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TOPIC INDEX

TOPIC INDEX

HOW TO USE THIS MANUAL

This manual has 17 chapters that deal with different areas of advice and paralegal work. Two other sections – Resources and a Legal Dictionary – are included at the end of the book for your information.

How can you find information in the manual?

To help you find the information you need, there are four tools you can use:

- A **Topic Index** is at the *front of the manual* (*after the Acknowledgements page*). The quickest way to find information is to use this alphabetical topic index that gives page references for most topics covered in the manual.
- An **Overview of Topics** (*See page after: How to use this manual*) lists each chapter and the most important topics in each chapter. This is to help you easily identify which chapter to refer to when you need information.
- A **Contents list** of the titles and page references of the 17 chapters (*before the start of Chapter 1*).
- A comprehensive **Contents List** *at the beginning of each chapter*. This includes the headings and sub-headings in the chapter and their page references.

In the text of each chapter, we have included cross-references to other sections in the manual where this is relevant.

The **Resources** section *at the end of the manual* is divided into 17 chapters. It contains useful addresses and contact numbers relevant to the specific chapters.

What is in the chapters?

Each chapter has these parts:

PART	WHAT IT TELLS YOU
Contents list	All the headings and sub-headings in the chapter, with their page numbers
Text	This gives you important information you need to know about the law relevant to a specific problem and the different systems and processes that apply
Problems	The most typical problems, what the law says regarding the problem, and what you can do to deal with the problem
Model letters and forms	Examples of letters you may have to write or forms you may have to fill in
Checklists	Lists of questions to ask clients

How to deal with problems

If you are faced with a problem, look at the **Overview of Topics** (*See page after*: *How to use this manual*) to see which chapter has information on the problem. You can also look at the alphabetical **Topic Index** (*at the front of the manual*).

If you know which chapter the problem falls under, go to the **contents list of that chapter**.

For quick answers, check the **Problems** at the end of each chapter and see if your problem is covered there.

If you need to write a letter, look at the **Model Letters** in that chapter to see if there is one that you can adapt to the situation you are dealing with. Remember not to copy the letter – it is only included as an example and you need to include the facts that relate to the problem you are dealing with..

If you need contact details for organisations or information on websites and publications, look under the **Resources** section at the end of the manual.

The **Legal Dictionary** at the back of the manual contains a list of difficult legal words with explanations.

We sincerely hope that the manual helps you with your legal advice work.

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The South African Constitution and Bill of Rights

Introduction

In 1994, after decades of living under an apartheid government, the first democratic election was held in South Africa. For the first time, South Africa could call itself a democracy because everyone who was a citizen of South Africa could vote in the elections. The Constitutional Assembly was constituted with the task of drawing up a Constitution to represent the interests and needs of all the people of South Africa. Included in the Constitution was a Bill of Rights, which gives people rights and responsibilities.

What is a Constitution?

The constitution of a country sets out:

- The social values that the country believes in
- The structures of government
- What powers and authority a government and government bodies have
- The rights of citizens
- The relationship between government and citizens
- Aspects of the relationships between citizens

A constitution is the highest law in the land and must be respected by all government bodies. It is higher than parliament and it can override any law that parliament makes if the law goes against the constitution. No law can go against the Constitution, whether it is a Customary law or a law that parliament makes.

The South African Constitution of 1996 is a document that consists of 14 chapters. It says how the government should rule the country and it includes a Bill of Rights.

What is a democracy?

Democracy means that everyone has a say in how the country is run. In a democracy, the government is put into power by its citizens. The adult citizens of a democracy elect their government. One way they do this is by choosing people to represent them in a parliament. In a multi-party system, the party that gets the majority votes governs the country.

CHARACTERISTICS THAT IDENTIFY A DEMOCRACY	
Citizens can participate in government It is everyone's right and duty to participate in government.	**Economic freedom** People can own property and businesses and they can choose their own work and join labour unions.
All people are equal before the law There is no legal discrimination based on race, religion, gender or other reason. Groups and individuals have a right to their own cultures, languages, beliefs and so on.	**Controlling abuse of power** There must be ways to prevent government officials from abusing their power. The courts are independent from the government, and there are other bodies that have the power to act against corrupt government officials.
Political tolerance Various opinions, beliefs, cultures, religions and so on need to be tolerated. So, while the majority of the people rule in a democracy, the rights of the minority must still be protected.	**Human rights** Democracies aim to respect and protect the human rights of all and often use a Bill of Rights to do so.
Accountability Officials who are elected and appointed in government are accountable to the people for actions and decisions.	**Multi-party system** A multi-party system means that more than one political party can participate in elections, so that people can choose who they want to represent them in government.
Transparency In a democracy, people and the media (newspapers, TV, radio) can get information about what government decisions are being made, by whom and for what reason.	**The rule of law** No one is above the law, including the president. This means that the law must treat everyone in an equal and fair way.
Regular, free and fair elections Citizens choose their own representatives for government. They elect these officials in a free and fair way, without corruption, and votes are secret. Elections are held regularly.	**The separation of powers between different arms of government** The Legislature (parliament), made up of people's representatives, make the laws and policies. The Executive (cabinet) implement and oversee the public service. The Judiciary act as independent referees to interpret the law when there are disputes or conflicts, or someone breaks the law.

(See: pg 100: Democracy and Public Participation)

Development of Constitutions in South Africa

Between 1910 and 1994, there were four Constitutions in South Africa:

1. In 1910, Britain decided to withdraw from the government of South Africa and handed the country over to the white residents of the country, who were the British settlers and Boers. The first Constitution for the Union of South Africa was adopted in 1910. This gave rights to the white minority but took away the right to vote for the majority of South Africans.
2. In 1960, the white government held a referendum to decide whether South Africa would become a Republic. On 31 May 1961, South Africa was declared a Republic, and the government adopted the second Constitution. This also took away the rights of black people.
3. In 1983, the government passed the third Constitution. This Constitution created the tricameral parliament, which meant there was a separate parliament for the White, Coloured and Indian groups. This Constitution excluded black people and automatically made them citizens of the homeland where they were born. They had no rights outside these homelands.
4. In 1994, twenty-six parties negotiated and adopted an interim Constitution that gave the vote to everyone. This Constitution lasted for two years. During that time, the elected government worked as the Constitutional Assembly and had to draw up a final Constitution. This finally became law on 18 December 1996.

CODESA

On 2 February 1990, the National Party government unbanned political parties, released many political prisoners and detainees, and unbanned many people, including Nelson Mandela.

On 20 and 21 December 1990, the first session of CODESA (Convention for a Democratic South Africa) was held. There were 19 political groups at this event. All parties agreed to support the Declaration of Intent, which said that they would begin writing a new Constitution for South Africa.

The Multi-party Negotiating Process

In March 1993, full negotiations were initiated under the name of the MPNP - Multi-party Negotiating Process - instead of CODESA. Twenty-six parties took part in the MPNP to write and adopt an interim Constitution to say how the government would govern after the elections on 27 April 1994. The MPNP drew up the Interim Constitution which was to last for two years.

The Constitutional Assembly (CA)

After the elections in 1994, the new parliament - working as the Constitutional Assembly (CA) – wrote the final Constitution, and on 8 May 1996, it was finally adopted by the Constitutional Assembly. The final Constitution was passed by parliament and became law on 18 December 1996.

The South African Constitution

The South African Constitution describes the social values of the country, and sets out the structures of government, what powers and authority a government has, and what rights citizens have. The Founding Provisions of the Constitution set out the principles and guarantees of democracy in South Africa. ***(See pg 14: Founding Provisions)***

Because the Constitution is the highest law in the land, it stops each new government from passing its own laws that contradict the Constitution. It is also much more difficult to change the Constitution than any other law, as it needs a two-thirds majority vote in parliament. The Constitution, therefore, protects democracy in South Africa.

A government should never have unlimited power. Even democratically elected governments can abuse this power. There are cases of governments that were elected in democratic elections but then refused to allow further elections and became permanent rulers. Other governments abuse their power by persecuting people who are against them. The Constitution guards against governments abusing their powers in the future.

Our Constitution helps to guard against abuse of power by:

- Having rules about when elections should happen and what happens to parties that lose
- Making it very difficult to change the constitution
- Making sure that no person or government body has too much power
- The separation of powers (splitting power between different branches of government – parliament, cabinet and the judiciary)
- Setting out the human rights that people have in a bill of rights
- Creating independent courts and commissions that will protect people's rights, as well as monitor the government to make sure that it is doing its work properly
- Making it compulsory for all government bodies to be accountable and transparent to the public

---

The relationship between the Constitution and other laws

The Constitution is a law passed by parliament and it is the highest law in the land. All other laws must follow it. Other laws are divided into statutes (laws or acts), common law and customary law:

> **Statutes** are laws or acts which are made by government. Laws made by the national parliament are called acts of parliament, laws made by provincial legislatures are called ordinances, and laws made by municipal councils are called by-laws.
>
> **Common law** means laws that have not been made by parliament or any other government. They are unwritten laws. Common law is based on Roman-Dutch law (laws that were brought by the Dutch when they arrived in South Africa). The courts used these laws and developed them when they made decisions (or set precedents).
>
> **Customary laws** are also unwritten laws. They are laws that apply to certain cultures or ethnic groups.

All these laws have to follow the Constitution. In other words, they cannot go against what the Constitution says. So, new laws must follow the Constitution, and the government must change old laws or parts of old laws if they don't follow the Constitution. If a customary law or common law goes against the Constitution, then a court will say it is invalid. In other words, it can't apply in the situation.

EXAMPLE

In customary law, a biological father does not have automatic rights and responsibilities to his children. Rather, a father's right to his biological children is linked to marriage and the question of lobola. If lobola was agreed then the child belongs to the father's family. If it was not agreed, then the child belongs to the mother's family. But in the case of Hlope v Mahlalela, the court did not approve of the role of lobola in deciding the responsibilities of parents and their rights and instead focused on the best interests of the child, which is a principle enshrined in the Constitution.

Changing or amending the Constitution

The Constitution is much more difficult to change than other laws.

Section 74 of the Constitution says that if parliament wants to change the Constitution, then:

- At least two-thirds (66%) of the members of parliament must vote to change it and
- at least 6 provinces in the National Council of Provinces must vote to change it ***(See pg 17: National Council of Provinces)***

Section 1 of the Constitution says that South Africa is one sovereign, democratic state founded on values of human dignity, equality, human rights and freedoms. It also says that the Constitution is supreme and that there must be regular, free and fair elections where everyone can vote.

If Parliament wants to change Section 1 or Section 74, then:

- At least 75% of the members of parliament must vote to change it, and
- at least 6 provinces in the National Council of Provinces must vote to change it ***(Read: Section 74 of the Constitution)***

The separation of powers

The separation of powers in the Constitution means the government's functions and powers are split into 3 branches. These branches each perform a separate function and are independent of each other. The purpose of this is so that they keep a check on each other.

Separation of powers is an important part of democracy because it prevents any elected official or government body from abusing its powers. The

3 branches are:

- The legislature (parliament) which makes the laws
- The executive (cabinet) which enforces (carries out) the laws and
- The judiciary that interprets the laws

THE LEGISLATURE

The national legislature is called parliament. Parliament makes new laws and changes old laws for the whole country. It is made up of the National Assembly and the National Council of Provinces. Both of these bodies are responsible for making laws.

Each province also has a legislature called a provincial legislature, which makes laws for each province.

The legislatures at national and provincial level are elected by citizens in national and provincial elections every five years.

THE EXECUTIVE

The national executive is made up of the president, the vice-president and the cabinet. The national executive is responsible for carrying out the laws, in other words, for putting the laws written by the legislature into action.

The cabinet is made up of ministers (such as the minister of health) who are appointed by the president. Each minister governs a department with public servants doing the administration.

The ministers cannot make their own laws although they can draft new laws or change old laws and ask parliament to pass these. Ministers must make sure that the policies of the government are implemented. Parliament can also ask ministers to explain why they are carrying out policy in a particular way. They report to parliament every year and their budgets are approved by parliament. In this way the executive is accountable to the legislature.

Each province also has its executive. The provincial executives are made up of a premier and members of an executive council appointed by the premier.

THE JUDICIARY

The judiciary is made up of courts, judges and magistrates. They make decisions in cases that are referred to the courts based on the laws made by the legislature and carried out by the executive. These decisions then help to define how laws should be applied. The courts also ensure that laws made by the legislature do not go against the Constitution. The Constitutional Court has the power to declare a law invalid if the judges find that it goes against the Constitution. In this way, the judiciary acts as a watchdog over the legislature and the executive - and holds them accountable to the Constitution and the laws they have passed.

People can take cases to court if they believe the actions of the executive go against the law or the Constitution. In this way, the courts act as a check on the work of the executive.

The judiciary must be independent of the executive and the legislature. In this way it can make fair decisions, even if this goes against what the legislature and executive want. Cases are often between different spheres of government, e.g. a municipality and a province. The judiciary interprets the law only and must apply it neutrally. An independent body called the Judicial Services Commission appoints judges, so these judges are independent of the government in power.

EXAMPLE

1. *Parliament (the legislature) writes a new law that says all children at school must get a free meal. The minister of education (the executive) gives the education department instructions to carry out the new law. But when Thokozile goes to school she doesn't get a free lunch. The school refuses to give a free meal to any of the students. Thokozile's father and mother go to court to demand that the school give the students lunch. The court tells the school to do this because this is what the law says.*

2. *Parliament (the legislature) passes a law that says doctors who are Rastafarians cannot work in state hospitals. The Department of Health (the executive) gives instructions to all hospitals to dismiss all Rastafarian doctors. These doctors go to court and say that this law is invalid because it discriminates against people on grounds of their religion, and it goes against their rights in the Constitution. The court agrees with the doctors and declares the law invalid.*

The spheres of government

The government in South Africa is divided into three spheres: national, provincial and local. The three spheres are autonomous, but in terms of Chapter 3 of the Constitution they have to work together and coordinate things such as budgets, policies and activities, particularly those that cut across all the spheres.

National parliament makes and carries out laws about issues that affect the whole country. These are issues like economic policy, defence and relationships with other countries. National parliament makes laws called Acts of Parliament, which the whole country has to follow. ***(See pg 16: Chapter 4: Parliament)***

Provincial governments deal with things that affect their own provinces. Schedule 5 of the Constitution lists the issues that provincial government is responsible for. Each provincial legislature makes its own laws called ordinances and these apply to people living in the province. The provinces can draw up their own constitutions, but these constitutions cannot go against the national Constitution. ***(See pg 19: Chapter 6: Provinces; See pg 21: Schedule 5)***

There are some issues that both national and provincial government can make laws about. These are listed in Schedule 4 of the Constitution. However, national government is responsible for setting national standards on these issues, so laws written by provinces must follow national standard-setting legislation. ***(See pg 20: Schedule 4)***

Local government is the third sphere of government. Local governments deal with things that affect the local area that they control. Part B of Schedules 4 and 5 of the Constitution says what things local government is responsible for. This includes collecting rubbish, providing water, parking, electricity and parks. Laws written by local governments are called by-laws, and they apply to the areas falling under the control of the local government.

Summary of the Constitution

Preamble

We, the people of South Africa, Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
>
> *Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
>
> *Improve the quality of life of all citizens and free the potential of each person; and*
>
> *Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.*

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.

Chapter 1: Founding provisions

SECTION 1: The Republic of South Africa will be one sovereign, democratic state founded on the following values:

- Human dignity, equality, advancement of human rights and freedoms
- Non-racialism and non-sexism
- The Constitution will be supreme
- The rule of law will be supreme

- All adults will be able to vote
- There will be a common voter's roll
- There will be regular elections
- There will be a multi-party system of democratic government to make sure there is accountability and openness

***SECTION 2*:** The Constitution is the highest law in the law in the country and everyone will be bound by the Constitution. Any laws that go against the Constitution will be changed or set aside.

SECTION 3: All South Africans are South African citizens. Every citizen is equal and has a right to the rights and privileges of being a citizen of South Africa. Everyone also has duties, obligations and responsibilities of being a citizen of South Africa. ***(See pg 66: Chapter 2 Citizenship)***

SECTION 4: The national flag will be black, gold, green, white, red and blue.

