁰

However (unless the principal is not disclosed or an agent's name is stated on the bill of entry or the principal is outside the country), the agent or person will not be liable if he proves that he was not party to the principal's non-fulfilment of the obligation, that he notified the Controller when he became aware of the non-fulfilment, and that reasonable steps were taken by him to prevent non-fulfilment.⁵¹

The principal is not relieved from liability for the fulfilment of the obligation or the penalty or amounts incurred.⁵²

Sellers must produce proof of payment of duty

Any person selling, offering for sale or dealing in imported or excisable goods or any person having such goods entered in his books or mentioned in any documents about his transactions, must, when requested by an officer, produce proof as to the person from whom the goods were obtained and, if he is the importer or manufacturer or owner, as to the place where the duty due was paid, the date of payment, the particulars of the entry for home consumption and the marks and numbers of the cases, packages, bales and other articles concerned, which marks and numbers must correspond to the documents produced in proof of the payment of the duty.⁵³

It is presumed that a person did not pay duty, unless he proves that he did

If in a prosecution or dispute in which the State, Minister, Commissioner or an officer is party, the question arises whether the proper duty was paid or whether any goods have been lawfully imported, manufactured or otherwise dealt with, or whether any books, accounts, documents, forms or invoices required to be completed and kept, exist or have been duly completed and kept or have been furnished to any officer, it is presumed that duty was not paid or that the goods were not been lawfully imported, manufactured or otherwise dealt with, or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be, unless the contrary is proved.⁵⁴

If in a prosecution it is alleged by the State, Minister, Commissioner or officer that any goods have been imported or otherwise dealt with, it is presumed that the goods have been imported, or otherwise dealt with, unless the contrary is proved.⁵⁵

A person in charge of company business is liable for the company's obligations

⁵⁰ Section 99(1).

⁵¹ Section 99(2)(a)(i), (ii) and (iii).

⁵² Section 99(2)(b).

⁵³ Section 102(1).

⁵⁴ Section 102(4).

⁵⁵ Section 102(5).

In the event of a contravention of the Act or the incurring of any liability under the Act by any company, firm, partnership or club, any person having the management of any premises or business in which, or in connection with which, the contravention took place or the liability was incurred may be charged with the offence and will be liable to the penalties provided for it and any liability incurred.⁵⁶

Officers can enter premises, inspect books and require explanations

An officer may, without notice, at any time enter any premises and make whatever examination and enquiry he deems necessary; require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by the Act is required to be kept or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in the Act and which is or has been on the premises or in the possession or custody or under the control of the person or his employee; can require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in the Act, its production then and there, or at a time and place fixed by the officer; and examine any such book or document and may require from any person an explanation of any entry in it.⁵⁷

Officers can break and enter to search

If an officer, after having declared his official capacity and his purpose and having demanded admission into any premises, is not immediately admitted, he and any person assisting him may at any time, but at night only in the presence of a member of the police force, break open any door or window or break through any wall on the premises for the purpose of entry and search.⁵⁸

An officer or any person assisting him may at any time break up any ground or flooring on any premises for the purpose of search and if any room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand, may open such room, place, safe, chest, box or package in any manner.⁵⁹

Officers can question anyone

An officer may require any person to appear before him at any time and place fixed by the officer and may then and there question that person, either alone or in the presence of any other person, as he thinks fit, with respect to any matter dealt with in this Act.⁶⁰

An officer may question, with respect to any matter dealt with in the Act, any person whom he finds on any premises entered or whom he has reasonable grounds for believing to have been employed on any premises in respect of which any provision of the Act is applicable, or whom he has reasonable grounds for believing to be or to have been in possession, custody or control of anything, in respect of which any such provision is applicable.⁶¹

⁵⁶ Section 103.

⁵⁷ Section 4(4)(a)(i)–(v).

⁵⁸ Section 4(6)(a).

⁵⁹ Section 4(6)(b).

⁶⁰ Section 4(7).

⁶¹ Section 4(8).

