Courts and police

Introduction

The law is a set of rules used to control the behaviour of people in society, which:

- Tells you what you are **entitled** to
- Tells you what you **must** do
- Tells you what you **must not** do
- Tells you what others **may not** do to you
- Tells you what your **rights are against the state** and others
- Tells you what your **responsibilities** are as a member of society

In other words, the law tells you about your legal 'rights' and 'duties'. South Africa is now a constitutional democracy, which means the Constitution and Bill of Rights are the supreme law. Our Constitution guarantees certain human rights, and is one of the most progressive in the world. In line with a constitutional democracy everyone has responsibilities. In addition to this, there is criminal law for violations against the state. Punishment is part of the set of rules. If you do not follow the rules, then you can be punished.

Without laws, there would be confusion, fear and disorder in society. But this does not mean that all laws are fair. So a law can be unfair and still be the law. Every society agrees that some laws are necessary. But the laws should be made in a democratic way, so that they will be just and fair. In our society, a law must be tested against the Constitution to see if it is fair.

Where does the law come from?

Before the European settlers arrived at the Cape, the people of South Africa had their own laws and rulers. Today, these laws are called 'indigenous law' or 'customary law'.

When Jan Van Riebeeck arrived at the Cape in 1652, the Dutch Settlers brought their law from the Netherlands. This is called 'Roman-Dutch Law'. For the next 150 years, this Roman-Dutch law was the official law of the Cape.

In the early 1800s, the British took over the rule of the Cape from the Dutch. They brought English law with them.

Customary law, which is a dynamic system, was recorded and distorted by officials of colonialism and apartheid.

In 1910, the four colonies of South Africa joined together to become the Union of South Africa. This created one central government with the power to make all the laws of the country. But most people were not allowed to vote for this government. So laws were made by a government that was not elected democratically. For the majority of the people of South Africa, many of these laws were very wrong.

In April 1994, one central government was elected democratically for the first time in South Africa. So today's law comes mainly from these cultures:

- The culture of the people who were here in the beginning
- The culture of the settlers from the Netherlands
- The culture of the British settlers
- The culture of the liberation movements

The South African common law is made up of Roman-Dutch and English law, and since 1994 customary law. A law passed by parliament overrides common law. The Constitution is supreme to all law. All law must be in line with the Constitution, and if it cannot be developed or interpreted to this effect, then it must be found to be unconstitutional. If a law is unconstitutional the Constitutional Court can say so and ask the parliament to fix it within a certain time. It will also say what applies in the meantime.

Constitutional law

In 1996, South Africa got a new constitution, the Constitution of the Republic of South Africa Act 106 of 1996. ***(See pg 7: Development of Constitutions in South Africa)***

Section 2 of the Constitution says that the Constitution is the supreme law of the land. All laws have to follow it and cannot go against it. ***(See pg 9: The relationship between the Constitution and other laws)***

Provincial governments can make their own constitutions, but these constitutions cannot go against the national Constitution.

Statute law

Statute law is written law that has been approved by the legislature. The legislature is parliament. Parliament is situated in Cape Town. Statute law is usually called an 'act', and it is published in a government newspaper called the Government Gazette. An example of a statute law is the *Protected Disclosures Act No. 26 of 2000*. This means it was the 26th Act (law) passed in 2000. ***(See pg 17: Making laws)***

The executive then must enforce the law as written by the legislature. Ministers and bodies (e.g., Department of Health) are part of the executive.

The manner in which the laws are carried out is written in the Regulations.

Provinces, towns and cities are allowed to make their own laws which only apply to them. These are called **ordinances** for the provinces, or **by-laws** for the towns and cities.

The Constitutional Court can declare any statute law invalid if it goes against the Constitution. Other courts can only declare less important laws invalid. ***(See pg 17: What happens if a bill is, or might be, unconstitutional?)***

Common law

The common law is the set of laws not made by parliament or any level of government. Crimes like murder, theft and treason are part of the common law. The common law has developed through the decisions of judges in the Courts. The Roman-Dutch and English law brought by the Dutch and British settlers is also part of the common law. The common law can be changed by new decisions in the courts.

The common law applies to everyone equally in the whole country. But statutory law is stronger than common law. It is only when there is no statutory law about something that the common law will apply.

Customary law

Customary law comes from indigenous cultures in South Africa and is also often referred to as indigenous law. When the settlers arrived in the Cape in 1652 there was already an established legal system being practiced by the people who lived there. This indigenous legal system was:

- Unwritten
- Passed on orally from generation to generation
- Strongly tied to culture, tradition and the tribe

However, customary/indigenous law was not recognised as part of the South African legal system by the colonial powers. Roman-Dutch law was seen as the common law of the land after the settlement of the Dutch-East India Company in 1652.

At that stage, all the customary laws were passed on by word of mouth and were unwritten.

When Britain took over the Cape in 1814, the colonial policy was to keep the local laws of the new colonies as long as they were “civilized”. Roman-Dutch law was seen as civilized,

and all other systems of law were ignored. The customary laws were codified, but the sources were men, and the recorders were men with a Western perspective and interpretation. The codification of customary law failed to take into account its dynamic nature.

It was only when South Africa became a democracy in 1994 and adopted its Constitution that indigenous law was recognised as having the same standing as Roman-Dutch law.

Under the Constitution, Roman-Dutch and customary/indigenous law are now treated as equal. However, if the customary law is in conflict with the Constitution, then the court has to apply the Constitution and the Bill of Rights. The courts are required to apply customary law, but where it may conflict with the Constitution, they should first develop it in line with the Bill of Rights before finding it unconstitutional. For example, in the 2008 case of *Shilubana and Others v Nwamitwa*, the Chief of the Valoyi Community in Limpopo died without a male heir. Because customary law at the time did not allow a woman to become a Chief, his eldest daughter Ms Shilubana did not succeed him as Chief, and her father's brother was appointed. However the community passed resolutions stating that Ms Shilubana could become Chief because the Constitution provided for women to be equal to men. The Constitutional Court acknowledged the right of traditional authorities to develop customary law and must consider past practices of the community and the requirements of the Constitution.

Customary law is used in chief's or headman's courts, but these can only deal with certain cases between people who are part of the culture. Also, there may be cases that are excluded, for example, where they affect the status of women and the return of lobola. The representation of women as litigants and as "judges" in these courts is also an issue that the state is considering.

How is a court decision or judgement made?

The person who listens to both sides of the case in the court, and who then decides which side is right and which side is wrong, is called the judge or magistrate. The decision of the **judge** or the **magistrate** is called a **judgement**.

A judgement can be made in one of 3 ways:

1. The judge or magistrate looks to see if there is a rule in law that fits the case. If there is already a rule, then the judge or magistrate must use it.
2. Sometimes there is no rule to fit the case. The judge or magistrate must now make their own judgement. If the judgement sets a new rule of law, this creates a PRECEDENT. In other words, the judge sets a new standard.

EXAMPLE

Imagine the law says that you must rest on Sundays. You go to a film one Sunday, and you are accused of breaking the law because you are not 'resting'. In court, you tell the magistrate that you were not breaking the law because watching a film is the same as resting for you. The magistrate decides that this is correct, and so a precedent is set that you can now watch films on Sundays.

3. Sometimes there is a rule which covers the facts of the case but it has always been applied in a particular way. A person may argue that the rule can be applied in a different way. If the judge or magistrate decides that the rule can be used in a new way, then the judge or magistrate gives a new interpretation or explanation of that law. This judgement can also be called a PRECEDENT.

A **precedent** becomes the law unless it is rejected or changed by a higher court. A precedent is important because it becomes the new law and so will be used in future judgements.

The Constitution requires all courts to develop the law in line with the Constitution before finding it unconstitutional. If a court finds the law unconstitutional, it must be referred to the Constitutional Court to confirm that finding.

In constitutional cases, the precedent of the Constitutional Court must be followed by all courts. In other cases, the precedents of the Supreme Court of Appeal must be followed by the courts below it, namely, the high courts and magistrates' courts.

In the same way, the precedents of the high court (provincial and local courts) must be followed by all magistrates' courts.

Parliament can change a precedent by making a new law.

Kinds of law: criminal and civil

There are two main kinds of law in South Africa: CRIMINAL LAW and CIVIL LAW. Constitutional law affects both criminal and civil law.

CRIMINAL LAW

In a criminal case, the state prosecutes the accused person for committing a crime or breaking the law. 'Prosecutes' means the state makes a charge against someone. If the court finds the person guilty, the person can be sent to prison, or fined, or punished in some other way. Examples of different crimes and breaking the law include rape, public violence, assault, theft and trespass.

Usually, the state is not the complainant (the one making a charge). The state prosecutes, but any person or individual can be the complainant and lay a charge against another person or against the state.

A criminal case can be brought against anyone who has broken the law, including a person who works for the state, such as a member of the police or defence force. So if, for example, you are unlawfully assaulted or shot by a member of the police or defence force, you can bring a criminal case against them.

When a case is brought before a magistrate, the prosecutor must prove beyond a reasonable doubt that the accused committed the offence. 'Beyond a reasonable doubt' is the standard that must be met by the prosecution's evidence in a criminal prosecution: that no other reasonable explanation can be drawn from the facts except that the defendant committed the crime, in this way overcoming the presumption that a person is innocent until proven guilty.

CIVIL LAW

Civil law is the set of rules that govern your private relationships with other people. The state does not take sides in a dispute between private people.

EXAMPLE

CIVIL LAW DEALS WITH: *cases such as marriage and divorce; if someone owes you money; rental agreements; evictions; damage to property; injuries to people and disputes over credit agreements.*

A civil case is usually brought by a person (called the plaintiff) who feels that they were wronged by another person (called the defendant). If the plaintiff wins the case, the court usually orders the defendant to pay compensation (money).

Sometimes, the court may also order a defendant to do, or stop doing, something – for example, to stop damaging the plaintiff's property.

The state may be involved in a civil case as a party if it is suing or being sued for a wrongful act – for example, if government property is damaged or a government official injures somebody without good reason.

When a case is brought before the magistrate the plaintiff must prove "on a balance of probabilities" that the defendant is wrong. "On a balance of probabilities" means simply that one side has more evidence in its favour than the other, even by the smallest degree.

CRIMINAL AND CIVIL ACTIONS

Sometimes, a person's act may lead to both criminal and civil actions.

EXAMPLE

*Piet hits one of the employees in his factory. This is a crime of **assault.** The state will prosecute him in the **criminal court** if the employee lays a charge against him. If there is enough proof to show that he is guilty, he may be punished by the state. But Piet ALSO causes pain to the employee. This is a damage that one **person does to another person**. The injured employee could sue Piet for damages and make him pay compensation for medical expenses, lost wages and pain and suffering. This will be a civil claim for damages through the **civil court**.*

Structure of the courts

The courts are used to make people obey the law. They do this by deciding disputes brought to them. The ordinary courts are:

- Constitutional Court
- Supreme Court of Appeal
- High Courts
    - High Courts in different provinces
    - Local divisions, for example Witwatersrand Local Division
- Magistrates' Courts
    - Regional Magistrates' Courts
    - Ordinary Magistrates' Courts
- Small Claims Courts

- Community Courts and Courts of Chiefs and Headmen

Courts that deal with special kinds of cases:

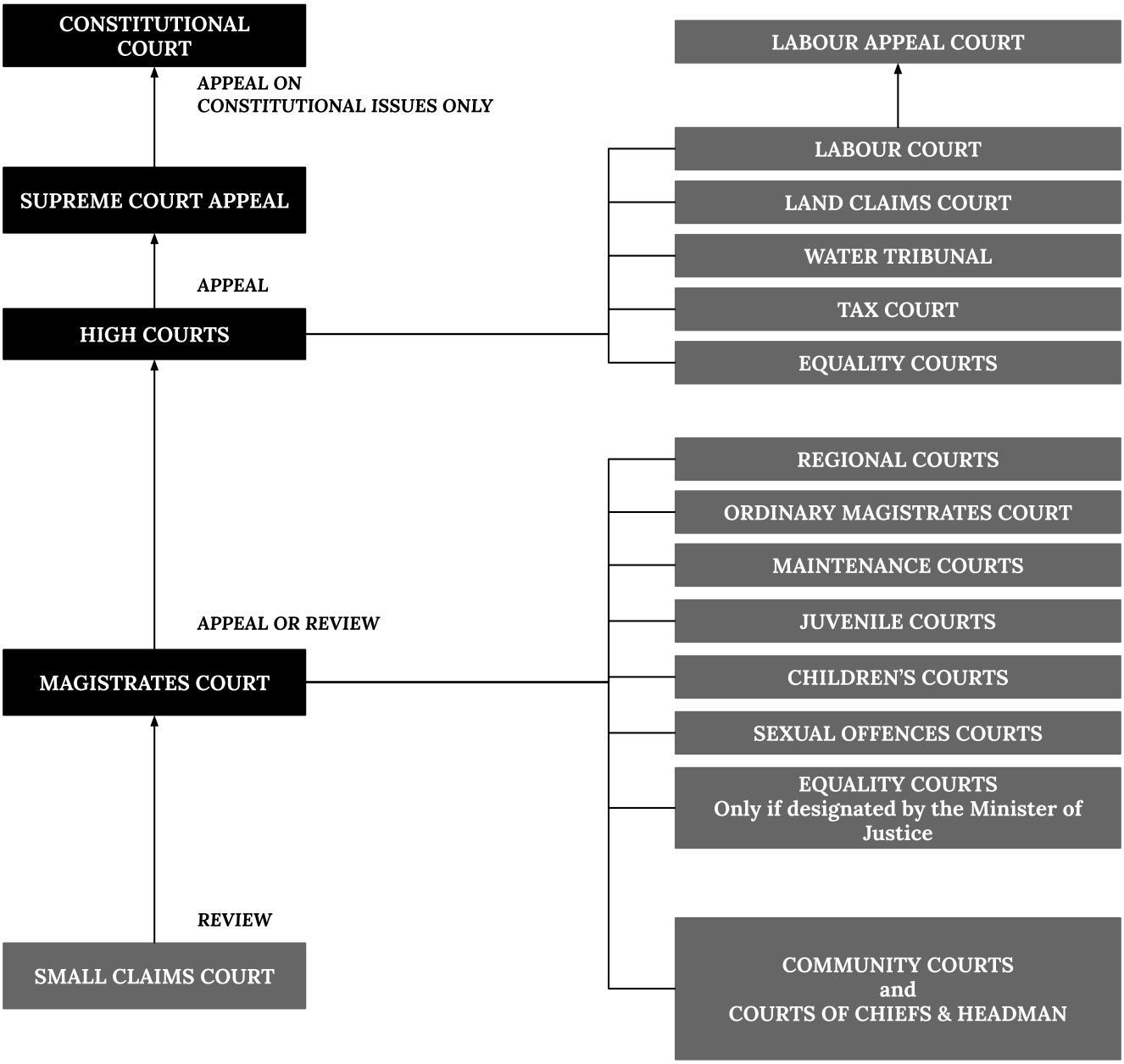
- Labour Appeal Court: deals with appeals from the Labour Court
- Labour Court: deals with disputes under the Labour Relations Act
- Land Claims Court: deals with land claims and land tenure issues
- Family Courts: deal with family matters, like divorce (fall under Regional Courts)
- Maintenance Courts
- Juvenile Courts
- Children's Courts
- Sexual Offences Courts
- Tax Courts
- Water Tribunal
- Equality Courts
- Chiefs and Headmen's Courts: deal with customary law matters; anyone dissatisfied with the decision in a Chief's or Headman's Court can take their matter to the ordinary courts.

Statutory Bodies

These are bodies that have the authority to assist in resolving legal disputes. These bodies are established in terms of legislation and get their authority from legislation. It is usually cheaper to use these bodies than the courts, and disputes are resolved much faster. Examples of statutory bodies include:

- CCMA was established in terms of the *Labour Relations Act*
- Housing Rental Tribunal was established in terms of the *Housing Rental Act*
- Pension Funds Adjudicator established in terms of the Pension Funds Act

THE COURTS IN SOUTH AFRICA AND APPEAL AND REVIEW PROCEDURES



The Constitutional Court

The Constitutional Court is in Braamfontein, Johannesburg and it is the highest court in South Africa. It deals only with constitutional issues. There are 11 Constitutional Court judges, but cases only need to be heard by at least 8 of the judges.

No other court can change a judgement of the Constitutional Court. Even parliament cannot change the decisions of the Constitutional Court. If the Constitutional Court makes a decision that says a law must be amended or it cannot be passed because it is unconstitutional, parliament can decide to change the law in order to make it constitutional.

The Supreme Court of Appeal

The Supreme Court of Appeal is in Bloemfontein in the Free State. Except for the Constitutional Court, this is the highest court in South Africa. It only hears APPEALS from the high courts. All cases in the Supreme Court of Appeal are heard by three or five judges.

Except for the Constitutional Court, no other court can change a judgement of the Supreme Court of Appeal. Only the Supreme Court of Appeal can change one of its own decisions.

The High Courts

The High Courts can hear any type of criminal or civil case. The High Courts usually hear all the cases that are too serious for a magistrate's court. It also hears appeals and reviews against judgements in the magistrate's court. Cases in the high courts cost more money.

All cases in the High Courts are heard by judges. In civil cases, usually, only one judge hears the case. But if the case is on appeal, then at least two judges must hear the case.

In criminal cases, only one judge hears the case. Sometimes, in very serious criminal cases, the judge appoints two assessors to help a judge. Assessors are usually advocates or retired magistrates. They sit with the judge during the court case and listen to all the evidence presented to the court. At the end of the court case, they give the judge their opinion. The judge does not have to listen to the assessors' opinions, but it usually helps the judge to make a decision.

The Judicial Services Commission recommends who should be appointed as judges to the president, who then appoints judges. Judges are paid by the state.

WHERE ARE THE HIGH COURTS?	
• Eastern Cape High Court, Makhanda • Eastern Cape High Court, Mthatha • Eastern Cape High Court, Bhisho • Eastern Cape High Court, Port Elizabeth (Gqeberha) • Free State High Court, Bloemfontein • North Gauteng High Court, North Pretoria • South Gauteng High Court, South Johannesburg • KwaZulu-Natal High Court, Pietermaritzburg	• KwaZulu-Natal High Court, Durban • Mpumalanga High Court, Mbombela • Mpumalanga High Court, Middelburg • Limpopo High Court, Polokwane • Limpopo High Court, Thoyandou • Limpopo High Court, Lephalala • Northern Cape High Court, Kimberley • North West High Court, Mahikeng • Western Cape High Court, Cape Town

APPEALS AND REVIEWS FROM A HIGH COURT

To appeal against a court's decision means to ask a higher court to consider the evidence again and see whether the lower court was wrong in its decision.

If a matter is being appealed, new evidence will not be allowed. If your case was decided by only one judge, you can also appeal to have the matter considered again in the same court by three judges, called a full bench.

If you want to appeal against a decision of a high court to the Supreme Court of Appeal, you must first get permission to appeal from that High Court. This permission is called **'leave to appeal'.**

EXAMPLE: GETTING LEAVE TO APPEAL

If your case was heard in the KwaZulu-Natal High Court, then you must apply to the same High Court for leave to appeal to the Supreme Court of Appeal. If this permission is refused, you can ask the Supreme Court of Appeal itself for permission to appeal. The right to appeal is not an automatic right. Sometimes the judge will not give permission for you to take the case on appeal. ***(See: pg 201: What is an appeal?)***

If you think that the **proceedings** in the High Court were unfair or not according to the law, you can ask for a **review**. Reviews happen automatically in certain circumstances. In other cases, you have to ask for a review. ***(See pg 201: What is a review?)***

CIRCUIT COURTS OF THE DIVISIONS OF THE HIGH COURT

Circuit courts are part of the High Court and aim to service people living in rural areas. The jurisdiction of a Circuit Court applies to specific areas within the High Court division. Circuit courts hear civil and criminal cases, which are held at least twice a year. The cases are heard by judges from the High Court Division.

