LAWLESS REGULATION

GOVERNMENT AND CIVIL SOCIETY ATTEMPTS AT REGULATING SOMALI INFORMAL TRADE IN CAPE TOWN

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Lawless Regulation

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African Centre for Migration & Society
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About the ACMS

The ACMS is an independent, interdisciplinary and internationally engaged Africa-based centre of excellence for research and teaching that shapes global discourse on human mobility, development and social transformation. The ACMS is one of the continent’s leading institutions for research, teaching and outreach on migration.
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Executive Summary

Introduction

Since the mid-1990s, Somali traders have set up numerous small informal grocery shops (also known as spaza shops) in Cape Town’s townships. While this path to self-reliance has brought benefits to a range of South African stakeholders, it has also led to threats from competing South African traders who resent the Somali presence in the spaza market. Some community members have also targeted these shops for robbery and looting because they are foreign-owned. In response to these tensions, government authorities and sectors of civil society have attempted to regulate and restrict Somali spaza shops both formally and informally.

Informally, mediations led by the police and non-governmental organisations have sought to ease the frustrations of South African shopkeepers. These meetings have generally culminated in agreements prohibiting the opening of new Somali shops in certain areas. Formal regulatory attempts have included fining Somali shops, drafting new by-laws, issuing policy statements about foreign shops, and proposing laws tightening the regulation of the spaza market. Both formal and informal measures may skirt the law, be applied in a discriminatory manner, and stifle free competition. This report examines these regulatory efforts.

Methodology

This is the third in a series of three reports examining the situation of Somali traders in the Western Cape. The first report explored Somali traders’ efforts to access justice when they were victims of crime. The second report investigated the economic aspects of Somali trade. This report turns to state and civil society attempts at regulating Somali businesses in Cape Town. All three reports focus specifically on Somali nationals because they make up the majority of foreign spaza shopkeepers in the region.1

The research covers three field sites near Cape Town: Philippi, Khayelitsha, and Kraaifontein (specifically Bloekombos and Wallacedene). It also includes more limited research on the experiences of Somali traders in small towns in the Western Cape. Sites visited included Ceres, Tulbagh, Prince Albert Hamlet, Vredenberg and Caledon.

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1 ACMS carried out research in three townships in Cape Town where residents, Somali traders and police all confirmed that the vast majority of foreign shopkeepers in their areas were Somali nationals. These observations are also reflected in local surveys. For example, a Philippi East police audit of spaza shops in their jurisdiction indicated that Somali traders operated 69.5 percent of foreign national spaza shops (57 out of 82 foreign national shops). South Africans operated 90 shops (interview with Philippi East sector managers, Philippi East, 8 November 2011). ACMS also visited a number of small towns in the province where there was a higher ratio of Ethiopian traders, but Somali traders still operated the majority of foreign national businesses.
The findings are based on qualitative interviews with 66 Somali traders: 49 who were working in townships and seventeen in small towns in the Western Cape. ACMS also interviewed South African township residents, local community leaders, police, prosecutors and members of civil society.

Findings and implications

Informal agreements restricting Somali trade in Cape Town’s townships

Government and civil society have brokered various agreements to restrict Somali shops and prices in an effort to alleviate tensions with South African shopkeepers: Masiphumelele (2006), Khayelitsha (2008), Gugulethu (2009), Philippi (2009), Philippi East (2011), and Kraaifontein (2012). These agreements raise a variety of concerns:

- Undermining the law: Agreements that fix prices or prohibit Somali nationals from opening new shops breach the Competition Act (No. 89, 1998). They also infringe upon the right to work guaranteed to refugees and asylum seekers in South Africa, as well as the rights to equality and dignity. Government involvement in illegal agreements undermines the rule of law.
- Non-enforceability: Somali community representatives lack the legal authority to enter into trade agreements on behalf of new Somali traders. As a result, the agreements are not legally enforceable.
- Providing a basis for future conflict: Although alleviating conflict in the short-term, the inability to enforce the agreements may lead to renewed tensions down the line.
- Self-help solutions: The lack of enforceability encourages parties to take the law into their own hands.
- Cartel culture: Agreements that prohibit new competition or fix prices promote anti-competitive cartel and turf mentalities.
- Corruption: Agreements are not linked to legislation and lack government oversight, increasing the risk of corruption.
- Effect on consumers: Anti-competitive practices harm the interests of consumers, many of whom live below the poverty line and struggle to cope with increasing food prices.
- Decreased income generation opportunities: By prohibiting new Somali shops in townships, these agreements deprive Somali refugees and asylum seekers of business opportunities. South Africans who receive income from Somali businesses (such as landlords) also lose out on income opportunities.
- Threat of corporate competition: The focus on restricting Somali trade rather than adapting business practices to be more competitive will make it harder in the long run for spaza shops to remain competitive against increasing competition by corporate supermarkets.
- Discrimination feeds xenophobic attitudes: Agreements that discriminatorily restrict Somali shops contribute to perceptions that foreign nationals are an illegitimate presence in the country, despite their legal basis to reside and work in South Africa.
Formal restrictions on Somali township businesses

Government sponsored measures to curb Somali businesses in Cape Town include:

- Widespread fining of Somali traders in numerous townships in the city in 2011 and 2012.
- New city by-laws passed in November 2012 that clamp down on specific shop features that are more prevalent in foreign shops.
- A 2012 ANC policy discussion document questioning whether asylum seekers should be permitted to engage in informal trade.
- A draft 2013 Licensing of Businesses Bill imposing new restrictions on informal traders.

Not all formal regulatory efforts have been legal. In some instances, police issued fines on the basis of the non-existent ‘Local Authorities Act 19 of 1974’. Despite the absence of any legal requirement, the Gugulethu municipal office has insisted that Somali traders obtain informal trading permits. The police have also used excessive force—such as teargasing and physical assaults—in carrying out some fining operations.

Conclusion and recommendations

This report sets outs and evaluates both informal agreements restricting Somali trade and more formal efforts to regulate Somali businesses. These efforts carry repercussions for foreign traders, for local communities, and for social cohesion. For foreign traders, informal regulation increases uncertainty and threatens long-term viability. For consumers, price fixing and limits on shop numbers limit consumer choice. Informal governing arrangements also encourage self-help and generate conflict among stakeholders, including Somali and South African shopkeepers, residents and landlords. New formal laws and policies also tend to overlook the conditions of foreign national traders in the city and the effect of these policies on their livelihoods.

In light of the findings of the report, ACMS makes the following recommendations:

To government departments engaged in conflict mediation (including local, provincial and national government departments):

- Develop a multi-sector response to address threats against foreign traders, taking into account the social, economic, and security aspects of the conflict.

- Develop solutions within the legal framework. Government parties should not tolerate or condone mediation outcomes that violate the law or encourage self-help.

- Refrain from encouraging foreign traders to agree to any undertakings in an environment where they are under threat of physical harm or violence.
• Ensure that mediations include all community stakeholders, including landlords and local community leaders.

• Ensure that mediators are independent and neutral.

To the South African Police Service:

• Lay charges of intimidation or incitement against South African traders who send out threatening letters to foreign traders or their landlords, who threaten foreign traders at negotiation meetings, or who attempt to physically evict foreign traders from their shops.

• Reinstate charges dropped during mediations where subsequent threats are made.

• Consult relevant municipal authorities to ensure that regulatory actions take place within the legal framework.

To the City of Cape Town:

• Promote local integration and social cohesion between migrant communities and South African nationals.

• Enhance skills development programmes for spaza shopkeepers.

• Consider implementing business advice exchanges between foreign and South African traders.

• Encourage the diversification of small businesses in townships to avoid conflict generated between traders operating similar businesses. This could be done through skills training, apprenticeships or seed funding.

• Avoid regulations that discriminate, either directly or indirectly, against foreign migrants.

• Provide accurate and consistent information to traders attempting to comply with relevant legislation.

• Consult South African and foreign spaza shopkeepers to ensure that zoning scheme regulations are sensitive to the contexts in which they work.

To the Competition Commission

• Investigate anti-competitive horizontal practices, price fixing and market division.
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• Raise public awareness amongst police, mediators, and foreign national and South African traders about prohibited trading practices in accordance with its mandate to ‘implement measures to develop public awareness of the provisions’ of the Competition Act.²

To the Department of Trade and Industry regarding future legislation aimed at regulating informal trade:

• Limit the discretion of state officials in legislation regulating informal trade to avoid opportunities for corruption and discrimination.

• Consider implementing a registration rather than a licensing process to minimize opportunities for abuse.

• Provide a mechanism for traders to report corruption or discrimination in the licensing process.

• Establish clear, accessible, and low-cost application or registration processes so that informal traders with less informational and financial resources are able to comply.

• Promote compliance by providing education and assistance.

• Ensure that requirements enhance business certainty by, for example, facilitating license renewals and minimizing the required frequency of renewals.

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² Competition Act, Section 21(1)(b).
Introduction

Somali nationals began migrating to South Africa in significant numbers in the mid-1990s, most seeking refuge from the civil war in their home country. Many have opened small businesses to support themselves. Their most common business venture is the informal grocery or spaza shop. These shops have brought economic benefits to Somalis and South Africans alike, but not all community members have welcomed their presence. As a result, Somalis have been frequent targets of regulatory efforts to restrict their trade.