SECTION 5: The national anthem will be decided by the president.

SECTION 6: There are 12 official languages. These are: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu and sign language.

A Pan-South African Language Board must promote the use of all official languages, the Khoi, Nama and San languages, and sign language. It must promote and respect other languages used in South Africa, such as Arabic, German, Greek, Gujarati, Hebrew, Hindi, Portuguese, Sanskrit, Tamil, Telegu, Urdu and other languages used for religious purposes.

Chapter 2: The Bill of Rights

Chapter 2 of the Constitution contains the human rights which are protected in South Africa.

The section 'Human Rights' includes a summary of the Bill of Rights (Sections 7 – 39 of Chapter 2 of the Constitution) and other topics related to human rights.

Chapter 3: Co-operative government

Government works at national, provincial and local levels. ***(See pg 12: Spheres of Government)***

All spheres of government must:

- Keep the peace and national unity of South Africa
- Look after the well-being of the people of South Africa
- Be effective, transparent and accountable to the republic as a whole
- Be loyal to the constitution and to South Africa
- Respect the status, institutions, powers and functions of government in other areas
- Not take on powers that the Constitution doesn't give them
    - Use their powers and perform their functions in a way that doesn't interfere with government in another area
    - Co-operate with each other by assisting, supporting, and consulting with each other on things of common interest

Chapter 4: Parliament

Parliament makes laws for the country. It is also called the national legislature. Laws made by Parliament may not conflict with the Constitution. Parliament has two houses: the National Assembly and the National Council of Provinces.

THE NATIONAL ASSEMBLY

The National Assembly consists of between 350 and 400 members of parliament. The people of South Africa vote in general elections for people to represent them in the National Assembly. Only people who are 18 years or older can vote in an election. General elections are held every 5 years.

Members of the National Assembly are elected according to the system of proportional representation. This means people vote for the party and not for a person. ***(See pg 99: Proportional representation)***

WHO CAN BE A MEMBER OF THE NATIONAL ASSEMBLY?

To be a member of the National Assembly, a person must be a South African citizen who is registered to vote.

Permanent delegates to the National Council of Provinces or members of a provincial legislature or municipal council cannot be members of the National Assembly.

HOW DOES THE NATIONAL ASSEMBLY MAKE DECISIONS?

The National Assembly makes decisions by voting. If the decision is about a new law (a bill), more than half of the members of the National Assembly must be present before there can be a vote. If the decision is about anything else, at least one-third of all the members must be present. The president is not allowed to vote in the National Assembly.

THE NATIONAL COUNCIL OF PROVINCES (NCOP)

The NCOP represents provincial and local government interests in parliament and in the executive. It works with the national assembly to make and pass new laws and to change old laws. The NCOP has 90 members. Each province sends 10 delegates. The 10 delegates are made up of 4 special delegates, including the premier of the province, and 6 permanent delegates. The NCOP elects a chairperson and two deputies.

MAKING LAWS

The National Assembly can pass laws on any matter, including matters in the functional areas listed in Schedule 4 of the Constitution. However, it cannot pass laws on matters in the functional areas listed in Schedule 5 of the Constitution unless it becomes necessary for reasons such as maintaining national security. A bill can be introduced to parliament by a cabinet member or deputy minister, a parliamentary committee, or a member of the National Assembly. The National Council of Provinces (NCOP) can introduce a bill if it is about something that falls under the powers of the provinces. ***(See pg 20: Schedule 4; See pg 21: Schedule 5; See pg 118: Making new laws (at national level); see pg 126: Making new laws (at provincial level))***

WHAT HAPPENS IF A BILL IS, OR MIGHT BE, UNCONSTITUTIONAL?

- Members of the National Assembly can apply to the Constitutional Court for an order to declare that all or part of an Act of Parliament is unconstitutional. At least one-third of the members of the National Assembly must support this application. The application must be made within 30 days of the date on which the President signed the act.
- If the President thinks a bill goes against the Constitution, the President can refuse to sign it and send it back to parliament for them to look at again.

- If parliament makes the changes suggested by the President, the President must sign the bill.
- If parliament does not make these changes, the President can either sign the bill or send it to the Constitutional Court for the Court to say whether or not the law goes against the Constitution.
- If the Constitutional Court is satisfied with the bill, the President must sign it.
- If the Constitutional Court is not satisfied with the bill, it will be sent back to parliament. Parliament can either change the bill or let it fall away.
- If the Constitutional Court is satisfied with the bill, the President must sign it.
- If the Constitutional Court is not satisfied with the bill, it will be sent back to parliament. Parliament can either change the bill or let it fall away.

Chapter 5: The President and the national executive

The national executive is the body that puts the laws written by parliament into action. The executive cannot pass new laws. The national executive is called the cabinet, and it consists of the president, the deputy president and cabinet ministers appointed by the president.

THE PRESIDENT

The president is the head of state, head of the cabinet and commander-in-chief of the defence force. The National Assembly elects them from among its members.

THE CABINET

The cabinet consists of the president, the deputy president, and all the ministers, for example, the minister of education, the minister of health, and so on. Each minister has a government department and administration that they are in charge of.

The president selects and appoints the deputy president and the ministers in the cabinet. The president can also appoint deputy ministers to assist members of the cabinet. The president can dismiss any of these people they have appointed.

The deputy president and the ministers are all accountable to the president and to parliament. The executive has to follow the policies of the government. For example, the minister of education and his or her department must carry out all the laws that parliament makes about education and put into practice the government's policies on education. The different departments can refer bills to parliament to have them made into laws.

Chapter 6: Provinces

There are 9 provinces: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Limpopo, North West and Western Cape.

Each province has its own provincial government. This is made up of a provincial legislature and a provincial executive.

PROVINCIAL LEGISLATURES

The provincial legislatures write laws called ordinances for their provinces. Only people living in the province and people visiting it have to follow these laws.

Members of provincial legislatures are elected during the national general elections, which take place every 5 years. There will be between 30 and 80 members in each provincial legislature.

PROVINCIAL EXECUTIVES

The provincial executives are made up of the premier and the executive council of that province. The executive council consists of the premier and not more than 10 members appointed by the premier.

POWERS OF THE PROVINCES

Provincial governments have decision-making powers for their own provinces. They can make their own constitutions and their own laws, but these must follow the national Constitution. Provincial legislatures can pass laws on any matter in the functional areas listed in Schedules 4 and 5 of the Constitution. National and provincial government share powers to make laws about some issues, like health, welfare and education. National government is responsible for setting national standards on these issues, so laws written by provinces must follow national standard-setting legislation.

SCHEDULE 4: CONCURRENT FUNCTIONAL AREAS OF NATIONAL AND PROVINCIAL LEGISLATURES

PART A

- Administration of indigenous forests
- Agriculture
- Airports (not international or national)
- Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection
- Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education
- Environment
- Health services
- Housing
- Indigenous law and customary law
- Industrial promotion
- Language policy and the regulation of official languages
- Media services
- Nature conservation, excluding national parks
- Police
- Pollution control
- Population development
- Public transport
- Public works only in respect of the needs of provincial government
- Regional planning and development
- Road traffic regulation
- Soil conservation
- Tourism
- Trade
- Traditional leadership
- Urban and rural development
- Vehicle licensing
- Welfare services

PART B

The following are local government functions. The national government and the provincial governments have the legislative and executive authority to see that municipalities perform these functions.

- Air pollution
- Building regulations
- Child care facilities
- Electricity
- Ferries, jetties, piers and harbours
- Firefighting services
- Local tourism
- Municipal airports
- Municipal planning
- Municipal public transport
- Municipal public works
- Stormwater management systems in built-up areas
- Trading regulations
- Water and sanitation services (domestic water use and sewage disposal systems)

SCHEDULE 5: FUNCTIONAL AREAS OF PROVINCIAL LEGISLATURES	
PART A	
• Abattoirs • Ambulance services • Archives that belong to the provinces • Libraries (but not national libraries) • Liquor licences • Museums (but not national museums)	• Provincial planning • Provincial cultural matters • Provincial recreation and amenities • Provincial sport • Provincial road and traffic • Vets
PART B	
The following are local government functions. The provincial governments have the legislative and executive authority to see that municipalities perform these functions.	
• Beaches and amusement facilities • Billboards and display of advertisements in public places • Cemeteries, funeral parlours and crematoria • Cleansing • Control of public nuisances • Control of businesses that sell liquor to the public • Facilities to accommodate and bury animals • Fences • Licensing of dogs • Licensing and control of businesses that sell food to the public	• Local amenities • Local sport facilities • Markets • Municipal abattoirs • Municipal parks and recreation • Municipal roads • Noise pollution • Pounds • Public places • Refuse removal and refuse dumps • Street trading • Street lighting • Traffic and parking

Chapter 7: Local government

Local governments make decisions and laws, called by-laws, for their own municipal areas. These may not go against the Constitution, nor acts of parliament or provincial ordinances. Municipal councils carry out the executive and legislative functions of local government.

WHO CAN VOTE IN LOCAL GOVERNMENT ELECTIONS?

Municipal councils are elected every 5 years in local elections. People who can vote must live in the area covered by the local government, and they must be registered as a voter in the area.

POWERS OF LOCAL GOVERNMENT

Local governments have the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, and any other matter referred to them by national or provincial laws. ***(See pgs 20 and 21: Schedules 4 and 5)***

Chapter 8: Courts and administration of justice

The Constitution says the courts are independent. This means that the national executive and parliament cannot interfere in what the courts do. Everyone, including the government, must follow the decisions of the courts. The courts are:

- The Constitutional Court
- The supreme court of appeal
- The high courts
- Magistrate's courts
- Other courts set up by acts of parliament, for example, the labour court, land claims court, small claims court

THE CONSTITUTIONAL COURT

The Constitutional Court is made up of a chief justice, deputy chief justice and nine other judges. The judges can only be judges in this court for up to 12 years. The Constitutional Court is the highest court to hear cases about the Constitution, and all other courts must follow its decisions. For example, the Constitutional Court says the death penalty is not allowed because it goes against people's right to life, so no other court in South Africa can sentence anyone to death.

WHAT CASES CAN GO TO THIS COURT?

There are certain cases that only the Constitutional Court can make decisions about. Some of these cases are:

- Disputes over constitutional matters between government bodies and between different levels of government, for example, between a national and a provincial body.
- Whether laws passed (or about to be passed) by parliament or provincial governments go against the Constitution.
- If any conduct of the president goes against the Constitution.

HEARING CASES ABOUT THE CONSTITUTION

Any court can hear a case about the Constitution, including cases about abuses of rights. Courts can do the following:

- Remove a law which is unconstitutional
- Stop any conduct which is unconstitutional
- Give the body which made the law time to change the law

The Supreme Court of Appeal and the High Courts can make an order about how unconstitutional a law is. But they can only provide 'temporary relief' until the case goes to the Constitutional Court. Only the Constitutional Court can confirm that it is unconstitutional and therefore invalid.

WHO CAN TAKE A CASE TO THE CONSTITUTIONAL COURT?

Anyone can take a case directly to the Constitutional Court but it is difficult for a person who is not a lawyer to do this because of the legal questions involved. It would, therefore, be better to use a lawyer to take a case to Court.

TAKING A CASE TO THE CONSTITUTIONAL COURT

Anyone who wants to bring a case to the Constitutional Court must usually start in a High Court. In certain cases, the state will provide legal aid. A High Court will hear the case, and it has the power to make a decision. If the person who has brought the case is unhappy with the decision, they can usually appeal against a decision of the High Court. The appeal will be heard in the Constitutional Court. The Constitutional Court has to decide on the meaning of the Constitution in relation to a dispute. It has to interpret the relevant section(s) in the Constitution and see how it applies to the case.

The Constitution says that at least 8 judges must hear any case that goes to the Constitutional Court. Decisions of the Court are reached by a majority vote of the judges hearing a case.

Sessions of the Constitutional Court are open to the public and press. ***(See below: examples of Constitutional Court cases)***

EXAMPLES

1. *A provincial law (ordinance) says the province must only employ female teachers. All male teachers must be dismissed. A male teacher takes his case to the High Court. The High Court cannot remove this law. But the judges of the High Court can say that they think the law goes against the Constitution. They can decide that the teacher cannot be fired until the Constitutional Court has decided whether the law is constitutional or not.*

   The male teacher, another male teacher, or the Provincial Department of Education can ask the Constitutional Court to decide whether the law goes against the Constitution or not.

2. *Mr Soobramoney was a diabetic who suffered from heart disease and kidney failure. He applied to a state hospital for special treatment involving the use of a very expensive machine. Because of the shortage of machines and staff, the hospital only admitted patients who could be cured or those who needed a kidney transplant. Mr Soobramoney did not fit either of these two categories. He was told that he did not qualify for the treatment.*

   He applied to the KwaZulu-Natal High Court claiming that he had a right to receive treatment from the hospital because:

   - *Section 27 of the Bill of Rights says no one can be refused emergency medical treatment*
   - *Section 11 says he has a right to life*

   The High Court turned down his application. Mr Soobramoney appealed to the Constitutional Court. The Court said his case was not an emergency that would allow him to receive emergency medical treatment. It also said that even though Mr Soobramoney had the right to have access to health care, the state only had to provide what it could afford. In this case, the state could not afford to give him the treatment. The Court turned down the appeal.

THE SUPREME COURT OF APPEAL

The Supreme Court of Appeal has a Chief Justice, a Deputy Chief Justice and other judges. This court is the highest court of appeal in all cases, except cases about the Constitution. It decides on appeals from lower courts, and decisions of this court must be followed by all lower courts.

HIGH COURTS

Each province has a High Court which is headed by a judge president and a deputy-justice president. Some provinces may also have 'branches' called local divisions.

If a person is unhappy about a decision of a High Court, they can appeal to:

- The Constitutional Court, if it is a constitutional matter
- The Supreme Court of Appeal in any other matter ***(See pg 201: Trials, appeals and reviews)***

MAGISTRATE'S COURTS

Each area in the country has its own magistrate's court. These courts deal with less serious criminal and civil courts. If a person is unhappy with the decision of a magistrate, they can appeal to a High Court of that province.

HOW JUDGES ARE CHOSEN

The Judicial Services Commission interviews judges and recommends a shortlist of four for each vacant position to the president, who makes the final decision. ***(See pg 187: Structure of the Courts)***

Chapter 9: State institutions that support constitutional democracy

The Constitution says there will be seven government institutions to protect people from abuse by the government. They are referred to as the Chapter 9 Institutions or protection mechanisms.

It is their job to make sure that the government does its work properly. ***(See pg 54: Protecting Human Rights)***

These institutions are independent and report to parliament at least once a year. They are:

- The Public Protector
- South African Human Rights Commission
- Commission on Gender Equality

- The Auditor General
- Independent Electoral Commission
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- Independent Communications Authority of South Africa

Chapter 10: Public administration

Public administration refers to people who work for the government, also called the public service. This includes anyone who gets a salary from the government such as the police, army and people working in government departments like the education department.

The public service must put the policies of the government into practice.

The Public Service Commission is an independent body whose job is to monitor, evaluate and oversee the administration of the public service. It is made up of one representative from each province and it must account to parliament. For example, it investigates grievances of employees in the public service, ensures that public officials follow correct procedures, and so on.

Chapter 11: Security services

The security services consist of a single defence force, a police service and an intelligence service. National security is controlled by parliament and the national executive. The security services are there to protect the people and the country, and they are not allowed to act for or against a political party. ***(See pg 228: Reporting a case of police misconduct)***

Chapter 12: Traditional authorities

The Constitution recognises traditional leaders and indigenous or customary law. It says the courts can apply customary law if it is appropriate in a case. But, customary laws cannot go against the Constitution. So, if a customary law goes against the Bill of Rights, it will be regarded as invalid.

The Constitution establishes a national council of traditional leaders and provincial councils of traditional leaders. These councils allow traditional leaders to play an advisory role on matters relating to traditional leaders and customary law in national and provincial governments. ***(See pg 135: Traditional leadership)***

Chapter 13: Finance

THE NATIONAL REVENUE FUND

The Constitution sets up a national revenue fund. All money raised by the national government must go into this fund, for example, taxes, fines and donations. Parliament and provincial governments get their money from this Fund.