Magistrates' Courts

These are the lower courts that deal with the less serious criminal and civil cases. The regional courts deal with both civil and criminal matters and have recently been given jurisdiction to deal with divorce cases. The District Courts deal with criminal and civil cases. The magistrate makes the decisions in a Magistrates' Court, sometimes with the support of lay assessors. Most Magistrates' Courts can hear Equality Court cases. These are cases where you feel you have been discriminated against, harassed or subject to hate speech. Magistrates' Courts can be divided into either criminal courts or civil courts. ***(See pg 189: Chart: The courts in South Africa and appeal or review procedures)***

CRIMINAL COURTS

In Criminal Courts the state prosecutes people for breaking the law. Criminal Courts can also be divided into two groups:

- Regional Magistrates' Courts
- Ordinary Magistrates' Courts (also called District Courts)

REGIONAL MAGISTRATES' COURTS

Regional Magistrates' Courts deal with more serious crimes than the District Magistrates' Courts - for example, murder, rape, armed robbery and serious assault.

A Regional Magistrate's Court can impose a maximum fine of R600,000 and a maximum sentence of 15 years for common law offences (this means no law or Act of Parliament determines the sentence for the offence). Where a law provides for a maximum term of imprisonment that is more than 15 years for a specific offence then the court can impose that sentence. For example, the *Drugs and Drug Trafficking Act (No. 140 of 1992)* provides for a maximum sentence of 25 years imprisonment for dealing in drugs. In terms of the *Criminal Law (Sentencing) Amendment Act (No. 38 of 2007)* a Regional Magistrate's Court can sentence a person who has been found guilty of offences that include murder or rape to imprisonment for life. The Court can also sentence people who have been found guilty of certain offences such as armed robbery or stealing a motor vehicle to prison for a period up to 20 years.

Regional Courts have civil jurisdiction to hear divorce cases. Regional courts can hear civil matters above R200 000 up to and including R400 000.

ORDINARY (DISTRICT) MAGISTRATES' COURTS

These courts try the less serious crimes. They cannot try cases of murder, treason, rape, terrorism, or sabotage. They can sentence a person to a maximum prison sentence of 3 years (per offence) or a maximum fine of R120 000. A statute may provide for a maximum term of imprisonment in excess of 3 years for specific offences that are heard in the district magistrates' courts. Ordinary Magistrates' Courts can hear civil cases when the claims are for less than R200 000. They cannot deal with certain matters, such as:

- DIvorces
- Arguments about a person's will
- Matters where it is asked if a person is mentally sane or not

SPECIALISED MAGISTRATES COURTS

There are some specialised courts located at the level of the Magistrates' Courts that deal with certain types of matters. They are the children's courts, commercial crime courts and sexual offences courts

SPECIALISED COMMERCIAL CRIMES COURTS (SCCCs)

The Specialised Commercial Crimes Courts operate at the level of the regional courts. These courts hear commercial crime and organised commercial crime matters. The first SCCC was established in 2009. They are found in all nine regional divisions. A Regional Magistrate presides in the SCCC. Commercial and organised commercial crimes are investigated by the commercial branches of the South African Police Services. These cases are prosecuted by the Specialised Commercial Crimes Unit of the NPA.

JUVENILE COURTS

A juvenile is a child under the age of 18 years. Children accused of crimes are normally tried in the ordinary criminal Magistrates' Courts, but in the larger cities, special Magistrates' Courts are set aside as Juvenile Courts. Court cases involving juveniles are not open to the public (called in camera), and if possible, the parents should be present.

Sometimes, during the trial of a juvenile, the court might send the child to the Children's Court ***(See pg 195: Children's Courts)***. This will happen if the court thinks that the child's parents or guardian may be unfit or unable to look after the child or if there are no parents or guardians. If the Children's Court decides that the parents are fit and able to look after the child, then the case is referred back to the criminal court, and the trial will continue. If the Children's Court finds that there are no parents or guardians or that the parents or guardians

are not fit or able to look after the child properly, then the court may order that the child be removed to a 'place of safety'. If the child is transferred from the criminal (juvenile) court to the Children's Court, the criminal trial must wait until the Children's Court comes to a decision. ***(See pg 559: Removing children from abuse or neglect)***

CIVIL COURTS

REGIONAL COURTS

In the past, Regional Magistrates' Courts could only deal with criminal law cases. In order to make the courts more accessible to people it was decided to extend the jurisdiction of Regional Magistrates' Courts to include civil matters.

Regional Courts may now hear the following matters:

- Divorces and issues stemming from divorces
- Disputes over movable and immovable property between R200 000 and R400 000
- Credit agreements of between R200 000 and R400 000
- Road Accident Fund claims between R200 000 and R400 000

District Magistrates' Courts can hear civil cases when the claims are for less than R200 000. They cannot deal with certain matters, such as:

- Divorce
- Arguments about a person's will
- Matters where it is asked if a person is insane

MAINTENANCE COURTS

The Maintenance Court is situated in the Magistrates' Court. A parent who does not receive maintenance from the other parent can approach the Maintenance Court to make an application for Maintenance. There is a Maintenance Officer in charge of the Maintenance Court. It is not necessary to have an attorney to claim maintenance. The Maintenance Officer will help you to fill in the necessary forms.

If one of the parents of the child refuses to pay maintenance, then the case must go to the Maintenance Court. If so, the Maintenance Officer will give details on when to appear in court and which court to go to.

If the parent is unable to pay maintenance for the child, an application can be made to claim maintenance from that person's parents. The Maintenance Court will make an order regarding maintenance if it is in the best interests of the child.

If the complainant has a maintenance order, and the other parent has defaulted in paying the maintenance in terms of the order, then the complainant should

report the matter to the Maintenance Court. If the matter has been reported to the Maintenance Court and cannot be resolved, it will be sent to the Criminal Court.

The Maintenance officer will inform you about all the procedures that should be followed. When the matter is at the Criminal Court, a prosecutor will be appointed to deal with it. The prosecutor will then prosecute the defaulting party. The matter will then proceed as a criminal case. **(See pg 570: *Problem 4, Getting maintenance through the Maintenance Court*)**

CHILDREN'S COURTS

Every Ordinary magistrate's court also acts as a Children's Court and has jurisdiction over any matter arising from the application of the *Children's Act (No. 38 of 2005)*.

The Children's Court can decide on cases that involve:

- The protection and well-being of a child
- The care of, or contact with, a child
- Paternity of a child
- Support of a child
- The provision of:
    - Early childhood development services
    - Prevention or early intervention services
- Maltreatment, abuse, neglect, degradation or exploitation of a child
- The temporary safe care of a child
- Alternative care of a child
- The adoption of a child, including an inter-country adoption
- A child and youth care centre, a partial care facility or a shelter or drop-in centre
- Any other matter relating to the care, protection or well-being of a child provided for in the *Children's Act*. **(See pg 544: *Summary of the Children's Act*)**

A Children's Court does not deal with criminal cases.

SEXUAL OFFENCES COURTS

Sexual Offences Courts have been introduced in Regional Magistrate's Courts to:

- Reduce secondary victimisation often suffered by the victims when they engage with the criminal justice system, particularly the court system
- Reduce the turnaround time in the finalisation of these cases
- Improve the conviction rate in sexual offence cases

Since April 2022, 116 Regional Courts have been upgraded to Sexual Offences Courts. A sexual offences court is defined as a regional court that deals exclusively with cases of sexual offences.

A hybrid Sexual Offences Court is defined as a regional court dedicated to dealing with sexual offence cases in any specified area. It is a court that gives priority to sexual offences cases, but it can deal with other cases at the same time.

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007)* was introduced to protect communities against sexual offences. This Act requires that support services be provided to victims of sexual abuse to reduce and remove secondary traumatisation in the criminal justice system.

Sexual Offences Courts are required to provide these services to victims of sexual crimes:

- **Court preparation services** - preparing people with information on the court procedures, services and benefits and providing support by the Court Preparation Officer (CPO) on the day of the trial
- **Intermediary services** - The prosecutor will apply to the court to allow a child victim or a person with mental disability to testify in a private testifying room with the help of an intermediary who will explain the questions in a simple manner
- **Private waiting room for adult and child victims**
- **Pre- and post-trial trauma debriefing services**
- **Private testifying room and closed court services**
- **Witness fee services** - this covers return travelling costs and food while in court

EQUALITY COURTS

Equality Courts have been established in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (also called the Equality Act) to hear cases about unfair discrimination, hate speech or harassment (but not discrimination in the workplace, which is dealt with by the Labour Courts). All magistrate's courts serve as Equality Courts in all 9 provinces. The website of the Department of Justice / Equality Courts (www.doj.gov.za) has the contact details for Equality Court enquiries. Equality Courts have powers to conciliate and mediate, grant interdicts, order payment of damages or order a person to make an apology.

Any person or an association acting on its own behalf or on behalf of others can bring a case to the Equality Court. For example, a non-governmental organisation (NGO) can bring a case on behalf of the public. You are entitled to bring a case to the Equality Court if you feel the bad treatment you or someone

else received was due to someone discriminating against you on one of the following grounds:

- Race
- Gender
- Sex
- Pregnancy
- Marital status (which includes
- life partnerships as well as single persons)
- Ethnic or social origin)
- Colour
- Sexual orientation
- Age
- Disability
- Religion, conscience & belief
- Culture
- Language or
- Birth

COMMUNITY COURTS

Community Courts can be described as "district courts" that deal with the same cases as normal Magistrates' Courts, the difference being that they only deal with petty crimes such as shoplifting cases, petty theft, petty gambling offences, petty traffic offences, drunkenness, drinking in public, riotous behaviour, failure to comply with a lawful instruction of a police officer, various train-related offences, common assault etc.

COURTS FOR CHIEFS AND HEADMEN

These courts have jurisdiction to hear certain matters on the level of magistrates' courts. They are designed to deal with customary issues in terms of customary law. An authorised African headman or their deputy may decide cases using indigenous law and custom (for example, disputes over ownership of cattle or lobolo), brought before them by an African against another African within their area of jurisdiction.

These courts are commonly known as Chief's Courts. A person with a claim has the right to choose whether to bring a claim in the Chief's Court or in a Magistrate's Court. Anyone who is not satisfied with the decision in a Chief's or Headman's court can take their matter to the ordinary courts.

APPEALS AND REVIEWS FROM A MAGISTRATE'S COURT

If you are involved in a criminal or civil case in a Magistrate's Court, you can ask the High Court to look at the decision of the Magistrate's Court and decide whether it was correct. This is called an **appeal**. If you want to appeal against a decision of a

Magistrate's Court, you must first get permission to appeal from that Magistrate's Court. This permission is called **'leave to appeal'**. If this permission is refused, you can ask the High Court itself for permission to appeal.

If you think that the **proceedings** in the Magistrate's Court were unfair or not according to the law, you can ask the High Court to review the case. Reviews happen automatically in certain circumstances. In other cases, you have to ask for a review.

Reviews happen automatically in certain circumstances, for example, when an accused represents themselves in a criminal trial. In other cases, you have to ask for a review. ***(See pg 201: Trials, appeals and reviews)***

Small Claims Court (SCCs)

SCCs are situated in the Magistrates' Courts. If there is no SCC in your area, you must bring your case to the Magistrate's Court. The SCC is easier and cheaper for people to use to settle disputes. The court charges a small fee to cover the cost of the summons and the fee of the Sheriff of the Court. A commissioner presides over the proceedings and decides who is right and who is wrong. You cannot use an attorney in the SCC but get advice from a paralegal or an attorney to prepare for your case in the SCC. You can only use the SCC for claims up to a value of R20 000. If your claim is for more than R20 000, you can give up part of the claim so that it is R20 000 or less. ***(See pg 242: Small Claims Court)***

The Labour Court

The Labour Court is a special court for hearing labour cases that fall under the Labour Relations Act. So, this court is used only for matters between employers and employees or employees' unions. The Labour Court interprets all the labour laws. It says which things are unfair labour practices and deals with automatically unfair dismissals - for example, dismissing a worker for exercising a legal right under the *Labour Relations Act*. It can order an employer, worker or union to stop committing an unfair labour practice. It can give jobs back to employees who have lost their jobs unfairly, and so on.

Many cases must go to the CCMA (Commission for Conciliation, Mediation and Arbitration) before the Labour Court. The CCMA deals with a range of labour issues. The CCMA has a procedure that can speed the process up called a 'Conarb'. This is where it does the conciliation (trying to find a mediated and agreed settlement) and then an arbitration (where the CCMA makes a ruling directly afterwards).

The Labour Court hears reviews of CCMA decisions, dismissals based on discrimination and dismissals for large retrenchments. The Labour Appeal Court hears appeals against decisions in the Labour Court, and this is the highest court for labour appeals. ***(See pg 376: Adjudication by the Labour Court)***

The Land Claims Court

The Land Claims Court specialises in dealing with disputes that arise out of laws that underpin South Africa's land reform initiative. These are the *Restitution of Land Rights Act*, 1994, the Land *Reform (Labour Tenants) Act*, 1996, and the *Extension of Security of Tenure Act*, 1997. The LCC has the same status as the High Courts. Any appeal against a decision of the LCC lies with the Supreme Court of Appeal and, if appropriate, to the Constitutional Court. The LCC can hold hearings in any part of the country if it thinks this will make it more accessible and it can informally conduct its proceedings if this is appropriate.

Who works in the legal system?

Judges – They are nominated (usually by their court divisions or law societies) and then interviewed by the Judicial Service Commission. The JSC sends a shortlist of four judges to the president who then decides on who to appoint.

Assessors – In serious criminal cases in the High Courts, two assessors are appointed to help the judge. Assessors are usually advocates or retired magistrates or experts in a particular area, such as children. They sit with the judge during the court case and listen to all the evidence presented to the court. At the end of the court case, they give the judge their opinion. The judge does not have to listen to the assessors' opinions but it usually helps the judge to make a decision.

Master of the High Court – The Master's Branch of the High Court is there to serve the public in respect of:

- Deceased Estates
- Liquidations (Insolvent Estates)
- Registration of Trusts
- Tutors and Curators
- Administration of the Guardian's Fund (minors and mentally challenged persons)

Magistrates – They are appointed by the Minister of Justice. They hear and decide cases in the Magistrates' Courts.

Lay assessors – Lay assessors are recruited through community organisations and are given basic training on the law and legal procedures. They help the magistrate reach a fair decision by providing background information on the issues in a case and giving the broader community perspective.

Director of Public Prosecutions – At each High Court, there is a Director of Public Prosecutions (DPP) with a staff of assistants. The DPPs are responsible for all the criminal cases in their province, so all the prosecutors are under their control. The police bring the

information about a criminal case to the DPP. The DPP then decides whether there is a good enough reason to have a trial and to prove in court that the person is guilty.

National Director of Public Prosecutions – The office of the National Director of Public Prosecutions was established on 1 August 1998, in terms of section 179(1) of the Constitution. The National Director of Public Prosecutions (NDPP) is in charge of the National Prosecuting Authority (NPA), which is responsible for managing the performance of Directors of Public Prosecutions (DPPs), Special Directors and other members of the Prosecuting Authority. ***(See pg 204: National Prosecuting Authority)***

Prosecutors – Prosecutors are employed by the National Prosecuting Authority. The prosecutor represents the state in a criminal trial against people who are accused of committing a crime. Before the trial, the prosecutor works with the South African Police Services to find out all the facts about the case, and to prepare state witnesses who saw what happened or who have other information. The prosecutor decides whether to prosecute the case or not. The prosecutor then presents all this information in court and tries to convince the judge or magistrate that the accused person is guilty. The prosecutor does this by asking the state witnesses to tell their stories. The prosecutor also cross-questions the witnesses that the accused person brings to court, to try and disprove what these witnesses say. The prosecutor may divert cases to rehabilitate, especially juvenile first offenders.

Attorneys and Advocates – Every person is entitled to appear personally before a court to plead a cause or to raise a defence. However, due to the complexity of legal issues and the specific manner in which court applications have to be submitted to the court, it is sometimes best to hire an attorney and advocates. ***(See pg 255: Using an attorney)***

Public defenders – If a person who is accused in a serious criminal case cannot afford to pay for their own attorney, their case will be taken up by a public defender. Public defenders are attorneys who are paid for by Legal Aid South Africa. The aim of Legal Aid South Africa is to make legal representation available to poor and indigent people at the government's expense.

Paralegals or advice-givers – Paralegals are people who have had non-degree training or informal training, so they cannot act in formal legal proceedings. They advise people and organisations on different aspects of the law, including advice on their rights and ways of protecting their rights.

Trials, appeals, and reviews

What is a trial?

A trial is a court hearing in a Magistrate's Court or a High Court, called the trial court.

The magistrate or judge listens to all the people who have information about the case. This information is called the **verbal or oral evidence**. The court also looks at the **physical evidence**, for example, a knife or a letter. These are called exhibits in the trial.

The magistrate or judge listens to the evidence from both sides. If it is a criminal trial, the magistrate or judge listens to the state and its witnesses, as well as the case of the accused and the witnesses called by the accused. The magistrate or judge then makes a decision, called a **judgement**. ***(See pg 210: Chart: Summary of steps in a criminal court case)***

What is an appeal?

If you lose a trial, you can appeal. This means you ask a higher court to change the decision of the trial court. Usually, the appeal court will not listen to any new evidence. It will only read the report from the lower court to see what evidence was given. A case in the Magistrate's Court can go on appeal to the nearest High Court and then to the Supreme Court of Appeal. A case heard in a High Court can go directly on appeal to the Supreme Court of Appeal. The Supreme Court of Appeal only listens to appeals – it does not listen to any new trials.

In a civil case, the person who loses the case must usually pay the costs of the person who wins. So, if you lose the appeal, you usually have to pay the legal costs of the other party for both the trial and the appeal. In a criminal appeal, you pay your own legal costs, whether you win or lose. It is very expensive to take a case on appeal. ***(See pg 189: Chart: The courts in South Africa and appeal and review procedures; See pg 191: Appeals and reviews from a High Court; See pg 197: Appeals and reviews from a Magistrate's Court; See pg 248: Taking a judgement on review; See pg 376: Adjudication appeals (in the Labour Court))***

What is a review?

A higher court can also be used for a review. If you think proceedings in a Magistrate's Court or High Court were unfair (for example, the magistrate or judge was biased) or not done according to the law, you can take the case on review to a higher court.

AUTOMATIC REVIEW

An automatic review – where you don't ask for the review – takes place in the following circumstances:

- In a criminal case, a judge will review your case automatically if you do not have an attorney and the sentence is more than 6 months in prison or a fine of more than R12 000. That means the judge will decide if the magistrate made the right judgement according to the law.
- If you do not have an attorney in a criminal case, and your sentence is more than 3 months in prison or a fine of more than R6 000, AND you are sentenced by a magistrate who has **worked for less than seven years** as a magistrate, then your case will also automatically be reviewed by a judge.

ASKING FOR A REVIEW

If you think things did not happen in the right way in the court, then you yourself can ask for a review. This means you can ask for a review if you think that the court procedures were unfair or irregular. For example:

- You may think that the magistrate or the judge did not give you a proper chance to explain yourself clearly
- You may think that the judge or the magistrate was against you even before the case was finished.

If you ask for a review, your attorney must give papers to the courts to show why you feel the judgement should be reviewed.

OUTCOME OF THE REVIEW

The higher court may change the judgement, or may correct the procedures, or may say that there must be a new trial.