These restrictions have come in response to several developments: vocal opposition from competing South African spaza traders, perceptions that Somali shops threaten poor South Africans’ economic opportunities, and crimes targeting Somali shops. In Cape Town, regulatory efforts by government and civil society have resulted in informal agreements between South African and Somali business representatives that prohibit new Somali shops from opening in townships. National and local government institutions have turned to more formal mechanisms such as fines and trade regulations. This report examines the efficacy of these formal and informal responses and their implications for conflict resolution and social cohesion.

This is the third in a series of three reports examining the situation of Somali traders in the Western Cape. The first report focused on the access to justice dimension of the Somali experience in the Western Cape—in particular Somali traders’ ability to access formal and informal justice mechanisms in the aftermath of crime. The second report examined the economics around Somali businesses, describing Somali business practices and the role of these businesses in local economies. This report explores the socio-political dynamics around these businesses, investigating various government and civil society interventions aimed at regulating Somali shops.

The first section of the report briefly outlines the research methodology. The second section describes the background of Somali migration to South Africa and the legislation governing spaza business operations. The third section turns to informal agreements between South African and Somali business representatives, and the final section examines attempts to formally regulate Somali traders.
Research Methodology

Introduction

The report’s findings are based on field research conducted over two periods totalling twelve months: from September 2010 to February 2011, and from October 2011 to March 2012. The primary field sites were located in three townships:

1. Kraaifontein: Bloekombos and Wallacedene
2. Philippi: Philippi East and Browns Farm
3. Khayelitsha: Site B, Site C and Harare

While conducting in-depth qualitative research in these areas, the field researcher also spent significant time in Somali residential neighbourhoods in Mitchells Plain and Bellville, where many of the Somali traders from the field sites preferred to be interviewed. Bellville is located approximately 25 kilometres from Cape Town’s city centre, and Mitchells Plain lies approximately 30 kilometres from the city centre.

In all of the main sites, the researcher interviewed Somali shopkeepers, residents and members of the formal and informal justice sectors, including police, prosecutors, legal aid practitioners, and local community leaders. Prior background research of the field site areas helped to inform these interviews. In addition to site interviews, the researcher observed mediation meetings between Somali and South African traders.

Choice of field sites

Because the initial research targeted access to justice in the aftermath of crime, field sites were linked to the levels of crime against Somali traders in the area. Given the lack of public police statistics on crime rates against foreign shopkeepers, ACMS selected the field sites on the basis of information provided by the Somali Association of South Africa (SASA), a Somali community organisation operating in Cape Town, Johannesburg and Port Elisabeth.

SASA identified Kraaifontein and Philippi as crime hot spots, corresponding with media reports, but advised that crime rates against foreign shopkeepers in Khayelitsha had decreased. Accordingly, ACMS initially envisioned Khayelitsha as a useful comparison point through which we could potentially identify factors that contributed to this decrease. However, during the course of the research it became clear that Somali shopkeepers in Khayelitsha also experienced disproportionate levels of crime, especially robbery and looting, though crimes orchestrated by South African traders appeared to be less frequent. ACMS retained Khayelitsha as a field site because we deemed the absence of crime orchestrated by South African traders...
to be an important feature for comparison. ACMS was unable to identify any townships in the Cape Town area where general crime rates against foreign shopkeepers were low.³

A few interviews were also conducted with Somali traders working in Masiphumelele and Gugulethu, where significant government and civil society regulatory interventions have taken place.

**Interviews**

ACMS interviewed 66 Somali shopkeepers, and 65 South African township residents (including nine South African shopkeepers and six landlords). The interviewees also included policemen, legal aid attorneys, and prosecutors, as well as members of civil society and other stakeholders. Interview questions were both specific and open-ended. All interviewees gave informed consent after the researcher explained the nature of the research. All interviews were kept confidential, and interviewees were free to stop the interview at any time.

<table>
<thead>
<tr>
<th>Area</th>
<th>Somali traders</th>
<th>SA residents</th>
<th>SA traders</th>
<th>Police</th>
<th>Landlords</th>
<th>Legal Aid</th>
<th>Prosecutors</th>
<th>Other stakeholders</th>
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<td>20</td>
<td>7</td>
<td>4</td>
<td>4</td>
<td>13</td>
</tr>
</tbody>
</table>

Somali shopkeepers spoke about their experiences with crime and with the justice system. Many also spoke about regulatory schemes set up in their neighbourhoods to address conflict between South African and Somali traders. Most interviews with Somali traders took place in neutral locations in Bellville and Mitchells Plain, where many Somali nationals reside, and where some also do business. The shopkeepers preferred that the interviews take place away from their shops for a range of reasons: they felt uncomfortable responding to questions in front of customers, they did not like being interrupted while serving customers, and they did not want to draw attention to themselves.

Initially, Somali interviewees were identified through SASA. The initial interviewees then identified additional potential interviewees. The researcher conducted each interview individually, as Somali traders had particular experiences of crime, and group situations would make accurate recording of chronological and specific events difficult.

³ This assessment was made via speaking to Somali traders working in different townships across Cape Town, as ACMS did not have access to comprehensive statistics on crime affecting foreign traders in the city.
In addition to Somali traders, ACMS also interviewed South African residents in the three primary field sites. Residents were asked about their perceptions of Somali shopkeepers. They were also asked their views on the community structures that dealt with crime. During these interviews residents spoke about informal arrangements limiting the number of Somali shops in their neighbourhoods.

The interviews covered a wide demographic of residents as possible, including young, middle-aged and elderly residents—both male and female. ACMS identified some community leaders in Philippi and Khayelitsha via referrals from residents. The field researcher also spoke directly with individuals who happened to be on the streets while she was in the field site. This approach was chosen over the snowball technique in order to obtain a more random, broad spectrum of opinion that would not limit the respondents to particular social networks.

Interviews with South Africans were conducted both individually and in groups, depending on whether residents were encountered alone or with friends or family. The research did not rely on focus groups because community divisions over foreign shops might have inhibited residents from sharing their views. Most interviews were conducted on weekends in order to access both employed and unemployed South Africans. Where residents could not speak English, interviews were carried out with the assistance of a translator.

Community workers in both Philippi and Kraaifontein cautioned that conducting research in the field sites could reinvigorate dormant conflicts. This risk was greatest with South African shopkeepers, many of whom had previously attempted to forcibly remove foreign shopkeepers from all three of the field sites. Some had also allegedly ordered the murders of their Somali competitors. To minimise the risk of reviving these resentments, the researcher conducted only a limited number of interviews with South African shopkeepers and relied largely on observations made during attendance at four open meetings hosted by police in Khayelitsha. South African shopkeepers from several different townships attended these meetings to voice their concerns.

**Participant observation**

As mentioned above, the field worker attended four meetings hosted by police in response to intimidation from South African traders threatening to forcibly close Somali shops. The meetings, held in Khayelitsha, concerned a 2008 agreement between Somali and South African traders prohibiting the opening of new Somali shops in Khayelitsha. South African traders from Khayelitsha and the neighbouring townships of Mfuleni and Nyanga voiced their concerns about Somali shops at these meetings. The police and local government authorities worked to mediate tensions.

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4 This concern was raised by a representative of a non-profit organisation in Philippi, and by a city-appointed mediator in Kraaifontein.

5 Police detectives in Philippi East and Kraaifontein informed ACMS that South African traders had orchestrated attacks on Somali traders in the area. In 2010, police arrested five South African traders who were linked to 33 criminal cases involving attacks on Somali shops in Kraaifontein.
Background on the Somali presence in the Western Cape

Somali nationals have come to South Africa predominantly as asylum seekers, and many have since acquired refugee status. The first Somalis in Cape Town began as hawkers in the city centre and other business districts. They eventually entered the township spaza shop market, seeking out better market opportunities and less stringent business start-up regulations. This background chapter discusses Somali migration to South Africa and their path to entrepreneurship. It also sets out the legislative framework governing spaza shops in Cape Town’s townships.

Somali migration to South Africa

Somali migrants began arriving in the country in the mid-1990s, after the emergence of democracy in South Africa. Most of them were fleeing the civil war that erupted in 1991 following the collapse of dictator Siad Barre’s government. Some Somalis also fled from the Somali Region of Ethiopia (also referred to as the Ogaden Region), where the Ethiopian government has carried out large-scale political repression and human rights abuses.6

According to Somali respondents, migration to South Africa intensified following the Ethiopian invasion of Somalia in December 2006. The invasion ousted the ruling Islamic Courts Union, sparking the rise of al-Shabaab and leading to renewed conflict.7 The increased violence and warfare triggered a second wave of migration to South Africa from mid-2007, made up of Somalis primarily from the areas surrounding Mogadishu, where most of the fighting took place.8 The second wave of migration has slowed down considerably since 2012.9

Somali business operations in Cape Town

Somali traders are engaged in diverse business activities in townships and formal central business districts (CBDs). Somalis initially worked in the city’s central business districts, including the city centre, the Mitchells Plain town centre and the Bellville train station area. Often, they started out as hawkers selling socks, belts, sandals, snacks or cigarettes. Today these businesses have grown and diversified. Cape Town’s city centre houses many Somali internet cafes, grocery stores, clothing shops, and restaurants. Mitchells Plain and Bellville now have densely populated Somali neighbourhoods with Somali-owned grocery stores,

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furniture and upholstery shops, clothing shops, restaurants, cafes, bulk cash and carry stores, internet and printing shops, travel agents, laundrettes, and guest houses.