THE FINANCIAL AND FISCAL COMMISSION

This commission is an independent body whose job it is to advise and make recommendations to any level of government about how to spend their money. It can also give advice about how much money should go to provincial and local governments.

HOW TAXES ARE BUDGETED

The government gets taxes and levies from people who work (income tax), from companies and from VAT (the tax that people pay on goods that they buy). This money goes into the national revenue fund. The minister of finance and the finance department prepare the national budget for the country which says how the money in the national revenue fund will be allocated.

Chapter 14: General provisions

International agreements only become law in South Africa once they are made law by an Act of Parliament and they are published in the government gazette.

Human Rights

The first part of this section gives an explanation of human rights and related issues. The second part provides a summary of the South African Bill of Rights, which is Chapter 2 of the Constitution.

What are human rights?

Human rights are also called natural rights. They belong to people because they are human beings. People are entitled to them regardless of where they live, their class, race, sex, age, and so on. There are many international documents that deal with human rights, for example, the Universal Declaration of Human Rights, which has been signed by many countries with different social, political and economic systems.

Most people would support human rights that are based on basic values, such as respect for human life and human dignity. But, not all people agree on the interpretation of such rights and how they should be put into practice. There is also debate about which human rights are most important and which are less important. The Bill of Rights in the South African Constitution contains the human rights that will be protected in South Africa.

LEGAL RIGHTS AND MORAL RIGHTS

> Legal rights are rights laid down in laws which are made by parliament and they may give people certain rights. For example, it was once a legal right to own slaves because there were laws that allowed this, even though it went against the human rights of the people who were slaves.
>
> There are also moral rights. For example, people over a certain age may have a legal right to drink alcohol, but others may believe that they do not have a moral right to do so. Different people have different ideas of what is moral and what isn't moral. Some communities may practice moral codes that go beyond what the law says.

Indivisibility of rights

Rights are often divided into different categories, such as first, second and third-generation rights, civil and political rights, socio-economic rights and collective and

cultural rights. But while it may be convenient to put these rights in categories, in reality they all overlap with each other and are completely interdependent. So, even if a single right seems more important than another, they still depend on each other to be effective. For example, for people to be able to use their right to vote effectively, they must have other rights like the right to attend political meetings, to have freedom of speech and to be free to move anywhere.

Political rights are also strongly linked to socio-economic rights: if people don't have food to eat, a roof over their heads or running water, then they might see little value in their right to vote or to join a political party.

The three generations of rights are traditionally described as follows:

> **First generation:** Civil and political rights and freedoms that everyone is entitled to (examples include the right to life, to vote, freedom of speech, to assemble and demonstrate).
>
> **Second generation:** Social and economic rights that everyone should have, but these rights may only be realised when resources permit (examples include the right to basic services, access to housing, land, health care, education and the right to earn a living).
>
> **Third generation:** Collective rights and cultural rights. These are also called community rights (examples include environmental rights, the right of all people to self-determination and the right to development).

Rights and responsibilities

For every right that a person has, there is usually a responsibility that is connected to that right. For example, you have a right to freedom of expression but a responsibility not to tell deliberate lies about someone else. There is a general responsibility to respect and be tolerant of other peoples' rights, for example, you enjoy the right to religious freedom and all beliefs are respected. You also have the responsibility to respect others' beliefs, rights and choices. So, even if your faith condemns homosexuality, you are not allowed to discriminate against gay people.

The government also has responsibilities in terms of rights. These are examples of some rights and responsibilities:

EXAMPLE: SOME RIGHTS AND RESPONSIBILITIES

Right to freedom and security of the person.
You have a responsibility not to abuse your partner or children in the privacy of your home. The government has a duty to ban the use of torture to get information from people.

No slavery or forced labour.
You have a responsibility not to allow your children to go to work when they are very young. The government has a responsibility to pass and monitor a law that sets a minimum age for people who are working. The government has to act against human trafficking.

Freedom of movement and residence.
People are free to move between provinces and cities. You have a responsibility to accept anyone who comes and lives next door to you as your neighbour. The government has a responsibility to issue passports and identity documents to all citizens who apply.

Right to education.
All children have a right to education. You have a responsibility to send all your children to school. The government has a responsibility to build enough schools and provide enough teachers so that everyone can go to school and get a proper education.

Conflicts in rights

There are times when one person's right will conflict with the rights of another person. The South African Bill of Rights says it is acceptable in certain situations to limit rights, if it is reasonable to limit them in the situation, and it is justifiable in an open and democratic society that is based on equality and freedom. Where there is a conflict of rights, and each person thinks their right is more important than the other person's right, the courts may be approached to decide whose right is more important in a particular situation. ***(See pg 53: Limitations on Rights)***

EXAMPLES

1. *A school which follows Hindu traditions and customs refuses to take a child into the school because the child is not a Hindu.*

   The school says they have a right to practice their own religion, culture and belief. The parents of the child argue that it is their right to send their child to any school of their choice. They say their child has a right to education.

   The conflict is about the right to education versus the right to practice your own religion, culture and beliefs.

2. *In a rural community some people make a living by chopping down trees for firewood that they sell to the public. The government has appointed an official to protect the environment and to stop people from chopping the trees down.*

   The conflict is about the right to choose how to earn a living versus the right to an environment that is protected so that people can always live there.

3. *Jon believes he is exercising his right to freedom of expression when he carries a poster around that says, 'Jews go back to Israel'. But Jewish people have the right to protection against discrimination and to practice their own religion. Jon's right could probably be limited because this is a form of hate speech, and he is creating dislike or hatred for Jewish people by his actions.*

International documents on human rights

Human rights are set out in many international documents. When a country ratifies a document, it agrees to be bound by the rules in the document and make the document a part of its own laws.

If a country has signed but not ratified a document it means it supports the rules in the document and promises not to commit acts which would defeat the purpose of that document. It can mean the country plans to go through a process in order to ratify the document later.

South Africa has signed some international documents and ratified others. These are some of the most important international human rights documents:

INTERNATIONAL HUMAN RIGHTS DOCUMENTS

- 1948 Universal Declaration of Human Rights (not legally binding on governments, but it has moral and political authority in international communities). South Africa has not signed nor ratified it.
- 1953 Convention on the Political Rights of Women. South Africa has signed and ratified it.
- 1957 Convention on the Nationality of Married Women. South Africa has signed and ratified it.
- 1966 International Covenant on Economic Social and Cultural Rights. South Africa has signed and ratified it.
- 1966 International Covenant on Civil and Political Rights. South Africa has signed and ratified it.
- 1966 International Convention on the Elimination of All Forms of Racial Discrimination. South Africa has signed and ratified it.
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). South Africa has signed and ratified it.
- 1981 African Charter on Human and People's Rights. South Africa has signed and ratified it.
- 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. South Africa has signed and ratified it.
- 1989 Convention on the Rights of the Child. South Africa has signed and ratified it.
- 1996 International Labour Organisation Conventions: Convention Concerning Forced or Compulsory Labour, Convention Concerning the Abolition of Forced Labour, Convention Concerning Discrimination in Respect of Employment Occupation. South Africa has signed and ratified these.
- Rome Statute on the International Criminal Court has been signed and ratified.

Creating a human rights culture in South Africa

A human rights culture means people in a society understand what their rights are and understand that they have a duty to respect and tolerate other people using their rights. The Bill of Rights in the Constitution guarantees our rights and says we can defend them in court. This will go a long way towards creating a human rights culture. But building a human rights culture depends mostly on the attitudes of individuals, and the respect and tolerance that is shown amongst people.

People are tolerant when they learn to accept and live with the differences in other people, whether it is their attitudes, actions, cultures, religions, sexual orientation, lesbian, bisexual, etc. For example, a tolerant person will accept that other people have different opinions to their own. They will respect them by allowing them to express themselves without shouting at them or assaulting them.

Summary of the South African Bill of Rights

Chapter 2 (Sections 7 – 36) of the Constitution contains the human rights that will be protected in South Africa. The following section describes each of these rights and relevant laws that have been passed to give effect to individual rights.

Section 7: Introduction

A Bill of Rights is included in the Constitution to make them law so that people can use them in court to protect themselves.

The Bill of Rights can only be changed by an act passed by:

- The national assembly, if at least two-thirds (66%) of the members of parliament vote for it and
- The national council of provinces, if at least 6 provinces vote for it. **(*See pg 10: Changing or amending the Constitution*)**

Section 7 also says the government must respect, protect, promote and fulfil the rights in the Bill of Rights.

Section 8: Application of the Bill of Rights

The Bill of Rights applies to all laws. It must be followed by all branches of government and all government bodies. This means it must be followed by:

- The legislatures (bodies that make laws)
- The executive (bodies that carry out the laws)
- The judiciary (the courts) **(*See pg 10: The separation of powers*)**

VERTICAL AND HORIZONTAL APPLICATION OF THE BILL OF RIGHTS

> The Bill of Rights applies to all matters between citizens and the government. This means it applies in a vertical way between government and citizens. It protects citizens from things done to them by the government.

The Bill of Rights also works in a horizontal way. This means it applies to matters between ordinary people. It protects people from things done to them by other people.

EXAMPLES

1. *A restaurant owner says men must wear a jacket and tie in his restaurant. He puts Peter out of his restaurant when he takes off his jacket and tie. Peter complains that he has a right to dress however he likes. The restaurant owner says it is his property and he has a right to put people out if he doesn't like what they are doing.*

2. *The same restaurant owner also refuses to allow women to come into his restaurant. He says his restaurant is only for males. Shanaaz comes into the restaurant for a meal. He tells her to leave. She complains and says he is discriminating against her because she is a woman. The restaurant owner says it is his right to do what he likes with his property.*

   In both these examples, each person has rights. The question is, whose rights are more important in the circumstances and whose rights should be protected? The Bill of Rights protects people from having their rights abused by another person (in other words, it works in a horizontal way), but sometimes, it is difficult to know whose rights are more important in each case. Ultimately, it will be up to the courts to decide whose rights should be protected.

Section 9: Right to equality

1. *Everyone is equal before the law and has the right to equal protection and benefit of the law* - Laws may not unfairly discriminate against anyone, and everyone is entitled to equal rights and freedoms.

2. *Equality includes the full and equal enjoyment of all rights and freedoms.* The government must take active steps to change the inequalities of the past by passing laws that promote the achievement of equality. This is called *affirmative action*.

   Affirmative action means taking positive action to protect or help a person or group who has been prejudiced or disadvantaged in the past, to help undo the imbalances and disadvantages that were caused by discrimination and oppression in the past. The Employment Equity Act puts the right to equality

into practice in the workplace. People from designated groups (black people - including African, Coloured and Indian - women and people with disabilities) must be given equal employment opportunities, and they must be equitably represented in all work categories and levels. **(See pg 345: Employment Equity Act)**

3. Neither the state nor any person can unfairly discriminate against someone, either directly or indirectly. It is against the law to discriminate against anyone on any of the following grounds:

    - Race and colour
    - Sexual orientation: being gay, lesbian or heterosexual
    - Marital status: being single, married or divorced
    - Gender: social and cultural male or female roles (for example, where a woman can't get a certain job just because she is a woman) sex: physical differences between men and women (for example, a woman is discriminated against because she is pregnant)
    - Pregnancy
    - Age
    - Disability
    - Ethnic origin: being from a particular background, such as a clan or language group
    - Culture: having a shared culture and traditional practices
    - Language
    - Religion, conscience, belief
    - Birth

It is not always the case that an action which treats people differently is an infringement of the right to equality. The Constitutional Court has decided that there are a series of questions that need to be asked before it can be found that a particular action amounts to discrimination. These questions are:

- Does the action differentiate between people or categories of people?
- If the action does differentiate, is there a rational connection between the action and a legitimate government purpose? In other words, does the government have a good reason for the action?
- Does the differentiation amount to unfair discrimination?

The Promotion of Equality and Prevention of Unfair Discrimination Act (2000) creates a general prohibition against unfair discrimination and says what discrimination is against the law in different sectors of society including: in employment, education, health care, land, housing and accommodation, insurance, pensions, services, associations and

partnerships, clubs, professions and the media. The Act also says how people who have been discriminated against can be compensated for this.

If someone is charged with unfair discrimination, it is up to the person who is discriminating (not the person discriminated against) to prove that the discrimination was reasonable and justifiable. The courts will decide if an action was unfair by looking at how the action affected the person bringing the claim.

Equality Courts can hear cases of discrimination and have powers to conciliate and mediate, grant interdicts, order payment of damages, or order a person to make an apology. (See www.doj.gov.za and click on *Equality legislation* for contact details of *Equality Court Managers in the different provinces*).

According to the South African Human Rights Commission, the right to equality remains the right most frequently litigated by the Commission in the Equality Courts. Most of these cases involve the use of derogatory words or comments with racial undertones. After race, discrimination based on disability and ethnic origin accounts for the largest number of equality-related complaints received by the SAHRC.

CASE STUDY

A case of unfair discrimination was brought against the President when he said that certain women and children should be released from prison as part of an amnesty programme. Hugo, the person bringing the claim of unfair discrimination, said it was unfair that men weren't given the same treatment as women.

The argument brought by the President against Hugo was that the women prisoners were needed to look after the children, and that is why it was fair that they should be released rather than the men. The court said the action taken by the president was not unfair.

Section 10: Right to human dignity

Everyone has dignity and the right to have their dignity respected and protected.

EXAMPLE

The Department of Basic Education's 2021/2022 annual report showed that 2,982 schools still used pit latrines. This is a violation of the right to dignity as well as life, health and safety.

Section 11: Right to life

Everyone has the right to life. *The Criminal Procedure Act* includes the right for police (or someone legally entitled to make an arrest) to 'shoot to kill' in certain situations or use 'deadly force' in certain circumstances to carry out an arrest. The Constitutional Court recently looked at the use of force to make an arrest and at how this impacted a person's rights. In the case of S v Walters, the Court had to look at balancing peoples' right to life, dignity and bodily integrity and the interests of a just criminal system. The Court said the provisions relating to 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. ***(See pg 224: Using force to make an arrest)***

THE DEATH PENALTY

The debate about the death penalty is based on the right to life and the right not to be treated or punished in a cruel, inhuman or degrading way (Section 12). Those who are against the death penalty argue that the state cannot execute (kill) criminals even if they have taken someone else's life. Others say that the death penalty should be allowed because someone who has taken another human being's life has given up the right to their own life. The Constitutional Court has said that the death penalty goes against a person's right to life. So, a court cannot pass the death sentence against anyone.

TERMINATION OF PREGNANCY (ABORTION)

The debate about abortion is based on the right to life and the right for women to make decisions about reproduction (having children) and to have control over their own bodies (Section 12). People who argue against abortion say the unborn baby has the right to life from the moment the egg is fertilised. People who argue for abortion

say that women have the right to make decisions about their own bodies and that the decision as to when life begins (in the womb or at birth) is for each individual to make. Parliament has passed a law called *The Choice on Termination of Pregnancy Act*, which allows women the choice to terminate a pregnancy up to a certain stage. Obviously, anyone who is opposed to abortion cannot be forced to have one.

Section 12: Freedom and security of the person

This includes the following rights:

- Not to be put in prison without good reason
- Not to be detained without trial
- To be free from all kinds of violence in both public and private
- Not to be treated or punished in a cruel, inhumane or degrading way; torture is not allowed.
- To make decisions about reproduction (having children)
- To have control over our own bodies
- Not to be forced to have medical or scientific experiments done on people

VIOLENCE AND ABUSE IN THE HOME

Everyone has the right to be free from all forms of violence in the home. This right ensures that the government and the police must take measures to prevent domestic violence, for example, abuse of women and children in the home.

Among countries that collect gender-based violence (GBV) statistics, South Africa has one of the highest rates of GBV in the world. In May 2022, the Committee on the Elimination of Discrimination against Women (CEDAW) reported that South Africa's low levels of prosecution and conviction in domestic violence cases and the frequent failures by the police to serve and enforce protection orders, exposed survivors to repeated abuses and resulted in the violation of women's rights.

CORPORAL PUNISHMENT

The Constitutional Court has said that punishing people and children by whipping them or giving them a caning goes against this right. *The Abolition of Corporal Punishment Act* (1998) says beating a child as a form of punishment is illegal because it goes against a child's right to dignity and their right not to be treated in a degrading way.