Settling disputes outside of court

Many legal problems can be settled without going to court and this is usually a much cheaper option for settling disputes. Different ways of trying to solve disputes without going to any of the courts include negotiation, mediation and arbitration. ***(See pg 261: Problem 1: Which court should be used in each example?)***

Negotiation

Negotiation means that people who have a problem talk to each other about their problem and try to solve it by coming up with a solution that suits both sides. ***(See: pg 1004: Negotiation Skills)***

Mediation

Mediation happens when people with a problem agree to have a third person act as a go-between to help them settle their problem. For example, two neighbours who are always fighting about neighbour issues can use a mediator to act as a go-between and help them reach a compromise. The mediator does not act as a judge and does not make a decision which the parties must follow. ***(See pg 374: Arbitration by the CCMA or Bargaining Council)***

Arbitration

Arbitration takes place when people who have a problem agree to have a third person (called an arbitrator) listen to their arguments and make a decision which both parties agree in advance to follow. So, the arbitrator acts like a judge. An arbitration is quicker and less formal than a court case. ***(See pg 374: Arbitration by the CCMA or Bargaining Council; See pg 1009: Arbitration)***

The criminal courts and criminal cases

Criminal cases must follow certain laws and rules. These are referred to as criminal laws and procedures. They define what must happen before a case gets to court, the role and powers of the police in this process, what happens in court and what happens at the end of the court case. ***(See pg 221: Police)***

Criminal charges

WHAT IS A CRIMINAL CHARGE?

A criminal case can be brought against anyone who has broken the law. This includes a member of the police (SAPS) or soldiers in the defence force (SANDF).

If you are unlawfully assaulted by a member of these security services, you can lay a criminal charge against the person. If you have laid a charge against a member of the police, they are sometimes reluctant to take the complaint or investigate the case. Likewise, with cases that they don't think are very important, they may refuse to take the complaint, or the police investigation is stopped without a proper explanation.

The police cannot refuse to take a statement from a person who wishes to lay a complaint. If a police officer refuses to assist you with a charge, you can ask to speak to the Station Commander or lay a charge at a different police station.

Pressure from attorneys or the community can help to get the police to take an investigation more seriously. You can also get your Community Police Forum to take up the issue, or you can refer the complaint to the Independent Police Investigative Directorate (IPID). ***(See pg 232: Community Police Forums; See pg 228: Reporting a case of police misconduct)***

In a case where you have been assaulted or raped, you must be able to identify the person who assaulted or raped you. If you do not know the name but you remember the face, you must be prepared to point the person out at an identity parade. Even if you cannot identify the person by appearance or name, you must still lay a charge because there are other ways to positively link a person to crimes of rape and assault, such as DNA testing or other forensic evidence available to the police. Immediately after the rape, go to a police station and get a J88 form. Do not wash or change your clothing, go straight to a doctor for an examination.

Remember that if you have laid a charge against someone and the person is charged, you will have to give evidence in court. You must be very sure of the facts that you give to the police in your statement because the defence will cross-examine you and try to catch you out.

Only the courts can decide if you or anyone else has committed a crime or not. If the court finds you guilty of committing a crime, then you have to pay a fine, go to jail or get a suspended jail sentence.

THE NATIONAL PROSECUTING AUTHORITY

The National Prosecution Prosecuting Authority (NPA) is responsible for instituting criminal proceedings against a person on behalf of the State. It is the NPA that decides whether a case against a person is strong enough to go ahead in a criminal court or not.

The Office of the National Director of Public Prosecutions includes the National Director, who is the head of the Office and manages the Office, Directors of Public Prosecutions, Investigating Directors and Special Directors.

There are 8 units that fall under the NPA:

1. National Prosecution Prosecutions Services (NPS)
2. Asset Forfeiture Unit (AFU)
3. Sexual Offences and Community Affairs (SOCA)
4. Specialised Commercial Crime Unit (SCCU)
5. Witness Protection Unit (WPU)
6. Priority Crimes Litigation Unit (PCLU)
7. Integrity Management Unit (IMU)
8. Corporate Services (CS)

The National Prosecutions Service, managed by a Deputy National Director and nine provincial Directors of Public Prosecutions (DPP), is responsible for

prosecutions in both the high and lower courts of South Africa. The Constitution and the NPA Act provide the prosecuting authority with the power to institute criminal proceedings on behalf of the state and to do anything necessary related to this function, which includes supporting the investigation of a case or stopping criminal proceedings where necessary.

WHAT ARE YOUR RIGHTS IF YOU ARE CRIMINALLY PROSECUTED?

- You must be told what the charge is against you
- You have the right to a quick and public trial. You must be charged and taken to court within 48 hours after your arrest.
- You have the right to a trial by an unbiased court, usually in the area where the crime was committed
- At the trial, you have the right to question any witnesses and the evidence used against you ***(See pg 51: Section 35 of the Bill of Rights: Arrested, Detained and Accused persons)***
- You have the right to ask for an attorney. If you cannot afford an attorney, the state must help you to apply for legal aid to pay for an attorney. You have a right to legal aid if you face a serious charge. ***(See pg 257: Applying for legal aid)***

Many people are still sentenced to go to prison without being defended by attorneys. Make sure you ask the court for a lawyer or legal aid.

If you are denied any of these rights, you may be able to take the Court's decision on review. ***(See pg 201: Trials, appeals and review)***

STEPS IN LAYING A CRIMINAL CHARGE AGAINST ANOTHER PERSON	
1	If you have been injured in any way, it is important to go to a doctor (or the state district surgeon) for a medical check-up as soon as possible.
2	Report your complaint at the charge office of the nearest police station.
3	Make a statement to the police. You must be very careful of what you say because you have to swear under oath that you are speaking the truth. Do not sign your statement if you are not happy with the way the police have recorded it. Ask to change it before you sign. It is not up to the police in the charge office to decide whether a complaint is serious enough to be investigated. They MUST take a statement from anyone who comes into the police station to make a complaint.
4	Ask for a copy of the statement before you leave the charge office. You have the right to get a copy.
5	Get the police reference number. This is the police register number of all complaints made at the charge office. This is your proof that you reported the crime to the police. The reference number is also called an OB number (Occurrence Book number) or VB-nommer (Voorvalleboeknommer).
6	Get a medical report. If you are injured and you need medical treatment, the police will ask you to get a medical report form filled in. This form is called a J88 medical report. You can go to your own doctor or to the district surgeon to get this form filled in. Then, you must take the completed form back to the police in the charge office. If you can, it is a good idea to make a copy of the form and keep this.
7	The police will open a case docket and investigate a criminal charge against the person or people whom you have laid a charge against. The case docket is given a number called a CR number (Criminal Register number) or MR nommer (Misdaadregisternommer). Ask the investigating officer for the case docket number.
8	Check on progress by regularly contacting the investigating officer for your case. Whenever you phone you should quote the CR/MR reference number. If there is no progress with a serious case, and you are not satisfied that the police are doing everything they are supposed to, you might want to ask an attorney to phone on your behalf. If you believe the police are deliberately not investigating a case, for example of police corruption or assault by a police officer, you can make a complaint to the Independent Police Investigative Directorate (IPID). ***(See pg 228 Reporting a case of police misconduct; See pg 268: Problem 10: Police misconduct)***

THE INVESTIGATION

If someone makes a charge against you, or if the police suspect that you committed a crime, then they will investigate. Usually, this means that they ask questions, visit places, search for things, and so on.

CHARGE AND ARREST

When the police have enough reasons to think that you committed the crime, then they will charge you. The charge is what they say you have done wrong. The police may arrest you when they charge you. Sometimes, they may even arrest you before they charge you. If you are arrested but not immediately charged, the law says you must be brought before a Magistrate's Court within 48 hours of being arrested. You can immediately ask to contact an attorney. If you appear before a Magistrate you may ask for legal aid to get an attorney. ***(See pg 227: Rights of arrested people; See pg 257: Applying for legal aid)***

PRISONER'S FRIEND

If you do not have an attorney then you can ask for the Prisoner's Friend as soon as you get to the court. Every Magistrate's Court has a Prisoner's Friend. This person is employed by the state to help people with telephone calls, organising bail money, organising witnesses, and so on. At smaller Magistrates' courts, a court official called the Clerk of the Court may also be the Prisoner's Friend.

STATEMENTS

When you are charged with a crime, the police usually try to take a statement from you. But you only need to give your name and address. You do not have to give any other information to the police if you do not want to. If you make a statement, try not to say things that you may regret later. Your statement can be used against you in court. The police may not put pressure on you to make a statement, nor may they assault or torture you to get a statement. ***(See pg 227: Rights of arrested people)***

Bail

After your arrest, you can be released in the following ways before the court case is over:

- You can be released into the care of your parents or guardian if you are under 18 years old OR
- You can be released with a warning to appear in court on a certain date OR
- You can be released on bail

Bail is money paid to the court or to the police. If you pay this money, you can go home until the date of your court case.

When your court case is over, you get the bail money back, even if you are found guilty. But you will not get your bail money back:

- If you do not come to court on the day of your court case
- If you interfere with any witnesses
- If you break any of the conditions of bail

If you are released on bail, then you will get a written notice. This notice will tell you where the court is. It will show the day and the time that you must be in that court. And it will also show any conditions, for example, that you must report every week to the police station.

There are three kinds of bail:

1. Police bail
2. Bail by certain prosecutors
3. Court bail

POLICE BAIL

You can ask the police for bail as soon as you have been arrested and taken to the police station. If they agree, they will decide how much bail you must pay. You must pay the money in cash. You must get a receipt saying how much you paid and when you must appear in court. When you have paid the bail, the police must release you.

If the police will not agree to police bail, you must wait for the court hearing. In court, you can ask for court bail.

The police cannot grant bail if you were arrested for a serious crime, for example, rape, murder, armed robbery, housebreaking, etc.

BAIL BY CERTAIN PROSECUTORS

For some of the serious crimes, a prosecutor can agree to bail. You must ask the police to telephone the duty prosecutor to check whether you can get bail.

COURT BAIL

When you are brought to court, the court case usually does not finish on the same day. You have a right to ask the court to be released on bail until the case finishes. You can ask for bail at any time on or after the first day in court.

When you ask for bail, you must convince the judge or magistrate that:

- You will not run away
- You are not a danger to other people
- You will not commit further crimes
- You will not intimidate any witness in the case
- You have a permanent address

If you ask for bail, you (or your attorney) must give the court details of where you live, your employment situation, and so on.

When you pay the bail, you must get a receipt. Only the person with a receipt for the bail will get the money back after the trial.

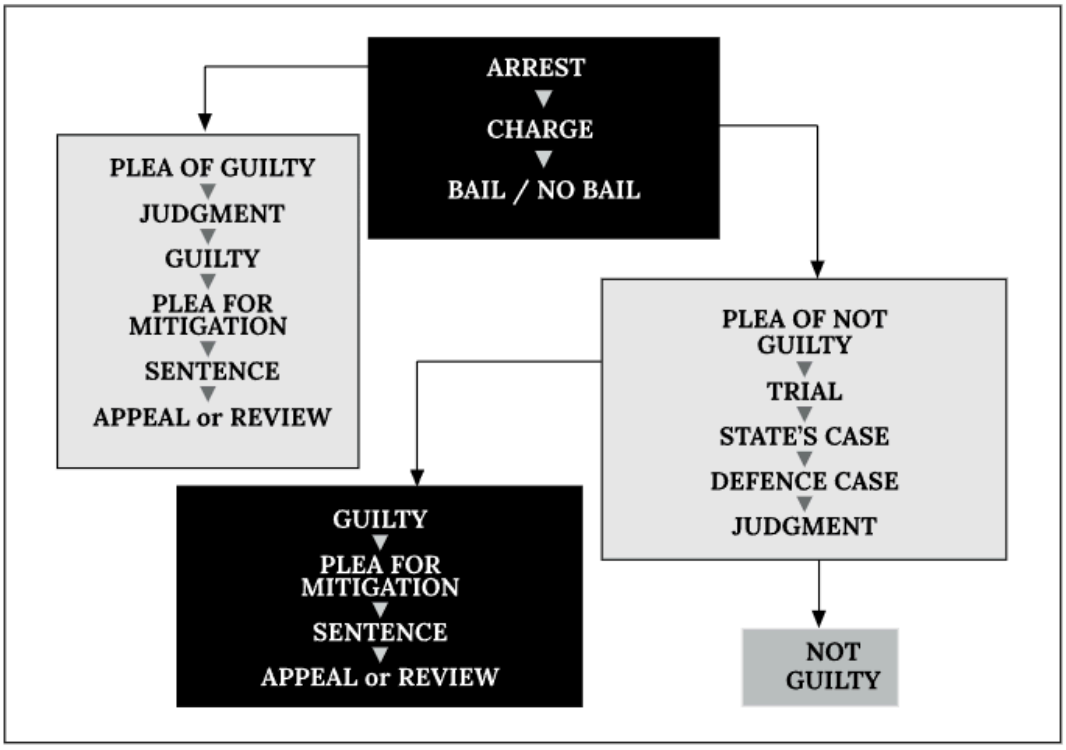
THE CRIMINAL PROCEDURES SECOND AMENDMENT ACT (BAIL LAW)

The *Criminal Procedures Second Amendment Act* (also known as the Bail Law) includes some strict measures regarding bail for people accused of serious offences. The Act lists very serious offences (schedule 6 offences), which include murder, rape, armed robbery and vehicle hijacking, and makes it very difficult for people who are accused of these offences to get bail. The accused will have to prove that exceptional circumstances exist before bail is granted. For Schedule 5 offences, like robbery with aggravating circumstances, drug-dealing, arms-dealing, corruption, fraud, theft or forgery of large amounts of money, the onus will be on the accused to prove that they should get bail. If an accused is charged with a Schedule 5 offence and has been previously convicted of a Schedule 5 or 6 offence, bail will not normally be granted. This is done in a bail hearing at court, where the accused will bring evidence to show why they should get bail, and the prosecutor will ask the investigating officer to provide reasons why the accused should not get bail, for example, that the accused will intimidate witnesses.

According to this law, bail applications for Schedule 5 or 6 crimes will only be heard in Regional Courts. These cases can also not be heard outside of court hours (in other words, there is no night court). Bail can also be refused when an offence has caused community outrage, although this can only happen in exceptional circumstances. Finally, a person accused of a Schedule 5 or 6 crime must disclose all previous convictions and outstanding charges against them at the bail application and they will not have the right to have access to the police docket during the bail hearing. This will help to stop the intimidation and victimisation of witnesses in court cases.

Steps in a criminal court case

SUMMARY OF STEPS IN A CRIMINAL COURT CASE



THE FIRST DAY

Before the criminal trial begins, you must appear in court and the prosecutor tells you what the charges are. The Magistrate will then ask if you understand the charges and whether or not you would like an attorney or if you would like Legal Aid to assist you. If you need an attorney you should ask for a postponement to enable you to get someone to represent you and prepare your case. The court should always ask you whether you want an attorney. You or the prosecutor can ask for a postponement if there are good reasons, for example:

- To have time to find an attorney
- To prepare the case
- To contact witnesses

So, on the first day in court, you can ask for bail if you are under arrest, and you can ask for a postponement of the case. You should also tell the magistrate if you were assaulted by the police or if the police put any pressure on you to make a statement.

THE PLEA

Before the trial begins, the Magistrate asks you to PLEAD. This means that they ask you to say whether you are 'guilty' or 'not guilty'. Do not plead 'guilty' unless you are sure that:

- You did what the prosecutor says you have done, AND
- You did not have a good reason to do what you have done.

You will plead 'not guilty' if:

- You did not commit the crime OR
- You did what people said you had done, BUT you had a good reason for doing it. This reason will then be used in your defence.

If you can prove a defence, the court may decide that you are not guilty of the crime you are charged with or that you are guilty but that your reasons show you should get less punishment. These reasons are then called 'mitigating factors'.

If you plead 'guilty', the magistrate will ask you some questions to be sure that you understand the charge. If your answers make the magistrate think that you have a defence, then the magistrate **must** change your plea to 'not guilty'. If the magistrate accepts your plea of guilty, then they will decide that you are 'guilty as charged'. There is no need for the trial to continue. Your next step will be 'plea in mitigation'. ***(See pg 213: Evidence in mitigation)***

If you plead 'not guilty,' the magistrate must ask you more questions. This is to find out what your defence is.

THE TRIAL

The trial will go ahead if you plead 'not guilty' or the magistrate changes your plea to 'not guilty'.

THE STATE PRESENTS ITS CASE

The state prosecutor presents the state's case to try to show that you are guilty. The prosecutor calls witnesses for the state to give evidence against you. You or your attorney and the magistrate can also question each state witness. This is called cross-examination. The prosecutor can then question the witnesses again. This is called re-examination.

After the prosecutor has called all the state witnesses, they close the case. Now, it is your turn (the accused) to present your case.

DISCHARGE

If there is not enough evidence to show that you committed the crime you are accused of, then you can ask for a discharge. This means you ask the court to set you free. If the magistrate agrees, then a discharge will be given. If the discharge is not given, the case will go on.

THE CASE IN YOUR DEFENCE

The magistrate or judge will ask you or your attorney if you want to give evidence, and if you want to call witnesses. Sometimes, you don't need to give evidence yourself, but if you decide not to, the judge or magistrate might think that you are trying to hide something. All evidence is given under oath. After you have given evidence (if you choose to), you or your attorney can now call your own witnesses. Your witnesses are people who can give the court information to show that you are not guilty. The prosecutor and magistrate can then cross-examine each witness. You (or your attorney) can then re-examine each witness. After you or your attorney have called all the defence witnesses, you 'close the case' for the defence.

ARGUMENT

The prosecutor then sums up the state's case and gives reasons why you should be found guilty.

You or your attorney go over the main points of your defence and summarise why the court must find you not guilty.

JUDGMENT

After listening to both arguments, the magistrate or judge will say if the court finds you guilty or not guilty. The court may postpone the case to give the judge or magistrate time to think about the judgement.

IMPORTANT

You can only be found guilty of a crime if the state proves that you are guilty* 'BEYOND A REASONABLE DOUBT'. *This means that there must be* NO DOUBT *in the court's mind that you are guilty.

If the court finds you 'not guilty', then you are acquitted. This means you are free to go. If you paid any bail money, you can now ask to get it back.

EVIDENCE IN MITIGATION

If the court finds you 'guilty', then you get a chance to ask the court for a lighter sentence. This is called 'evidence in mitigation'.These are reasons that can help you to get a lighter sentence:

- If you are very sorry
- If you did something to correct the wrong, for example, if you gave back something you stole
- If you are younger than 18
- If it is your first offence
- If many people depend on you for support
- If you have other responsibilities, for example, a job
- If it can have a bad effect on you to be in prison, or to have a very heavy punishment, for example, if you have health problems

CASE STUDY

THE CASE OF SERGEANT MANDISI MPENGESI

The criminal court case of Sergeant Mandisi Mpengesi was heard in the Cape High Court. Sergeant Mpengesi was charged with the murder of his six-year-old daughter's alleged rapist. He pleaded in mitigation that he had always been very committed to his police work, which involved helping people whose children had been molested and raped. He said he killed the man because of what this man had done to his daughter and that he had only acted in a way any parent who loved his child would have done.

Sergeant Mpengesi was sentenced to 9 years imprisonment. There was an outcry from the public who thought that there were strong mitigating factors which should have helped him get a lighter sentence.

SENTENCE IS GIVEN

The magistrate or judge will now say what your punishment (or sentence) will be. It can be:

- A prison term
- A fine
- A community service order

- Any of these together
- A caution and discharge
- For children under 18, the sentence can be admittance to a reformatory, or the passing of the sentence can be postponed until the person turns 18
- Correctional supervision: this means serving your sentence outside prison under the supervision of a 'correctional official'

Minimum sentences – The *Criminal Law Amendment Act* lays down harsh and minimum sentences for people who would previously have received the death sentence. The court has to give you at least the sentence laid out in the Act for the specified offences.

Maximum sentences – If a law says that the maximum punishment for a particular crime is 6 months or R600, the court does not have to sentence you to these maximum amounts. The sentence can be anything up to these maximum amounts.

Alternative sentences – If you are found guilty, the court might sentence you to a fine OR imprisonment. So sentences can be given 'in the alternative'.