Somali traders eventually sought business opportunities in the township spaza market. Spaza shops are small, informal stores that provide basic food and household items such as bread, milk, sugar, cooking oil, soft drinks and cigarettes. The earliest Somali traders began opening spaza shops in townships in the mid to late 1990s. These shops became a noticeable presence in the townships in the early 2000s. Somali traders favour the township spaza market because of the untapped business opportunity, the low start-up costs, and the informal business environment, where permit and paper requirements are low or non-existent. Two Somali traders also pointed to increasing competition from Chinese traders in the clothing market as pushing them into the grocery market.

Spaza shop owners or their employees usually sleep in their shops, or in separate rooms attached to the shops to defend against robberies. The wives and children of Somali shop owners and employees generally do not live in township areas, but in Somali neighbourhoods in Bellville and Mitchells Plain. Somali women often oversee businesses in these neighbourhoods, which include clothing and fabric shops, restaurants and street stalls.

The expansion of Somali shops in Cape Town’s townships has met with local backlash, especially from competing South African spaza shopkeepers. South African shopkeepers have on numerous occasions sent out notices to Somali traders instructing them to close their businesses and leave the area. Police and Somali traders also suspect them of orchestrating the murders of competing Somali traders by paying youths to shoot at them or set their shops alight. These tensions have encouraged government and civil society to find ways to regulate township trade both informally and formally.

Laws regulating spaza shops in Cape Town’s townships

The primary laws governing spaza shops include zoning, health and tax regulations. Cape Town’s zoning scheme regulations, which came into effect in 2013, distinguish between single residential 1 and 2 zones. Areas that are zoned single residential 2 automatically permit house shops subject to conditions around shop size, operating hours, and the sleeping arrangements of shopkeepers. Areas that are zoned single residential 1 require zoning permission from the city’s Planning and Building Development Department to open a house shop.

12 Interview, Tulbagh Somali trader, Tulbagh, Western Cape, 1 March 2012. Interview, Vredenburg Somali trader, Vredenburg, 8 March 2012.
14 Interview, Kraaifontein police detective, Kraaifontein, 1 December 2011. Interview, Philippi East detective, Philippi East, 1 December 2011. Many Somali traders interviewed believed that certain attacks on their shops had been orchestrated by competing South African traders.
Shopkeepers whose premises do not comply with zoning provisions need to apply for rezoning, departure, or consent use. These applications can be complex and costly, as they involve drawing up building plans, obtaining conveyancers’ certificates, and in the case of re-zoning, the payment of advertising fees of over R5000. Zoning departures, while less expensive, lapse after a few years and must be renewed.

While the zoning scheme regulations explain that properties are zoned as single residential 1 or 2 based on the property size and degrees of infrastructural and housing formality, an examination of the city’s zoning map reveals that residential zoning also depends largely on the historical racial profile of the areas.\footnote{City of Cape Town’s zoning viewer, available at https://www.capetown.gov.za/en/Planningportal/Pages/Disclaimer.aspx, date accessed 26 January 2015.} Except for some pockets of shack settlement, residential areas that were previously categorised as white and coloured tend to be zoned single residential 1. Black townships such as Gugulethu or Khayelitsha are zoned single residential 2, despite the fact that these townships cover diverse income levels and degrees of formality. This sometimes confuses spaza shopkeepers who assume laws governing their shops in low-income and informal areas are uniform.

Apart from complying with zoning regulations, spaza shops selling foodstuffs must obtain a certificate of acceptability from the city’s Department of Environmental Health in accordance with the ‘Regulations Governing General Hygiene Requirements for Food Premises and the Transport of Food’.\footnote{Regulation No 962 of 2012 enacted under section 15(7)(b) the Foodstuffs, Cosmetics and Disinfectants Act (No. 54, 1972). These certificates are relatively easy to obtain.} Traders who earn above the tax threshold must also register with the South African Revenue Service (SARS). The legal requirements for spaza shops therefore vary depending on the circumstances of each shop.

Additional permitting requirements do not apply to spaza shops. According to the City of Cape Town, the Business Act (No. 71, 1991) requires only those businesses that sell prepared meals, prepare food on site, or provide health and entertainment services to obtain business licenses.\footnote{City of Cape Town Environmental Health Department webpage titled ‘licensing and certification’, available at https://www.capetown.gov.za/en/CityHealth/EnviroHealth/FoodQualityandSafety/Pages/LicencingandCertification.aspx, date accessed 20 January 2015.} The city’s informal trading by-laws only require trading permits in designated trading areas where the city has adopted a trading plan to regulate trade.\footnote{Section 8, City of Cape Town: Informal Trading By-Law, Provincial Gazette No. 6677, 20 November 2009, available at http://openbylaws.org.za/za/by-law/cape-town/2009/informal-trading/, date accessed 26 January 2015.}

Cape Town city officials have generally been reluctant to enforce regulatory requirements in townships. For instance, prior to the enactment of the new zoning regulations in 2013, government officials characterised the study’s township field sites as ‘free trade areas’.\footnote{Speech given by Law Enforcement official at meeting between Somali and South African traders, Khayelitsha, 20 March 2012. Interview, City of Cape Town Land Use Planning official, Kraaifontein, 11 January 2011. Interview, Khayelitsha police official, Khayelitsha, 25 October 2011. Interview, Harare police official, Harare, 7 December 2011.} This lack of regulation enabled traders with relatively little education and income to more easily set up businesses. New legislation has increased confusion over the legal status of spaza shops.
Conclusion

The Somali community in Cape Town comprises primarily asylum seekers and refugees who fled political repression and civil war. Although Somali traders engage in diverse business activities, township spaza shops are their most common enterprise. Low regulatory requirements and weak enforcement have facilitated entry into the spaza shop market. At the same time, the growth of Somali shops in townships has drawn unfavourable attention from South African spaza shopkeepers fearing increased competition. The following chapter will examine police and civil society responses to threats against Somali traders, which have largely taken the form of informal trade agreements between South African and Somali retailer associations.
Informal Trade Agreements

South African shopkeepers have forged informal associations to intimidate Somali shopkeepers into closing their businesses, often by sending letters or leaflets [see annexures] imposing a deadline for closure. In response, government and civil society groups have convened meetings to assuage South African shopkeeper grievances. These meetings have frequently given rise to informal trade agreements that allow existing Somali traders to operate while preventing new shops from opening. In at least one instance, mediators also recommended that Somalis raise their prices to match South African prices. Outnumbered by their South African counterparts, Somalis traders had little bargaining power and reported feeling compelled to accept these conditions to avoid violence and keep their businesses open. This chapter explores the origins and implications of these agreements.

History of anti-competitive agreements

Agreements prohibiting new Somali shops go back as far as 2006, but they have become largely inactive since late 2012 as a result of declining Somali migration. They nonetheless raise critical questions around government and civil society approaches to managing migration. This subsection describes the events that preceded these informal trade agreements.

Masiphumelele 2006

The earliest Cape Town area agreement prohibiting new Somali shops that ACMS identified was negotiated in Masiphumelele (near Fish Hoek) in 2006. The agreement came in the aftermath of riots reportedly instigated by South African shopkeepers and leaving 50 Somali traders homeless. As a result, the Directorate for Social Dialogue and Human Rights under the office of the Western Cape Provincial Premier intervened and appointed two NGOs—Africa Unite and the Islamic Relief Worldwide—to mediate between South African and Somali traders.

The language of the official report documenting the conflict resolution process suggests that the provincial government held two underlying assumptions. First, the report insinuates that townships belong to South African nationals and that foreigners are not fully entitled to be there, despite their legislated rights to work and reside anywhere in the country. For example, it critiques the ‘influx’ of Somali shops into

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20 For example, at a 7 March 2012 meeting about Somali shops, ACMS counted 75 South Africans (primarily shopkeepers) and ten Somali community representatives.
24 Report by the Provincial Government of the Western Cape, supra note 22 at 6.
25 Ibid at 20.
Lawless Regulation. Government and Civil Society Attempts at Regulating Somali Informal Trade in Cape Town

Masiphumelele, describing the opening of several new shops in the area as an ‘invasion’. The report also refers to Masiphumelele as ‘borrowed space’ for Somali traders, suggesting that the neighbourhood is the preserve of South Africans and Somalis do not have a legitimate right to settle there.

Second, the report assumes that small businesses operated by foreigners pose a threat to the economic interests of poor South Africans. Characterising low prices at Somali shops as ‘unfair competition,’ the report points to the call by mediators for a follow-up meeting ‘to inter alia tackle issues of pricing.’ The report fails to take into account the interests of consumers who benefit from lower prices, as well as landlords, many of whom rely on rent paid to them by Somali tenants for their economic survival. Instead, it describes landlords as being inconsiderate to the community:

Landlords operate from a different power base as the ordinary person who is landless. Landlords also have the power to abuse this privilege, which might often lead to an attitude of oblivion with regard to the aspiration for social and economic justice.

The report warns that, as in Masiphumelele, ‘other communities in the Western Cape are up in arms over a perceived take-over by Somali refugees and a noticeable threat to their economic survival.’

Africa Unite ultimately brokered an agreement between South African and Somali traders that Somalis would not open any new shops in Masiphumelele. This solution rested on the notion that the best way to address the conflict was to control the perceived influx of Somali shops. This approach of limiting Somali shops has defined conflict interventions across Cape Town as well as in the Western and Eastern Cape provinces.