XENOPHOBIC ATTACKS

There have been many xenophobic attacks on refugees and migrants, including people being killed if they fail to provide proof of their identity. An anti-migrant movement has been established in many provinces. These actions are a violation of the right to security of the person.

Section 13: Slavery, servitude and forced labour

No form of slavery or forced labour is allowed.

Section 14: Right to privacy

Everyone has the right to privacy, including the right not to:

- Be body-searched without a court order
- Have your home searched without a court order
- Have your things taken from you
- Have your letters opened, or your telephone tapped

The Interception and Monitoring Prohibition Amendment Act (1996) prevents peoples' conversations from being intercepted.

Section 15: Freedom of religion, belief and opinion

Everyone has the right to believe or think what they want, even if their opinion is different to the government. Everyone has the right to practice the religion they choose and in the way that they choose, provided that their actions do not go against the Constitution. For example, a woman who marries according to customary law does not lose her rights of equality when she gets married.

Government institutions, like schools, can follow religious practices (like having prayers in the morning,) but this must be done fairly, and people cannot be forced to attend them.

Section 16: Freedom of speech and expression

Everyone has the right to say what they want, including the press and other media. However, there are certain kinds of speech that are not protected, which means that this right is limited in certain ways. The kinds of speech that are not protected are:

- Propaganda for war
- Inciting (encouraging) people to use violence
- Hate speech, which means spreading hatred and encouraging people to act violently or harmfully towards other people.

Section 17: Freedom of assembly, demonstration, picket and petition

Everyone has the right to assemble with other people, hold a demonstration, picket or present petitions. They must do this in a peaceful way and they may not carry weapons.

The Regulation of Gatherings Act (1993) gives people rights to organize demonstrations and gather together, but it also gives guidelines for doing this, such as providing authorities with at least 7 days notice of the intention to hold a march, giving names, the purpose of the event, the place of the gathering or the route of the march and the numbers of people expected to take part. It also says the police can disperse a crowd, using reasonable force, if they believe there is a danger to people or property.

Section 18: Freedom of association

Everyone has the right to associate with whoever they want, for example, workers joining together and meeting in a trade union.

Section 19: Political rights

Everyone has the right and is free to make political choices, such as the right to:

- Form a political party
- Join any political party
- Encourage other people to join a political party
- Campaign for a political party or cause

ELECTIONS

Every adult citizen (18 years and older) has the right to free, fair and regular elections and to vote in secret in elections. ***(See pg 102: Voting in elections)***

Section 20: Citizenship

Your citizenship is protected and cannot be taken away from you. ***(See pg 66: Citizenship)***

Section 21: Freedom of movement and residence

Everyone has the right to move and live anywhere in South Africa and to enter and leave South Africa as they choose. They also have a right to a passport.

Section 22: Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely.

Laws can be passed to regulate how people practice their trade, occupation or professions.

Section 23: Labour relations

Everyone has the right to fair labour practices. Workers have the right to form and join trade unions and go on strike. Employers have the right to form and join employers' organizations.

Trade unions and employers' organisations have the right to:

- Make decisions about their own administration, programmes and activities
- Organise
- Form and join a federation
- Engage in collective bargaining

The right to strike and lock-out – While workers have a right to strike in terms of the Constitution, the right for employers to lock out their workers is not specifically included

in the Constitution. *The Labour Relations Act* says however that employers have the right to lock-out in certain situations. ***(See pg 377: Taking industrial action)***

Section 24: Environment

Everyone has the right to:

- An environment that is not harmful to their health or well-being
- Have the environment protected for present and future generations

The government must pass laws that prevent pollution and damage to our natural resources, promote conservation and make sure that natural resources are developed while also promoting the economic and social development of people. ***(See pg 735: Environmental law)***

EXAMPLE OF THE RIGHT TO A HEALTHY ENVIRONMENT

In 2022, in a case involving miners from a colliery in Mpumalanga, the High Court stated that the province's unsafe level of air pollution was in breach of Section 24(a) as well as other relevant sections of the Constitution that says everyone has a right to an environment that is not harmful to their health and well-being.

Section 25: Property

No one can have their property taken away from them unless this is done according to law.

EXPROPRIATING PRIVATE PROPERTY

The government can take a person's land away from them if:

- It needs the land for public purposes or
- It is in the public's interest, for example, if the government needs the land for its land reform programme.

If the government takes land from a person they must pay the person compensation. There are certain things to think about when a landowner and the government are deciding how much compensation to pay for the land. These are:

- The history of how the property was bought and what it was used for before
- How much the owner has improved the property
- What the property is being used for now
- The market value: what the price of the property would be if a private person or business bought it
- How much the government can pay: how much money the government has in its budget to pay for the property
- What the government want to do with the property

EXAMPLE

The government wants to build a dam to provide water for the community.

They want to build the dam on your property. The government can take the land from you but they must pay you for the land. The amount of money the government will pay can either be agreed between you and the government, or it can be decided by a court if you cannot agree.

LAND REFORM

Section 25 says the government must make laws and take other steps to help people or communities get land to live on. ***(See pg 669: Land and housing)***

LABOUR TENANTS

If a person has been living on land that they were not allowed to own because of apartheid laws, they will now be able to own this land or be paid compensation for it. An example of this is people who live on farms as labour tenants. *The Extension of Security of Tenure Act* gives labour tenants certain rights in terms of Section 25. ***(See pg 682: Land tenure reform)***

Section 26: Right of access to housing

Everyone has the right to have access to adequate housing. The government must take reasonable steps within its available resources to provide people with housing and access to land.

The fact that it is the government's duty only to provide housing 'within its available resources' means that the right to provide housing is limited to what the government can afford. The Constitutional Court has stated that there are three parts that make up the government's obligation to provide housing:

- What are reasonable measures that the government should take
- What steps should government take to steadily implement this right in stages over time
- What resources are available to make this possible

EVICTIONS

> This section protects people from being evicted from their homes or from having their homes demolished unless a court has heard the person's case and decided that they must leave. In this case, the court must give an eviction court order. ***(See pg 683: Extension of Security of Tenure Act [ESTA]) (See pg 690: Prevention of Illegal Eviction from and Unlawful Occupation of Land Act [PIE])***

Section 27: Right of access to health care, food, water and social security

Everyone has the right to have access to:

- Healthcare services (including childbirth facilities)
- Enough food and water
- Social security (which means support for people who can't support themselves or their dependents)

The section says government must pass laws and have policies that provide welfare assistance for the people who need it the most. ***(See pg: 463 Social grants)***

However, Section 27 also says that it is the government's duty to provide access to these facilities only 'within its available resources'. This means the government's duty is limited to what it can afford. But, the section says the government must improve these services over time.

EXAMPLE

In 2022, KwaZulu-Natal and the Eastern Cape experienced extreme rainfall and flooding. Damage to water infrastructure resulted in widespread disruptions to water suppliers throughout the provinces, leaving communities with no or interrupted supplies for months. There was no systematic effort on the part of government to ensure that people had access to the water they needed during this period. This, alongside the damage caused to houses, created a sanitation crisis as the floods destroyed some communal toilets, forcing some people to use the bushes. Several health facilities in KZN had insufficient water suppliers. There were also severe water shortages in the Nelson Mandela Bay Metropolitan Municipality in the Eastern Cape, which had faced drought since 2016. The water crisis was made worse by the failure of local authorities to fix leaks, and the city lost an estimated 29% of its water supply. These are examples of the violation of Section 27 of the Bill of Rights, where the government has a duty to provide access to these facilities and must improve these services over time

Emergency medical treatment – Everyone is allowed to have access to emergency medical treatment.

Section 28: Children's rights

A child is anyone who is under the age of 18. Every child has the right:

- To a name and a nationality from the day they are born
- To proper care by parents or a family member, or by someone else if the child has to be taken away from the family
- To enough food, shelter, basic health care and social services
- To be protected from being mistreated, neglected or abused
- Not to be forced to work or given work which is not suitable for a child
- To have a lawyer paid for by the government if the child has to appear in court
- Not to be used in wars
- To be protected during times of war

Whenever a decision is made about a child, the most important thing that must be thought about is what would be in the best interests of the child. ***(See pg 555: Child abuse and neglect)*** ***(See pg 480: Social grants for children below the age of 18 years)***

Children's rights if they are detained – A child may only be detained if it is absolutely necessary, and it must be for the shortest possible time.

A child has the right to be kept separately from other detained people who are over 18 and must be treated and kept in conditions that take into account the child's age. A detained child also has all the rights of any other detained person. ***(See Section 35: Arrested, detained and accused persons)***

Section 29: Education

Everyone has the right to:

- A basic education, including adult basic education
- Further education, which the government must make available and accessible

Everyone has the right to be taught at a government school in their own language but only if this is practical and if the government can afford it.

Section 30: Language and culture

Every person has the right to use their own language and follow the culture that they choose, but they cannot do anything that goes against the rights of other people.

Section 31: Cultural, religious and linguistic communities

Communities have the right to enjoy a shared culture, practice a shared religion and use their language. But they cannot do anything that goes against the rights that other people have.

Section 32: Access to information

If they need it to protect any of their rights, everyone has the right to have access to information that the government has and/or information that someone else has.

EXAMPLE

In the past accused people were not allowed to have access to the police dockets that included witnesses' statements, reports of the investigation, and other information about their cases unless the state agreed to give it to them. The Constitutional Court has said an accused person has the right to have access to the docket, because Section 32 gives people the right of access to information they need to protect or exercise their rights.

The Promotion of Access to Information Act gives people a right of access to all kinds of government information, providing very limited reasons why officials can refuse to give such information. This Act is a good weapon against corruption and makes the government transparent and accountable.

The Protection of Disclosures Act gives protection to 'whistle-blowers' - people who speak out against corruption, dishonesty or bad administration and who believe at the time that what they are saying is the truth. They are protected from internal disciplinary action, intimidation, and harassment if they have 'blown the whistle' on someone or a business.

Section 33: Just Administrative Action

Section 33 guarantees that administrative action will be reasonable, lawful and procedurally fair. It also makes sure that you have the right to request reasons for administrative action that negatively affects you. The section says government must pass laws that will:

- Provide for a review of the actions of a government official (or department) where the action might have gone against a person's rights, and
- Make it a duty of the government and all government bodies to put this right into practice, be just, and promote an efficient administration

The Promotion of Administrative Justice Act 2 (2000) (PAJA) says that all decisions of every administration at every level of government must be lawful, procedurally fair and reasonable and must follow the rules in the Act. Examples of administrative action are: applying for an ID or birth certificate, applying for a first-time homeowners subsidy, applying for a work or residence permit, and applying for refugee or asylum seeker status. The Act applies to all government departments, the police and army and private people who exercise public powers or perform public functions (for example, ESKOM, Telkom and the SABC). A person whose rights have been wrongly affected can ask for reasons to be given in writing to explain the administrative action taken. The Act also provides for review

of administrative action by a court or tribunal.

WHAT ARE THE REQUIREMENTS OF LAWFULNESS, PROCEDURAL FAIRNESS AND REASONABLENESS IN TERMS OF THE PAJA?

LAWFULNESS

When the state has a legal duty to act in a certain way and fails to do so, it is acting unlawfully.

PROCEDURAL FAIRNESS

The procedure that the government follows in making an administrative decision must be fair. If there is a set of established rules that the government must follow in coming to the decision, then these must be properly followed otherwise, the decision can be challenged. However, the common law rule – *audi alteram partem* rule – is one rule that the government must always follow in making a decision. This rule says that a person whose rights are or may be affected by an administrative decision must be allowed to state his or her concerns before the decision is made.

REASONABLENESS

Whether an administrative action is reasonable or not depends on the circumstances surrounding the decision, i.e. the environmental considerations against which the decision was taken.

A court will be asked to test whether the decision was reasonable or not, such as:

- Was the decision the suitable one to make in the circumstances?
- Was the decision necessary?
- Was the decision proportional? In other words, does it balance the competing interests of all the people who will be affected by the decision?

WHAT CAN YOU EXPECT FROM THE ADMINISTRATION?

When you apply for something (for example, a social grant) or when the administration decides to request something from you, you can expect to be:

- Told what decision is being planned before it is taken
- Allowed to tell your side of the story before a decision is made
- Told what the decision is and of your right to internal appeal or review
- Told that you have the right to request reasons
- Given proper written reasons for the decision
- Able to challenge the decision in court

EXAMPLE

Certain people in your community live in an informal settlement near the coast and close to an expensive coastal holiday resort where people from the city own holiday houses. A chemical company has been granted permission by the local authority to set up a chemical production plant very close to the informal settlement.

It is likely that this chemical plant will harm the environment and possibly the health of people in the community. These people want to find out how the chemical company got permission to set up the production plant, and what other action the chemical company may be thinking of taking. They have formally requested the local authority to provide them with information about the new chemical production plant so that they can use the information to comment on whether they think the permission for the plant should have been granted or not. Any decision taken by the local government is an administrative decision.

What can the community do?

- *They can use PAJA to get written reasons from the local authority for their decision to allow the erection of the chemical production plant.*
- *They can use the PAJA to challenge the procedural fairness of the municipality decision as their rights are affected by the decision, and they were not consulted prior to it being made.*
- *They can use the PAJA to challenge the reasonableness of the decision. Here, the court would consider all of the surrounding circumstances to see whether the decision was suitable, necessary and proportionate.*

Other rights that are potentially affected in this example include the right to equality if the nearby (wealthy) resort has not been negatively affected in the same way as the informal settlement and the right of access to information because the community's request for information about the chemical production plant has been ignored.

WHAT CAN YOU DO?

If you think that the administrative decision taken against you might be wrong, you can:

REQUEST REASONS FROM THE ADMINISTRATION

Requests must:

- Be in writing (if you can't write, ask a friend or relative to help you)
- Say what decision you are requesting reasons for
- Say why you think the decision is wrong
- Include your name, postal address, email address, fax and telephone numbers
- Be sent by post, fax, email or delivered by hand

You must be given reasons within 90 days of the administrator receiving the request. You can ask for the reasons to be given in writing.

USE INTERNAL APPEAL PROCEDURES

If you are not satisfied with the reasons given, then you can use internal appeal procedures if there is one. Some departments have an internal appeal procedure that you can use, for example, the Department of Home Affairs has an appeal board. You have to use any internal appeal procedure before taking any other action. The department must explain how the procedures work and how to make an appeal

GO TO COURT

If there is no internal appeal procedure, or if you have used the procedure and are still not satisfied, you can ask a court to review the decision. This must be done:

- Within 6 months of any internal appeal having been decided
- (Where there is no internal appeal) within 6 months of finding out the decision

USE OTHER REMEDIES

Taking a matter on review is expensive. Cheaper ways of finding assistance include:

- Using internal appeal procedures
- Complain to the area or regional manager of the department concerned
- Complain to the ward councillor or provincial MEC of the relevant department
- Refer the complaint to the public protector, the South African Human Rights Commission
- Approaching a justice centre (or, if there is no justice centre, the legal aid board) for legal assistance to take the case up

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Section 34: Access to courts

Everyone has the right to have any legal problem or case decided by a court or an independent body.