Suspended sentences – The court may sentence you to a period in prison but suspend all or part of the sentence. This means that the court says you will not be punished on condition that you do not commit a similar crime over a certain period of time. The court gives you a chance to show that you will not do the same thing again. For example, the court may sentence you to 1 year in prison but suspend this sentence for 3 years. This means that you do not have to go to prison now, but if you are found guilty of committing the same or a similar crime in the next 3 years, then you will have to go to prison to serve your sentence of 1 year.

You will also get an additional sentence for the new crime you committed.

EXAMPLE

You are found guilty of ordinary assault and sentenced to 3 years in prison. Two of these years are suspended for 5 years. So you serve 1 year in prison. After that, you are released. Your sentence is suspended for the next 4 years.

If you are charged and found guilty of assault in the next 4 years, then you will have to go to prison to serve out the rest of the first sentence, which is another 2 years. This will be in addition to the new sentence you might get for the second assault.

REVIEW OR APPEAL

You can ask for permission to appeal against the decision of the judge or magistrate if you don't agree with the judgement. You can also ask for a review if you think there were any irregularities during the trial. **(See *pg* 201: *Trials, appeals and reviews*)**

PAROLE

If you have served more than half your sentence and have behaved well in prison, you may be released on parole. Parole means you can be released from prison before you have completed your sentence on condition that you do not misbehave when you are out of prison. Your sentence still runs, but you do not have to stay inside the prison as long as your behaviour is good. If your behaviour outside prison is not good, you go back to prison for the rest of your sentence.

The *Parole and Correctional Supervision Amendment Act* extends the powers of the courts to make sure that a prisoner serves a compulsory period of their sentence before they can be considered for parole. Parole Boards have the authority to control the release of prisoners on parole.

HAVING A CRIMINAL RECORD

If the court finds you guilty, you will have a criminal record for the rest of your life. If you are ever charged again for anything else, the state will check your criminal record. Sometimes, if you are looking for a job, people will also check if you have a criminal record.

If you are not guilty of the crime that you have been charged with, you must enter a plea of 'not guilty' and not be intimidated into agreeing that you will plead guilty in exchange for a very light sentence.

Dealing with organised crime: The Prevention of Organised Crime Act

The *Prevention of Organised Crime Act (No. 121 of 1998)* contains far-reaching measures to deal with the problem of organised crime in South Africa. This is a summary of the main sections of the Act.

It is a crime to manage any organisation whose members are committing serious crimes.

This section is aimed at people like gang bosses who are in a position of authority over those who are committing the crimes. This can lead to a sentence of up to 30 years. It is not necessary to prove that they were directly involved in committing a specific crime.

Any person who receives or owns property from illegal activities will be guilty of an offence. The state only has to prove that they 'ought reasonably to have known' that the property comes from an illegal activity.

The state can seize any asset (a material thing that belongs to you) that has been used to commit a crime, or that has been obtained through crime.

This section allows the state to seize criminal assets without first having to find the owner guilty beyond a reasonable doubt (the normal test in a criminal case).

EXAMPLE

Where the state believes that drugs are being sold from a particular house, the state only has to prove that there is a 51% chance that the house is used to sell drugs. No one has to be convicted (found guilty) of drug dealing before confiscating the house. It is not necessary to prove that the owner of the house was involved in the crime or even knew about the drug dealings.

The state can confiscate assets that:

- Have been used to commit a crime, for example, a car used to transport stolen goods, a house from which drugs are sold, or a bank account used to hide dirty money
- Have been gained from the unlawful activity

The **Asset Forfeiture Unit** is responsible for carrying out the work involving the seizure of assets under the Act. The Asset Forfeiture Unit works from the office of the National Director of Public Prosecutions.

The Act makes it a crime to recruit members to a gang or participate in criminal gang activity.

The Act sets penalties for people like gang bosses with sentences of up to 30 years in prison or fines of R10 million, in addition to losing property that they have gained through gang-related activities. Any person who promotes or helps in criminal gang activity will be liable for a sentence of up to 3 years, and any person recruiting, advising or helping someone to join a gang can go to prison for 2 years.

The Child Justice System

The *Child Justice Act 75 of 2008* is part of a process of reforming the youth justice system in South Africa to deal more fully with children accused of committing offences. The Act covers the procedures that people in authority must follow from the time the child is arrested until the moment when the sentence is passed and aims to protect children's rights. The Act also follows the restorative justice approach towards children accused of committing crimes. This approach means '*promoting reconciliation, restitution and responsibility through the involvement of a child, the child's parent, family members, victims and communities*'.

Reconciliation means bringing the parties together to resolve the matter and reach an agreement on how the child should be punished. **Restitution** means putting the child back into their own environment.

AGE AND CRIMINAL CAPACITY

According to the *Criminal Justice Act* (CJA), a child is someone who is under the age of 18. The CJA is specifically intended for children between the ages of 12 and 18. The CJA states that:

- A child **under the age of 12 years** cannot be arrested. A child under 12 years does not have criminal capacity, which means they don't have the capacity to understand the difference between right and wrong and to act according to this understanding. This means they cannot be charged or arrested for an offence. In such a case, the child will be dealt with by social workers who may refer the child to a Children's Court.
- A child **older than 12 years but below the age of 14 years** is presumed to lack criminal capacity unless the state proves that they had criminal capacity. In other words the state can prove that the child did understand the difference between right and wrong and they acted according to this understanding. A child in this age category can be arrested.
- A child **above 14 but under 18 years** of age is said to have criminal capacity and can be arrested, prosecuted and diverted at the discretion of the prosecutor.

TYPES OF OFFENCES

The *Child Justice Act* provides for three different types of offences:

- **Minor offences:** Includes theft of property worth not more than R2 500, malicious damage to property that is not more than R1 500, and common assault.
- **More serious offences:** Includes theft of property worth more than R2 500, robbery, assault that includes causing grievous bodily harm, public violence, culpable homicide, and arson.
- **The most serious offences:** Include robbery with aggravating circumstances, rape, murder and kidnapping, amongst others.

HOW THE CHILD JUSTICE SYSTEM WORKS

A child who is suspected of committing an offence will be apprehended by the police and assessed. Depending on how serious the offence is, the child may be warned, summoned or arrested and required to appear at a **preliminary inquiry**. The preliminary inquiry is an informal process which will be held within 48 hours of the child's arrest. It includes the child, their parents, the magistrate, prosecutor, probation officer and legal representative.

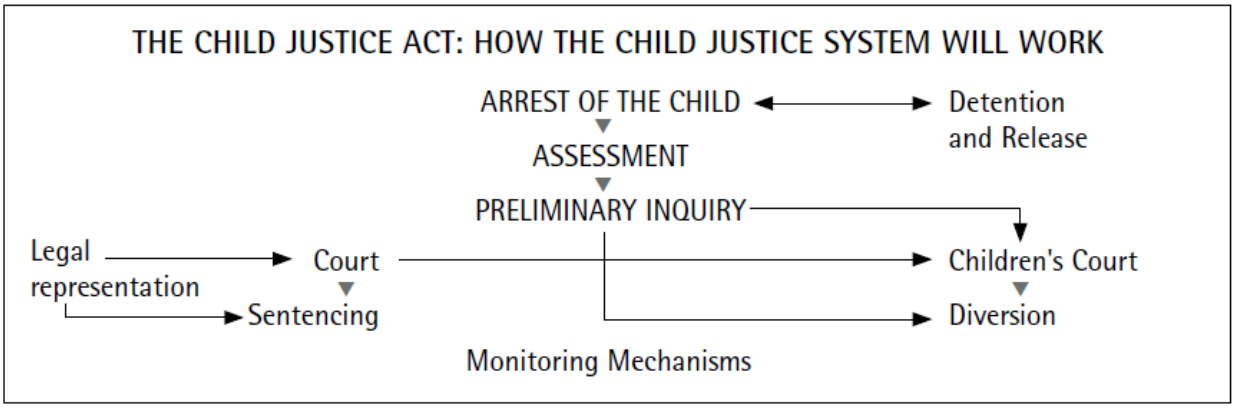
The purpose is to try and find ways of assisting the child to accept that they did wrong and that they have responsibility for the crime. If the child accepts responsibility, a plan is developed to assist the child not to repeat the crime. This may include diversion ***(See pg 219: Diversion)***.

STEP-BY-STEP GUIDE TO THE CHILD JUSTICE PROCESS

1. A child is suspected of committing an offence.
2. If the offence is serious, the child may be arrested and charged by the police. If the offence is less serious, the child and their parent or guardian or an appropriate adult will be warned or handed a notice to appear in court by the police.
3. There are two possibilities at this stage:
    a. A child under 12 must be referred to a probation officer (social worker), or
    b. A child between the ages of 12 and 17 years must be assessed by a probation officer.
4. The parent, guardian, appropriate adult or police bring the child to court.
5. A preliminary inquiry will be held to inquire into the matter to decide on how to proceed with the matter and whether or not the child accepts responsibility for the crime.
6. At the preliminary inquiry, there are four possible steps that may be taken:

a. If the child is in need of care and protection, the matter will be referred to the children's court, which will determine the best possible environment for the child.
b. At the preliminary inquiry, the probation officer's assessment report will be considered.
c. If the child accepts responsibility, it may recommend at the preliminary inquiry that the child be diverted. If the child does not complete or comply with the diversion, they will be brought back to court.
d. If no diversion order is made by the court or the child does not comply with the diversion, the case is referred to the Child Justice Court for plea and trial.

7. At the trial, the child could be convicted and sentenced or acquitted.



DIVERSION

Diversion means finding an alternative way for criminal offenders to 'pay' for their crimes so that they don't have to follow the normal court procedures and end up in prison with a criminal record. Diversion focuses on rehabilitating people back into their communities, and so diverting them away from the formal court procedures. Types of diversion programmes include attending a life-skills course, doing unpaid work in the community, or paying back the victim of a crime.

The child justice system promotes the use of diversion of cases away from the formal court procedures. The Child Justice Act says:

- There must be an assessment by the probation officer of the child within 48 hours of the child's arrest

- There must be a preliminary inquiry held by a district magistrate within 48 hours of the child's arrest and before their plea

The Act sets out three levels of diversion, which cover different types of diversion programmes. The probation officer can make recommendations about which diversion programme a child should be sent on.

SENTENCING OPTIONS

Diversion programmes form a large part of the sentencing options that magistrates can use when dealing with children who are in conflict with the law.

Sentencing options include:

- **Community-based sentence,** which includes community service
- **Restorative justice sentences** which involves the child offender, the victim, or the families concerned and community members through family group conferences or victim-offender mediation.
- **Correctional supervision** which involves monitoring of the child by a correctional official. This sentence is served in the community.
- **Direct prison sentence** in a correctional facility

ONE-STOP CHILD JUSTICE CENTRES

The Act says a One-stop Child Justice Centre can be situated anywhere but not in a court or police station. These centres provide:

- Offices for police and probation officers, attorneys representing children, people providing diversion and prevention services, people who trace families of children
- Temporary accommodation for children who are waiting for the outcome of the preliminary inquiry
- a Children's Court to hear children's court inquiries
- a Regional Court

The role of the magistrate who presides over a case involving a child is:

- To make sure the compulsory assessment has been completed
- To make a decision about whether the matter should be diverted, or transferred to a Children's Court for an inquiry, or prosecuted

The magistrate has to decide where to place a child. Magistrates can only make informed decisions about children if they work closely with their families, NGOs, welfare agencies, community members and others during the preliminary inquiry.

Police

Powers of the police to question

If you are driving a car, motorcycle or any other vehicle, the police can ask you to stop at any time, give your name and address and show your driver's licence. If you refuse to do any of these things, you can be charged.

The police can ask you to produce your ID book **at any time** and you must do this. They can **question** anyone without arresting them. But whether a person has to answer the police's questions depends on the circumstances. The police may ask you to give your **full name and address** if they:

- Suspect you of committing a crime
- Suspect you of trying to commit a crime
- Think that you might be able to give them some information about a crime

But you can ask the police officer for their identity document. If the police officer refuses, you need not give your name and address. If the police officer produces their ID then you must give your name and address. If you don't you could be prosecuted for committing a crime. ***(See pg 266: Problem 7: Refusing to give your name or address to the police)***

If the police officer asks you any other questions it is your right not to answer these questions. It is also your right to say that you will only answer other questions if your attorney is present. The police might ask you to go to a police station to make a statement. You have the right to refuse to go. But the police may decide to arrest you. You must then go to the police station with them, but you still have the right to refuse to make a statement, even if you are under arrest. ***(See pg 223: Powers of the police to arrest)***

Powers of the police to search and seize

You have a right to keep your body and property private. But sometimes the police need to collect evidence against criminals, so they are allowed to search you. They can take things away, which is called seizing. There are two ways of searching and seizing property. These are:

SEARCH WITH A SEARCH WARRANT

> The police must get legal permission for a search. It is usually signed by a magistrate. It must describe the person or the place to be searched and the things which the police will seize.

The police must carry out the search by day unless the warrant says they can search at night.

The police can only search the people and property mentioned in the warrant, and they can only seize the things mentioned in the warrant.

If the police are about to search you or seize your property, you can **demand to see the search warrant.**

A special type of search warrant can be issued allowing the police to enter any place or premises if they think that a meeting held on the premises threatens state security, or if they think that any offence was committed or planned on the premises.

SEARCH WITHOUT A SEARCH WARRANT

The police do not need a search warrant to search if:

- You agree to let them search you
- The police have reasonable grounds for thinking that a magistrate would issue a warrant, but that the delay in getting the warrant would give you time to get rid of the evidence
- You are arrested
- The search is at a roadblock, but they must still have reasonable grounds for thinking that a magistrate would issue a warrant
- The police suspect that you have drugs or dagga, illegal liquor, guns or ammunition or stolen crops or animals with you
- The police reasonably suspect you have information that can help an investigation Then they can enter your property to question you, but they must always first ask for your consent to search or enter your property.

The police can use force to enter your premises if you refuse to allow them in and they ask you if they can enter.

A policeman can only search men, NOT women. Women can only be searched by policewomen or any other woman that the police ask to do the searching.

If your premises are unlawfully searched or if you are abused during a search, you can sue the government. You can also sue the government if the police damage any of your property unnecessarily.

If the police get evidence against you by going against any of your rights, the court may refuse to hear that evidence. ***(See pg 268: Problem 10: Police misconduct)***

Powers of the police to arrest

The law says that the police can only arrest you if:

- They want to charge you and take you to court or
- If you are a suspect in a police investigation

An arrest for any other reason is unlawful. For example, if the police arrest you just to scare you, this is unlawful. An arrest is also unlawful if the police do not obey the rules about arrest.

If the police arrest you, you can usually pay bail money to the police or the court and go home until the date of your court case. ***(See pg 207: Bail)***

ARREST: GENERAL RULES

(See pg 51: Section 35 of the Bill of Rights: Arrested, detained and accused persons)

There are two ways in which the police can arrest you:

- With a warrant of arrest
- Without a warrant of arrest

ARREST WITH A WARRANT

The police get legal permission, usually signed by a magistrate, to arrest you. A police officer of the rank of lieutenant or higher can also sign an arrest warrant. The police must show you the warrant if you ask to see it, and they must give you a copy of the warrant if you ask for a copy.

ARREST WITHOUT A WARRANT

Sometimes, the police can arrest you without a warrant. Here are some examples of when this can happen:

- If you escape, or try to escape, after the police arrested you earlier
- If the police catch you while you are committing a crime
- If the police think you committed a serious crime like murder, rape, serious assault, housebreaking
- If the police think you committed a drug or liquor offence
- If the police find you at night, doing something that makes them think that you are about to commit a crime or have already committed a crime
- If the police think you have not paid a fine which a court ordered you to pay

- If you try to stop the police from doing their duty
- If the police think you have guns or ammunition without a licence
- If you are carrying any other dangerous weapon and you can't give a good reason to the police
- If the court said you must go to prison for certain periods, for example, every weekend, and you do not go
- If the police think you broke the conditions of a suspended sentence

MAKING A LAWFUL ARREST

There are three things the police must do to make an arrest lawful:

1. **The police must tell you that you are under arrest** – Sometimes, the police ask you to go with them to the police station without saying that they are arresting you. If you go with them voluntarily, then they do not have to arrest you. It is your right not to go with them unless they arrest you.
2. **The police must have physical control over you when they arrest you** – This means the police must make sure you can't get away. If you do not try to run away, the police do not have to use force to control you. But if you do try to run away, the police can use reasonable force to keep control of you, in other words, only as much force as is necessary.
3. **The police officer must tell you why you are under arrest** – This means the police must tell you what offence they think you have committed.

UNLAWFUL ARREST

Here are some examples of unlawful arrest:

- If there was **no good reason** to suspect that you committed an offence
- If the purpose of the arrest was not to charge you but just to **scare** you
- If the police officer **did not tell you** that you were under arrest, and you were not caught while committing an offence ***(See pg 268: Problem 10: Police misconduct)***

USING FORCE TO MAKE AN ARREST OR TO STOP YOU ESCAPING FROM ARREST

The law says that when the police make a **lawful** arrest, they can use force if you try to fight or run away. The law says that the amount of force must be just enough to stop you from fighting or running away. The *Criminal*

Procedure Act, Section 49, deals with the right of police (or someone entitled to make an arrest) to use deadly force in certain situations. Section 49(1) of the Act deals with the use of force to carry out an arrest. Section 49(2) says that 'deadly force' may be used in certain circumstances to carry out an arrest. The clause was challenged in the Constitutional Court because it was held to go against a person's right to life [Section 11 of the Bill of Rights] as well as their right to human dignity [Section 10 of the Bill of Rights] and bodily integrity [Section 12 of the Bill of Rights]. These rights had to be balanced with the interests of a just criminal system. ***(See pg 267: Problem 8: Police shoot and injure while making an arrest)***

In the case of *S v Walters* (*May* 2002), Walters and his son had been charged with murder after they shot a suspect running away from their bakery one night. The state (the prosecution) said Walters had no right to kill a suspect in the process of carrying out the arrest. The Court found that section 49 must be interpreted to exclude the use of a firearm unless:

- The suspect is threatening to harm the person arresting them or someone else, or
- The suspect is suspected of having committed a serious crime involving or threatening harm to a person.

Section 49 of the *Criminal Procedure Act* has subsequently been amended. The Court found that the provisions in Section 49(2) allowing the use of 'deadly force' for arrests were too wide and were, therefore, unconstitutional. For example, using 'deadly force' in the case of a person caught shoplifting would not be justifiable.

The court summarised the main points regarding the use of force to make arrests under this section:

- Force can only be used where it is necessary to carry out the arrest
- Where force is necessary, then the least amount of force to carry out the arrest must be used
- When deciding what degree of force is reasonable and necessary, all the circumstances must be taken into account, including:
    - The threat of violence from the suspect to the arrestor or someone else, and
    - The nature and circumstances of the offence committed by the suspect (the force must be proportional to the offence)
- Shooting a suspect for the sole purpose of making an arrest is only possible in limited circumstances, for example, when:

- There is a threat of violence from the suspect to the arrestor (person arresting them) or someone else
- The suspect is suspected of having caused someone serious harm
- There is no other reasonable way of carrying out the arrest at that time or later
- The arrestor is acting in self-defence or in defence of any other person

EXAMPLE

The case of Andries Tatane, an unarmed protester shot dead by police in Ficksburg, as well as the shooting of 34 strikers in Marikana, are examples of cases where the use of force may have been excessive.

UNLAWFUL USE OF FORCE

Here are some examples of unlawful use of force:

- If the arrest itself is unlawful, any force that the police use is unlawful
- If you did not try to fight or run away, and the police used force in making the arrest
- If the police used more force than necessary

ARREST BY AN ORDINARY PERSON

This is also called a citizen's arrest. Any ordinary person can arrest you without a warrant of arrest in these cases:

- If you committed a serious offence, or the person suspects that you committed a serious offence
- If the person is reasonably sure that you committed an offence and you try to run away when they try to arrest you
- If you are fighting and someone may be seriously injured
- If the person thinks you went into any fenced land, or a kraal shed or stable, intending to steal crops or animals
- If the person finds you with some animals or crops which they suspect that you stole, and you can't explain why you have them
- If the person is in charge of the premises or is the owner, they can arrest anyone who commits an offence on the premises

You are also an 'ordinary person'. You can arrest other people in the above cases, too. For example, someone snatches your bag in the street. You chase after them and catch them. You can lawfully arrest the person.