Khayelitsha 2008
On 22 August 2008, the Zanokhanyo Retailers Association ('Zanokhanyo'), representing shopkeepers in Makhaza, Khayelitsha, distributed hundreds of letters to Somali shopkeepers in Khayelitsha ordering them to close their shops for 21 days from 25 August until 14 September 2008. The letters stated that during this period they would attempt to find ‘a solution for the influx of your shops’. Police responded by arresting several members of Zanokhanyo. To avoid prosecution, the members agreed to halt their demands that Somali shopkeepers leave. South African Police Service (SAPS) officials encouraged Zanokhanyo to enter into a mediation process with representatives of the Somali community, as well as with the South African National Civic Organisation (SANCO), an umbrella body for township street committees, which represented

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26 Ibid at 16.
27 Ibid.
28 Ibid at 25.
29 Ibid at 31.
30 Ibid at 47.
31 Ibid at 48.
33 Original letter from Zanokhanyo Retailers Association dated 22 August 2008 (on file with author).
Khayelitsha shopkeepers outside Makhaza. SAPS appointed a reverend involved in counter xenophobia efforts to mediate.

The process resulted in a signed agreement dated 27 November 2008 prohibiting any new shops from opening in Khayelitsha (an area with approximately 400,000 residents) without the approval of the Zanokhanyo Retailers Association and the Somali Retailers Association. A member of the Somali Retailers Association complained:

> We signed the agreement in Khayelitsha out of pressure from local people. Even though it was agreed it came out of pressure from local people. People will ask ‘why are Somalis signing these agreements?’ That is probably the answer then. You have to say ‘yes yes’ otherwise you know, someone can even shoot you.

Although the written agreement applies to all shops—both South African and Somali—Somalis lacked the power to force new South African shops to close. South Africans, on the other hand, made numerous attempts to enforce the agreement. For example, in March 2012 members of Zanokhanyo ordered several Somali shopkeepers to close their shops and remove their stock. Some members broke into the shops, began removing stock themselves, and physically assaulted Somali traders.

Numerous meetings followed these closure attempts, with the participation of the City of Cape Town, SAPS and representatives from the United Nations High Commissioner for Refugees (UNHCR). At one meeting, Sibongile Mbotwe (the special advisor to the national Minister of Police Nathi Mthethwa) urged Somali traders to comply with the 2008 agreement, stating:

> The beauty of Khayelitsha post 2008 is this agreement. We must ask the Somalis to give an audit of shops in 2008 and we start from there. Then we go to the community and speak to them. We say we want to avoid 2008 and we therefore reached an agreement. The police will come and make sure the agreement is enforced in each and every community.

The community was not united around support for the Khayelitsha agreement. The councillor of ward 98 in Khayelitsha was critical of the agreement because residents benefited from the rents paid by Somali traders. Many residents also protested against attempted closures of Somali shops in their

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34 Interview, Khayelitsha community activist, Cape Town, 12 March 2011.
35 Interview, Representative of the Somali Retailers Association, Bellville, 14 November 2010.
36 Copy of agreement signed by Zanokhanyo Retailers Association and the Somali Retailers Association dated 27 November 2008 (on file with author).
37 Telephone interview, Somali Retailers Association representative, 2 August 2012.
38 Telephone interview, Somali Retailers Association representative, 21 August 2012.
39 ACMS could not find out who called these meetings.
40 Statement by Sibongile Mbotwe, Meeting in Khayelitsha, 7 March 2012.
41 Interview, ward 98 councilor, Khayelitsha, 22 June 2012.
neighbourhoods. In some instances, interventions by local residents prevented shop closures. But SANCO continued to support restrictions on Somali businesses.

Gugulethu, 2009

In May 2009, South African shopkeepers sent threatening leaflets to Somali shopkeepers in Gugulethu ordering them to close their shops. Although aware of the leaflets, the police did not make any arrests after a group of South African shopkeepers from Gugulethu quickly approached them to negotiate. Police appointed a local NGO, the Anti-Eviction Campaign (AEC), to act as mediator.

On 17 June 2009, the Gugulethu police and the AEC convened a meeting. The meeting ended with the formation of a ten-person committee with equal Somali and South African representation. The committee was tasked with developing recommendations to address the South African shopkeepers’ grievances, which included:

- Somali traders sold their goods at much cheaper rates.
- Somalis opened their shops close to existing local shops, and consumers would then choose the Somali shops because of their cheaper prices.
- South African shopkeepers were forced to close their shops because they were unable to compete with Somalis.
- Somalis kept to themselves and were not involved in South African communities.

Three hours after the meeting, one of the five Somali committee members was murdered by an unknown assailant. In a follow-up meeting, Community Safety MEC Max Lennit explained that the police would do all they could to bring the murderer to justice and would not tolerate any further violence. Three years after the murder, a former Somali committee member reported that the case remained unsolved.

The Gugulethu agreement states that the committee jointly came up with a ‘four point resolution’ with restrictions on Somali shops, but a trader representing the Somali Association of South Africa claims that members of the Anti-Eviction Campaign distributed these printed restrictions in advance at one of their meetings. The restrictions state that:

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43 Interview, ward 98 councillor, Khayelitsha, 22 June 2012.
44 Agreement titled ‘Draft mutual agreement between Somali and local traders in Gugulethu and other communities in the Western Cape Province aimed at resolving trade conflict’ and dated 6 August 2009. The agreement outlines events that took place in Gugulethu between May and August 2009 (on file with author).
45 Ibid.
46 Ibid.
47 Telephone interview, Somali Association of South Africa representative, 2 August 2012.
48 Ibid.
1. The distance between the South African and Somali shops must be at least 100 metres;
2. No Somali shops are allowed to open until further notice;
3. The distribution of shops must be 70 percent South African and 30 percent Somali; and
4. Prices of basic items such as bread, paraffin, and milk must be the same in both Somali and South African shops.  

Somali representatives indicated that they needed to consult the Somali community about these restrictions. During these consultations, Somali shopkeepers complained about moving their shops in accordance with the 100 metre distance requirement. Many had invested significant savings into their businesses and could not easily move elsewhere. They also rejected the price fixing demands:

You cannot fix the price because me and you and somebody else we are not buying the groceries at the same place. There are a lot of wholesalers where people are buying their goods. There are different wholesalers in Cape Town with different prices. There are different manufacturers with different prices... One person is buying in bulk; one person is buying only two or three items. So the prices can never be the same... So the issue of pricing I told them this thing is not possible. But they were insisting that thing to be there.

In July 2009, South African traders called for additional negotiations after the Somalis failed to comply with the four conditions. Somali representatives initially refused. They eventually resumed negotiations after UNHCR encouraged them to participate to avoid further conflict. The meetings were characterised by threats of violence; inconsistent police attendance increased Somali feelings of insecurity. After one particularly contentious meeting, Somali community representatives again decided to stop attending, in part bolstered by the vocal support of residents at the meetings who rejected the proposed trade restrictions.

Media reports state that the agreement was signed on 17 August 2009. The Somali Association of South Africa denied signing the agreement and told ACMS that it had never seen a copy of the final agreement. An association representative believed that any Somali trader who signed the agreement did so ‘out of pressure’. The AEC only provided ACMS with an unsigned copy of the agreement, making it impossible to identify the signatories.

49 Gugulethu agreement, supra note 44.
50 Telephone interview, Somali Association of South Africa representative, 2 August 2012.
51 Interview, Somali Retailers Association representative, Bellville, 10 January 2011.
52 Ibid.
53 Telephone interview, Somali Association of South Africa representative, 2 August 2012.
54 Ibid.
55 Ibid. Interview, Somali Association of South Africa representative, Bellville, 26 October 2012.
57 Telephone interview, Somali Association of South Africa representative, 2 August 2012.
58 Ibid.
In subsequent media coverage, a Competition Commission spokesperson told the Cape Times that not all agreements restricting competition violated competition laws. The spokesperson added that the Commission had not received a complaint, but it could initiate its own investigation if there was ‘reason to believe the law is being breached’.  
Neither the complaint nor the investigation mechanism was ever initiated.  
Other Cape Town area sites where ACMS identified anti-competitive agreements included Nyanga, Philippi, Kraaifontein (Wallacedene and Bloekombos), Mfuleni, and the Strand.

Agreements beyond Cape Town

Agreements prohibiting Somali nationals from opening shops extend beyond Cape Town. In 2011, agreements in a number of townships in the Saldhana Bay municipality prohibited new Somali shops. A 2009 agreement prohibited new Somali shops in Mbekweni, near Paarl. In the Eastern Cape, a March 2011 agreement in Motherwell, outside of Port Elizabeth, required existing Somali traders to register their shops with the ‘Port Elizabeth Spaza Forum of South Africa’ and allowed the forum to close any future Somali shops. In July 2012, municipal law enforcement officials in the Nompumelelo township in Bhisho fined a Somali shopkeeper for contravening a 2010 agreement prohibiting new Somali shops in the area that had been signed by local residents, members of the Somali community, and Buffalo City Metro Law Enforcement officials. The Provincial MEC for Local Government and Traditional Affairs led a delegation to Nompumelelo to address angry residents who threatened to loot the new shop and concluded that limits on Somali shops were justified and should be enforced.