Section 35: Arrested, detained and accused person

ARRESTED PEOPLE

If a person is arrested, they have the right to:

- Keep silent
- Be told, in a language that they understand, that they have the right to keep silent and what will happen if they do not keep silent
- Not to be forced to make a confession or to admit anything that could be used against them during their trial
- Be taken to court within 48 hours of their arrest
- Be charged and released, either on warning or on bail, unless there is a good reason to keep the person in jail

DETAINED PEOPLE

If a person is detained (kept in jail or a police cell), either while they are waiting for their trial, or after they have been sentenced, they have the right to:

- Be told in a language they understand why they are being detained
- Be informed immediately that they can have a lawyer
- Choose their lawyer
- Have the government pay for a state lawyer, if they cannot afford one, and injustice might result if they are not given a lawyer
- Be kept in proper conditions, including being allowed exercise and getting food
- Accommodation, food, reading material and medical treatment at the state's expense
- Speak to and be visited by the person's husband, wife or partner, their family, a religious counsellor, and their own doctor
- Go to court to challenge the reasons for their detention and to be released if there are no lawful reasons for being detained

ACCUSED PEOPLE

A person accused of committing a crime must be given a fair trial. This includes the right to:

- Be treated as an innocent person
- Be told what the charge is against them
- Be told that they have a right to a lawyer
- Their lawyer or a lawyer paid for by the government, if they cannot afford one and injustice might result if they are not given a lawyer
- Be given enough time to prepare their defence
- A public trial in an ordinary court
- Be present during their trial
- Keep silent
- Not be forced to give evidence against themselves
- Call witnesses and challenge any witnesses used against them
- Be tried in a language that they understand, or have an interpreter
- Not be convicted for doing something which became a crime after they did it, in other words, if it was not a crime when they did it
- Be sentenced within a reasonable time if they are convicted
- Be sentenced to the least serious punishment if the punishment for what they have done has changed since they did it
- Appeal against their conviction and sentence to a higher court

- Have their case reviewed by a higher court
- Not be tried twice for the same crime

If the state gets evidence against a person by going against one of their rights, this evidence will not be allowed in court.

Section 36: Limitations on rights

The rights in the Bill of Rights can be limited if this is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom.

These are the factors that a person or court must take into account if a right is to be limited:

- The nature of the right
- The importance of the purpose of limiting the right
- How much the right will be limited
- The relation between the limitation and its purpose
- Whether there are better ways to achieve the same purpose ***(See pg 30: Conflicts in rights)***

Section 37: States of emergency

It may be necessary for a government to declare a state of emergency to deal with a major problem facing the country. During a state of emergency, the Bill of Rights is usually affected.

The government can only call a state of emergency when:

- The life of the nation is threatened by war, invasion, disorder, natural disaster or other public disorder, and
- The state of emergency is necessary to restore peace or order

The state of emergency and any laws passed as a result of the state of emergency can only last for 21 days, unless the national assembly extends this. At least two-thirds (66%) of the members of the national assembly must agree to extend this. They can extend it for 3 months at a time.

There are certain rights that cannot be limited at all, even during a state of emergency. Some of these are:

- The right to human dignity

- The right to life
- The right to equality (race and sex only)
- Freedom from torture

Section 38: Enforcing rights

The following people can take a case to court, if they believe that a right has been threatened or infringed:

- Anyone representing themselves
- Anyone acting on behalf of another person who cannot take the case to court
- Anyone acting as a member of a group, or in the interests of a group or class of people
- Anyone acting in the public interest
- An association acting in the interests of its members

Section 39: Interpreting the Bill of Rights

When the courts are deciding a case on the Bill of Rights, they must promote the values of an open and democratic society based on freedom and equality. They must look at international laws (such as the Universal Declaration on Human Rights) and at the way courts in other countries have decided similar cases.

Protecting Human Rights

Chapter 9 of the Constitution creates seven institutions or protection mechanisms for protecting peoples' rights. The institutions are:

- The Public Protector
- South African Human Rights Commission
- Commission on Gender Equality
- Office of the Auditor-General
- Independent Electoral Commission
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- Independent Communications Authority of South Africa

Other institutions that also protect people's rights are the constitutional court and the land claims court. People can also take cases about human rights abuses to the magistrate's courts and high courts. If you take a case to the magistrate's court or high court, you can represent yourself but usually you would need a lawyer to prepare the papers and to send them to court. This costs a lot of money. The protection mechanisms are free, and people can send in their complaints to be investigated without having to go to a lawyer.

The Public Protector

The Public Protector represents citizens and watches over the activities of government officials to stop them from abusing their powers. The Public Protector is an independent official and is accountable to the constitution. Public Protector officials must act in a transparent way and must send a report of their activities and findings to parliament at least once a year.

The government appoints the national public protector but each province can also have their own public protector that falls under the national office.

HOW IS THE PUBLIC PROTECTOR APPOINTED?

A parliamentary committee consisting of members from each political party in parliament nominates someone to be the public protector. The national assembly and the national council of provinces then approve the nominations. The public protector will stay in office for 7 years, but they can be removed from this position by the president on grounds of misbehaviour, incapacity or incompetence.

A provincial public protector is appointed by the provincial premier in consultation with the national public protector. The person who is nominated must be approved by a two-thirds majority of the provincial legislature.

THE FUNCTIONS OF THE PUBLIC PROTECTOR

These include:

- To investigate complaints about any of the following:
- Poor administration of government
- Government officials who abuse their powers
- Improper conduct of public officials
- Corruption of public funds by public officials
- Any act or omission (something that has not been done) by public officials that results in prejudice to a citizen

- To resolve disputes
- To refer matters to other agencies, for example, the Attorney General, to prosecute the person who is guilty of any misconduct

WHAT CAN THE PUBLIC PROTECTOR DO?

The Public Protector has the power to do the following:

- Order a person to attend a hearing
- Order a person to give evidence or produce any document
- Enter a person's home or a workplace if this is necessary for an investigation

A person who is being investigated by the Public Protector has the right to give their side of the story and to be represented at the hearing.

MAKING A COMPLAINT TO THE PUBLIC PROTECTOR

Any person can make a complaint to the public protector. If you want to make a complaint, you must make an oral or written statement saying:

- What the complaint is about, including the nature of the complaint and its background and history
- Why the public protector must investigate the complaint
- The steps you have taken to solve the complaint yourself. You should mention names, dates and what was said. Copies of any correspondence between you and the officials should be attached to your letter of complaint
- Any other information that may be relevant to the case
- Your postal address and a telephone number where you can be reached

You can write or ask someone to write on your behalf. You can also phone the Public Protector's office and report your complaint. Complaints can also be lodged at visiting points and workshops conducted by the office. Visiting points are areas that have been identified for the purpose of conducting interviews with complainants, and they are found in all provinces. Visiting points are serviced at least once a month.

Use any of the following contacts to make a complaint:

- Email: registration2@pprotect.org
- Telephone: 012 362 3473
- Toll-free: 0800 112 040

The services of the Public Protector are free. ***(See pg 1055: Resources: Public Protector contact details)***

South African Human Rights Commission (SAHRC)

The SAHRC promotes respect for human rights and protects human rights. It must educate people about human rights, and it can investigate complaints about human rights abuses. If necessary it can arrange for someone to have a lawyer to defend their rights, and it can take cases to court.

The SAHRC is an independent body and is only accountable to the Constitution and parliament. The SAHRC must send a report of its activities to parliament at least once a year. The SAHRC consists of a chairperson and 10 members. The members are nominated and approved by the national assembly and the national council of provinces. Members of the SAHRC can be commissioners for 7 years.

MAKING A COMPLAINT TO THE SAHRC

Anyone can make a complaint to the SAHRC. If you are unsure if you can lodge a complaint, you can visit any of the nine Provincial Offices of the SAHRC or contact them using the following contact details:

- Email: complaints@sahrc.org.za
- Telephone: 011 877 3600

If you want to make a complaint, you must do the following:

- Lodge the complaint at the Provincial Office where the alleged violation took place. If it is not possible to establish where the violation took place, then it should be lodged at the Provincial Office where the respondent resides, carries on business or is employed.
- In the complaint, include the following information:
    - Indicate whether the complaint is being lodged on your own behalf of on behalf of another person, group or class of people, organisation, government department, etc.
    - Full names of the complainant
    - Race and gender of the complainant
    - Physical and postal address of the complainant
    - Telephone or Fax numbers and email address of the complainant
    - Preferred method of communication
    - Full details of the violation, which includes:
        - Date and place where it took place
        - Type of human right alleged to be violated

- Particulars of any person, group, or class of people, organisation, government department responsible for the violation
- Names and contact details of the people who can provide information relevant to the complaint
- Name and contact details of anyone who has been involved in trying to resolve the complaint
- Whether the complaint is urgent and reasons for this
- Any other relevant information or supporting documents that can be used in the investigation

A complaint to the Provincial Office of the SAHRC should preferably be in writing, but a verbal complaint can be made in person or by telephone.

The right to lodge a complaint expires three years after the violation has taken place unless there is a good reason for the delay. ***(See pg 1056: Resources: SAHRC contacts)***

Commission on Gender Equality (CGE)

The CGE will protect men and women who complain that they have been discriminated against because of their gender or sex. The CGE will also advise lawmakers on laws that affect equality between men and women, and on the position of women as citizens.

The CGE is an independent body and is only accountable to the Constitution and to Parliament. The commission must send a report of its activities to Parliament at least once a year. The CGE consists of a chairperson and 7 to 11 members. The National Assembly and the National Council of Provinces nominate and approve members to the CGE. The members of the CGE stay in office for 7 years.

The *Commission on Gender Equality Act* makes no provision for provincial offices. The functions of the CGE are to:

- Monitor, evaluate, review and report on laws, policies and practices of different government bodies and private businesses that affect gender equality
- Monitor international conventions to make sure that our laws and policies follow these
- Do research about gender equality
- Make recommendations to any legislature (in other words, any government body that makes laws) to adopt new laws to promote gender equality
- Network with institutions and other bodies to promote gender equality
- Educate civil society about gender equality

- Investigate any gender-related issues if someone makes a complaint
- Resolve disputes if someone has made a complaint
- Refer any complaint that it can't resolve to the public protector or the South African human rights commission

WHAT CAN THE CGE DO?

The CGE has the power to:

- Order a person to attend a hearing
- Order a person to give evidence or produce any document
- Enter a person's home or a workplace, if this is necessary for an investigation

The CGE can request any level of government to assist them with an investigation or with any of their functions.

MAKING A COMPLAINT TO THE CGE

Anyone can make a complaint to the CGE for an alleged violation. The complaint can be in any language. Your complaint should include the following information:

- Your name, address and telephone number
- Who you are complaining about and their contact details
- What happened to you, when it happened and who was involved
- What law you think has been broken and how
- Whether you have made a complaint anywhere else and, if so, what happened

You can use any of the following ways to make a complaint:

- By post
- Send a hard copy complaint form
- Complete an online complaint form
- By email

Follow the link on the CGE website for access to the complaint form, online complaint portal and email address: https://cge.org.za/complaints/

If you do not receive an acknowledgement of your complaint within 7 days, you can send an email to the CGE or call them on 011 304 7182.

After receiving your complaint an investigation/legal officer will be allocated to look into your complaint. The officer will call you to discuss how the matter will be taken forward. ***(See pg 1058: Resources: CGE contact details)***

The Auditor General

The Auditor General is the watchdog of all money that is given to the government and spent by them. The Auditor General checks the accounts of all national and provincial government departments and all local governments to make sure that money is being accounted for.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Cultural Rights Commission)

This commission was established in terms of the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002*. Its purpose is to promote and protect the rights of different cultural, religious and language communities. It must promote and develop peace, tolerance and national unity amongst these communities, on the basis of equality, non-discrimination and freedom of association.

MAKING A COMPLAINT TO THE CULTURAL RIGHTS COMMISSION

If a community believes their cultural, religious or linguistic rights are being denied or violated, they can make a complaint to the Cultural Rights Commission.

A complaint should be made in writing, using the correct form. The complaint can be made in the following ways:

- At the Cultural Rights Commission office
- Email: info@crlcommission.org.za
- Telephone: 011 358 9100
- Any other mode of communication

The Complainant must complete the correct complaint form, including their personal details.

Go to the Cultural Rights Commission website to access the form: www.crlcommission.org.za.

The Commission will assist those who cannot write or the disabled to put their complaints in writing.

Independent Electoral Commission (IEC)

This commission has been set up to manage elections to make sure that they are free and fair.

MAKING A COMPLAINT TO THE IEC

If you want to make a complaint/enquiry/request/suggestion or provide feedback to the IEC, you can go to their website and send them a message:
https://www.elections.org.za/pw/About-Us/Feedback-Online-Form

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Independent Communications Authority of South Africa (ICASA)

ICASA exists to monitor all aspects of broadcasting in South Africa. For example, it must make sure that radio and television broadcasts are fair and that they represent the views of South African society.

MAKING A COMPLAINT TO ICASA

WHAT TYPES OF COMPLAINTS CAN YOU LODGE WITH ICASA?

You can lodge a complaint against any service provider licensed by ICASA to provide communications services such as broadcasting, telecommunications or postal services.

Categories of complaints include complaints against:

- Telecommunications service providers
- Postal service providers
- Broadcasting service providers

HOW TO LODGE A COMPLAINT WITH ICASA

Complaints against providers of telecommunications and postal services

- First, lodge a complaint with your service provider and get a reference number for your complaint
- Give the service provider 14 working days to resolve the complaint

- If the service provider fails to resolve the complaint in this time or if the response is not satisfactory, then you can refer the complaint to ICASA.
- Complaints must be in writing and can be lodged in the following ways:
    - Use the ICASA online complaints portal via the website: https://www.icasa.org.za/pages/lodge-a-complaint
    - Fill out the complaint form: https://www.icasa.org.za/consumer-publications/consumer-complaints-form
        - Email it to: consumer@icasa.org.za
        - Fax it to: 012 568 3444

Complaints against providers of broadcasting services

- All broadcasting-related complaints must be submitted in writing. You can send your complaint through:
    - Email: consumer@icasa.org.za
    - Fax: 012 568 3444
    - Post: Address your complaint to the relevant ICASA office.
    - In-Person: Visit an ICASA office and submit your written complaint. **(See pg 1059: *Resources: ICASA contact details*)**

Land Claims Commission (LCC)

The Land Claims Commission was established in terms of Section 25 of the Constitution to mediate and decide on claims to land made by people who had been forcibly removed under the laws of apartheid.

Problems

Problem 1: Taking a case to the South African Human Rights Commission

Joe Mkhize applies to go to Welmoed High School. The school is only two blocks away from where he lives with his parents. At Welmoed High School, most of the students speak Afrikaans, and all of the lessons are in Afrikaans. Joe speaks a different language from the language used at this school. The school governing body rejects his application to attend the school. They say they only want Afrikaans-speaking people to come to Welmoed High School. They say it is their right to refuse to let him register. Joe's parents believe they have a right to send Joe to the school.

WHAT ARE HIS RIGHTS?

Joe has a right to attend Welmoed High School in terms of section 9(3) of the Bill of Rights, which says he has a right not to be discriminated against on the basis of his language. Section 29 also says he has a right to an education.

People do have a right to develop their own language and culture, but they cannot exclude people from a government school on the basis of their language or religion, or any other factor listed in the 'equality' clause.

WHAT CAN YOU DO?

You can help Joe and his parents to make a complaint to the South African Human Rights Commission. ***(See pg 57: South African Human Rights Commission)***

Problem 2: Making a complaint to the Public Protector

Mrs Jansen applied for her Older Person's Grant 8 months ago. She has still not received a penny of this grant. She finds out that there are some people who never have to wait for their grants. When she asks the SASSA officer for reasons for the delay he says he doesn't know what the reasons are for the delay. Even when she asks him to investigate he says he doesn't have the time. She feels helpless and decides to take action because she is desperate for the pension payments.

WHAT ARE HER RIGHTS?

The Public Protector has a duty to investigate state officials and bodies if, by their conduct, people believe they are not doing their jobs properly or abusing their

powers in any way. Mrs Jansen has a right to have access to information (S 32) held by the state that will help her exercise her rights. She also has the right to just administrative action (S 33) and to be given reasons why her grant has taken so long to arrive.

WHAT CAN YOU DO?

You can help Mrs Jansen make a complaint to the Public Protector. **(*See pg 56: Making a Complaint to the Public Protector*)**

Problem 3: Taking a case to the Commission on Gender Equality

Maria Johannes is a farmworker. She is a member of a farmworker's union.

When she falls pregnant, her employer tells her to leave, and he employs someone else in her place. Maria is angry, and she discusses this with other women on the farm. Many of the women feel angry because they only get work when it suits the farmer. They all agree that the farmers' actions are unfair, and they decide to take further steps.

WHAT ARE THEIR RIGHTS?

The Constitution and the *Employment Equity Act* (*EEA*) say there can be no discrimination on grounds of gender, sex and pregnancy. In this case Maria Johannes and the other female workers have been discriminated against. The Commission on Gender Equality will protect people (men and women) who complain that they have been discriminated against because of their gender or sex.

WHAT CAN YOU DO?