Officers have powers of arrest

The Commissioner may determine a category of officers who have the power to carry out an arrest for the purposes of enforcing the Act.⁶²

These officers are deemed to be peace officers as defined in the Criminal Procedure Act.⁶³ That Act⁶⁴ gives to peace officer the power to arrest, without warrant, any person whom the officer reasonably suspects of having committed an offence ‘the punishment for which may be a period of imprisonment exceeding six months’ without the option of a fine.⁶⁵ This refers to statutory offences.⁶⁶

Officers can lock up goods

An officer may lock up, seal or otherwise secure any room, place, vehicle or goods if he has reason to believe that a contravention under the Act has been or is likely to be committed in respect thereof or in connection therewith.⁶⁷

No-one is entitled to compensation for loss or damage arising out of any bona fide action of an officer.⁶⁸

Officers can detain goods

An officer or member of the police force may detain any vehicle, or goods at any place for the purpose of establishing whether that vehicle or goods are liable to forfeiture under the Act.⁶⁹

The vehicle or goods may be detained where they are found or must be removed to and stored at a place of security determined by the officer or member of the police force, at the cost, risk and expense of the owner, importer, manufacturer or the person in whose possession or on whose premises they are found.⁷⁰

Commissioner can seize goods liable to forfeiture

The Commissioner may seize any vehicle or goods liable to forfeiture.⁷¹ If any goods liable to forfeiture cannot readily be found, the Commissioner may demand from any person who imported, manufactured or otherwise dealt with the goods contrary to the provisions of the Act or committed any offence under this Act rendering the goods liable to forfeiture, payment of an amount equal to the value for duty purposes plus any unpaid duty thereon.⁷²

Tax Administration Act*SARS can inspect at random*

This Act⁷³ says that SARS can select a person for inspection or audit on the basis of any consideration relevant for proper administration of a tax Act, including on a random basis.⁷⁴

⁶² Section 4A(1)(a).

⁶³ Section 4A(2).

⁶⁴ Criminal Procedure Act 51 of 1977.

⁶⁵ Criminal Procedure Act s 40(1)(b) read with Schedule 1.

⁶⁶ *Areff v Minister van Polisie* 1977 (2) SA 900 (A). See Joubert et al eds *Law of South Africa* vol 5(2) 2ed A Skeen ‘Criminal Procedure’ para 209(b) fn 8.

⁶⁷ Section 4(12).

⁶⁸ Section 4(13).

⁶⁹ Section 88(1)(a).

⁷⁰ Section 88(1)(b).

⁷¹ Section 88(1)(d).

⁷² Section 88(2)(a)(i).

⁷³ Tax Administration Act 28 of 2011.

SARS can inspect to determine if a person is registered for tax and keeping records

A SARS official may, for the purposes of administration of a tax Act and without notice, arrive at premises at which the official has a reasonable belief a trade or enterprise is being carried on, and conduct an inspection to determine whether the person occupying the premises is registered for tax, and whether he is complying with the Act's record-keeping requirements.⁷⁵

A person obliged to apply to register under a tax Act must apply for registration for one or more taxes,⁷⁶ and keep records, books of account or documents that enable him to observe the requirements of a tax Act,⁷⁷ in a form authorised by or under the Act.⁷⁸

SARS can search and seize foreseeably relevant documents and things

A SARS official exercising powers under a search must produce the warrant.⁷⁹ The official may in conducting a search open or cause to be removed anything which the official suspects to contain relevant material, seize any relevant material; make copies of relevant material, and require from a person an explanation of relevant material.⁸⁰ 'Relevant material' means any information, document or thing that is foreseeably relevant for assessing or collecting tax or showing non-compliance with an obligation under a tax Act or that a tax offence was committed.⁸¹

SARS can search without warrant if necessary

A senior SARS official may without a warrant exercise these powers of search and seizure if he on reasonable grounds is satisfied: that there may be an imminent removal or destruction of relevant material likely to be found on the premises, that if SARS applies for a search warrant, a search warrant will be issued, and the delay in obtaining a warrant would defeat the object of the search and seizure.⁸²

Non-compliance penalties

Provision is made for various penalties that may be imposed for non-compliance with a tax Act.⁸³

Criminal offences for non-compliance with tax laws

A person is guilty of an offence who, wilfully and without just cause,

- fails or neglects to register, or to submit a return or document to SARS, or to issue a document to a person as required under a tax Act, or to retain records;⁸⁴
- submits a false certificate or statement, or issues an erroneous, incomplete or false document required under a tax Act to another person;⁸⁵

⁷⁴ Section 40.