Following coverage of the 2009 Gugulethu agreement, UNHCR’s Cape Town office reportedly received calls from across the country requesting help in establishing similar dialogues in communities affected by xenophobic unrest. A UNHCR representative stated that other communities could use the agreement ‘as a blueprint, but only if the implementation is correct’. Echoing this sentiment, a member of the Anti-Eviction Campaign described how he advocated for the 2009 Gugulethu agreement to be adopted by South African shopkeepers throughout the Western Cape and had been in touch with South African shopkeepers as far as the North West and Limpopo provinces.

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59 Quinton Mtyala, ‘Somalis refuse to sign “one sided” deal for spaza owners’ Cape Times (Monday 17 August 2009).
60 Telephone inquiry, Competition Commission representative, 18 March 2011.
61 Interview, Group of Somali traders, Vredenberg, 20 February 2012.
62 Ester Lewis, ‘We’ll close down illegal spazas’ Cape Argus (8 February 2011), at 4.
63 Luyolo Mkentane, ‘Somalis to register with spaza body’ The Herald (25 March 2011) at 24.
67 Quinton Mtyala ‘Somali and local shopkeepers strike deal on peace’ Cape Times (20 August 2009).
68 Ibid.
69 Interview, Mediator representing the Anti-Eviction Campaign, Gugulethu, 16 November 2010.
Dormancy of agreements in Cape Town post-2012
Somali entry into the spaza shop market has been declining since 2012 as a result of reduced migration levels and alternative business pursuits. Many Somali traders have turned to business opportunities in small towns or more formal areas such as Bellville or the Cape Town city centre. As a result, there is currently little need for agreements limiting the Somali presence in the township spaza market and existing agreements have largely become dormant. They may, however, be revived if circumstances change.

The legality of agreements

Although informal trade agreements may be well-intentioned, they breach numerous South African laws. Government involvement further undermines the rule of law. These agreements conflict with the Constitution (No. 108, 1996) and with laws protecting consumer and migrant rights, including the Competition Act (No. 89, 1998) and the Refugees Act (No. 130, 1998). The agreements are also unenforceable under contract law. The relevant laws are set out below.

The Competition Act
Section 4 of the Competition Act prohibits any agreement between business competitors that substantially lessens or prevents competition in a market. The Act also prohibits competitors from dividing markets (for example by allocating each other business territories) or fixing prices.

Agreements between Somali and South African business competitors that forbid new Somali businesses from opening in certain neighbourhoods stifle competition. To the extent that agreements prohibiting new Somali shops divide markets by allocating territories to South African traders, they may be establishing illegal market division. Finally, agreements that fix the prices of basic items such as milk or bread engage in illegal price fixing.

Laws protecting refugees and asylum seekers in South Africa
The Constitution grants all individuals, including asylum seekers and refugees, the rights to equality and dignity. The Refugees Act grants refugees the right to seek employment. The Supreme Court of Appeal

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70 Many of the Somali spaza shopkeepers that the ACMS researcher interviewed in 2010 and 2011 eventually left the market, opting to seek formal employment (for example with South African businesses that supplied Somali shops and restaurants), or open businesses in formal central business district areas. Many of the traders in small towns had moved from cities in search of safer places to work.

71 Section 9(1) of the Constitution provides that ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’ (emphasis added). The Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4, 2000) was enacted to give effect to the right to equality set out in the Constitution. Section 6 of the Equality Act provides that: ‘Neither the State nor any person may unfairly discriminate against any person’. Section 10 of the Constitution states that ‘Everyone has inherent dignity and the right to have their dignity respected and protected’ (emphasis added). Agreements prohibiting Somali nationals from opening shops therefore unlawfully discriminate against them on the basis of their national origin. Discrimination also affects the dignity of Somali traders.

72 Refugee Act, Section 27(f).
has upheld asylum seekers’ right to work, linking it to the constitutional right to dignity and clarified that refugees and asylum enjoy the right to seek self-employment, including engaging in informal trade. Agreements prohibiting Somalis from opening new shops discriminate on the basis of nationality while infringing upon their right to work and associated right to dignity.

The legal enforceability of agreements
Contract law prevents parties from placing detrimental obligations on a third person who was not party to the agreement. Accordingly, agreements prohibiting new Somali shops are not binding on Somali shopkeepers who entered the market after the agreements had been finalised.

The effectiveness of agreements in preventing violence
The driving factor behind informal trade agreements is alleviating the threat of xenophobic violence. It remains unclear, however, whether these agreements resolve hostilities in the long term or reduce crime against Somali nationals.

SAPS statistics show that township business robberies (with foreign nationals making up most victims) have been increasing in Cape Town since 2006, including in areas with agreements in place. Orchestration attacks on Somali shops by South African competitors (including murders and arson attacks) decreased in Kraaifontein and Philippi East in 2010 and 2011 respectively. Police in both Philippi East and Kraaifontein attributed these reductions to the arrests of suspected conspirators, and not to the prohibition of new Somali shops. Somali community representatives also credited police action and arrests with motivating powerful South African township business owners to turn from violence to political pressure to combat competition. These business owners mobilized community structures (such as SANCO and political party branches) to pressure Somalis into signing informal agreements aimed at reducing trade competition. In Kraaifontein, the agreement limiting shops was entered into in January 2012 – more than a year after the arrest of key conspirators and the reduction of orchestrated attacks in the area in late 2010.

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73. Minister of Home Affairs and Others v Watchenuka and Others, 2004 (1) All SA 21 (SCA) 28 November 2003. The SCA found that a blanket prohibition on asylum seekers’ right to work was unlawful on the basis of human dignity.

74. Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism 2015 (1) SA 151 (SCA) (26 September 2014) at para 43 sets out that refugees and asylum seekers enjoy the right to seek self-employment, including engaging in trade.

75. SW Van der Merwe et al, Contract: General Principles (2004) 2nd ed, Juta, Landsdowne at 244.

76. SAPS police station figures per province 2003 to 2013, available at http://www.saps.gov.za/statistics/reports/crimestats/2013/crime_stats.htm, date accessed 26 February 2014. SAPS statistics do not set out the nationality of victims, but police interviewed in the study’s field sites indicated that foreign nationals made up the vast majority of business robbery victims in their jurisdictions. Similarly the Western Cape Provincial Commissioner of Police stated in parliament on 8 February 2012 that only 33% of reported business robbery victims in the Western Cape were South African citizens. The remaining victims were foreign nationals. SAPA, ‘Foreigners streaming into the Western Cape’ News24 (8 February 2012) available at http://www.news24.com/SouthAfrica/News/Foreigners-streaming-into-Western-Cape-20120208, date accessed 20 January 2014. SAPS confirmed the statistic in a letter dated 25 February 2013.

77. There are no public SAPS statistics on orchestrated crimes against foreign traders, but police detectives and Somali community representatives reported reductions.

78. Interview, Kraaifontein detective, Kraaifontein, 1 December 2011.
While agreements may not reduce crime, they do serve to quell anger and build relationships between South African and Somali traders, at least in the short term. At several meetings in Khayelitsha called in response to renewed threats against Somali traders, South African traders vented their frustrations while Somali community representatives reinforced their commitment to implementing agreements. These interactions temporarily reduced animosity and improved relations. The resulting peace, however, was brief. After the agreements proved to be unenforceable, conflict re-emerged in Khayelitsha in 2010 and 2012, and in Gugulethu in 2011.

Because the agreements lack any legal basis, parties cannot turn to the police or the courts for enforcement. New Somali shopkeepers have resisted attempts by members of the Somali Retailers Association to close down their shops in Khayelitsha. A Somali Retailers Association representative explained:

> Because if it [the agreement] was in 2008 and this person comes in 2009, he says ‘No I was not there when you were doing this agreement, so I want to do my own thing’.... and he has a right from the government. He will show you the paper that says he has a right to go and seek employment, study and work. So it becomes a problem for you to stop him.\(^{79}\)

The price fixing provisions also proved difficult to implement, as South Africans traders could more easily ascertain the prices that Somalis charged and undercut them. A Somali trader from Gugulethu reported that all attempts at price fixing in the area came to an end in January 2010 following the opening of the Gugulethu Square shopping centre, which contained a Shoprite and a Spar supermarket.\(^{80}\) In order to remain competitive, spaza shops had to abandon the higher fixed prices.

The mediating effects of trade agreements were limited, as neither the police nor Somali community representatives could prevent Somalis from opening new shops. These violations led to renewed threats and mobilisations against Somali traders and repeated meetings where stakeholders voiced blame against a range of parties (including the police, Somali community representatives, the municipality, new Ethiopian traders, customers, and landlords) for the lack of enforcement.

### Concerns arising from agreements

Apart from being illegal and playing an ambivalent role in reducing conflict, informal trade agreements prohibiting Somali shops raise additional concerns.

**Cartel culture**

Informal agreements have created cartel mentalities amongst both South African and Somali shopkeepers. Although they target Somalis, the agreements also favour established Somali traders by keeping new

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\(^{79}\) Interview, Bellville, 10 January 2011.

\(^{80}\) Interview, Gugulethu Somali trader, Gugulethu, 1 February 2012.
competitors out of the market. Police at the Harare Station in Khayelitsha reported that established Somali traders could open as many shops as they wished but the agreement kept new traders out. As a result, some Somali shopkeepers who initially adopted anti-competitive practices to appease South African businessmen and promote peace now support these practices as a means of keeping competitors away. In this way, what were initially adopted as peacekeeping measures have acquired the character of collusive arrangements.