RIGHTS OF ARRESTED PEOPLE

If you are arrested, Section 35 of the Constitution lists your rights as follows

- From the time of arrest (even before you have been charged, you have a right to see your attorney.
- The police officer must take you to a police station as soon as possible unless the warrant of arrest says they must take you to some other place.
- You do not have to answer questions, but you must give your name and address. It is best not to say anything else to the police until you speak to your attorney.
- While you are locked up in a cell, you have the rights to:
    - Have family visits
    - Dee a minister of religion (usually, this is a minister working for the government)
    - See a doctor (usually this is a government doctor, the district surgeon or a prison doctor)
    - Wear your own clothes
    - Exercise for at least one hour a day in the open air
    - Write and receive letters
    - Get enough properly prepared food and drink
- The police must take you to court within 48 hours after your arrest.

If the 48 hours ends after 4 pm on a weekday, then they must take you to court on the next day before 4 pm. If the 48 hours ends on a weekend or a public holiday, then they must take you to court on the first court day before 4 pm. This is usually the next Monday unless the Monday is a public holiday. If this does not happen, then it is unlawful for the police to keep you in prison. You can sue the police. **(*See pg 268: Problem 9: Your right to appear in Court within 48 hours of arrest*)**

If the police get evidence against you by going against any of your rights, this evidence will not be allowed in court. **(*See pg 51: Section 35 of the Bill of Rights: Arrested, Detained and Accused persons*)**

WHAT TO DO IF YOU ARE ARRESTED

- Do not struggle with or swear at the police – even if the police made a mistake
- Give the police your name and address - otherwise, keep quiet. You must also show your identity book if they ask for it. Do not discuss your case with

anyone and do not sign any statements about your case. If the police officers insist that you sign a statement, ask them to let you read it, if it is written in a different language, ask them to interpret it for you. Ask them for a copy of the statement.

- As soon as possible after you arrive at the police station, say that you would like to see an attorney. If you do not know an attorney, then ask to see your family. Ask them to get you an attorney. If you cannot afford an attorney, ask your family to apply for legal aid for you. ***(See pg 257: Applying for legal aid)***
- If you are released on police bail, ask for your bail receipt and find out when you are due in court. Never be late for or miss a court hearing. If you do not arrive in time, a warrant for your arrest may be issued. You may also lose your bail money if you do not go to court on the day of the court hearing.
- Do not talk about your case to anyone except your attorney – if you have one. Ask for your attorney to be present if you are questioned or told to attend an identity parade. **An identity parade** is when you and some other people are called to parade in front of a witness, who is asked to identify the person who committed the crime against them.

Reporting a case of police misconduct

THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

The *Independent Police Investigative Directorate Act, No. 1 of 2011*, provides for the establishment of an Independent Police Investigative Directorate (IPID), which is an independent police complaints body that must investigate any alleged complaint of misconduct or offence committed by a member of the police service including South African Police Services (SAPS) and Municipal Police Services (MPS). The IPID must be established at national and provincial levels. The IPID was established in terms of Section 206 (6) of the Constitution.

Apart from setting up the IPID, the objectives of the Act are as follows:

- To provide an independent oversight of the South African Police Service (SAPS) and Municipal Police Services (MPS)
- To provide an independent and unbiased investigation of criminal offences allegedly committed by SAPS and MPS
- To make recommendations concerning any findings under an investigation and how people should be disciplined
- To make SAPS and MPS more accountable and transparent as required by the Constitution.

STRUCTURE OF THE IPID OFFICES

The IPID will be established at national and provincial levels. The executive director is the head of the IPID and this person is nominated by the Minister of Police. The relevant parliamentary committee must confirm or reject the appointment. The executive director is appointed for 5 years, and the appointment can be renewed for only one additional term. The executive director appoints heads of each province.

FUNCTIONS OF THE EXECUTIVE DIRECTOR

The executive director must:

- Give guidelines for the investigation and management of cases by officials in provincial offices
- Refer criminal offences that are found after investigation to the national prosecuting authority for criminal prosecution and must inform the minister of police about this
- Ensure that complaints regarding disciplinary matters are referred to the national police commissioner and the provincial commissioner (if this is relevant
- Submit a monthly summary of the disciplinary matters to the minister of police
- Refer any recommendations that do not relate to criminal or disciplinary matters to the minister of police
- Ask for complaints relating to any offence committed by a member of the SAPS or MPS to be investigated, and if necessary, refer this to the national or provincial commissioner
- Refer any criminal matters which fall outside the scope of the IPID to the appropriate authority for investigation in terms of the law
- Report on the activities of the IPID to the minister or parliament when asked to do so

FUNCTIONS OF THE NATIONAL IPID OFFICE

The national office oversees and monitors the performance of provincial offices. It also gathers and stores information relating to investigations, develops public awareness of the IPID, makes recommendations to the SAPS and MPS resulting from investigations done by the IPID, and reports twice a year to parliament on the number and type of cases investigated, the recommendations and the outcome of these recommendations.

THE MANAGEMENT COMMITTEE OF IPID

The management committee consists of the executive director and the provincial head for each province. The functions of the management committee are to:

- Ensure there is coordination in each province and alignment with national objectives
- Identify any matters of strategic importance to the functioning of the IPID
- Ensure there is regular reporting on matters linked to the provincial directorates

PROVINCIAL OFFICES

Each provincial office is headed by a provincial head who has the following functions:

- To facilitate investigations of cases
- To control and monitor cases
- To refer matters investigated by the provincial office to the national or relevant provincial prosecuting authority for criminal prosecution
- To report to the executive director on recommendations and finalisation of cases
- To report to the MEC on matters referred to the provincial head by the MEC
- To ensure that proper guidelines are followed for investigations

POWERS OF INVESTIGATORS

An investigator has the same powers as a police officer in terms of the *Criminal Procedure Act*, 1977, in respect of:

- Investigation of offences
- Entry and search of premises
- Seizure and disposal of articles
- Arrest
- Execution of warrants
- Attendance of an accused person in court

An investigator can:

- Ask any person to submit an affidavit if it has to do with an investigation, to appear before them, or to give evidence or to produce any document in that person's possession or under their control

- Ask for an explanation from someone if they believe this has something to do with a matter being investigated

The person who has been investigated can refuse to answer any questions if this will incriminate them. The investigator must inform the investigated person of this right. If an investigator does get information in this way, it cannot be used as evidence against that person in court.

Types of matters that can be investigated

The IPID must investigate the following types of cases:

- Deaths in police custody
- Deaths as a result of police actions
- Any complaint relating to a police officer using an official firearm
- Rape by a police officer (whether the officer is on or off duty)
- Rape of any person while that person is in police custody
- Any complaint of torture or assault while the police officer is on duty
- Corruption matters in the police, whether this is raised by the executive director, or a complaint is made by a member of the public or referred to the Directorate by the Minister, an MEC or the Secretary of Police

The IPID can investigate matters relating to corruption involving the police.

IPID will not investigate service delivery complaints against SAPS or MPS members, such as failure to investigate, failure to assist, failure to give feedback, rudeness and police misconduct. These matters are dealt with by the police inspectorate in the offices of SAPS Provincial Commissioners.

REPORTING A COMPLAINT TO IPID

You can lodge a complaint with IPID if you are a victim, witness or representative if it is a case involving:

- Death in police custody
- Death as a result of police actions
- A police officer using an official firearm
- Rape by a police officer (whether the officer is on or off duty)
- Rape of any person while that person is in police custody
- Torture or assault by a police officer while on duty

- Corruption in the police

A complaint may be lodged in person, by telephone, by letter or by email to any IPID office. The complainant must fill in a Complaint Reporting Form (Form 2), which you can get from any IPID office. You can also download the 'Complaint Reporting Form' by following this link: https://www.ipid.gov.za/sites/default/files/IPID_Complaints_Form-Form2.pdf.

The police - either the Station Commander or any member of the SAPS or Municipal Police Services - have a duty to report to the IPID any matters that must be investigated by the IPID immediately after they become aware of it. Within 24 hours of becoming aware of the matter, they must submit a written report to the IPID on the correct form.

The SAPS or MPS must cooperate with the IPID in the following ways:

- By arranging an identification parade within 48 hours of the request made by the Directorate
- By making members available to provide affidavits or to give evidence or produce any relevant document that they have in their possession

DUTY OF POLICE TO ACT ON DISCIPLINARY RECOMMENDATIONS

If IPID's disciplinary recommendations have been referred to the national commissioner or provincial commissioner, then the relevant commissioner must start disciplinary proceedings within 30 days of receiving the recommendations. The police minister must be informed, and the Executive Director of the IPID must be sent a copy.

The commissioners must submit a written report every quarter to the police minister on the progress regarding disciplinary matters.

As soon as a disciplinary matter is finalised, the commissioner must inform the Minister of Police in writing of the outcome and send a copy to the executive director.

Community Police Forums

The South African Police Service (SAPS) has adopted 'community policing' as its basic philosophy for dealing with crime in communities. Community policing aims to bring the police and community together to solve problems of crime. The definition of community policing is: *'a philosophy that guides police management styles and operational strategies and*

emphasises the establishment of police-community partnerships and a problem-solving approach in response to the needs of the community.'

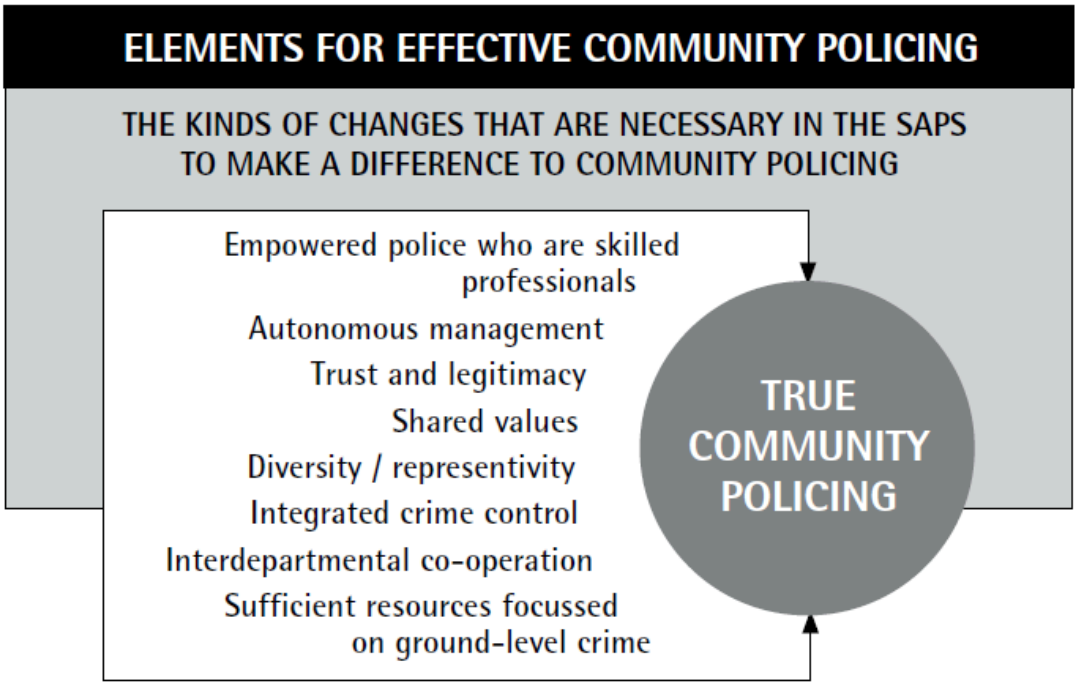
By working together, the SAPS hopes to make communities safer places to live in. This forms part of the National Crime Prevention Strategy, which has meant a shift from crime control to crime prevention. It also emphasises crime as a social problem rather than a security issue. The National Crime Prevention Strategy provides for a number of preventative programmes and underlying these is the basic policy of community policing.

Community policing requires the SAPS to focus on giving a good service, working in partnership with the community through the Community Police Forums and being accountable to the community.

FORMING COMMUNITY POLICE FORUMS (CPFS)

The CPF is a forum representative of organisations and groups in the community and local government that work with the police around issues of safety and security. The objectives of CPFs are to:

- Promote communication and cooperation between the SAPS and the community
- Improve the police services to the community
- Improve the transparency and accountability of the SAPS to the community
- Help with joint identification of problems and how to solve these



THE ROLE OF COMMUNITY POLICE FORUMS

A CPF should play the following roles:

- To make sure that local police can explain to people what they are doing about crime in the area
- To check on how well the police are using their resources in dealing with crime in the community
- To monitor how well the police are doing their work in the community, for example, is it easy to find a police officer when you need one, are there always plenty of police visible at rallies and other mass events, do police patrol the streets, do police respond quickly when a crime has been reported, and so on
- To enquire into local policing matters, for example, what are the main problems with crime in the community, are the police dealing with these issues effectively, and are the police using their resources most effectively

THE CPF CONSTITUTION

The CPF should have a constitution that contains the standard elements of a constitution, including the mission of the CPF, how decisions are taken, voting, meetings, financial procedures, etc.

PARTNERSHIPS BETWEEN THE COMMUNITY AND THE POLICE

CPFs represent a partnership between the community and the police. These are the roles of each partner:

- The police run the police station – although some Forum members may be trained to help with administration work
- The community advises and helps the police and monitors their performance

A CPF may be consulted on these aspects of the day-to-day running of the police station:

- New appointments to the station
- Changes from foot patrols to bicycles or cars
- Changes in how the police operate
- Changes to the police station, including where new police stations should be built

LOCAL GOVERNMENT AND CPFS

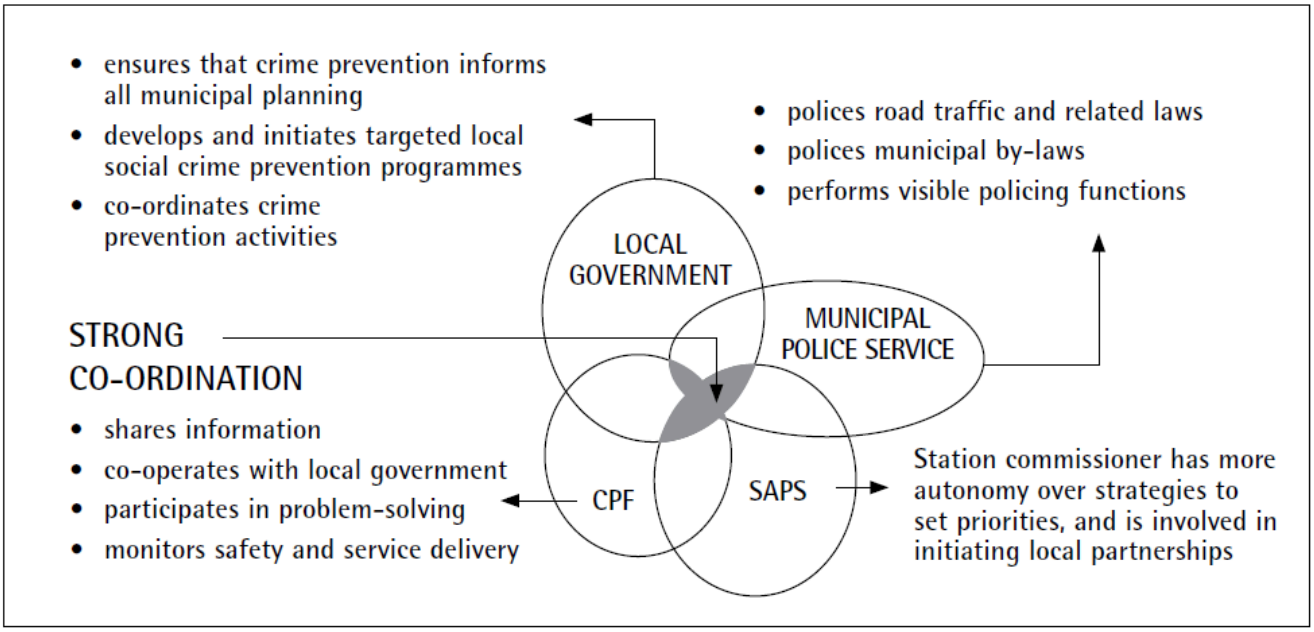
Local government should work with CPFs and Area Community Police Boards to set priorities and objectives for the forum.

CPFs should work with local government by:

- Setting crime prevention strategies together and agreeing on how these will be carried out
- Assisting with developing targeted social crime prevention programmes
- Identifying flashpoints and crime patterns, communicating these to local government and the saps, and participating in problem-solving
- Mobilising and organising community-based campaigns and activities and the resources that are needed to keep them going
- Facilitating regular attendance by local elected representatives at CPFs

The diagram below shows how the relationship between local government, community police forums, and the SAPS should work. Relationships also need to be built with various other government departments for example, the various provincial social services departments.

RELATIONSHIP BETWEEN LOCAL GOVERNMENT, COMMUNITY POLICE FORUMS AND THE POLICE



FUNDING CPFS

Funding in part for the CPFs is made available from the Provincial Secretariat of Safety and Security. However, the majority of the funds have to be raised by the forum from local businesses or through holding fund-raising ventures. CPFs need money for various aspects of their work. For example, money to hire transport to bring people to workshops or to hire consultants to train members of the forum in how to mediate disputes.

CPFs are required to set up a Funding Foundation to manage the funds. The Funding Foundation is a Section 21 (not-for-profit) company that raises money for projects and manages the income and expenses of the forum. The Funding Foundation should have a separate board of trustees. The trustees can be chosen from community-based organisations, private businesses, religious groups, and so on. The CPF should appoint a professional auditor to audit the financial records every year.

The civil courts and civil cases

Civil claims

In civil claims, it is not the state that prosecutes. In a civil claim, you bring a case against a person a company or other organisation. You can claim for money that is owed to you, or you can claim compensation for mental and physical harm that was done to you. This compensation is called DAMAGES. In a civil claim, the state can also be like a 'private person' if it is suing somebody else or if it is being sued for a wrongful act. ***(See pg 186: Civil law)***

Examples of problems where you can start civil claims include assault, eviction, divorce, defamation, injury because of negligent driving, breaking a contract and if someone owes you money. Civil claims can be brought in various civil courts including, the High Courts, District Magistrates' courts, Regional Magistrates' Courts, Small Claims Courts, Family Courts, Equality Courts and Chiefs and Headmen Courts. Each court has its own area of jurisdiction which is defined by law. This means the law says what kinds of cases the courts can hear and what kinds of sentencing can take place in each court.

The two sides in a civil claim are called the 'parties'. The person who complains is called the plaintiff. The person being sued is called the defendant. Civil cases heard in the Magistrate's Court or High Court will require an attorney to draw up papers for either of the parties. However, in the Small Claims Court you will not be allowed to use an attorney.

PRESCRIPTION PERIODS

All claims fall away (prescribe) after a certain period. In other words, you will lose your right to claim against another person if you wait too long to make the claim. If you are helping someone with a case, it is very important that you do not delay in taking follow-up action and that you advise the person immediately of the time limits.

PRESCRIPTION PERIODS FOR NON-GOVERNMENT CLAIMS

- **3 years -** Debt or claim from a contract or personal injury, defamation, wrongful death, trespass, etc., will prescribe 3 years from the date when it became payable. This means that the person who owes the debt will not be liable to pay this debt after 3 years if there has been no claim.
- **30 years -** A person can become the owner of a thing, such as a piece of land, after possession for an uninterrupted period of 30 years.
- **3 years -** A claim for compensation for loss or damage (bodily injury) from a motor vehicle accident must be lodged with the Road Accident Fund within 3 years from the date of the accident and must be finalised within 5 years from the date of the accident.
- **12 months -** A claim for compensation for injuries at work must be made within 12 months from the date of the accident.
- **3 months -** Notice of a claim against a lawyer for theft should be made to the Legal Practices Council within 3 months after a person became aware of the theft.