⁷⁵ Section 45(1).

⁷⁶ Section 22.

⁷⁷ Section 29.

⁷⁸ Section 30.

⁷⁹ Section 61(1).

⁸⁰ Section 61(3)(a)–(d).

⁸¹ Section 1 'relevant material'.

⁸² Section 63(1).

⁸³ Chapter 15.

⁸⁴ Section 234(a)–(e).

⁸⁵ Section 234(f)–(g).

- refuses or neglects to produce or make available any information, document or thing, or to answer truly and fully any questions put to the person by a SARS official, or to attend and give evidence when required;⁸⁶
- fails to comply with a directive or instruction issued by SARS under a tax Act, or to disclose to SARS any material facts which should have been disclosed under this Act, or to notify SARS of anything which the person is required to notify under a tax Act;⁸⁷
- dissipates his assets or assists another person to dissipate that the other's assets to impede collection of taxes, penalties or interest;⁸⁸
- fails or neglects to withhold and pay an amount of tax when required under a tax Act.⁸⁹

Person convicted of non-compliance can be fined or imprisoned for two years

A person convicted for non-compliance can be sentenced to a fine or imprisonment for up to two years.⁹⁰

Criminal offences for evasion of tax

A person is guilty of an offence who, with intent to evade tax or obtain an undue refund: makes a false statement or entry in a return or document, or signs one without reasonable grounds for believing it to be true; or gives a false answer to a request for information; or prepares or maintains false books of account or other records or falsifies them; or makes use of fraud or contrivance; or makes a false statement to obtain a refund or exemption.⁹¹

A person who makes a false statement is regarded as guilty, unless he proves there is a reasonable possibility he was ignorant of the falsity and that his ignorance was not due to negligence.⁹²

Person convicted of tax evasion can imprisoned for five years

A person convicted of evasion can be sentenced to a fine, or imprisonment for up to five years.

Foodstuffs, Cosmetics and Disinfectants Act

Selling contaminated or harmful food or cosmetics is an offence

This Act⁹³ lays down that it is an offence to sell, or make or import for sale:

- a foodstuff, cosmetic or disinfectant containing or treated with a prohibited substance, containing a substance in greater measure than permitted by regulation; or not complying with standards of composition or the like prescribed by regulation; or the sale of which is prohibited by regulation;⁹⁴
- a foodstuff or cosmetic contaminated or harmful to human health; or containing or treated with a contaminated substance or one harmful to health;⁹⁵

⁸⁶ Section 234(h).

⁸⁷ Section 234(i)–(j).

⁸⁸ Section 234(o).

⁸⁹ Section 234(p).

⁹⁰ Section 234.

⁹¹ Section 235(1).

⁹² Section 235(2).

⁹³ Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972.

⁹⁴ Section 2(1)(a)(i)–(iv).

⁹⁵ Section 2(1)(b)(i) and (ii).

- a foodstuff containing or treated with (subject to exceptions) a substance not present in its normal condition; or with a substance added to increase its volume so as to deceive; or with a substance removed so its nutritive properties are diminished in comparison to the normal foodstuff; or treated so its inferior condition is concealed.⁹⁶

‘Prohibited’ means prohibited by regulation of the Minister of Health.⁹⁷

Selling undisclosed blends is an offence

It is an offence (with exceptions) to sell a mixture of different foodstuffs, or a blend of different grades of one foodstuff, other than in a package with a label indicating that the foodstuff is a mixture or blend and specifying the ingredients and amounts.⁹⁸

Selling food, cosmetics or disinfectants made by prohibited methods is an offence

It is an offence to:

- use a prohibited method in making, packing or conveying a foodstuff, cosmetic or disinfectant;⁹⁹
- use a prohibited container in preparing, serving or administering a foodstuff or cosmetic in the course of a trade or business;¹⁰⁰
- sell or import for sale a foodstuff, cosmetic or disinfectant made, packed or conveyed using a prohibited method.¹⁰¹

False description is an offence

It is an offence (with exceptions) to sell, or import for sale, a foodstuff, cosmetic or disinfectant falsely described as regards its nature, composition, quality, strength, nutritive value or other properties or when or how it was made.¹⁰²

A person convicted is liable, on:

- first conviction, to a fine or imprisonment for up to six months, or both;
- second conviction, to a fine or imprisonment for up to 12 months, or both;
- third or subsequent conviction, to a fine or imprisonment for up to 24 months, or both.¹⁰³

Where a penalty is specifically prescribed by regulation for a contravention of a regulation, a person convicted of the contravention shall be liable only to the penalty so prescribed.¹⁰⁴

Employers are liable for employees’ acts

An act of an employee or agent that constitutes an offence under the Act is deemed to be committed by his employer or principal, who may be convicted and sentenced for it, unless he proves that he did not permit it and took reasonable measures to prevent acts of this kind, or that acts of this kind did not in any

⁹⁶ Section 2(1)(c)(i)–(iv).

⁹⁷ Section 1 ‘prohibited’, ‘regulation’ and ‘Minister’, and s 15(1)(b)(i).

⁹⁸ Section 3(1).

⁹⁹ Section 4(a).

¹⁰⁰ Section 4(b).

¹⁰¹ Section 4(c).

¹⁰² Section 5(1)(c).

¹⁰³ Section 18(1).

¹⁰⁴ Section 18(2).

circumstances fall in the course of employment or scope of authority of the employee or agent.¹⁰⁵ The fact that the employer or principal forbade an act of this kind is not enough proof that he took reasonable measures to prevent it.¹⁰⁶

Employees and agents are not relieved from liability.¹⁰⁷

Designated municipal officials can exercise inspectors' powers

The Minister of Health can authorise a local authority to enforce provisions of this Act through its officers.¹⁰⁸

The local authority can authorise any medical practitioner, environmental health practitioner, veterinarian or other person considered fit to exercise the powers of an inspector.¹⁰⁹

Authorised local authorities can prosecute any contraventions alleged to have taken place in their areas.¹¹⁰

Also, the Director-General of Health, after consultation with the provincial health department, can authorise a municipal employee he considers fit to exercise the powers of an inspector, but subject to the Director-General's control.¹¹¹

Other officials can also act as inspectors

Officers of the South African Police Service can also exercise the powers of inspectors under the Act.¹¹²

Customs officers are inspectors for the purposes of controlling imports of foodstuffs, etc. for compliance with this Act.¹¹³

Powers of inspectors

An inspector can at reasonable times enter any premises where a foodstuff, cosmetic or disinfectant is or is suspected to be made, treated, graded, packed, labelled, kept, conveyed, sold, served or administered, or where any other activity in connection with a foodstuff, cosmetic or disinfectant is carried out or suspected to be, and may:

- search the premises, take and remove samples of, any foodstuff, cosmetic or disinfectant found there, or any appliance, or product, material, object or substance found which is suspected to be used, or destined or intended for use, in connection with the making, treating, etc. of any foodstuff, cosmetic or disinfectant, or any other activity in connection with a foodstuff, cosmetic or disinfectant, or open any container of such foodstuff, cosmetic, disinfectant, or product, etc.;

¹⁰⁵ Section 8(1).

¹⁰⁶ Section 8(2).

¹⁰⁷ Section 8(3).

¹⁰⁸ Section 23(1).

¹⁰⁹ Section 10(3)(b).

¹¹⁰ Section 24(1).

¹¹¹ Section 10(1)(b).

¹¹² Section 10(3)(c) and (d).

¹¹³ Sections 10(1)(a) and 14, read with Customs and Excise Act s 107.