**Reliance on self-help measures**

The agreements also increase the risk of violence. Unable to turn to the courts or the police for enforcement, participants may adopt their own enforcement measures. One immigrant rights activist noted:

> If people want a system where a spaza businessman can dictate the prices or have cartel system it will become a market for gangster-like behaviour... If we are not careful, it can spiral out of control like we saw with the taxi violence, where there were killings for years over trade routes.

South African traders have already used violence to enforce trade agreements in Khayelitsha and shut down new Somali shops. Although threats of violence preceded the agreements, the agreements provided an added basis to drive out foreign competitors. Nor were the effects limited to conflicts between Somalis and South Africans. Police in all three field sites reported that conflict between new and established Somali traders had emerged in recent years.

**Corruption**

Because price fixing and market division agreements regulating spaza businesses are illegal and fall outside of the formal regulatory framework, they create opportunities for corruption and extortion. Stakeholders can use their positions to extract payment from Somali shopkeepers in return for permission to open shops. Many South African traders in Khayelitsha accused Somali traders of bribing their way into opening shops.

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81 Interview, Police sector commanders, Harare, Khayelitsha, 7 December 2012.
82 A Kraaifontein police detective reported that there was conflict between old and new Somali traders in the area (telephone interview, 30 July 2012). A Somali trader in Masiphumelele stated that established Somali traders in the area were using a local trade agreement between Somalis and South African traders to keep new Somali and Ethiopian competitors out of the market. Interview, Masiphumelele, 2 February 2012.
84 For example, South African traders in Khayelitsha attempted to enforce a local trade agreement by driving in convoy to Somali shops, shutting them down by force and assaulting traders. Interview, Somali Retailers Association representative, 21 August 2012.
86 Public meeting in Khayelitsha between Somali and South African traders, 7 March 2013.
**Interests of consumers**

Anti-competitive practices also negatively affect consumers, many of whom live below the poverty line. A 2008/9 study found that 80 percent of poor urban households surveyed in Cape Town experienced food insecurity – with 68 percent characterised as severely food insecure.\(^{87}\) For these households, higher prices can have a large effect on their living standards. Price fixing agreements force these consumers to pay higher prices for staples, which many already struggle to afford. Prohibitions against new Somali shops also reduce competition and diminish incentives for shopkeepers to lower prices.

**Decreased opportunities for South African and Somali income generation**

Most Somali spaza shops provide rental income to South African landlords. They also create economic opportunities for small-scale suppliers, cleaners, wholesale employees and shop assistants, as well as for the shopkeepers themselves.\(^{88}\) Limiting shops stifles these economic opportunities.

**Unfair discrimination that feeds xenophobic attitudes**

The discriminatory nature of price fixing and market division agreements reinforces notions that townships belong exclusively to South African nationals, feeding into xenophobic attitudes. The marginalisation of foreign-owned shops also may embolden those who deem it legitimate to prevent foreign nationals from entering townships and township markets.

**Factors relevant to regulating spaza shop numbers and locations**

The problems identified above point to the need for new approaches to regulating informal township businesses in Cape Town. Current government practices gravitate between the two extremes of under and over-enforcement. In some areas, local officials have not enforced regulatory laws, creating confusion over the legality of shops. In other instances, local officials have clamped down on shops (especially those run by foreign nationals), requiring them to comply with the same onerous requirements as businesses in wealthier formal areas. These requirements include obtaining certification that the title deeds are free of restrictive conditions (such as right of way servitudes), completing significant amounts of paperwork, and submitting designs for approval by the municipality. Such requirements are often insurmountable for township traders—foreign and South African alike—who may lack sufficient education, face language barriers, and be unable to afford legal advice. The effect may be to stifle small-scale informal enterprises.

Some form of regulation may nonetheless be appropriate for the informal market. Factors to consider in developing regulations include:

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\(^{87}\) Bruce Frayne, Wade Pedelton et al, ‘The State of Urban Food Insecurity in Southern Africa’ (2010) 2 Urban Food Security Series, Queen’s University and AFSUN at 29. The report categorises degrees of food insecurity by using the ‘Household Food Insecurity Access Prevalence Indicator’ (HFIAP) where ‘Households are categorized as increasingly food insecure as they respond affirmatively to more severe conditions and/or experience those conditions more frequently’.

• Concentration of shops: South African traders often claim that there are too many spaza shops in townships. This is used to justify prohibitions on new Somali shops. Somali community representatives conceded that certain streets possibly contained too many shops, but they noted that shops were sparse on other streets and housing blocks. Accordingly, any limits on shops may be better applied on a street-by-street basis rather than to the township as a whole.

• Opening next to existing shops: South African traders pointed to the practice of opening new Somali shops directly next to existing shops as a source of conflict. Somali community representatives expressed disagreement over this practice, with some maintaining that opening Somali shops near South African ones was inconsiderate. Others argued that when many shops existed in one place it drew crowds, and more crowds meant more customers: ‘In our experience where business is more the benefit is more’. Regulators should be cognizant of any such trading hubs.

• Pedestrian traffic: Streets or intersections with high pedestrian traffic such as thoroughfare streets or taxi stops can house higher numbers of spaza shops than quieter streets with less pedestrian traffic. High numbers of shops in a street or at an intersection therefore does not automatically mean that the overall concentration of shops is too high, as it depends on levels of pedestrian traffic in that area.

Conclusion and recommendations

Agreements prohibiting new Somali shops are not an effective way to resolve conflicts between South African and Somali shopkeepers. They undermine the rule of law—and with it South Africa’s constitutional foundations—and violate the legally guaranteed rights of foreign migrants. They also disregard the economic interests of a range of South African stakeholders. And perhaps most significantly, the agreements have failed to achieve their desired outcome. Rather than preventing xenophobia, agreements provide a basis for renewed conflict between Somali and South African traders, as well as within the Somali community itself when Somali shops open or operate in violation of such agreements.

To avoid running afoul of the Constitution and relevant legislation, regulation of spaza shops must be both legally enforceable and non-discriminatory. Existing remedies, which violate these requirements, foster self-help enforcement and violence while encouraging xenophobia.

89 Public meeting between South African and Somali traders in Khayelitsha on 7 and 20 March 2012. South African traders claimed there were too many Somali shops in the township. However, ACMS came across other South African traders in field sites who stated that their businesses were not affected by foreign national shops. One trader in Kraaifontein stated that his business had improved despite the presence of Somali traders in his neighbourhood, as he had adopted similar practices to Somali traders such as offering hampers and wide product range. Interview, Kraaifontein, 16 November 2011.

90 Interview, Somali Retailers Association representative, Bellville, 6 November 2011. In certain neighbourhoods, such as Pola Park and Never Never in Philippi East, residents stated that there were no Somali shops.

91 Interview, Kraaifontein Somali community representative, Bellville, 3 December 2012.
With the decrease in Somali migration to Cape Town since 2012, informal trade agreements have become less prevalent; there are few new Somalis to keep out. But attempts to regulate foreign traders are continuing in other forms. The following chapter will discuss ongoing and more recent state attempts at regulating Somali and other foreign traders.

Recommendations
In light of the above observations, ACMS makes the following recommendations:

To government departments engaged in conflict mediation (including local, provincial and national government departments):

- Develop a multi-sector response to address threats against foreign traders, taking account of the social, economic, and security aspects of the conflict.
- Develop solutions within the legal framework. Government parties should not tolerate or condone mediation outcomes that violate the law or encourage self-help.
- Refrain from encouraging foreign traders to agree to any undertakings in an environment where they are under threat of physical harm or violence.
- Ensure that mediations include all community stakeholders, including landlords and local community leaders.
- Ensure that mediators are independent and neutral.

To the South African Police Service:

- Lay charges of intimidation or incitement against South African traders who send out threatening letters to foreign traders or their landlords, who threaten foreign traders at negotiation meetings, or who attempt to physically evict foreign traders from their shops.
- Reinstate charges dropped during mediations where subsequent threats are made.

To the City of Cape Town:

- Promote local integration and social cohesion between migrant communities and South African nationals.
- Enhance skills development programmes for spaza shopkeepers.
- Consider implementing business advice exchanges between foreign and South African traders.
• Encourage the diversification of small businesses in townships to avoid conflict generated between traders operating similar businesses. This could be done through skills training, apprenticeships or seed funding.

• Avoid regulations that discriminate, either directly or indirectly, against foreign migrants.

To the Competition Commission

• Investigate anticompetitive practices, price fixing and market division.

• Raise public awareness amongst police, mediators, and foreign national and South African traders about prohibited trading practices in accordance with its mandate to ‘implement measures to develop public awareness of the provisions’ of the Competition Act.\(^\text{92}\)

\(^{92}\) Competition Act, Section 21(1)(b).
State Regulation of Somali Shops

In addition to the mediated agreements described above, Somali traders have faced formal regulatory efforts, including the enforcement of non-existent laws. This chapter discusses formal government attempts to limit Somali shops, whether by conducting fining operations, drafting new zoning schemes, or proposing new national legislation.