You can help Maria Johannes and the other female workers make a complaint to the Commission on Gender Equality. **(*See pg 59: Making a Complaint to the CGE*)**

Checklist

Reporting human rights complaints

- **Human rights abuses:** Report these to the South African Human Rights Commission ***(See pg 57: South African Human Rights Commission (SAHRC)***
- **Gender-specific human rights abuses (female and male):** Report these to the Commission on Gender Equality ***(See pg 58: Commission on Gender Equality (CGE))***
- **Complaints about government officials:** Report these complaints to the Public Protector ***(See pg 55: The Public Protector)***
- **Complaints about unreasonable or unfair administrative decisions:** Follow up the complaint in terms of the *Promotion of Administrative Justice Act, 2000* ***(See pg 47: Section 33: Just Administrative Action)***
- **Complaints about police officials:** Report these to the Independent Police Investigative Directorate (IPID) ***(See pg 228: Reporting a case of police misconduct)***

Citizenship

Introduction

To be a citizen of a country means that you belong to that country and have the right to live there. A country must protect its citizens if they need help when they are travelling in other countries.

Laws governing citizenship

- *Children's Act No.38 of 2005*
- *Children's Amendment Act No.41 of 2007*
- *Immigration Act No.13 of 2002*
- *Immigration Amendment Act, No.3 of 2007*
- *Immigration Amendment Act, No.13 of 2011*
- *Refugees Act No.130 of 1998*
- *Refugee Amendment Act No.17 of 2017*
- *South African Citizenship Act No.88 of 1995*
- *South African Citizenship Amendment Act No.17 of 2010*

NOTE

There are a number of laws undergoing reform, which may change the requirements described in this chapter. In November 2023, the government released a White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa. The White Paper was released for public comment. South Africa has different pieces of legislation dealing with citizenship, immigration and refugee protection, which are often not aligned with each other. The White Paper proposes that the government must review all the legislation relating to citizenship, immigration and refugee protection and include it all in a single law.

What does South African citizenship mean?

The Constitution gives many rights to 'everyone' but keeps certain rights for citizens only. If you are a citizen of South Africa, you have the right to:

- Vote

- Stand as a candidate in elections
- Live in any area in South Africa
- Choose your trade, occupation or profession
- Be given a South African passport for travel to other countries
- Come to South Africa even if you have lived somewhere else for a long time

None of these rights apply to people who are not South African citizens, even if they have lived legally in this country for many years until they become South African citizens. The government can pass laws which give certain rights to non-citizens but government can also pass a law which takes the vote away from them.

People who are not citizens must have permission to enter South Africa. If they want to stay, they must get a permit to live here.

South African citizenship and immigration legislation is very complicated, so this chapter only presents an outline of the laws. It definitely does not cover everything in our *Citizenship Act* nor the *Immigration Act*, or the laws that came before them. It is written to help you to know what kind of documents an advice seeker may need to collect before going to a lawyer and so that you know what you need to cover in any letter to a lawyer asking for assistance.

General citizenship problems

Problems are usually experienced by people who are having difficulties in getting a first Identity Document (ID). Very often it is because their citizenship is being questioned by the Department of Home Affairs. ID books are only issued to citizens and to those non-citizens who have been given a permit to stay permanently in South Africa.If the person does not have a birth certificate or good proof of being born in South Africa, they will be asked to bring all sorts of information about their parents, their schooling and so on.

WARNING

Anyone giving advice must be very careful when dealing with citizenship problems. IF A MISTAKE IS MADE, IT MAY MEAN THAT A CLIENT'S CASE IS RUINED AND CANNOT BE PUT RIGHT.

Advice-givers can assist a person to collect all the right proofs and documents but should then refer the case to a Law Clinic or public interest law firm such as the Legal Resources Centre, before doing anything else.

South Africa's citizenship law

There are three ways in which a person can be a citizen:

- *By birth*
- *By descent*
- *By naturalisation*

Citizenship by birth and descent are legal rights for anyone who can prove the facts of birth and parentage.

Citizenship by naturalisation is not a legal right. It can be granted or refused by the Minister of Home Affairs. According to the *Eighth Amended Act* of the Regulations in terms of the *South African Citizenship Act (1995)* that came into operation on 1 April 2003, a small fee may be applicable for a Certificate or written confirmation of South African citizenship.

Citizenship by birth

A person has to prove the **place** where they were born and the **date of birth**. The place must be in South Africa. Proving a birth can be very difficult if there is no birth certificate or if the person was not born in a hospital or clinic. The Department of Home Affairs is not easily satisfied if the only proof is affidavits so try to find other documents that can be attached to the affidavits. Documents that can help are:

- **Clinic cards or school reports**
- An **affidavit from the chief** of the area where the child was born or from another respected person in the community who has known the family for a long time and knows the child was born there
- An **affidavit from the owner of the property** where the child was born
- An **affidavit from the mother's employer** at the time of the birth
- An **affidavit from the person's older sister or brother** who already has an ID and is accepted as a South African citizen
- An affidavit from **people who helped the mother at the birth** or who were **neighbours at the time of the birth**

ONE PARENT IS A SOUTH AFRICAN, AND THE OTHER PARENT IS A FOREIGN NATIONAL

In terms of the *South African Citizenship Act (No. 88 of 1995)*, a child born in South

Africa to parents where one was either a South African citizen or a South African permanent residence holder at the time of the child's birth and the other parent is a foreign national, will be a South African citizen by birth in the case of births from 6th October 1995 when the Act came into operation.

NOT BORN IN SOUTH AFRICA: BORN OF A SOUTH AFRICAN PARENT

The requirements are:

- Proof of date and place of birth. (Full, unabridged certificate)
- Citizen status of parent/s at time of birth
- ID of South African parent
- Proof of birth registration

BOTH PARENTS ARE FOREIGN NATIONALS

A child who is born in South Africa to parents who are foreign nationals can apply for citizenship at the age of 18 years.

ADOPTED CHILD

Foreign children who are born in South Africa and legally adopted by a South African citizen are governed in terms of the *Children's Act of 38 of 2005* and their birth is registered in South Africa. This means they will have citizenship of South Africa by birth. ***(See pg 88: Citizenship Checklists)***

Citizenship by descent (not born in South Africa)

If you were born outside of South Africa to a South African citizen(s) or were adopted by a South African citizen in terms of the *Children's Act, 2005*, and your birth was registered under the *Births and Deaths Registration Act, 1992*, you can apply for citizenship by descent by submitting the following documents:

- Form DHA-24 to register your birth in terms of the *Births and Deaths Registration Act, 1992*. In the event you were born out of wedlock, both parents must sign the birth registration Form BI-24 to confirm paternity
- Forms DHA-529 (completed by yourself and your South African parents)
- Your foreign, unabridged birth certificate
- Your and your parent's marriage certificate (if applicable) and copies thereof
- If 15 years and older, an application for an identity document (DHA-9) with two identity document photographs

- Proof of your South African parent(s) foreign citizenship (if they have acquired such) and copies thereof
- Proof of identity of your South African parent(s)
- If you were adopted by a South African citizen, a copy of the adoption order

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Citizenship by naturalisation

Naturalisation is the granting of citizenship to someone who has come to South Africa from abroad and stayed in this country for some time.

If a person is a citizen of another country but wants South African citizenship, they can apply to the Minister of Home Affairs for citizenship. According to Regulations in terms of the *South African Citizenship Act (1995)*, a fee may be applicable.

These are the conditions that the person must fulfil when applying for citizenship:

- Must be over the age of 21
- Must have a permanent residence permit to live in South Africa
- Must have lived in South Africa as a permanent resident for at least one year of ordinary residence immediately before the application for naturalisation
- After acquiring permanent residency, have an additional 4 years of physical residence in the country during the 8 years before the naturalisation. This does not include the one year mentioned above
- Must be able to communicate in one of South Africa's official languages
- Must be of good character
- Must be knowledgeable of the responsibilities of being a South African citizen and
- If married to a South African spouse, must have two years of permanent residence and two years of marriage to the South African spouse before submitting the application

But, this application for citizenship can be refused by the Minister even if the person seems to fulfil all the conditions. It is regarded as a privilege, not a right.

How can a person lose South African citizenship?

A person can lose South African citizenship by:

- Renouncing the South African citizenship voluntarily
- Serving in the armed forces of another country while that country is at war with South Africa

- If the certificate of naturalisation was obtained using fraud or false representation
- If the certificate was issued in conflict with the provisions of the Act
- In the case of South African dual citizenship, the citizen has been sentenced to imprisonment for 12 months or more
- If the minister is satisfied that it is in the public's interest that such a citizen shall cease to be a South African citizen

NOTE

Anyone who complains that their South African citizenship has been taken away MUST be referred to an attorney.

Resumption of citizenship

You may apply to have your South African citizenship reinstated if you are a former citizen by birth or descent and you have returned to South Africa permanently or are living in South Africa permanently.

Former citizens by naturalisation must re-apply for permanent residence or apply for exemption thereof before they can be considered for resumption.

To apply for resumption, you need to:

- Complete Forms DHA-175and DHA-52
- Complete the application for identity document Form DHA-9
- Submit two identity document photographs that comply with the passport and ID photograph specifications
- Submit proof that you live in South Africa permanently (e.g. a municipal account) and a copy thereof
- Submit your marriage certificate (if applicable) and a copy thereof
- Pay the prescribed fee

Dual citizenship

South African citizens can have citizenship in other countries, provided individuals comply with certain procedures. In terms of the *South African Citizenship Amendment Act of 2004 (No. 17 of 2004)*, an adult South African citizen who has dual citizenship or nationality can

freely use their foreign passport outside South Africa. However, they must use their South African passport to depart from or enter South Africa.

Anyone over 18 seeking dual citizenship must first apply to retain their South African nationality.

According to the *South African Citizenship Amendment Act*, a citizen is guilty of an offence and is liable to a fine or imprisonment if they:

- Enter or depart from the Republic by making use of the passport of another country
- While in the Republic, they make use of their citizenship from another country to gain an advantage or avoid duty

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Permanent residence through the first step of kinship

A person can apply for permanent residence through a first step of kinship (family), for instance, where the applicant is the father of a child born in South Africa and whose mother is a South African citizen. This application for permanent residence can also be made through the holder of a permanent resident's permit who is in the first step of kinship. However, a foreigner cannot apply for permanent residence through a holder who obtained their permanent residence status through a first step of kinship.

EXAMPLES

APPLYING FOR CITIZENSHIP WITH A PERMANENT RESIDENCE PERMIT
A foreign national came into the Republic with an asylum-seeking permit and applied for status as a refugee, which was granted for two years. After two years, she applied for a permanent residence permit. If she stays for at least five years further, she can then apply for naturalisation.

APPLYING FOR PERMANENT RESIDENCE THROUGH A RELATIVE'S PERMIT
If a foreigner has married a South African citizen or permanent resident, they can apply for a Relative's Permit from their country of origin. Once in South Africa, they can apply to become a permanent resident. If the person is indeed a member of the immediate family and can satisfy the prescribed conditions, then the person can apply for permanent residency based on the first step of kinship.

APPLYING FOR PERMANENT RESIDENCE STATUS THROUGH A CHILD BORN IN SOUTH AFRICA (FIRST STEP OF KINSHIP)
A person who had applied for an Asylum Seeker's Permit and whose permit is going to expire wants to extend the permit. He has a relationship with a South African woman and

is the father of two children with her. The two children will be of South African birth due to their mother's citizenship. He wants to apply for his Asylum Seeker's Permit to be renewed. The person is advised to apply directly for permanent residence status based on the first step of kinship through his two children. If his name is on the birth certificate, then he could present the birth certificate as proof of kinship. However, if the biological father's name is not disclosed, then he would need to make a late application for an unabridged certificate.

NOTE: *In the case of a couple who are not married, the particulars of the father will only be evident on the unabridged birth certificate if the father's name was put down at the time of registration of the birth. If it is not recorded then a new application would need to be made to amend the birth certificate.*

Immigrants and migrants

Laws governing foreign nationals

Some people come to South Africa for the purpose of work, and they are called immigrants and migrants. Others are here to seek asylum and refugee status. ***(See: Asylum seekers and refugees).***

The *Immigration Act* (No. 13 of 2002) clearly states all applicants must present themselves to conduct the biometrics capturing that is required, namely a photograph and fingerprints being taken. A third party cannot apply on your behalf.

The *Immigration* Act and amendments to the Act deal with immigration and migration.

It regulates the admission of people to South Africa and their right to live and work here. The Act uses a licensing fee to manage the process of allowing foreigners to work and live in South Africa. It also regulates the movement of migrant workers in certain sectors, such as mining and agricultural work.

Applications for general work visas will require the following:

- A certificate from the Department of Employment and Labour confirming that despite a diligent search, the prospective employer has been unable to find a suitable South African or permanent residence holder to fill the position. If enforced, we anticipate a longer processing time will occur due to the added step in the already long process
- The applicant must prove that they have the necessary skills and qualifications in line with the job offer

- That the benefits offered are not inferior to the average salary of a South African citizen or permanent resident holding similar positions
- A South African Qualifications Authority (SAQA) certificate is obtained and submitted. This is an evaluation of foreign education according to South African standards.

Rights of non-citizens

Remember that there is no 'right' for a non-South African to be given a permit to come to South Africa or to live and work here. It is always permission that may be granted or refused. However, anyone who applies for permission has the right to **administrative justice.** This means they have the right to be given reasons, in writing, why permission was not given. (See *Just Administrative Action*)

If a person is granted permission to live in South Africa **permanently**, they are entitled to most of the rights that apply to 'everyone' in the Bill of Rights.

If they are given permission to remain in South Africa on a **temporary basis**, such as a work permit, they are protected by some but not all of the rights. It will be many years before the courts have made enough rulings in individual cases to give us certainty as to what rights protect such temporary residents.

Legal entry and staying in South Africa

The *Immigration Act* says that every person who is not a South African citizen and who wants to come to South Africa must come in through a legal 'port of entry.' That means a border crossing by road or railway, or an airport, or a seaport where there is proper border control with immigration officials and police persons as well as customs officials. This is applicable for entering and departing the Republic. People who enter otherwise are illegally present in the country, and if they are found, they will be deported.

To enter South Africa legally, a person must have a valid passport from their country or a certificate applied for and issued by the Department of Home Affairs. Such persons must also have some kind of permit to enter South Africa. If this is not the case, their passport must be valid for not less than 30 days after the expiry of their intended stay. There are two kinds of permits: permanent residence/immigration permits and temporary residence permits (legislation makes provision for many different types of temporary residence permits).

PERMANENT RESIDENCE

This permit allows a person to live permanently in South Africa while remaining a citizen of another country. According to the *Immigration Amendment Act*, this permit can be issued on condition that the holder is **not prohibited** (because of disease, outstanding conviction, previous deportation, association with terrorism or possession of fraudulent permits/passport) and **not undesirable** (declared incompetent, unrehabilitated insolvent, fugitive from justice or previous criminal convictions). In some instances such as in the instance of a scarce skill, a person who wants such a permit should **apply before coming to South Africa**. Sometimes, a person who is here on a temporary work permit will be allowed to apply for an immigration permit while they are already here. The other permits that they are on must still be valid.

There are four ways to obtain a permanent residence permit. If the person:

- Has been the holder of a work permit for five years and has received an offer for permanent employment
- Has been the spouse of a South African citizen or permanent resident for 5 years
- Is a child under the age of 21 years and born of a permanent resident
- Is a child of a South African citizen

The application forms are available at any South African embassy or consulate or directly from the Department of Home Affairs in Pretoria.

A fee is charged on application for a permanent residence. Contact the local Department of Home Affairs office to confirm the fee amount.

The following documents (where applicable) must be submitted with the application:

- A full set of fingerprints
- Marriage certificate/proof of spousal relationship, if applicable
- Divorce decree/proof of legal separation, if applicable
- Proof of custody/maintenance, if applicable
- Death certificate in respect of a late spouse, if applicable
- Consent of parents in respect of minors, if applicable
- Proof of judicial adoption, if applicable
- Police clearance certificates in respect of all countries in which you resided for a period of one year or longer since your 18th birthday
- A valid temporary residence permit if you are already residing in South Africa

When the application is received by Home Affairs, it is sent to a regional committee of the Immigrants Selection Board in the province where the applicant wishes to

live. The members of these regional committees and of the Board as a whole are not officials of any government department but are independent individuals. The committee will investigate the application.