- demand any information regarding any such foodstuff, cosmetic, disinfectant, appliance, product, material, object or substance from any person in whose possession or charge it is or from the owner or person in charge of such premises;
- weigh, count, measure or seal any such foodstuff, etc., appliance, product, etc. or its container, or lock, secure, seal or close any door or opening giving access to it;
- examine or make copies of any document found there which refers or is suspected to refer to such foodstuff, etc., appliance, product, etc.;
- inspect any operation carried out there in connection with the activity;
- demand any information regarding the operation from the person in charge or carrying out the operation;
- seize any foodstuff, appliance, product, document, etc. which appears to provide proof of contravention of a provision of the Act.¹¹⁴

Foodstuffs, etc., can be declared forfeit

The court convicting a person under the Act can declare any foodstuff, etc., appliance, product, etc. used in connection with the commission of the offence to be forfeited to the State.¹¹⁵

Immigration Act

Prohibits employing illegal foreigners

This Act¹¹⁶ prohibits the employing of an illegal foreigner, or any foreigner whose status does not authorise him to be employed by such person; or a foreigner in a capacity different from those contemplated in the foreigner's status.¹¹⁷ An 'illegal foreigner' is a foreigner who is in the Republic in contravention of the Act.¹¹⁸

Anyone who knowingly employs an illegal or other foreigner in violation of the Act commits an offence.¹¹⁹

Employer presumed to know status of his employees

If it is proven that a person was employed in violation of this prohibition, it is presumed the employer knew at the time of employment that the employee was a foreigner he was prohibited from employing, unless the employer proves that he employed the person in good faith,¹²⁰ and made a good-faith effort to ascertain the status or citizenship of his employees.¹²¹

If an illegal foreigner is found on any premises where a business is conducted, it is presumed that the foreigner was employed by the person who has control over the premises, unless prima-facie evidence to the contrary is adduced.¹²²

¹¹⁴ Section 11(1)(a)–(h).

¹¹⁵ Section 20(1).

¹¹⁶ Immigration Act 13 of 2002.

¹¹⁷ Section 38(1).

¹¹⁸ Section 1(1) 'illegal foreigner'.

¹¹⁹ Section 49(3).

¹²⁰ Section 38(3)(a).

¹²¹ Section 38(3)(b) read with s 49(2). These provisions are repetitious and confusingly drafted.

¹²² Section 49(5).

Employers can be sentenced to a year's imprisonment for a first offence, two years for a second, and three years for a third offence

Anyone who knowingly employs an illegal or other foreigner in violation of this Act is guilty of an offence, and liable on conviction to a fine or to imprisonment for up to one year. A second conviction is punishable by imprisonment for up to two years or a fine, and third or subsequent convictions by imprisonment for up to three years without the option of a fine.¹²³

A court can order employer who employs an illegal foreigner to pay costs to the Department of Home Affairs, to defray expenses of the illegal foreigner's deportation, detention, maintenance and custody.¹²⁴

An illegal foreigner must be deported.¹²⁵

The Director-General appoints immigration officers.¹²⁶

Without the need for a warrant, an immigration officer may arrest an illegal foreigner, and must deport him, whether or not the officer arrests him. The officer may, pending deportation, detain the foreigner or cause him to be detained at a place determined by the Director-General.¹²⁷

Criminal Procedure Act

Previous convictions must be taken into account when sentencing

The Criminal Procedure Act¹²⁸ says that, after an accused is convicted but before sentence is passed, the prosecution can produce to the court a record of his previous convictions.¹²⁹

The court must ask the accused whether he admits or denies these convictions.¹³⁰ If he denies them, the prosecution can tender evidence that he was previously convicted.¹³¹

If the convictions are proved against him or he admits them, the court must take them into account, when imposing sentence for the offence of which he has just been convicted.¹³²

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¹²³ Section 49(3).

¹²⁴ Section 49(12)(b) read with 34(3).

¹²⁵ Section 32(2).

¹²⁶ Section 33(2)(b).

¹²⁷ Section 34(1).

¹²⁸ Criminal Procedure Act 51 of 1977.

¹²⁹ Criminal Procedure Act s 271(1).

¹³⁰ Section 271(2).

¹³¹ Section 271(3).

¹³² Section 271(4).