PRESCRIPTION PERIODS FOR GOVERNMENT CLAIMS

A claim against a government body arising from a contract or wrongdoing, such as a personal injury, defamation, wrongful death, or trespass, will be prescribed after 3 years. You need to follow the following time limits:

- Give notice in writing of your intention to institute legal action against a government body within 6 months of the claim arising. The notice must be served on the person by hand or by electronic mail or fax.
- Claim against the relevant body within 3 years of the claim arising.

If you don't give the required 6 months' notice and you have good reasons for not giving proper notice, you can apply to the court for condonation. This means you ask the court to allow you to continue with the claim even though it has officially been prescribed because you had good reasons for failing to give notice.

PREPARING FOR A CIVIL CLAIM

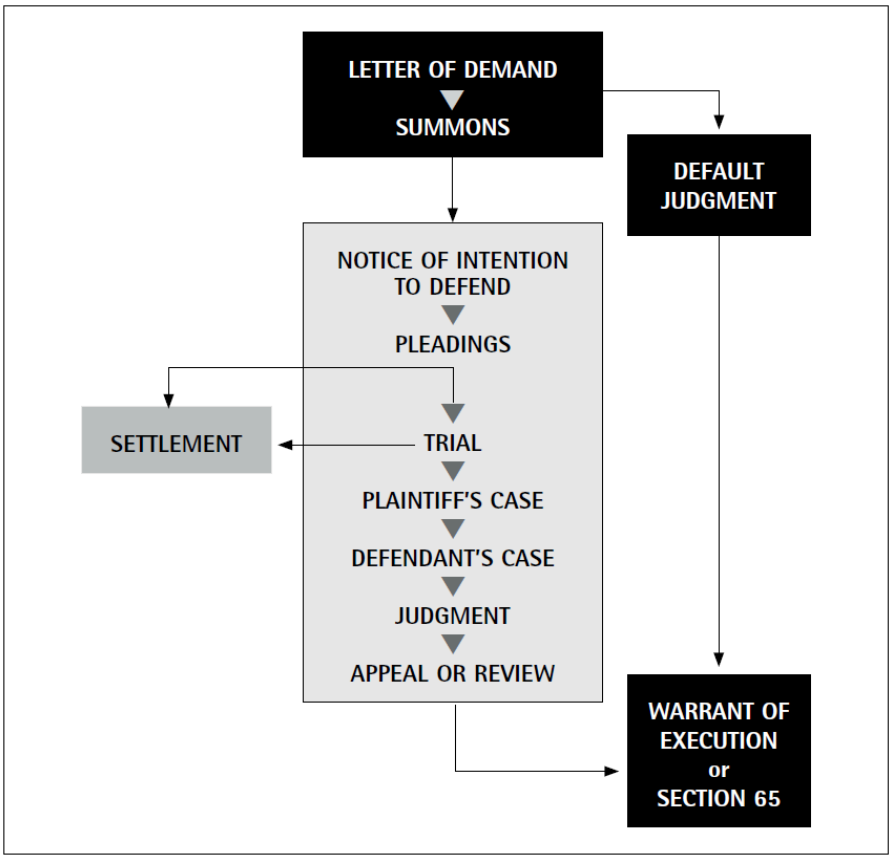
Before the steps in a civil claim can begin, this is what you must do:

- **Draw up a statement** – Make a statement about what happened to you.
- **Collect evidence to support your case** – For example, take photographs of your injuries, go to a doctor and get treatment and a medical certificate, and get the names, addresses, and statements of witnesses who saw the incident.
- **See an attorney (if this is appropriate)** – Take your statement to an attorney. The attorney will check your statement, and then make your statement into a sworn statement called an affidavit in the case of an Application. You must then swear that what you say in your affidavit is the truth.
- **Make a criminal claim at the same time** – Remember that if the act against you is a criminal act, then you can make a civil claim and a criminal case at the same time. For example, if someone assaults you, you can make a criminal charge against that person because it is a crime to assault someone. You can also bring a civil claim against that person for damages, for example, pain and suffering, loss of wages, medical costs, and so on.

Steps in a civil claim in a magistrate's court

The aim in a civil claim is for the plaintiff to prove to the court that their case is better than the case of the defendant. In the court they say this must be proved on a 'balance of probabilities'. This is different from the criminal case, where the state has to prove that the accused committed the crime 'beyond all reasonable doubt'. See the Chart on the next page for a description of the steps.

SUMMARY OF STEPS IN A CIVIL CLAIM IN A MAGISTRATE'S COURT



SUMMARY OF STEPS IN A CIVIL CLAIM

Letter of demand – The plaintiff's lawyer writes a letter to the defendant. This letter says what the plaintiff wants and gives the defendant a certain number of days to do it. It is a warning that you plan to take the other person to court, for example, the plaintiff requests R1000 that you owe them, and they demand that you pay within 10 days. If the defendant fails to pay within the prescribed period as set out in the letter of demand, then the plaintiff will issue a summons.

Issuing a summons – If there is no reply to the letter of demand, the attorney draws up and issues a summons. The summons is a document stamped by the court, setting out the details of the plaintiff's claim. It also tells the defendant to tell the court within 5 days whether the case will be defended. The defendant can answer the summons in one of these ways:

- Admit to owing the money and pay immediately, or
- Try to settle the case by reaching an agreement with the other side after discussing it with the plaintiff's attorney, or
- Defend the claim in which case the form called a Notice of Intention to Defend which is at the back of the summons, must be completed and returned to the court.

In all cases it is very important not to IGNORE the summons or to wait until after the return date has expired. If the defendant **doesn't tell** the court that the case will be defended, in other words, if the defendant does nothing about the summons, then judgement will be given in favour of the plaintiff. This type of judgement is called a **default judgement**.

DEFAULT JUDGMENT

If the court gives the default judgement, the plaintiff can claim against the defendant's property with a Warrant of Execution. The Sheriff of the Court will take some of the defendant's possessions and sell them to get money to pay the plaintiff.

THE DEFENCE

If the defendant wants to defend the case in court, then they must fill in a form called a Notice of Intention to Defend which is a form at the back of the summons. It gives the reasons why the defendant does not want to pay what the plaintiff claims in the summons. The form must be stamped at the court.

Then, a copy is given to the plaintiff's attorney.

PLEADINGS

The legal documents in a civil claim are called pleadings. These pleadings are difficult to understand, so it is a good idea to get an attorney to defend a civil claim. The attorneys from both sides set out the legal facts in the pleadings. Pleadings are drafted according to the rules of the court. The attorneys send all the information to each other.

At any time during the pleadings (or even during the trial), the plaintiff and defendant can decide to settle the case. In other words, they can reach an agreement on their own without the magistrate or judge having to decide the case. The aim of settling a case is usually to save both sides time and money. If the case is not settled this way, then it will go to court.

THE TRIAL

At the trial the plaintiff's attorney and the defendant's attorney each present their side of the case. This is done by giving evidence and calling witnesses. As in criminal cases, witnesses can be cross-examined and re-examined. When the attorneys decide they have led enough evidence, they close their client's cases. Each attorney tries to persuade the court that their client should win.

JUDGMENT

The magistrate or judge decides which side is right and gives a judgement in favour of that side.

REVIEW OR APPEAL

The plaintiff or defendant can apply for an appeal or a review if they are not satisfied with the outcome of the case or with the way the proceedings were conducted. ***(See pg 201: Trials, appeals and reviews)***

COSTS

Usually, the party that loses the case must pay their own legal costs and most of the legal costs of the other side. It is up to the magistrate or judge to decide as part of the court's judgement.

ENFORCING A CIVIL JUDGMENT

Enforcing a judgement means making sure that the party that lost the case pays up. It is usually necessary to use an attorney to enforce a judgement. There are different ways to enforce a judgement, including **paying instalments** and getting a **warrant of execution.**

PAYING IN INSTALMENTS

If the defendant cannot pay the sum of money all at once, they can offer to pay in instalments.

WARRANT OF EXECUTION

If the defendant still does not pay after the judgement has been given, the plaintiff can ask the court to issue a Warrant of Execution. This is a court order that says the Sheriff of the Court can go to the defendant's home and list the items owned by them like a television set, fridge, radio, motor car and so on. This is called attaching the property. The Sheriff of the Court can also attach the whole house if necessary.

The court attaches the defendant's property because this is the only way it can force the defendant to pay the judgement costs and any other amount the defendant owes, for example, the Sheriff of the Court's fees and the plaintiff's legal costs. The Sheriff of the Court then takes the attached property and sells it. The amount of the judgement plus legal costs is then paid to the plaintiff from what is made at the sale. If anything is left over, it will be paid back to the defendant.

If the defendant does not have enough property which can be sold to pay off the plaintiff's claim, the plaintiff can ask the court to look into the defendant's financial position. The court can then order the defendant to pay a certain amount each month or have a certain amount taken off from their salary each month by the employer and sent to the plaintiff. This is called a garnishee order. If the defendant refuses to obey this court order, they can be arrested for contempt of court.

PROBLEMS WITH CIVIL CLAIMS

Time-limits – There is often a time-limit on when you can bring your claim. These time-limits are called prescription periods. If you bring your claim too late, the court will not accept it. ***(See pg 236: Prescription periods)***

Long time to come to court – Civil claims often take a long time to get to court and to be settled.

Collecting good evidence – You need very good evidence to win a civil claim.

Cost of the civil claim – Civil claims cost a lot of money to bring. If you win your case, then the other side will usually have to pay your legal costs. If you lose your case, you will usually have to pay the other side's costs.

Small Claims Court (SCC)

The SCC is a civil court, but the procedures involved are much simpler, and you can only use it for certain 'small' civil claims. A 'small' claim is a claim with a value of up to R20 000. If your claim is for more than R20 000, you either have to use the ordinary magistrate's court, or you can give up part of your claim so that it is reduced to R20 000.

Certain claims **cannot** be heard in the SCC, even if their value is R20 000 or less.

Examples of these claims are:

- Divorce
- Matters concerning a will

- Malicious prosecution
- Wrongful imprisonment
- Seduction
- Breach of promise to marry

The SCC will also not hear cases that the Commissioner thinks involve difficult questions of law, and so should be heard by a Magistrate's Court. The state may not use the SCC, and you may not use it against the state, for example, to make a case against the police. You can use the SCC to claim from an organisation, a town council or a company. But an organisation, town council or a company may not use this court to claim against you.

EXAMPLES

CASES YOU CAN TAKE TO THE SCC INCLUDE:

- *You work as a domestic worker and have not been paid for three months. You want to claim wages from your employer.*
- *You bought a second-hand tape player mobile phone which stops working after the first month. You can claim against the seller.*
- *You are assaulted and have to have treatment for your wounds.*
- *You can claim against the person who assaulted you for pain and suffering, lost wages, medical fees, and so on.*
- *Someone negligently drives into your car, causing R1,800 worth of damage. You can sue the driver of the other car for this amount.*
- *You paid someone to do work for you and they did not do it properly. You can claim some of your money back.*

Neither you nor your opponent can use an attorney in the SCC.

WHICH SMALL CLAIMS COURT MUST YOU USE TO MAKE A CLAIM?

Your claim will be heard in the Small Claims Court in the area where the defendant lives or where the “cause of action” arose – you can choose either of these two options. The legal term “cause of action” means the reason for your claim (or what caused your claim).

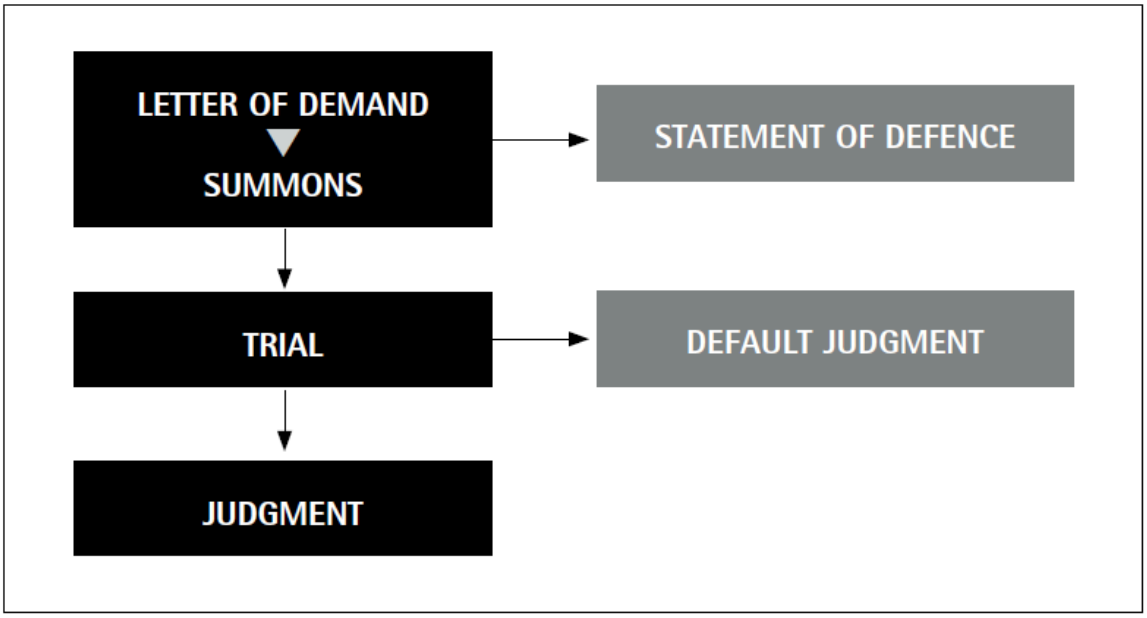
EXAMPLE

If you park your car outside your home, and Fabio smashes into it, the cause of action will be the collision that was caused by Fabio. However, Fabio lives in Pretoria, and you live in Johannesburg. Which Small Claims Court should you take the case to? You can choose to take the claim to the Pretoria Small Claims Court (where the defendant, Fabio, lives) or to the Johannesburg Small Claims Court (where the cause of action arose).

If the Magistrate's Court for the area where you live has a Small Claims Court, phone and ask the Clerk of the Small Claims Court for help. If the Magistrate's Court for your area does not have a Small Claims Court, the Clerk of the Civil Court will advise you where to take your claim.

SUMMARY OF STEPS IN A SMALL CLAIMS COURT

STEPS IN THE SMALL CLAIMS COURT



LETTER OF DEMAND

If you want to use the SCC, you must send an official Small Claims Court letter of demand to the defendant. You can get a form for the letter of demand at the SCC. The Clerk of the Small Claims Court will complete the Letter of Demand for you.

Include in your letter of demand a full description of your claim. **(*See pg 272: Model Letter of Demand for the SCC*)**

The defendant is given 14 working days to pay your claim. The 14 days start from the first working day after the defendant has received your letter. If the defendant does not reply within 14 days, you can take the next step which is issuing a summons.

The Letter of Demand must be in duplicate. There are three ways to deliver the letter:

1. **Send it by registered post.** Keep the registration slip and contact the post office by phoning the toll-free number on the registration slip. If the defendant receives the letter, the post office will inform you of the date of receipt, and you calculate the 14 working days, starting from the first working day after receipt of the letter. If the defendant does not collect your letter, the letter will be returned to you by the post office unclaimed after a full month. You may also collect the unclaimed letter at the post office after a full month.
2. **Hand-deliver the original copy of the letter to the defendant yourself.** If you hand deliver the letter, the defendant must sign your copy of it as an acknowledgement of receipt. Keep this signed copy in a safe place.
3. If the defendant refuses to sign your copy or refuses delivery, go to the nearest police station to sign an affidavit stating that you delivered the letter to the defendant, but they refused to sign acknowledgement or refused delivery.
4. **Take the letter to the Sheriff** serving the area where the defendant lives for hand-delivery. This will cost you a small fee.

ISSUING THE SUMMONS

If the defendant receives your letter but fails to pay after 14 days, you should return to the Clerk of the Small Claims Court with your registration slip or your proof of hand delivery and your copy of your letter.

The clerk will then issue you with a summons, which will have a court date on it. You must immediately take the summons to the sheriff to serve on the defendant. You can claim this cost back from the defendant in addition to your claim.

The Sheriff will inform you by means of the 'Sheriff's Return of Service' whether or not they were able to serve the summons. If the sheriff is unable to serve the summons, for example, if the defendant has moved to another address, then the sheriff will inform you of the reason. The clerk of the court will tell you what steps to take after this.

The summons gives the defendant 10 days to pay your claim. It also gives a date after the 10 days when they must appear in the SCC if the claim is not settled. You will also have to appear in court on the day referred to on the summons.

THE TRIAL

At the trial, the Small Claims Commissioner (who is usually an attorney) presides over the case. The commissioner explains the court procedure to both sides and asks all the questions. You can only ask your opponent questions when the commissioner says that you can. If you do not understand English or Afrikaans, you can ask for an interpreter, but you must ask for this before the day of the case.

Both you and your opponent can call any witnesses to support your cases. The commissioner will question the witnesses. The parties should also bring any documents involved in the case, for example, an invoice, receipt, photographs, statements by other people, and so on, which could be used as proof.

Changing the claim

At any time before the case, you can ask the small claims commissioner to change some of the details in any of the documents. Or you can ask the court to stop the claim altogether. The commissioner will allow any changes which they decide are reasonable.

THE COMMISSIONER GIVES JUDGMENT

When the commissioner has heard all the evidence, they will decide on a 'balance of probabilities' who is right. This is the same as in other civil cases. The commissioner does not have to listen to all the witnesses if they think it is not necessary.

There are three possible judgements that the commissioner can give:

1. **Judgment in favour of the claimant (also called the plaintiff):** The loser cannot appeal and has 10 working days to pay the claim, which includes the refund of the Sheriff's fees to the claimant.
2. **Judgment in favour of the defendant:** This means the claimant has lost their case. The claimant may not appeal against this judgement.
3. **Absolution from the instance:** This ruling is given if the commissioner cannot decide which side to believe. It means neither side has won. If this judgement is given, the claimant can, at a later stage, make a claim in the small claims court. For example, the claimant might find

proof of their claim after the court hearing, which would help them win their claim next time.

WHAT HAPPENS IF THE DEFENDANT DOES NOT APPEAR IN COURT?

Default judgement

If the defendant is absent and the plaintiff is present at court, the court will first ensure that the claim is valid, and then it will give the plaintiff a "default judgement" against the defendant. The term "default" means the defendant failed to attend the proceedings.

The defendant now has 10 working days to pay, starting from the day after the defendant is informed of the default judgement. A letter will be sent by the small claims court to the defendant notifying them of the default judgement.

Rescinding (setting aside) a default judgement

If the defendant has a legally valid defence to the claim AND a valid reason for failing to appear in court (they have to have both), they can ask the court to "rescind" (or cancel) the default judgement.

They do this by immediately lodging a Rescission Application with the Small Claims Court once they become aware of the default judgement.

NOTE

Lack of money is not a valid defence to a claim. 'Forgetting the court date', personal commitments or business pressures are also not valid reasons for failing to attend a court hearing.

If the court grants a rescission application, the claim starts from the beginning, and the claimant and defendant both have to appear in court. ***(See pg 246: The trial)***

WHAT HAPPENS IF THE CLAIMANT DOES NOT APPEAR IN COURT?

If a claimant fails to appear in court, for whatever reason, the Commissioner writes on the file, "removed from roll".

This means the claimant has to start their case over again by issuing a fresh summons and paying the Sheriff's fee a second time.

STEPS FOLLOWING JUDGMENT

The judgement of the court is final unless there are grounds for review. Whoever has judgement given against them must do what the court says.