The applicant must be:

- Of good character
- A 'desirable inhabitant' of South Africa
- Not likely to take a job for which there are enough South Africans available

The committee will give special consideration to the following applications, but there is still no 'right' to be granted the permit:

- Someone who is an **aged or destitute or disabled dependant** of a permanent resident provided that the permanent resident concerned has enough money to support the dependants
- The **husband or wife of a South African citizen or a permanent resident**

The Constitutional Court has said South Africans have a right to live in the country that they were born in with the partner of their choice. This means the government cannot refuse to give immigration permits to foreign-born spouses (husbands or wives) of South African citizens.

In terms of the 2014 amendments to the *Immigration Act*, foreign spouses in possession of a visitor visa could not change their status while they were still in South Africa. This meant that if they wanted to apply for a change of status after entering South Africa on a short-term visa, they would have to return to their home country to make the application and wait there until they got the relevant visa. This provision also applied to minor children having to return to their country of origin to make the application.

This legislation was challenged in the Constitutional Court, and in 2019, the Court ruled that foreign spouses and minor children of South African citizens or permanent residents who had visitor visas did not have to return to their home country to apply for their long-term visa but could do this directly in South Africa. This means that the foreign spouse of a South African citizen or permanent resident permit holder may now apply for a spousal visa in South Africa as long as they have a valid visa.

The Court has also said that the Department of Home Affairs may not refuse to issue work permits to foreign-born spouses of South African citizens unless they have a very good reason. Therefore spouses and dependants of South African citizens do not pay for an immigration application (Permanent Residence). People who have entered into a civil union in terms of the Civil Union Act, life partners in common law or gay relationships should receive the same treatment as married applicants.

Because they don't have marriage certificates, they have to supply affidavits stating they are life partners with their applications.

If the committee grants the permit, it may make it a condition that the person works and lives in the province concerned for at least 12 months.

If the permit is refused, the applicant may ask the Central Board to review the provincial committee's decision, but it does not have to. Legal advice is necessary to see if there can be any court challenge to the decision.

Withdrawal of a permanent residence permit can take place in circumstances including the following:

- If convicted of any listed offences
- Has been absent from the republic for more than three years unless exempted
- Has not taken up residence in the Republic within one year of the issuance

TEMPORARY RESIDENCE PERMIT

A temporary residence permit allows a person to stay in South Africa for a limited time.

A person who wants such a permit should **apply before coming to South Africa**. Application forms are available at any South African embassy or consulate or directly from the Department of Home Affairs in Pretoria. An application fee will be charged. If the permit is refused, there is no review procedure.

There are many different kinds of temporary permits that can be applied for. These are described in the *Immigration Act, Sections 11 to 23*:

VISITOR'S VISA OR TOURIST VISA

This is the easiest permit to get. These visitor's permits cannot be changed to any other kind of temporary permit. South Africa has visa agreements with certain countries, like the United Kingdom or the United States, which allow residents of these countries to just arrive at South Africa's borders and ask for a visitor's permit. The visitor's permit is granted for a period of up to 3 months. It may be issued for a longer period for visitors who have financial security and are engaged in specific activities such as research or charitable work.

DIPLOMATIC VISA

This is issued to an ambassador, minister of a foreign state, career diplomat, or consular officer.

STUDY VISA

This is for a foreigner wishing to study for a period longer than 3 months and who can satisfy prescribed conditions.

TREATY VISA

This is issued to a foreigner conducting activities in South Africa in terms of an international agreement to which South Africa is a party.

BUSINESS VISA

This is issued to a foreigner who is purchasing, investing in, or establishing a business in South Africa. It can also be granted to members of such foreigner's immediate family. Prescribed financial contributions apply.

CREW VISA

This is issued to a foreigner who is a member of the crew of a ship. The crew member has to remain in a predetermined area in terms of this permit.

MEDICAL TREATMENT VISA

This is issued to a foreigner who intends to receive treatment in South Africa for longer than three months.

RELATIVES VISA

This is issued to the immediate family of a citizen or resident and is issued for a fixed two-year period, which can be extended. It requires a South African relative to show they can financially support the foreign relative over the two-year period. This visa does not allow the foreign relative to work in South Africa.

WORK VISA

This is very difficult to get unless the employer can prove that every effort has been made to find a South African to fill the position.

Critical Skills Work Visa (CSWV)

The CSWV is a permit issued to applicants who have exceptional skills or qualifications that are scarce in South Africa. It replaces the Exceptional Skills and Quota Work visas.

Applicants for a CSWV must complete the Department of Home Affairs online form. It cannot be submitted by hand. Go to the

Department of Home Affairs website: www.dha.gov.za for a list of the requirements for a CSWV.

In 2022, a new Critical Skills List was published and the visa is issued in terms of this List. The list looks at occupations that are in high demand and those that are scarce, according to the Department of Higher Education and Training (DHET).

An offer of employment is not required when you apply for a CSWV but you will only be issued with a visa for one year to allow you to find employment within your Critical Skills category. You immediately qualify for permanent residency once you have been offered permanent employment in an occupation that appears on the Critical Skills List.

The CSWV is valid for up to five years, and it can be renewed in South Africa. The visa holder's spouse and dependent children can also be issued with a visa that is valid for the same period as the CSWV.

Employees who have been holding a Quota Work Permit are allowed to continue using this visa until it has expired. After this, they need to apply for a South African work permit or Critical Skills Work Visa. They can do this in South Africa.

General Work Permit

This is only valid for the duration of the contract of employment, and certification of continued employment needs to be submitted annually.

CORPORATE PERMIT

A 'corporate permit' is applied for by a 'corporate applicant' (an employer) and permits the employer to employ foreigners for a documented purpose and for a specified period.

The employer who is applying for a corporate permit MUST prove that they have previously searched for workers in South Africa and were unsuccessful in finding the required amount of workers to receive the permit.

Unskilled workers will need temporary residence permits to enter the country under a corporate permit.

Skilled workers will need to apply for General Work Permits under a Corporate Permit.

RETIRED PERSON'S VISA

This is issued to a foreigner who wishes to retire in the Republic of South Africa, provided they have proof of a pension from their country of origin or a minimum prescribed net worth. This is issued for 4 years and can be renewed.

EXCHANGE PERMIT

This is only issued to foreigners not older than 25 years who wish to participate in cultural, economic or social exchange programmes.

EXEMPTION PERMITS - NATIONALS OF ZIMBABWE AND LESOTHO

The Minister of Home Affairs created Exemption Permits to allow asylum seekers from Zimbabwe and Lesotho temporary entry for business, study or work. Initially, the Department set the ZEP status to expire in December 2022 but has extended this deadline and has published new policies regarding Zimbabwe Exemption Permits (ZEPs) and Lesotho Exemption Permits (LEPs) mostly to do with their expiration dates and application methods.

Automatic extensions

Nationals of Zimbabwe who were granted Zimbabwe Exemption Permits (ZEPs) in 2009 and nationals of Lesotho who were issued Lesotho Exemption Permits (LEPs) in 2019 will have the validity of their Exemption Permits automatically extended until December 31, 2024. These nationals now benefit from an automatic extension of their immigration status, which will save costs and time linked to extending this status.

Initial ZEP and LEP applicants applying after November 29, 2023

Initial LEP and ZEP applicants who applied for these permits on or after November 29, 2023, will automatically be granted a new validity period ending November 29, 2025. Those people applying for initial ZEPs and LEPs can now apply through the VFS Globa online portal https://www.vfsglobal.com/ZEP/SouthAfrica/zimbabwean_special_exemption.html. Previously, they could only apply in person at the Department of Home Affairs. This will result in an easier and faster application process for these applicants.

Exemption permit holders are allowed to stay, work, seek employment opportunities and conduct business in South Africa during the validity of the exemption permit.

Exemption permit holders are not allowed to apply for permanent residence or change their immigration status in South Africa during the validity of the Exemption Permit.

It is not certain whether there will be another extension of Exemption Permits after 31 December 2024 for current LEP and ZEP holders and after 29 November 2025 for new LEP and ZEP applicants.

Asylum seekers and refugees

The *Refugees Act (No 130 of 1998)* says that South Africa cannot refuse to allow a foreigner into the country or force them to return to their own country if in their own country:

- They would be persecuted because of their race, religion, nationality, or political opinion because they belong to a certain social group, for example, because of sexual orientation and/or
- Their lives would be in danger because of a war or serious disruption of public order.

Some of the people from other countries who are among us are 'asylum seekers' – they are people who have fled from their own countries because of political conflict or war. They are asking for refugee status in South Africa so that they can have some protection, while they wait for the time when it is safe for them to go home again. The *Refugees Act of 1998* and regulations apply to refugees living in South Africa.

DEFINITIONS OF ASYLUM SEEKERS AND REFUGEES

A refugee is a person from another country who has fled to South Africa to escape war or persecution and who has been granted refugee status under the *Refugee Act, No. 130 of 1998.*

An asylum seeker is a person from another country who has fled to South Africa to escape war or extreme violence and who is formally seeking refugee status but has not yet been granted it.

An undocumented foreign national is a person from another country who has entered South Africa and who is in the country illegally because they have not engaged with any formal processes to legalise their residence – or they have not engaged successfully. The person is undocumented in South Africa, however they may have documentation in their country of origin.

If a person or their dependants fall into one of these categories, then they could be regarded as refugees. But, a person does not qualify to be a refugee if they have committed a serious non-political crime. People who are fleeing from economic

hardship (no employment) or natural disasters (like floods or earthquakes) are not recognised as refugees in terms of the *Refugees Act*.

APPLYING FOR ASYLUM

Where the person seeking asylum enters South Africa, they will be granted a transit permit valid for 14 days in terms of the *Immigration Act*. A person who wants to apply for asylum must go to the refugee reception office during this time to submit an eligibility determination form (Form BI-1590).

You have the right to be assisted in English when making an application. Once you have made an application for asylum you will receive an asylum seeker permit. This is often referred to as a Section 22 permit. If you have been issued with this permit, then any other permit issued under the *Immigration Act* falls away.

The asylum seeker permit can be extended from time to time and will be valid for up to 6 months, after which it can be renewed. The government can withdraw the asylum seeker permit (Section 22) if:

- The applicant goes against any of the conditions on the permit
- They find that the application is not based on the truth
- The application for asylum has been rejected

If a permit has been withdrawn, the person seeking asylum can be arrested and detained until their application for asylum has been finalised.

When the government is deciding on an application for asylum they must explain the procedures to the person and tell them what their rights and duties are.

The Refugees Act says asylum seekers are not allowed to work or study. The South African Human Rights Commission challenged the Refugees Act, which states that asylum seekers are not allowed to work or study. As a result, the Department has instructed all Refugee Reception Offices to endorse the Section 22 permits allowing asylum seekers to work or study. ***(See: Resources pg 1060 for names of organisations that will assist with refugee and asylum problems)***

THE REFUGEES AMENDMENT ACT (NO. 17 OF 2017)

The *Refugees Amendment Act* was signed into law on 14 December 2017, but it can only be properly implemented once the Draft Regulations are finalised. These are some of the main focus points of the Act:

APPLYING FOR ASYLUM

The *Refugees Amendment Act* requires an asylum seeker to report to a Refugee Reception Office no later than five days after arriving in South Africa - or they can be excluded from refugee status. Those without an 'asylum transit visa' will be interviewed by an immigration officer to determine whether they have 'valid reasons' or not. Those who've entered 'illegally' risk being excluded from applying for asylum. All existing dependents must be declared upon applying for asylum.

REFUGEE RECEPTION OFFICES

Under the *Refugees Amendment Act*, the Director-General of Home Affairs would be able to establish as many Refugee Reception Offices as they regard as necessary – 'notwithstanding the provisions of any other law'. They would also be able to direct any category of asylum seekers to report to any 'place specially designated' when applying for asylum, implying something other than a Refugee Reception Office.

ABILITY TO WORK AND STUDY

Under the *Refugees Amendment Act*, asylum seekers would not have an automatic ability to work or study. The right to work or study would have to be 'endorsed' on an asylum visa following an assessment process to determine whether an asylum seeker can support themselves in any way.

EXCLUSION FROM REFUGEE STATUS

If implemented, the *Refugees Amendment Act* would expand the reasons why an asylum seeker could be excluded from refugee status. This would include committing a Schedule 2 crime, entering illegally into South Africa, or an offence related to fraudulent documentation. It would also include those who are fugitives from justice in countries 'where the rule of law is upheld by a recognised judiciary', and those who do not apply for asylum within five days of entering South Africa.

ABANDONING ASYLUM CLAIMS

Under the *Refugees Amendment Act*, an asylum claim will be considered 'abandoned' if an asylum seeker does not report to a Refugee Reception Office thirty days or more after the expiry of their asylum permit. Discretion is allowed but only if the asylum seeker can prove that they had 'compelling reasons' for having an expired permit. These reasons must be provided to the Standing Committee for Refugee Affairs.

CHANGES TO THE APPEAL SYSTEM

The *Refugees Amendment Act* will create the Refugee Appeals Authority, which allows for one member to make a decision (rather than the current quorum, which is three members) and for more flexible appointments of staff and Refugee Appeal Authority members.

WITHDRAWING REFUGEE STATUS

The *Refugees Amendment Act* would expand the reasons for which a refugee status could be withdrawn. Several actions could result in the withdrawal of refugee status – including a refugee seeking services from the consulate of their country of origin. The Act would allow the Minister of Home Affairs to announce a withdrawal of refugee status for a whole category of refugees (or an individual).

PERMANENT RESIDENCY

The *Refugees Amendment Act* would double the amount of time a refugee has to reside in the country before being allowed to apply for permanent residency. This application, which involves applying to be recognised as an 'indefinite refugee', will only be possible for those who've been granted refugee status for ten years, which is double the current requirement of 5 years.

REFUSING AN APPLICATION FOR ASYLUM

If an application for asylum is rejected, the person must be given the reasons in writing within 5 days of the refusal. If asylum is refused on grounds that the application is 'manifestly unfounded, fraudulent or abusive', the Standing Committee for Refugees will review the decision to refuse asylum. Such a case does not go to the Appeal Board.

An asylum seeker can lodge an appeal with the Appeal Board once they have been told that the application has been refused. The applicant must be allowed to bring a legal representative to the Appeal Board hearing if they request this.

RIGHTS OF ASYLUM SEEKERS

An asylum seeker:

- Has the right to healthcare and access to public healthcare services
- Has the right to look for work. If employed, the *Basic Conditions of Employment Act* will apply, and the person must be paid a minimum wage

- Cannot be refused access to education. As a holder of either a Section 22 or a Section 24 permit, a child is entitled to access to education at public schools

APPLYING FOR A REFUGEE PERMIT (SECTION 24)

Applicants will be interviewed for their refugee status application. They may bring witnesses or a person who can speak English to assist them in telling their story. They must also bring supporting documents such as:

- Birth Certificates
- Photographs
- Personal records
- Research was done about conditions in their home country, including newspaper articles

They will be notified about the outcome of their application within 180 days.

WHAT HAPPENS IF AN APPLICATION FOR REFUGEE STATUS IS DECLINED?

The person will be given 30 days to submit an appeal to the Refugee Reception Office or to leave the country. In the appeal, the person must state reasons why they should not go back to their home country.

A person can appeal on the basis that:

- The correct procedure for processing the application was not followed
- The facts on the application were not taken into consideration
- The person who interviewed him or her was biased

WHAT HAPPENS IF THE APPLICATION FOR REFUGEE STATUS IS APPROVED?