Proposed closure and re-opening of Somali businesses in Khayelitsha in 2010

A representative from the Somali Retailers’ Association described an early attempt at formally restricting Somali trade during a September 2010 xenophobia meeting at the Khayelitsha police station that was called by a local ANC leader. Several government departments attended, including the City of Cape Town’s Law Enforcement Department and the Department of Home Affairs. At the meeting, the chairperson of the Khayelitsha Crisis Committee, Reverend Templeton Mbekwa, suggested that all Somali shops in Khayelitsha be closed pending successful application to the City of Cape Town and SARS for the relevant permits. These restrictions would apply exclusively to Somali shops, while South African shops could continue to operate informally.

Representatives from SAPS and Home Affairs who attended the meeting supported the proposal, but the arrangement was never implemented. The City of Cape Town’s Law Enforcement Department objected on the grounds that it could not discriminatorily target Somali shops for enforcement.

Fining of Somali shops: November 2011 to March 2013

Between November 2011 and March 2013, SAPS officials fined Somali shopkeepers throughout Cape Town for failing to possess trading licenses. The fining took place in a number of areas, including Gugulethu, Philippi, Khayelitsha, Cravenby, Kraaifontein, and Observatory. The fines cited either the Local Authorities Act 19 of 1974 or the Business Act 71 of 1991. In some areas, traders were arrested during the course of fining operations and detained in police cells until the early hours of the morning, or in one case until 7pm the following night. Fines usually ranged between R1000 and R2000. While the fines cited the lack of trading licenses, the police in some areas told the traders that they were being arrested for keeping their shops open too late.

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93 Interview, Somali Retailers Association representative, Bellville, 14 November 2010. This description of events in Khayelitsha is based on the account of one representative from the Somali community. ACMS was unable to find additional sources to confirm these events.
94 Ibid.
95 Ibid.
96 Interview, Group of Cravenby Somali traders, Bellville, 18 January 2012. Interview, Observatory Somali trader, Woodstock, 23 February 2013.
These fines do not have a clear legal basis. The Local Authorities Act 19 of 1974 (the most common legislation cited on fines) does not exist. Act number 19 of 1974 is the Subdivision of Agricultural Land Amendment Act, which was repealed in 1998. Furthermore, according to the City of Cape Town’s Environmental Health Department, which issues business licenses, spaza shopkeepers do not require licenses in terms of the Business Act.  

It is unclear what prompted the fining, or why it was conducted by SAPS rather than by local law enforcement officers, who are normally charged with enforcing city by-laws. Some police officers reported that the instructions came from senior police officials within SAPS. The station commander of Ravensmead police station told Cravenby shopkeepers that the Provincial Commissioner of Police had ordered the fining of foreign-owned shops. Municipal officials in both Kraaifontein and Khayelitsha complained that SAPS had not given their offices prior notice or consulted them about their fining operations.

A fine issued by SAPS citing the non-existent Local Authorities Act

The fining of Somali businesses by SAPS raises a number of further concerns set out below.

98 Interview, Philippi East police officers, Philippi East, 22 November 2011.
99 Interview, Somali trader, Cravenby, 28 September 2012.
100 Telephone inquiry, Land Use Department, Kraaifontein, 12 January 2012. Telephone inquiry, Khayelitsha Planning and Development Management official, 15 March 2012.
Police abuse
In Cravenby, arrests were often accompanied by insults, beatings and tear gas.101 Traders recounted police statements such as ‘f… you this is not your country’ or ‘why don’t you go back to Somalia?’102 Police used tear gas on many occasions when entering shops.103 In one instance, they assaulted a trader who requested that they wait for his colleague to arrive before arresting him because he did not want to leave the premises unsupervised.104 A customer who attempted to intervene during the assault was fined R150 for ‘wrongfully and unlawfully and intentionally making a nuisance of herself by yelling; shouting and making a noise in any manner whatsoever after being warned by the police’.105

In September 2012, police arrested five Somali traders in Cravenby for not having trading licenses and locked them in the back of their van. They drove the traders around in circles at high speed for more than three hours, leaving them terrified and nauseous. They were then detained at the police station for several hours. When they complained about their treatment, the police threatened them with deportation. The traders remain fearful of the police.106

Discrimination
Somalis claimed that South African traders were not fined at the same rate. ACMS was unable to confirm this, but there are indications that Somalis may have been discriminatorily targeted. A municipal official in Gugulethu initially said that police had fined South African traders, but then explained that these traders were shebeen keepers.107 South African shopkeepers in Philippi East reported that police warned them to obtain a license, but did not fine them.108 According to a Khayelitsha court official, only new foreign shopkeepers in the area were being fined.109

Reinforcing xenophobia
Police often arrested traders in a highly public fashion. Such actions reinforce local perceptions of foreigners as illegal and engaged in criminal activities, and may heighten xenophobia.

Informal trading permits
In response to the fines, Somalis began approaching local authorities to obtain licenses. Local authorities in Gugulethu incorrectly informed Somali shopkeepers that they required informal trading permits at a cost of R150 for three months. Such permits are only required for trading on formally regulated trading areas.110

101 Interview, Group of Somali traders, Cravenby, 28 September 2012
102 Interview, Group of Cravenby Somali traders, Bellville, 26 January 2012.
103 Interview, Three Somali traders, Cravenby, 28 September 2012.
104 Interview, Cravenby Somali trader, Bellville, 18 January 2012.
105 Ibid. Copy of the fine on file with author.
106 Interview, Group of Somali traders, Cravenby, 28 September 2012
107 Interview, Fezeka Municipal office official, Gugulethu, 16 January 2012.
108 ACMS queried eight South African shopkeepers at a local wholesaler in Philippi East in March 2012.
109 Telephone inquiry, Khayelitsha Court, 27 June 2012.
110 See City of Cape Town’s Informal Trading By-Law, supra note 18.
Most Somali traders operate from privately owned properties belonging to South African landlords. Hundreds of them have paid for unnecessary informal trading permits.\footnote{A representative of the Somali Retailers Association stated that in 2012 he had assisted over one hundred Somali traders to apply for licenses at Fezeka municipal office in Gugulethu. All traders were issued informal trading permits at a cost of R150 for three months or R600 per year. Personal communication with author, September 2012.}

**City of Cape Town Zoning Scheme Regulations 2013**

New Cape Town zoning scheme regulations were passed in November 2012 and came into effect in March 2013.\footnote{City of Cape Town Zoning Scheme Regulations, November 2012, available at \url{http://www.capetown.gov.za/en/drugs/Documents/Cape_Town_Zoning_Scheme.pdf}, date accessed 31 January 2015.} Much like previous regulatory schemes, the regulations permit trading from residential properties in single residential 2: incremental housing zones. However, they place added restrictions on such activities, some of which curb features largely found in foreign-owned shops. Section 5.2.3, for example, regulates house shops in incremental housing zones. The section states, amongst other things, that:

- (a) ‘The extent and position of the retail component shall be clearly defined on a plan, and excluding any toilet or change room, shall not exceed 40 m\(^2\) or 40% of the total floor space of the dwelling, whichever is the lesser area’;

- (g) ‘The area used for a house shop may not open directly onto a bedroom or toilet, and no goods which will be sold from the house shop may be stored in a bedroom or toilet’.

- (j) ‘The house shop shall not operate outside the hours of 07:00 to 21:00 on Mondays to Saturdays and 08:00 to 13:00 on public holidays or Sundays’.

Clause (a) restricts the size of the shop. Foreign spaza traders generally utilise most of their properties for commercial purposes, and devote a small share of floor space for living and sleeping. By providing that only 40 percent of the property can be used for commercial purposes, the regulations may curtail the ability of spaza shops to compete in a market being increasingly threatened by supermarkets. Smaller floor space might limit traders’ ability to store and manage stock and restrict the product range they can offer to customers.

Clause (g) may disproportionately affect Somali and other foreign traders who face barriers accessing housing in townships, as well as high crime rates.\footnote{Somali traders face social and finnancial barriers accessing housing. For example, many cannot afford to buy property and do not benefit from state housing schemes. Others are reluctant to invest in property because of insecurity regarding their future. Many fear that xenophobic attacks will force them to leave. Crime affecting Somali traders is set out in the first report of this series: Vanya Gastrow with Roni Amit, ‘Elusive Justice: Somali traders access to formal and informal justice mechanisms in the Western Cape’ (2012) African Centre for Migration & Society, available at \url{http://www.migration.org.za/uploads/docs/report-38.pdf}, date accessed 20 January 2014.} Many Somali traders sleep on their shop premises to prevent theft or looting, often in a connected room. The provision may also negatively affect South African
traders operating shops from small houses or shacks without a separate room between their shop floor and bedroom.

Clause (j) reduces spaza shop hours. Although Somali-owned shops generally open earlier and close later than South African shops, South African shops wishing to extend their operating hours to compete with supermarkets will also be restrained.

Somalis traders who apply for land use permission may be rejected because they are tenants rather than owners. For example, a City of Cape Town sub-council refusal to grant a temporary land use departure to a Kraaifontein Somali trader criticised the fact that the owner of the house had rented out his garage to a third party. The sub-council’s proposal assessment states that ‘[t]he concept of a house shop is that the owner operates a small scale business which does not impact or alter the character of the residential environment’ (emphasis in original). Such reasoning would prevent land use permissions for most foreign nationals, the majority of whom rent their businesses from South African landlords (ACMS did not ascertain whether similar reasoning extended to other sub-councils).