TAKING A JUDGMENT ON REVIEW

The commissioner's decision or judgement cannot be taken on appeal. However, the commissioner's judgement can be taken on review in the High Court on three grounds ***(See pg 201: What is a review?)***:

1. If the court did not have jurisdiction. In other words, the case should not have been heard in that court.
2. If the commissioner was biased or corrupt
3. If the proper procedure was not followed in the court. This is also called a gross irregularity. For example, if the commissioner did not allow one of the sides to tell their story, this is not proper procedure because each side must get a fair hearing.

ENFORCING A SMALL CLAIMS COURT JUDGMENT

If the defendant fails to pay the claim in terms of the court order, you will have to transfer your claim to the ordinary civil courts.

You can get a document called a Writ of Execution against Moveable Property at a stationery shop. The clerk of the Small Claims Court Administration may help you to complete the document. You must then take this document to the sheriff (as you did with the summons).

The Writ gives the sheriff the right to seize any attachable property belonging to the defendant. The sheriff will charge a fee for doing this.

NOTE

It is expensive to try and enforce the Small-Claims judgement in the ordinary civil courts (especially if the defendant has disappeared or does not own any property that can be attached). You need to decide whether it is worth your time, money and effort to continue trying to enforce the judgement in the civil courts.

Equality Courts

These are courts set up in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (the Equality Act)*. Anyone can take a case to the Equality Court if they feel they have been discriminated against on any of the grounds for non-discrimination listed in the Constitution. In addition to a listed ground, the Equality Act also prohibits any discrimination of any other ground where the discrimination:

- Causes or encourages systemic disadvantage
- Undermines human dignity
- Seriously impacts on the equal enjoyment of a person's rights and freedoms that is equivalent to discrimination on a ground listed in the Constitution

You can also take a case for hate speech or harassment to the Equality Court. You may not take a case that involves discrimination in the workplace; this falls under the *Employment Equity Act No. 55 of 1998*. ***(See pg 196: Equality Courts)***

When you lodge a case with the Equality Court, it is up to the other party, the person who has been accused of discrimination, to prove to the Court that they did not unfairly discriminate against you.

REFERRING A CASE TO THE EQUALITY COURT

If you have any questions on whether you should lodge a case, how a case is progressing, or what you would like to ask the Court to do, you can ask the equality clerk at the Court.

It does not cost anything to bring a case to the Equality Court unless you fail to attend a court date without good reason then the court might make you pay the costs of the side that did attend. The equality clerk or the South African Human Rights Commission can advise you on getting legal assistance. The Act says that the Court staff must help people find legal assistance if they ask for it. However, legal assistance does not necessarily refer to a qualified attorney. Legal assistance can be given by a member of staff from a Non-profit organisation (NPO), someone from an advice office, a paralegal or senior law student, or anyone who understands the subject and how the court will operate.

If a complaint involves special knowledge of a particular cultural community, the presiding officer can appoint up to two recognised experts in this area, called 'assessors,' to help the Court understand the case more clearly.

If you do not speak the main language used by the Equality Court, you have the right to be helped by an interpreter.

STEPS TO TAKE IN REFERRING A CASE TO THE EQUALITY COURT	
1	Contact your local Magistrates' Court and ask if it is an Equality Court. If it is not, ask where the closest one is. All High courts and most Magistrates' Courts have an Equality Court.
2	Go to the Equality Court and lodge your complaint with the Equality Clerk. The clerk will help you to complete the relevant form.
3	The Equality Clerk must, within 7 days, notify the other party called the respondent, that you have lodged a complaint. The respondent will be given a form by the Clerk if they deny the allegation and want to give their side to the incident. They must return the form to the equality clerk within 10 days of receiving it. The equality clerk must also pass details of the complaint to the Presiding Officer within 3 days of you lodging it.
4	The presiding officer must decide within 7 days if the case should be heard by the Equality Court, or whether another forum, for example, the CCMA, would be more appropriate to deal with it. If the presiding officer decides to refer the matter to another forum, the clerk must notify the parties of the referral. The alternate forum must deal with the matter as fast as possible. If the alternate forum does not resolve the matter, it must refer the matter back to the Equality Court with a report. The Equality Court will then have 7 days within which to give instructions as to how the matter should be dealt with.
5	If the presiding officer agrees this is a case for the Equality Court, then the equality clerk must set the first court date, which is called a directions hearing. At this hearing, the presiding officer will sort out issues such as: when can the parties come to trial, does anyone need an interpreter or should assessors be used.
6	The Equality Clerk must then legally serve notice of the hearing on the parties. If either of the parties cannot afford to pay for the notice to be served, the equality clerk can decide that the State must pay for this.
7	The parties must then appear in the Equality Court on the date set by the Court.

WHAT ORDER CAN THE EQUALITY COURT MAKE?

It is the duty of the Equality Court to decide whether unfair discrimination, hate speech or harassment, as the case may be, has taken place as alleged in the complaint. After holding the enquiry, the court will decide what order to make. The order could be:

- A settlement between the parties
- Payment of damages
- Requiring the unfair discriminatory practices to stop or that specific steps must be taken to stop the unfair discrimination, hate speech or harassment
- Making available specific opportunities and/or privileges that have been unfairly denied to the complainant

- Implementing special measures to address the unfair discrimination, hate speech or harassment
- Directing the respondent to accommodate the needs of a group or class of people
- An unconditional apology
- Making the respondent go through an audit of specific policies or practices that the court decides
- Directing the clerk of the Equality Court to submit the matter to the Director of Public Prosecutions for the possible institution of criminal proceedings.

RIGHT OF APPEAL AND REVIEW IN THE EQUALITY COURT

Any person who is dissatisfied by an order made by the Equality Court may appeal against the order to either the High Court or the Supreme Court of Appeal. An appeal can also be made directly to the Constitutional Court.

If a presiding officer in a Magistrate's Court rules on a ground of discrimination not listed by the Act, the decision must be submitted to the relevant High Court for review once the proceedings have been finalised.

Interdicts

WHAT IS AN INTERDICT?

An interdict is the name for a special kind of court order which tells someone to do something, or not to do something. For example, you can ask the court to make a court order to stop a landlord if he tries to evict tenants in an illegal way. You can apply for an interdict in the High Court and in the Magistrate's Court.

WHO CAN BRING AN INTERDICT?

You can bring an interdict in 3 ways:

1. As an individual representing yourself or your family
2. As an organisation or church representing the members of your organisation
3. As a community leader, organisation or religious body representing a community As an individual, you will have to ask an attorney to help you get an interdict. **(*See pg 252: Chart: Steps in getting an interdict*)**

PROBLEMS WITH INTERDICTS

STRICT LEGAL RULES FOR BRINGING AN INTERDICT

There are very strict rules for bringing an interdict which state that you must:

- Show the court that the case is very urgent. You must show that there is a very real threat if you don't get the interdict. ***(See pg 264: Problem 3: How urgent is the need for an interdict?)***
- Have very good evidence of the threat. In other words, you must have many statements supporting your claim, witnesses, medical certificates, photographs, and so on.
- Show that NO OTHER LEGAL ACTION WOULD PROTECT you enough. For example, you must show that using the ordinary criminal courts will not help because they are too slow or that they have not helped protect you in the past.

STEPS IN GETTING AN INTERDICT	
1. DRAW UP STATEMENTS	The person (or people) who wants to get an interdict must draw up statements of what has happened and why they want the interdict. ***(See pg 969: Taking a statement)***
2. APPROACH AN ATTORNEY	Contact an attorney and hand over the statement(s). The attorney will meet the person who wants to get the interdict as well as any witnesses. The attorney will check on the information and may want to take further statements.
3. MAKE AFFIDAVITS	The attorney will draft affidavits for people to sign. **(See pg 974: Affidavits)**
4. GET AN INTERIM INTERDICT	The attorney approaches the Court to ask for a temporary interdict. A temporary interdict is also called an interim interdict. If you get an interim interdict, this means that the court gives you the interdict but only for a short time. In other words, the court says that you are protected but only until a certain date. In the meantime, the other side gets a chance to answer your affidavit/s and defend themselves. The interim interdict lasts until the case comes back to the court at the set date.
5. GET A FINAL INTERDICT	If the other side decides to fight the case, a date will be set for the Court to decide whether you should get a permanent or final interdict.

IGNORING THE INTERDICT

Sometimes, you get an interdict, but the other party just ignores it. Then, you can take further legal action against the other side. You can get your attorney

to go back to court and ask the court to lock up the other party for refusing to obey the interdict. The other party is in contempt of court.

LIMITED EFFECT OF INTERDICTS

Interdicts are not necessarily a lasting solution to a problem. For example, a farmworker may get an interdict to prevent a farmer from unlawfully evicting them. But the farmer can then just get a court order, allowing them to evict the farmworker lawfully.

But interdicts can be useful by publicly exposing unlawful actions by people. Interdicts also give you some time in which to decide what you are going to do.

In this time you might be able to negotiate with the other side about a settlement that will suit both sides.

COST OF GETTING AN INTERDICT

Interdicts cost a lot of money to bring to court. If you lose the case you might have to pay for the other side's costs.

SPECIAL KINDS OF INTERDICTS

A protection order is a special kind of interdict that you can get under the Domestic Violence Act to stop any person abusing you in the home. A protection order is an order from the court telling an abuser to stop abusing someone. **(*See pg 266: Problem 7: Getting a Protection Order*)**

Spoliation orders

WHAT IS A SPOLIATION ORDER?

A person who owns or is using something that is then taken away from them can go to court to get the item returned quickly. They can ask the court for a spoliation order, also called a 'mandament van spolie'. So, it is an order from the court that an item of property be returned to the person who had peaceful possession of it. It is a useful remedy because it can provide someone in an urgent situation with immediate relief. However, applying to the magistrate's court for a spoliation order can be quite a complicated process. It will be necessary to get an attorney to help you do this.

WHO CAN APPLY FOR A SPOLIATION ORDER?

There are two requirements for a spoliation order:

1. The applicant must have had peaceful possession of the property. It is not a requirement for the applicant to have been the owner of the property, the applicant only has to show that they had peaceful possession.
2. That the peaceful possession was unlawfully (without a legal reason) disturbed. It could have been taken away with force or without the applicant's consent.

WHAT MUST YOU SHOW THE MAGISTRATE TO GET A SPOLIATION ORDER?

- You must show the magistrate that what was taken away is in the area of the Magistrate's Court where you are applying for the order. For example, if someone takes your oxen from your home in Queenstown and goes to Peddie with them, you must go to the magistrate in Peddie and ask for them back.
- You must tell the magistrate the name and address of the person or people who disturbed your possession.
- You must show the magistrate that it is possible for the other person to replace your possession (it does not have to be the original item).
- You must show that you took steps to restore your possessions as soon as possible. The magistrate will want to know what you did since your possession was disturbed.

EXAMPLES

SITUATIONS WHERE A SPOLIATION ORDER CAN BE GRANTED

MY BICYCLE WAS STOLEN: *Two weeks later, I see someone using a bicycle which I think is mine. I ask them to return it, but he refuses, saying that the bicycle is theirs. I can go to the police and make a complaint of theft. I can also go to court and ask for a Spoliation Order to get my bicycle back. But I cannot just go and take it back, as this would be taking the law into my own hands. The courts must decide who the real owner of the bicycle is.*

I RENT A HOUSE: *The owner forces me out and changes the lock on the door so I cannot go back in. I go to court that same day and ask for a spoliation order. If I am successful, the magistrate will order that I be allowed back into the house immediately. If the owner wishes to get me out, he must make a proper case in court, and he must get a court order.*

Using an attorney

If you have to appear in court, it is important that you get legal advice from a qualified person because court procedures can be very complicated. You can get this from a qualified paralegal, attorney or advocate.

The current legal profession is divided into two branches - advocates and attorneys. The attorney is the person who you first contact when you are looking for legal advice or if you have a legal problem (unless you have access to an advice centre and paralegals). Attorneys should provide a broad range of services to cover a variety of legal problems.

Attorneys can refer clients to advocates who are experts in various areas of the law, especially the presentation of cases in court. Advocates also give legal opinions and help with the drafting of legal documents.

In terms of the *Right of Appearance in Courts Act (No. 62 of 1995)*, advocates can appear in any court, while attorneys can appear in all of the country's lower courts and can also apply to appear in the superior courts.

Responsibilities of attorneys

From the time that the attorney starts on your case, they are working for you. The attorney is there to advise you about your problem. The attorney also represents you in any meeting with an opposing party and in court hearings. This means that the attorney speaks for you, acts for you and charges you a fee for doing this.

As the client of an attorney, you have the following rights:

- To professional, honest and unbiased advice at all times
- To be treated with professional courtesy, respect and fairness, regardless of your race, nationality, age, gender, sexual orientation or disability
- To privacy and attorney-client confidentiality
- To agree on the type of service you can expect and receive
- To clear explanations in terms you can understand
- To find out from the start of the consultation what you are hoping to achieve, and aim to make sure that your expectations are realistic
- To know who will be handling your matter
- To be advised on the likely success of your matter and not to do unnecessary work that will lead to unnecessary expenses

- To an explanation of the cost implications and how the costs are likely to be calculated
- To be kept informed of costs so that you can work out if you can afford to pay for a particular course of action and if it is worth it
- To be kept updated on developments and progress
- To have a response to your letters and telephone calls within a reasonable time
- To a clear bill which shows the work done and the amounts charged
- To complain about your attorney if you believe the attorney is acting unethically or in an unprofessional manner
- To have the attorneys' account assessed and taxed if you believe it is too high
- To cancel your mandate to the attorney at any stage (subject to certain conditions) and to consult another attorney

REPORTING ATTORNEYS

Attorneys fall under the jurisdiction of the Legal Practice Council (LPC). The LPC is mandated to regulate the professional conduct of attorneys. If you have a complaint about your attorney, first talk to them about your concerns. Then, if you are still not satisfied, you can lodge a complaint with the relevant provincial office of the LPC. These are the types of problems with an attorney you could lodge a complaint about:

- Persistent delays in answering letters
- Failing to account for money held on your behalf
- Improper, unprofessional or unethical conduct
- Failing to give proper attention to your case

The Legal Practice Council will investigate all complaints of attorneys and advocates acting in an unprofessional manner. Go to the LPC website: www.lpc.org.za for a complaint form and guidance on how to submit the complaint.

When do you need an attorney?

Many people only see an attorney after they get into trouble. But the best time to see the attorney is before the trouble starts. By getting sound legal advice before you do something, you can prevent a legal problem from happening. For example, an attorney can help you before you start a business, make a will or sign a contract.

How to find an attorney

The Magistrates' courts usually have a list of attorneys. But these lists do not say which attorney will be the right one for your problem. Some big cities have organisations like the Legal Resources Centre or Legal Aid Clinics at the Universities that you can turn to for legal advice and support. They can also help you to find an attorney who will be sympathetic towards your problem. In the rural areas, it is best to approach your local civic association, advice office, religious organisation or trade union.

Before taking a case, an attorney usually asks for money as a deposit towards fees. You should discuss how much the whole case is going to cost the first time you see the attorney.

How to pay for an attorney

Going to court and paying for an attorney can be very expensive, but if you cannot afford this, there are ways to get an attorney's services for free or for very little money. Legal aid is one of the most important of these services, but others include University Legal Aid Clinics, Legal Aid Centres, Law Society offices, Justice Centres and advice centres.

Applying for legal aid

If you cannot afford to pay for an attorney, you can apply for legal aid (financial help for attorney's fees) by applying to Legal Aid South Africa. Legal Aid represents in most criminal cases if the accused cannot afford a lawyer. Legal Aid can also represent in civil cases; however, the types of civil cases they represent are very limited. You will have to pass a means (income) test to get Legal Aid, which means you have to show that you earn less than an amount fixed by Legal Aid South Africa. If you qualify for Legal Aid, a Legal Aid attorney will be appointed for you, and then Legal Aid South Africa will pay most of your attorney's fees.

You **cannot** get legal aid for the following kinds of problems:

- Traffic offences, such as driving, speeding or parking offences and drunken driving
- Criminal cases, if you are going to plead 'guilty'
- Defamation, or insults to your character

- Where you are suing for money (damages) for relationship-related claims such as defamation, breach of promise to marry, infringement of dignity or privacy, seduction, adultery
- Cases to prove a person is the father of another person's child
- Child maintenance cases which can be decided by a maintenance office

You can get legal aid for divorce cases, but **not** if:

- There is a reasonable possibility that you might get together with your spouse again
- There are no children involved in the divorce
- You do not meet the means test

You **can** get legal aid for a labour matter:

- If you are claiming unfair dismissal (you have been unfairly dismissed) as long as your claim is made within the time limits set by the *Labour Relations Act*
- To demand a merit report (but legal aid will be refused if there are good reasons to believe you are not taking up a job on purpose or that you resigned from a job in order to be granted legal aid)

You can also get legal aid for appeals on all these types of cases listed, whether criminal or civil (cases where you are suing or being sued). For appeals, the Director must also believe that you have a reasonable chance of success.

MEANS TEST

In order to get legal aid, you must pass the MEANS TEST.

The 'means test' means you have to show that you earn less than an amount fixed by Legal Aid South Africa. This amount varies if you are single or married and also changes with time. You also have to show that you don't have any other 'liquid assets', such as money in a savings account, which could be used to pay for your legal fees. If you earn more than the means test then you will not qualify for legal aid for your case. Your attorney or the legal aid officer will ask you questions about your wages. For purposes of the means test, your salary means net salary: the money that is left over after the following deductions are made:

- Pension
- Medical aid
- Income tax
- UIF

If a person is applying for legal aid for a divorce case, then the person is treated as a **single person** for purposes of the means test.

Means test amounts:

- Single persons who are employed and have a net monthly income of R8 700 or less can get Legal Aid. This amount is what the person receives after tax has been taken off.
- An applicant who is part of a household and whose household has a net income of R9 500 per month or less can get Legal Aid. This amount is what the household receives after tax has been taken off, and
- If the applicant or household owns immovable property (a house). The immovable property must not be worth more than R754 400. They must also only have one house and they must live in it.

These amounts are increased every few years to keep up with the cost of living.

STEPS TO TAKE TO GET LEGAL AID

Go to a Legal Aid branch office or, if there is not one in your area, to the nearest Magistrate's Court to enquire about legal aid. All magistrates' courts have a legal aid officer who will help you with your legal aid enquiries.

The Legal Aid officer will check that you satisfy the means test and whether your matter falls within the scope of the guidelines set out by the Legal Aid Board. If you qualify, then you will be sent to an attorney, who will receive what is called a 'legal aid instruction' for your case. That attorney will then deal with your case. Attorneys do have a right to refuse a legal aid instruction, but they normally do not refuse. If they do refuse, a legal aid instruction can be made out to another attorney.

Legal aid clinics

Legal Aid South Africa also operates a number of Legal Aid Clinics, which employ attorneys to provide legal services to people. Some of these clinics are established in partnership with universities, and Legal Aid South Africa runs others.

Justice centres

Legal Aid South Africa saw the need to establish Justice Centres to deal with the number of people requiring legal assistance. Justice Centres are like Legal Aid Clinics but much bigger.

Full-time staff and attorneys who work there provide a number of different services. ***(See pg 1066: Resources for contact details of Legal Aid Justice Centres)***

WHO CAN USE JUSTICE CENTRES?

A person can only use the services of an attorney in a Justice Centre if they qualify under the means test for legal aid. ***(See pg 258: Means test)*** The priority of Justice Centres is to assist vulnerable groups such as women, children and people who are landless.

WHAT SERVICES DO JUSTICE CENTRES PROVIDE?