APPENDIX

*Brief Summary of Comments on draft Bill: Submitted by Free Market Foundation and Law Review Project.*¹³³

Draconian

The draft Bill would require every business in the country to obtain a licence.¹³⁴ The Bill would criminalise all businesses, existing or new, who don't obtain a licence.¹³⁵

Ineffective licensing authorities

Municipalities would be the licensing authorities. The Financial & Fiscal Commission reported in 2012 that lack of capacity was crippling municipalities due to their high vacancy rates, skills deficits, inappropriate staffing, and poor accountability for performance.

'Deemed licences' unworkable

The draft Bill envisaged 'deemed licences'. It said, if the licensing authority has not issued or renewed a licence within a specified time after receiving the application, the application must be deemed to have been approved and the licence must be 'deemed as having been issued'.

This would be unworkable in practice: Applicants to whom licensing authorities had not promptly issued licences, and whose licences were 'deemed as having been issued', would be penalised as if they were unlicensed. Inspectors would be given powers to impose fines on a licence holder who 'fails to produce a business licence' upon request, and to 'close any premises pending further investigation'.

Draft Bill conferred arbitrary discretionary powers

It is not clear that licensing authorities would have to issue licences to businesses who qualify.¹³⁶

The draft Bill would give licensing authorities power to impose any licence condition in their sole discretion. The Bill even gives licensing authorities sole discretion to amend a licensee's licence conditions after issue of the licence.¹³⁷

¹³³ Both submissions are available on the FMF website, at <http://www.freemarketfoundation.com/publications/the-free-market-foundations-submission-on-the-licensing-of-business-bill-2013> , and

<http://www.freemarketfoundation.com/publications/law-review-projects-submission-on-the-licensing-of-business-bill-2013> .

¹³⁴ The draft Bill would apply to every provider of any goods or services. This is wide enough to cover every grocery and greengrocer, car dealer, pharmacy, and seller of livestock. It would include every factory and wholesaler of heavy machinery and raw materials. It also includes every service provider, from lawyers and hospitals to hotels, car parks, airports, freight carriers and advertising agencies. It is doubtful if each licensing authority would exercise its powers to grant exemptions generously.

¹³⁵ The draft Bill provides no clear transitional period to enable all existing businesses to obtain licences. Licensing authorities would be swamped with applications. It is doubtful if each licensing authority will exercise its powers to grant exemptions generously.

¹³⁶ The Bill does not say that a licensing authority 'must' issue licences to businesses which satisfy the requirements. It says instead that the licensing authority 'may' issue a licence.

¹³⁷ The Bill lacks any guidelines about the conditions licensing authorities could impose.

The Bill would give officials power to seize goods. An inspector could remove any goods from premises and confiscate them. He would not have to give any reason, or have to abide by any fair procedure. This allows exercise of arbitrary power.

Draft Bill's proposed penalties are disproportionate and unconstitutional

The proposed Bill would have draconian consequences for persons convicted of contravening the counterfeit-goods, tax, food-safety or immigration laws. It would empower municipalities to order persons found guilty of contravening such a law to stop business.

Draft Bill would infringe provinces' exclusive legislative powers

The draft Bill would infringe provinces' exclusive legislative powers over licensing and control of undertakings that sell food to the public, and over street trading.¹³⁸

Draft Bill's appeal bodies would not be independent

Appeal bodies provided for in the proposed Bill would not be independent. Licensing authorities would establish their own appeal bodies to hear appeals from decisions of the licensing authorities. There was no guarantee that appeal bodies would be impartial and independent.

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¹³⁸ While the national government has power to enact legislation regulating trade, the Bill goes too far. Parliament may intervene in a matter of exclusive provincial competence, when necessary to maintain essential national standards. Yet the Bill fails to show that the national interest requires uniform national legislation about the licensing of undertakings that sell food to the public or street trading. Also, the Bill unconstitutionally delegates to the Minister a legislative power to set norms and standards nationally. The Constitution requires that Parliament should itself enact national norms when intervening in exclusive provincial matters.

About the Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit policy organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships. The Foundation is a registered Non Profit Organisation and a Public Benefit Organisation with Section 18A(1)(a) approval.