**National policy proposals 2012 to present**

In 2012 the ANC released a policy document that considered restrictions on foreign traders.\textsuperscript{114} Noting that many asylum seekers operate informal spaza shops in townships, the document argued that they should not be permitted to engage in any informal trading, as their legal status has not yet been determined.\textsuperscript{115} It also questioned whether laws should ‘apply equally to both asylum seekers and citizens’.\textsuperscript{116}

In March 2013, the Department of Trade and Industry (DTI) published a draft Licensing of Businesses Bill in part aimed at addressing concerns over foreign traders.\textsuperscript{117} At the time of writing, the DTI was redrafting the Bill. The initial version provided licensing authorities with wide discretion to grant and revoke licenses, including the authority to permanently revoke the licenses of businesses that are threatened or affected by public violence.\textsuperscript{118} The Bill also categorised a broad range of state officials as inspectors\textsuperscript{119} and granted


\textsuperscript{115} Ibid at 6.

\textsuperscript{116} Ibid.


\textsuperscript{118} Draft Licensing of Businesses Bill, Section 26 (2).

\textsuperscript{119} In terms of section 31, state officials who are deemed to be inspectors include:

- Any member of SAPS of or above the rank of sergeant;
- Any officer as defined in section 1 of the Customs and Excise Act;
- Traffic officers appointed in terms of the National Road Traffic Act;
- Any person appointed under section 10 of the Foodstuffs, Cosmetics and Disinfectants Act;
- A peace officer contemplated in section 334 of the Criminal Procedure Act; and
- Any person designated by the Minister as such.
these inspectors wide powers of search and seizure, including the power to inspect premises and confiscate goods without a warrant.¹²⁰ Traders not in possession of a valid license could face up to ten years imprisonment.¹²¹

**Conclusion and recommendations**

Somali traders face a variety of formal regulatory challenges. These include threatened closures of shops; fines and harassment; by-laws that criminalise key features of their businesses; and national policy initiatives questioning their right to engage in informal trade. Restrictions targeting foreign nationals may also affect South Africans who rely on their services, rental incomes and wholesale purchases.

Many regulatory efforts constrain foreign traders rather than harnessing their entrepreneurial potential. Current regulatory frameworks are also detached from the realities faced more generally by informal traders, who often lack the education and financial resources needed to navigate formal licensing and certification requirements. Effective regulation of the spaza market, including land use policies, should take these realities into account to find an appropriate balance between regulatory interests (e.g. health, nuisance) and economic interests and to encourage economic growth.

**Recommendations**

In light of the above observations, ACMS makes the following recommendations:

**To the South African Police Service:**

- Consult relevant municipal authorities to ensure that regulatory actions take place within the legal framework.

**To the City of Cape Town:**

- Provide accurate and consistent information to traders attempting to comply with relevant legislation.
- Consult South African and foreign spaza shopkeepers to ensure that zoning scheme regulations are sensitive to the contexts in which spaza traders work.

**To the Department of Trade and Industry:**

- Limit the discretion of state officials in legislation regulating informal trade to avoid opportunities for corruption and discrimination.

¹²⁰ Draft Licensing of Businesses Bill, Sections 32, 33 and 34.
¹²¹ Draft Licensing of Businesses Bill, Section 27.
• Consider implementing a registration rather than a licensing process to minimize opportunities for abuse.

• Provide a mechanism for traders to report corruption or discrimination in the licensing process.

• Establish clear, accessible, and low-cost application or registration processes so that informal traders with less informational and financial resources are able to comply.

• Promote compliance by providing education and assistance.

• Ensure that requirements enhance business certainty by, for example, facilitating license renewals and minimizing the required frequency of renewals.
Conclusion and Recommendations

In their efforts to regulate informal trade, both city officials and civil society actors have adopted measures that stifle the entrepreneurialism of foreign traders in Cape Town’s low-income areas. These measures have included informal trade agreements restricting Somali trade, aggressive finings and arrests, and regulations that disproportionately affect foreign shops. These responses have fostered a climate of lawless regulation.

Negotiated agreements that prohibit Somali nationals from opening new shops in townships or that set up price fixing arrangements are usually a response to threats of violence by South African traders. While these agreements may ease tensions in the short term, they often contribute to renewed tensions when the agreements cannot be enforced. The agreements also violate legislative and constitutional principles.

The negative effects of these regulatory efforts extend beyond the foreign traders themselves. Foreign spaza shops offer local residents lower prices and are closer to their homes than big supermarkets. Somali traders not only avoid competing for employment by turning to self-employment, they also generate income for South African landlords and provide residents with economic benefits.122

While regulation can produce positive results, unlawful or incautious regulation may bring a range of harms—both to the targets of regulations and to the residents they serve. This report highlights the effects of regulation when officials and civil society develop regulatory frameworks that fall outside of legal and constitutional parameters, or do not address the needs and conditions of informal markets. In order to be effective and to benefit all stakeholders—including traders, residents, landlords and customers—regulations should avoid unnecessary restrictions on trade and economic growth and should be implemented in a lawful, non-discriminatory manner.

In light of the findings of the report, ACMS makes the following recommendations:

To government departments engaged in conflict mediation (including local, provincial and national government departments):

- Develop a multi-sector response to address threats against foreign traders, taking into account the social, economic, and security aspects of the conflict.

- Develop solutions within the legal framework. Government parties should not tolerate or condone mediation outcomes that violate the law or encourage self-help.

- Refrain from encouraging foreign traders to agree to any undertakings in an environment where they are under threat of physical harm or violence.

122 These benefits are discussed in the second report in this series, ‘Somalinomics: A case study on the economic dimensions of Somali informal trade in the Western Cape’, supra note 88.
• Ensure that mediations include all community stakeholders, including landlords and local community leaders.

• Ensure that mediators are independent and neutral.

**To the South African Police Service:**

• Lay charges of intimidation or incitement against South African traders who send out threatening letters to foreign traders or their landlords, who threaten foreign traders at negotiation meetings, or who attempt to physically evict foreign traders from their shops.

• Reinstate charges dropped during mediations where subsequent threats are made.

• Consult relevant municipal authorities to ensure that regulatory actions take place within the legal framework.

**To the City of Cape Town:**

• Promote local integration and social cohesion between migrant communities and South African nationals.

• Enhance skills development programmes for spaza shopkeepers.

• Consider implementing business advice exchanges between foreign and South African traders.

• Encourage the diversification of small businesses in townships to avoid conflict generated between traders operating similar businesses. This could be done through skills training, apprenticeships or seed funding.

• Avoid regulations that discriminate, either directly or indirectly, against foreign migrants.

• Provide accurate and consistent information to traders attempting to comply with relevant legislation.

• Consult South African and foreign spaza shopkeepers to ensure that zoning scheme regulations are sensitive to the contexts in which spaza traders work.

**To the Competition Commission**

• Investigate anti-competitive horizontal practices, price fixing and market division.
• Raise public awareness amongst police, mediators, and foreign national and South African traders about prohibited trading practices in accordance with its mandate to ‘implement measures to develop public awareness of the provisions’ of the Competition Act.\textsuperscript{123}

To the Department of Trade and Industry regarding future legislation aimed at regulating informal trade:

• Limit the discretion of state officials in legislation regulating informal trade to avoid opportunities for corruption and discrimination.

• Consider implementing a registration rather than a licensing process to minimize opportunities for abuse.

• Provide a mechanism for traders to report corruption or discrimination in the licensing process.

• Establish clear, accessible, and low-cost application or registration processes so that informal traders with less informational and financial resources are able to comply.

• Promote compliance by providing education and assistance.

• Ensure that requirements enhance business certainty by, for example, facilitating license renewals and minimizing the required frequency of renewals.

\textsuperscript{123} Competition Act, Section 21(1)(b).
Annexures: Warning Letters to Somali Traders

ATT: All Foreign Shop Owners (Somalis)

Re: Close your shops

We send this communiqué to you as business companions that you must close your shops as of 25 August 2008 to 14 September 2008. Within the 21 days from the date mentioned you all have to ensure that your shops are closed until further notice.

The business, political and community leadership of Khayelitsha is currently engaging with each other in finding a solution for the influx of your shops into our communities.

Therefore we order all of you to close down your shops whereas the 21 days applies as a period of concern where all matter regarding your existence in our communities are being discussed.

For further information about this communiqué, you may contact us at the numbers above.

Regards

S. Citwa
Chairperson
6 June 2010

Dear sir or madam,

The people of the Blockombo, Malcomber and Balcocder and the Sanco Community are whereby all the Somali people must not buy the other groceries they must sell that ones which is in their shop’s and no one that proposed is start tomorrow on Monday and next week Monday on 14/06/2010 They must back and go.

From Committee.

Khulali Small Business Association
12862 Liberia Street
Dear Commander,

Re: Confirmation letter to visit the shops of the Somalians in Lower Crossroads.

This confirmation letter serves to inform the following:

- That today on the 6th / 7th July 2011 at about 11.00am.
- The following structure that is since March 2011, the Lower Crossroads Business Forum, the area committees, members, the chairman of these places where these shops of the Somali shops will be assisting the owners of these shops.
- The Somali where they refute to inform them about the resolution taken from the previous meetings held.
- That if at the end of 25th June 2011, they renew their demands to stop the operation of their shops and at the end of July 2011, they may close their shops completely and after their shops are closed, the Somali having meetings.

Hopefully this confirmation letter will assist your good works.

Yours sincerely,

T.F. Tobingunya

Cell: 078 335 941 / 079 071 906