Justice Centres provide services such as:

- **Referrals:** The Justice Centres keep a detailed database of relevant services and agencies for helping people who need social, economic, welfare or psychological assistance. The Centres refer people to an appropriate agency with a referral letter.
- **Advice:** The Centres help people who need basic legal advice, such as where and how to apply for a birth certificate, interpret a contract, and so on.
- **Legal representation:** The Centres provide legal representation to people for cases including criminal, civil, family law and labour cases. The legal representation focuses on using processes such as arbitration, mediation and negotiation, not only litigation (formal legal procedures).

University Legal Aid Clinics

Many universities in South Africa have law clinics. The clinics usually help people who fall within the income limits set by Legal Aid South Africa. But they do not exclude people for the other reasons set out by Legal Aid South Africa. So, for example, they will take on cases like traffic offences and maintenance claims.

Senior law students deal with the cases that come through the legal aid clinics. Like paralegals, these students cannot do court work, but they can give advice, write letters and negotiate settlements for people who cannot afford to get an attorney. ***(See pg 1068: Resources for contact details of University Legal Aid Clinics)***

Advice centres

Advice offices are found in many of the major cities and rural towns. Advice office employees are not attorneys, but they do get paralegal training. Paralegals can give advice,

write letters, refer people to the right authorities or organisations where they can be helped, refer people to attorneys, and so on.

Legal Resources Centres

Legal Resources Centres are public interest law firms funded by private donors. They deal with problems that affect large numbers of people in the community. ***(See pg 1067: Resources for contact details of Legal Resources Centres)***

Attorneys' Associations

Local associations of attorneys may assist with funding of specific cases, or provide attorneys to take on cases or give advice for free. These attorneys' associations are:

- Lawyers for Human Rights (LHR)
- Black Lawyers Association (BLA)
- National Association of Democratic Lawyers (NADEL)
- Women's Legal Centre - the Women's Legal Centre provides free advice, and also takes on cases that will have an impact on the advancement of women's rights

Problems

1. Which court should be used in each example?

MARY IS CAUGHT SHOPLIFTING

Mary is caught shoplifting a dress in a shop. She will be arrested and charged in the criminal court of the ordinary Magistrate's Court in the area where she shoplifted the dress. Shoplifting is stealing, and it is a criminal offence. ***(See pg 193: Ordinary Magistrates' Courts)***

JOHN IS CHARGED WITH RAPE

John will be charged in the Regional Magistrate's Court or the High Court in the area where he committed the crime. Rape is a very serious criminal offence and cannot be heard in the ordinary Magistrate's Court. ***(See pg 192: Regional Magistrates' Courts)***

The woman that John raped can also sue John privately for damages in the civil court of the ordinary Magistrate's Court. But if her claim is for more than R200 000, she will have to sue through the High Court. ***(See pg 187: Criminal and civil actions)***

PEDI MURDERS HIS WIFE

Pedi will be charged with murder in the High Court in the province where he committed the murder. Murder is a very serious criminal offence and cannot be heard in the ordinary or regional Magistrate's Court.

MXOLISI BUYS A FAULTY TV

Mxolisi buys a faulty second-hand TV from a shop in town. He pays R800 for the TV. When he gets home he finds after a day that it stops working. The shop refuses to refund his money.

Mxolisi has a private civil claim against the shop. If there is a Small Claims Court in this town, then Mxolisi can use this because his claim is less than R20 000. If there is no Small Claims Court in the town, then Mxolisi must use the ordinary Magistrate's Court to claim his money back from the shop. This is more expensive and takes longer than the Small Claims Court. ***(See pg 198: Small Claims Court)***

JEREMY BUYS A CAR WHICH BREAKS DOWN

Jeremy buys a car from a garage in Cape Town for R35 000. The car breaks down three days later. He will have to fit a reconditioned engine to the car to get it going again.

Jeremy has a private civil claim against the garage. He must sue the garage through the civil courts in the ordinary Magistrate's Court in Cape Town.

THEMBA AND BHEKI QUARREL ABOUT COWS

Themba and Bheki live in a rural village in KwaZulu-Natal. They quarrel about who owns certain cows.

This is a civil dispute. They can use the Chief's or Headman's court in the area in which they live, or they can use the ordinary Magistrate's Court. ***(See pg 197: Community Courts; See pg 197: Courts for Chiefs and Headmen)***

CHERYL IS DISMISSED FOR BEING LATE

Cheryl is dismissed from her job because she arrives late one morning. She says that this is unfair because she says this is the first time she has been late. But the employer refuses to reinstate her.

Cheryl can go to the Commission for Conciliation, Mediation and Arbitration for help. If the CCMA cannot solve the problem, they will refer the matter to the Labour Court. ***(See pg 370: Solving disputes under the LRA)***

BENNY IS NOT SATISFIED WITH A PAINTER'S WORK

Benny signs a contract with a painter to paint his house 'to his own satisfaction' for an agreed sum of money. When the painter has finished, they ask Benny to pay them. Benny refuses because he says that 'any fool' can see that the house needs another coat of paint before the job can be called complete. The painter refuses to paint another coat.

If both Benny and the painter agree, then they can call in a third person to act as a **mediator** between them. It will be better if this third person is a professional in the building trade. This will usually be the quickest and cheapest way to solve the problem. ***(See pg 203: Mediation)***

But if this fails, then the painter can refer the civil claim to the Small Claims Court or the Magistrate's Court to get their money from Benny.

HIGH RATES – BUT NO RUNNING WATER

The Civic Association in Kliptown is unhappy because there is no running water in a number of houses in the town. They say they are paying high rates and have a right to running water. The municipality keeps saying that it is doing something about this, but nothing ever happens.

The Civic Association should send a delegation to the Municipality and demand that the Municipality speak to them about their complaint. The two sides should enter into negotiations to try and sort out the problem. ***(See pg 1003: Negotiation skills)***

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2. Claim is too large for the Small Claims Court (SCC)

You have a claim against Furniture Wholesalers for R23,200. Can you use the Small Claims Court to get your money back?

WHAT DOES THE LAW SAY?

If you want to claim this full amount, you cannot use the Small Claims Court. The law says that you can only use the Small Claims Court if your claim is for R20,000 or less.

If you want to claim R23 200, you must use the Magistrate's Court. The Magistrate's Court is much more expensive (because you have to use an attorney) and also takes more time than the Small Claims Court to sort out problems. You can, however, reduce your claim to R20 000 if you want to use the SCC. You will lose R3 200, but in the long run, this may be cheaper than paying attorney's fees to bring the case to the magistrate's court. ***(See pg 198: Small Claims Court)***

WHAT CAN YOU DO?

If you decide to reduce the claim so that you can use the Small Claims Court, then you must follow the procedures of the Small Claims Court.

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3. How urgent is the need for an interdict?

The police have conducted a number of raids on various houses in the Nomsamo community. They say they are looking for stolen goods. The community says these raids take place too often, and the police never find any stolen goods. People feel the police are trying to intimidate the community. They want to get an interdict to stop raids in the future.

WHAT DOES THE LAW SAY?

The community must show that the need to stop the police from conducting the raids is urgent enough to get an interdict. The case will be urgent enough for an interdict if the community can prove that there is a good chance the police will raid again very soon.

WHAT CAN THE COMMUNITY DO?

The community must approach an attorney to help them with the interdict. ***(See pg 251: Interdicts; See pg 252: Problems with interdicts)***

There are many things that the community can do to help the attorney, such as:

- Collecting statements from people whose houses were raided
- Finding out what goods were confiscated by the police
- Finding out whether anybody was assaulted in the raid
- Getting details of how many times the police have raided in the past 3 months, what they confiscated in those raids, and so on

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4. Passing the Legal Aid means test

Maria Shave is a single person with two children who go to school. She earns R5 000 per month before deductions are made from her salary. She pays R200 into a pension fund every month and her bond repayment on her house is R400 per month. Will she qualify for legal aid?

WHAT DOES THE LAW SAY?

The means test says a single woman earning R8 700 per month or less can get Legal Aid. This amount is standard for every single person applying for legal aid and doesn't depend on how many dependants she has.

For purposes of the means test, a person's salary is the money that is left after deductions are made for things like income tax, pension, housing, medical aid and so on.

It is also important that the specific case that she needs the legal aid for, falls within the cases covered by legal aid. ***(See pg 258: Means test; See pg 257: Applying for legal aid)***

DOES SHE QUALIFY FOR LEGAL AID?

Maria earns R5 000 per month. For the purposes of the means test, Maria's salary will be R5 000 less [R200 (pension) + R400 (bond repayment)]

R5 000 – (R200 + R400) = R4 400

This amount is less than the means test amount of R8 700 per month which means Maria will qualify for legal aid (provided her case is the type of case covered by legal aid).

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5. Appealing against the decision of a magistrate

James lives on a farm. One day, his wife was critically ill, and he ran to town to call a doctor. On the way, he ran across another farm owned by Philip because it was the quickest possible route to the nearest town. Philip caught him and asked him what he was doing on his land. Even after James explained, Philip called the police and told them James was trespassing on his farm. James was arrested and charged with trespass. He appeared before the criminal court, and the magistrate found him guilty. He was sentenced to 6 months in prison. He wants to appeal against this decision.

WHAT DOES THE LAW SAY?

James says his wife was critically ill, so he took the shortest possible route to town. He said he did not mean to trespass and did not do any damage to the property. He wants to appeal against the decision of the magistrate.

The law says you can appeal to a higher court if you think that the trial court (in this case, the Magistrate's Court) made a mistake in interpreting the facts of the case or didn't apply the law correctly. ***(See pg 201: Trials, appeals and reviews)***

WHAT CAN HE DO?

James must get an attorney to help him with his appeal against the magistrate's judgement. The attorney must draw up legal documents for an appeal. James can go

to the legal aid office to apply for legal aid to pay for the attorney. ***(See pg 257: Applying for legal aid)***

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6. Failing to obey a court order

Joe assaulted his brother Richard. Richard suffered some bad wounds, and he had to spend 3 days in hospital recovering. When he leaves the hospital, he finds that he has lost his job. He is also told that his account at the hospital is R1,000 for medical fees.

Richard sues his brother in the civil court for an amount of R9,000, which includes medical fees, lost wages, and pain and suffering. He wins his case in court and the court orders Joe to pay the amount claimed by Richard plus all Richard's legal costs.

Joe ignores the court order and tells Richard that he refuses to pay because it was all Richard's fault in any case.

WHAT DOES THE LAW SAY?

The court has already decided that Joe owes Richard the money. Because Joe refuses to pay, Richard will have to spend more time and money on an attorney trying to get his money back.

WHAT CAN HE DO?

Richard will have to go back to his attorney.

The attorney will apply for a Warrant of Execution on behalf of Richard.

A Sheriff of the Court will then go to Joe's house and take some of his property. The Sheriff will sell the property and pay Richard. ***(See pg 241: Enforcing a civil judgement)***

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7. Refusing to give your name or address to the police

The police raid your house. They say they suspect the bicycle they find in your house is a stolen bicycle. They ask you for your full name and address. You refuse to give it to them. They then arrest you and take you to the police station.

WHAT DOES THE LAW SAY?

The law says that if a police officer suspects that you committed a crime, or that you are trying to commit a crime or that you might be able to give them some information about a crime, they can ask you to give your full name and address. ***(See pg 221: Powers of the police to question)***

Before you give the police your name you can ask to see the identity documents of the police officers. If the police refuse to show their IDs, you need not give your name and address.

You can get a fine or prison sentence for refusing to give your name or address.

WHAT CAN YOU DO?

You must give the police your name and address if they suspected that you committed a crime. You do not have to say anything else. Ask tose your attorney, or if you do not have an attorney, call a family member, a friend, or someone from the nearest advice office. Ask your family to apply for legal aid for you. ***(See pg 227: What to do if you are arrested; See pg 257: Applying for legal aid)***

Ask the police for police bail. If they don't give you bail, ask for bail as soon as you are charged in court. ***(See pg 207: Bail)***

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8. Police shoot and injure while making an arrest

The police suspected two men, Paul and Lundi, of being car thieves. One afternoon, the police saw a pink car parked outside a house with the two suspects sitting inside. The registration number was the same as the number on a car reported stolen two days before. The police stopped and got out to arrest the men, but they tried to run away. The police ran after them calling for them to stop, but they carried on running. The police fired a warning shot with a gun and then shot both men in their legs. Then they arrested the men.

WHAT DOES THE LAW SAY?

The police found Paul and Lundi in the stolen car. The law says that a police officer can arrest you without a warrant if they catch you while you are committing a crime. ***(See pg 223: Arrest without a warrant)*** This was therefore a lawful arrest. The law says the police can use force to make an arrest if the suspect tries to fight or run away but they must use as little force as possible. If they shoot, they must try to shoot just to stop the person, not to kill. The Constitutional Court has held (*in S v Walters*) that shooting a suspect for the sole purpose of making an arrest is only possible in limited circumstances. ***(See pg 224: Making a lawful arrest)***

In this case, the police could not stop Paul and Lundi without shooting them. So, the use of force was lawful. ***(See pg 224: Using force to make an arrest or to stop you from escaping arrest)***

WHAT CAN THEY DO?

If the police ask Paul and Lundi to give them their names and addresses, they must do this. They do not have to say anything else.

Paul and Lundi have a right to see an attorney. If they do not know an attorney, they must contact a member of their families, a friend or someone from the nearest advice office to find an attorney or to apply for legal aid for an attorney.

They may ask to see a doctor immediately to treat their injuries, and they may ask for court bail when they appear in court. ***(See pg 207: Bail)***

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9. Your right to appear in court within 48 hours of arrest

You are arrested at 5 pm on a Wednesday afternoon. The police tell you that you will only be appearing in court on the following Monday. This means that you will have to spend the weekend in jail.

WHAT DOES THE LAW SAY?

The law says that the police must take you to court within 48 hours after your arrest. You were arrested at 5 pm on Wednesday afternoon. If you count 48 hours after this time, it will be 5 pm on a Friday afternoon. The court is closed at this time and for the rest of the weekend. So you cannot appear in court. You must appear on the first court day after this. This will be the following Monday. ***(See pg 227: Rights of arrested people)***

WHAT CAN YOU DO?

As soon as you get to the police station, ask to see your attorney. If you don't know an attorney, then ask to contact a member of your family or a friend to get an attorney for you. You can ask for police bail.

If the offence is very serious and the police refuse to give you police bail, then you must stay in jail until you appear in court on the following Monday. When you get to court, you must ask for court bail. ***(See pg 207: Bail)***

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10. Police misconduct

The police arrest you after they catch you shoplifting a shirt from the local department store. They take you to their van, waiting outside. On the way to the police station, they ask you questions about what happened. You refuse to answer their questions. Two of the police assault you.

WHAT DOES THE LAW SAY?

The law says that you only have to give the police your name and address. You do not have to say anything else to the police. So you did not have to answer the

questions that the police officer asked you in the van. The law says that if you do not try to fight or run away, the police cannot use force to make the arrest. In this case, you did not resist the arrest. So, the use of force was unlawful. ***(See pg 221: Police; See pg 51: Section 35 of the Bill of Rights: Arrested, detained and accused persons)***

As soon as you get to the police station, ask to see your attorney or to telephone someone you know to arrange an attorney for you. Ask to see a doctor immediately. In this example, you can sue the safety and security minister in the civil courts for damages suffered as a result of the use of unlawful force. You can also make a criminal charge against the individual police officer who assaulted you.

If the police:

- Unlawfully search you or your premises
- Arrest you unlawfully
- Use unlawful force when arresting you
- Refuse to give you your rights once you are arrested
- Do not bring you to court within 48 hours after your arrest, or on the first possible court day if the 48 hours ends on a weekend or a public holiday

then you can sue the police to pay you compensation. This is a **civil claim** against the police.

Unless you were resisting arrest and the police used a lawful amount of force, the police may not abuse, torture, assault, shoot, sexually assault or rape you when they question you, search you or your premises, arrest you, or try to get you to make a statement. If they do, you can sue the police to pay you compensation in a **civil claim**, and you can lay a **criminal charge** against the police.

If you were raped or injured, you must see a **doctor** as soon as possible after the assault. The doctor will treat your injuries and will make a medical report, which will be used in the criminal case against the police.

- If you are not in jail you can go to your own private doctor or a government doctor.
- If you are in jail, you must ask to see a doctor immediately. You will see a district surgeon, who is a government doctor. Ask for the doctor's name and remember it, or write it down.

Ask the doctor to write down all your injuries.

WHAT CAN YOU DO?

REPORT A CASE OF MISCONDUCT TO THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

This is an independent body set up by the government to investigate serious cases of police misconduct.

If someone has been seriously injured or killed by the police, you must contact the IPID for help. You can also complain to the IPID about police corruption or other serious complaints about police behaviour.

You can ask at any police station or Magistrate's Court how to lodge a complaint with the IPID. There must be an IPID office in each province that must investigate the complaint. ***(See pg 228: Reporting a case of police misconduct)***

MAKE A CIVIL CLAIM AGAINST THE POLICE

The Minister of Police is responsible for police officers if they commit an offence 'in the course and scope of their duties' (in other words, while they are on duty or as part of their police work). In a civil case, your claim for compensation would, therefore, be against this minister. You will only sue the individual police officer who acted unlawfully if that officer was off duty at the time or if the action was not a part of their police duties.

EXAMPLE

Your neighbour is a police officer, and one night, out of anger, they assault you because you are making too much noise. This action was not part of their police duties. They were acting as an individual. So you would sue the police officer themself and not the Minister of Police.

If you want to make a civil claim against the police, you must:

- Get help from an attorney
- Make the claim before 12 months have passed from
    - The date of the event, or
    - The date when you should have become aware of the event, whichever is the later date
- Give the police 1 month's notice that you are going to sue them

So your attorney must first write to the police to say that you are going to make a case against them and why you are making a claim. The notice must reach the police within 11 months. Then, you must wait one month from the date that the notice reached the police, before starting the case.

If you bring the claim after 12 months have passed or if you haven't given the police 1 month's notice, the court may still hear your claim if you can prove to the court that it is in the interests of justice for your claim to be heard.

LAYING A CRIMINAL CHARGE AGAINST THE POLICE

Make a **statement** to an attorney as soon as possible regarding the assault made on you by the police officers. The attorney will help you to lay a charge against the police officer(s) who assaulted you. If you are charged, you must tell the magistrate or judge as soon as you get to court that you were assaulted. If the police refused to get you an attorney or a doctor, you must also tell the magistrate or judge this. These things are written down in the court record and will be part of the evidence.

Follow the usual procedure to **lay a criminal charge against the police officers**. ***(See pg 206: Laying a criminal charge against another person)***

Checklists

Particulars to take if someone has received a summons

- How much time do you have left to respond to the summons?
- Do you have an attorney?
- Would you like an attorney to help you defend the case?
- Can you afford to pay for an attorney? If not, would you like to apply for legal aid?

Particulars to take if someone has already appeared in court on a criminal charge

- When did you appear in court for the first time?
- What was the charge?
- Did you plead to the charge? If so, did you plead 'guilty' or 'not guilty'?
- Do you have an attorney to defend you in court? If not, would you like an attorney?
- Can you afford to pay for an attorney? If not, would you like to apply for legal aid?

Model letters

Letter of Demand for the Small Claims Court

Letters of demand MUST be delivered by hand or sent by registered post with an A.R card filled in at the Post Office. You must keep the proof of posting (registered slip), the A.R. card when the Post Office sends it back to you, and an exact copy of the letter to hand to the Clerk of the Court if you issue the summons.

EXAMPLE

FROM
(your name and address, and your contact telephone number)

TO ***(name and address of defendant)***

Date

Dear ***(name of defendant)***

WRITTEN DEMAND IN TERMS OF SECTION 29(1) OF THE SMALL CLAIMS COURT ACT, 1984:

Take note that the undersigned hereby claims from you the sum of R……, in respect of

(give brief details, such as 'unpaid loan', or 'collision damage')

Take note further that unless the said sum is paid to the undersigned within 14 days from receipt of this letter, summons will forthwith be issued against you.

Yours faithfully

…… ***(your own signature)***
YOUR NAME IN FULL