- If the application is successful, the person will be granted refugee status and a Section 24 Permit that is valid for two years
- They will immediately be issued with a Refugee ID in terms of Section 30 of the Refugee Act
- This Section 24 Permit must be renewed at the Refugee Reception Office 90 days before the expiry date

RIGHTS AND DUTIES OF REFUGEES

A refugee:

- Has all the rights contained in the Bill of Rights, except rights specifically reserved for citizens, for example, the right to vote

- Can apply for an immigration permit in terms of the *Immigration Aliens Control Act* after living in South Africa for 5 years after the date that they were given asylum
- Can get an identity document and passport
- Can look for work, and the *Basic Conditions of Employment Act* applies if employed
- Can use the basic health care services and primary education facilities
- May apply for social assistance grants, mainly the Disability Grant and Foster Care Grant ***(See pg 463: Social grants)***

If you would like to view a sample of Form BI-1590 'Eligibility Determination Form for Asylum Seekers (for Sections 22 and 24)', you can use the following link: https://www.passport2000.com/files/BI-1590.pdf

Checklists

General advice on citizenship

As an advice–giver, you must be very careful when dealing with citizenship problems. If a mistake is made, it may mean that a client's case is ruined and cannot be put right. You can help people to collect all the right proofs and documents, but you should then refer the case to a Law Clinic, or public interest law firm.

Remember to check a person's story as far as possible in case they are using false documents to get citizenship illegally.

Ask the person the following questions:

- Are you a citizen of another country who wants to apply for South African citizenship?
- Are you a South African who has lost your citizenship?
- What was the reason for refusing to issue you with an identity document or birth certificate?

Born in South Africa

PROOF OF BIRTHPLACE AND DATE OF BIRTH

1. Have you got a birth certificate?

2. If you haven't got a birth certificate, can you find at least two or more of the following documents?
    - The record of your birth from the hospital or clinic where you were born
    - Your baptismal certificate
    - Clinic cards from when you were a baby
    - A letter from the chief in the area in which you were born
    - A letter from the owner of the farm where you were born
    - A letter from your mother's employer at the time of your birth
    - A letter from any midwife who helped your mother at the birth
    - Affidavits from the people who helped your mother at the time of your birth
    - Affidavits from your elder brothers or sisters who have IDs and are recognised as South African citizens
    - Your primary school records or a letter from the school principal
    - A house permit on which your name is written if your family lived in an urban area

BORN IN SOUTH AFRICA BEFORE 1949

You have a right to South African citizenship, regardless of your parents' status. But, the proof of the place and date of your birth must be very good. Affidavits from other people are not usually considered to be sufficient.

BORN IN SOUTH AFRICA BETWEEN 1949 AND JUNE 1961

You will also have to prove your father's position at the time of your birth:

- Is your father a South African citizen?
- Can you prove this with his identity document?
- If he is not a South African citizen:
    - Does he have an ID showing him to be a permanent resident in South Africa?
    - Does he have a passport for the country he came from?

You will need to try to find proof of his status at the time you were born. These might be:

- Old passports showing his registration for work or permission to be in South Africa
- The record from TEBA showing that he was a contract worker in the mines
- Any other paper showing that he was working legally in South Africa at the time you were born

BORN IN SOUTH AFRICA AFTER JUNE 1961

1. Was either your mother or your father a South African citizen at the time you were born?
2. Can you prove this with their Identity Document?
3. Was either your mother or your father a permanent resident at the time you were born?
4. Can you prove this with their Identity Document, permanent residence permit, or immigration permit in their passport?

Requirements for permanent residency

THE MAIN APPLICANT IS THE RELATIVE OF A CITIZEN OR RESIDENT WITHIN THE FIRST STEP OF KINSHIP

This service applies to a prospective permanent resident who wishes to apply for a permanent residence permit on the basis of being a family member of a South African citizen or permanent resident within the first step of kinship. For the purpose of permanent residence, family members within the first step of kinship

are prescribed as biological and judicially adopted children or adoptive parents and step-parents.

- **Fully completed application forms**
- **Photographs:** 2 recent colour passport-type photographs
- **Passport:** Valid original passport
- **Birth Certificate:** Unabridged birth Certificate
- **Medical Report:** The report must not be older than 6 months
- **Radiological reports:** All applicants 16 years and older (excluding pregnant women)
- **Police clearance certificate:** In respect of all countries of residence in excess of three months (Originals only) Only accepted if issued by the relevant police authority)
- **Marriage Certificate:** Unabridged certificate. Proof of registration of customary marriage. Documentary proof of cohabitation and the extent to which the related financial responsibilities are shared by the parties
- **Divorce Certificate:** Divorce decree(s) or proof of legal separation and all relevant court orders regarding custody & maintenance of children and previous spouse(s) (Required irrespective of whether or not the applicant has since re-married)

- **Education:** CV (Detailed curriculum vitae) - including highest educational, trade or professional certificates evaluated by the South African qualifications
- **Proof of kinship:** Relationship confined to biological or judicially adoptive parents, biological or judicially adopted children or a spouse
- **Proof of cohabitation:** Proof in the form of communal accounts or other documents reflecting cohabitation
- **Undertaking by citizen:** Undertaking from citizen/resident regarding financial, medical and emotional responsibility for the applicant. (Not applicable where the relative is the parent of a minor child of a South African citizen/resident)
- **Confirmation from citizen:** Confirmation that the South African citizen/permanent resident did not obtain residence in terms of Section 27(g) of the Act
- **Payment of the applicable fee**

Democracy, government & public participation

Introduction

When people vote for direct representatives or political parties in elections (for government and any other institutions), they are voting for these representatives or parties to make laws and policies on their behalf and to ensure that these are carried out. This is one of the most important principles of democracy. The Constitution sets out the right to vote, participate in political parties and stand in elections, in Section 19.

Democracy also means that the people who have been elected are accountable in various ways to the people who voted for them. Citizens have a role to play in participating in government and governance processes on an ongoing basis to ensure that the people they vote for carry out their duties and obligations. They have a constitutional right to be involved in these processes in all spheres of government: national, provincial and local. To participate effectively in the decision-making and implementation processes, you need to know:

- The systems and structures of all spheres of government (and key public entities)
- How laws and policies are made in all spheres of government
- What the best opportunities are for public participation in all spheres of government
- Different methods of participating
- The rights of citizens
- The obstacles and challenges to effective participation in decision-making and implementation processes
- How to strategise collectively to highlight and address the needs of especially poor and vulnerable communities and individuals

This chapter looks at democracy and at public participation in a democracy.

Democracy

Democracy is a way of governing a country. The most common definition of democracy is ‘rule by the people’. Citizens are allowed to choose public representatives to represent them in government. They do this in regular, free and fair elections. The public representatives run government on our behalf. They use our tax money to ensure that services are delivered.

However, the democratic practice of citizens doesn't end here. Democracy also means that the people who have been elected are accountable in various ways to the people who voted for them. They have to act and deliver on the promises they made during elections and should ensure the participation of local communities in setting plans and priorities.

All public representatives and officials must be open (transparent) and accountable in their actions and decisions.

When we vote, we give the government a mandate to pass and enforce laws on our behalf. In making laws the government has to follow the Constitution, and it uses the courts as well as the police to enforce the laws.

If the government becomes unpopular or doesn't do what it promised to do then people can vote for another party in the next election and vote the present government out of power. This is essentially how democracy works and why it can be an effective system of government.

The Constitution sets out the principles for how the public service should operate in section 195:

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted
- Public administration must be development-oriented
- Services must be provided impartially, fairly, equitably and without bias
- People's needs must be responded to, and the public must be encouraged to participate in policy-making
- Public administration must be accountable
- Transparency must be fostered by providing the public with timely, accessible and accurate information
- Good human-resource management and career-development practices, to maximise human potential, must be cultivated
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation

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The principles of democracy

Democratic principles are ideas that most people believe are essential for a democracy to thrive. The most important principles of democracy are:

Public participation: People have a right and a duty to participate in government and in civil society. Public participation includes standing for elections, voting in elections, becoming informed, holding and attending community meetings, joining civil and/or political organisations, paying taxes, and protesting and petitioning.

Equality: All people should be treated equally and without discrimination and be given equal opportunities.

Tolerance: While the party representing the majority of people runs government, in a democracy, the rights of opposition or minority groups are also protected.

Government serves all the people equally. Everyone should be allowed to express their opinions and join the political, religious or civil groups of their choice.

Accountability: Government must be accountable to the people for its actions, including the laws that are passed and how these laws are implemented. Our taxes are used for government spending and all budgets and financial statements should be presented to parliament and be available to the public.

Transparency: Government must be open to the public about its actions. It must allow the public to give input before new laws are passed.

Regular, free and fair elections: Elections must happen in a free and fair way, without intimidation, corruption or threats to the public before or during the election. Elections should also be held regularly. For South Africa, these occur every five years.

Accepting the results of elections: When a political party loses an election, the party and its supporters must accept this result.

Economic freedom: People in a democracy should be allowed to have some kind of private ownership of property and business, they should be allowed to choose their own type of work and join labour unions.

Controlling and preventing the abuse of power: There should be ways to prevent government officials from abusing their powers. The courts should be independent, and they should have the power to:

- Act against government officials or bodies that commit an illegal or corrupt act.
- Allow for public participation and elections
- Check police abuse of power
- Intervene where corruption is exposed

Human rights: The human rights of individuals and groups are enshrined and protected in the Bill of Rights. The Bill of Rights includes a list of rights and freedoms that are guaranteed to all people in the country. All rights and freedoms need to be protected to prevent these from being violated. Section 7 of the Constitution defines what the Bill of Rights is:

- The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- The state must respect, protect, promote and fulfil the rights in the Bill of Rights
- The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36 or elsewhere in the Bill

Multi-party system: More than one political party must be allowed to participate in elections and play a role in government. Since the national and provincial elections in 2024 and in local government, independent candidates are also provided for.

Rule of law: The rule of law means laws rule above all else and that no one is above the law, including the parliament or president of the country. Everyone must obey the law and be held accountable if they break the law. The law must also be equally, fairly and consistently enforced. Laws are the rules made on our behalf by parliament. The judiciary acts as a referee and enforces the rule of law. They may judge any action by government, citizens, organisations or companies and will use the Constitution and laws to decide whether the action is legal or illegal.

Electoral system and electing a government

The Constitution gives everyone who is a citizen and 18 years or older the right to vote in elections.

The electoral system for the national assembly and provincial legislatures is the proportional representation system, and all citizens are entitled to vote if they are registered voters. Voters vote for a party or an independent candidate of their choice.

The local government electoral system is a mixture of proportional representation and constituency system.

South Africa holds national, provincial and local elections every five years, and the local government elections usually occur about two years after the national and provincial elections.

Having regular, free and fair elections is one of the cornerstones of democracy. This goes together with other important democratic principles such as the right to vote, to choose which party you want to belong to and the obligation to accept the results of an election.

There are different ways to elect representatives into government, including the system of proportional representation and the constituency-based system. The South African national and provincial elections are based on the system of proportional representation while the local government electoral system is partly based on proportional representation and partly constituency-based. In 2024, the Constitutional Court order that independents must be able to stand for national and provincial elections was implemented.

CHANGES TO THE ELECTORAL ACT IN 2024

In 2024, Amendments to the Electoral Act were passed by Parliament to accommodate independent candidates in Provincial Legislatures and Parliament. Three ballots were used, and parties received seats according to the percentage of the votes they won. Independents could also compete for a provincial seat or a regional to national-seat.

PROPORTIONAL REPRESENTATION

This means that parties get a certain number of seats in parliament according to the percentage of votes that they get in an election. So, for example, if your party gets 15% of all the votes in the country, then it gets 15% of the seats in parliament.

There are 400 seats in the national parliament. So, for every 1% of the vote, a party gets 4 seats. The example on the next page shows how seats are allocated for the top three parties that won seats in the 2014 election.

EXAMPLE: NATIONAL ELECTIONS 2014

Party	% of the votes	Number of seats
African National Congress	62 %	*247 seats*
Democratic Alliance	22 %	*89 seats*
Economic Freedom Fighters	6 %	*25 seats*
Other small parties (together)	7 %	*39 seats*

CONSTITUENCY-BASED ELECTIONS

According to this system, the country is divided into voting areas called constituencies. Each political party chooses one person to represent the party in each constituency. This person is the party's candidate. Independents can also stand without a party backing them. People in a constituency vote for the candidate of their choice. So, a person only goes to parliament if they get the most votes in that constituency. It is also called the “first past the post” system and is used for ward councillor elections in South Africa.

For national and provincial elections, there are no small constituencies. Each province is, in effect, a multi-member constituency.

Local government electoral system

The local government electoral system differs from the national and provincial electoral systems of pure proportional representation. Voters get three ballots – one for the local council (party names), one for a ward candidate (individual names) and one for the district council (party names). In the local council, half of all councillors come from wards where they are directly elected as individuals. The other half come from party lists and are elected according to a proportional list system. District councils are partially elected based on proportional representation, and partially appointed by the councils of local municipalities within the district.

In the eight metropolitan councils (the City of Johannesburg, the City of Tshwane, eThekwini, Ekurhuleni, Mangaung, Buffalo City, the City of Cape Town and Nelson Mandela Bay Municipality), voters get only two ballots, as there are no district councils.

MUNICIPAL BY-ELECTIONS

By-elections take place within 90 days after a municipal ward council seat becomes vacant due to the death, expulsion or resignation of a ward councillor.

Public participation

Public participation means that citizens should be able to interact with government on decisions that affect them. Democracy should not end with elections, government makes

thousands of decisions that need input from the people. For example, many organisations and individuals make representations to parliament in public hearings when new laws are discussed. At a local level, municipalities should consult people on housing developments and the use of public land.

Citizens have a right (and a duty) to have a say on how the government does its work. Citizens also pay taxes and have a right to know how this money is being spent. If people don't participate, the government may make decisions without hearing the opinions of the people and, as a result, will not be transparent and accountable for their actions. This can lead to the abuse of power. The Constitution says all spheres of government (national, provincial and local) have to make it easy for people to participate in government. Section 118 (1)(a)(b)(i) and (ii) of the Constitution deals with public access to and involvement in provincial legislatures, and Chapter 4 of *The Local Government Municipal Systems Act* is dedicated to community participation.

So we can see that public participation is an important part of democracy – and in particular for South Africa – because it makes the government:

- Open and accountable for its actions
- Act on its promises (usually made in election manifestos, policy and budget speeches of ministers, and the annual State of the Nation Address (by the president)

If you want to participate effectively, you need to be properly informed, which means:

- Knowing what is happening in your community and what the important issues are
- Understanding government budgets and available resources
- Knowing what is happening in your broader society
- Knowing what your legal rights are and where decisions will be made

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How can you participate and influence decision-making?

Here is a list of ways that you can participate and influence decision-making:

- Vote in elections
- Participate in party politics
- Organise, support and hold public demonstrations and campaigns
- Petition local, provincial and national leaders
- Lobby decision-makers (e.g. a municipal councillor, mayor, speaker, member of parliament or senior government official, e.g. municipal manager, and participate in decision-making processes, such as public hearings or public consultation meetings)

- Engage with ward committees, intergovernmental meetings, budget, IDP and local consultative meetings at a local government level. Use these to hold local councillors accountable and participate in policy formulation and implementation planning
- Make written or verbal submissions to council committees ***(See pg 142: Checklist: Making a written and verbal submission)***
- Print and distribute leaflets to the public
- Use local radio and TV stations or social media networks, e.g. WhatsApp, Facebook and X, to spread your message
- Refer complaints to appropriate institutions like the South African Human Rights Commission (SAHRC), Commission on Gender Equality, the Public Protector, and Independent Police Investigations Directorate (IPID) for police issues
- People can also lobby constituency representatives of statutory institutions, such as the National Economic Development and Labour Council (NEDLAC), South African National Aids Council (SANAC) and other structures that encourage public participation

Voting in elections and lobbying are two of the most important ways of participating in decision-making processes.

Voting in elections

The Constitution gives everyone who is 18 years or older the right to vote in secret in elections. The *Electoral Amendment Act (No. 34 of 2003)* says a person who is a South African citizen, has a bar-coded ID and is 16 years old can apply to register as a voter. Their name can only be placed on the voter's roll once they reach the age of 18 years.

NATIONAL AND PROVINCIAL ELECTIONS

South Africa's national and provincial elections take place every five years.

Voters vote for a political party or an independent. The political party then gets a share of seats in parliament in direct proportion to the number of votes it got in the election. Each party then decides on members to fill the seats it has won. This is called a proportional representation (PR) voting system. Independents win a seat by getting the quota of votes needed for one seat.

Democratic national and provincial elections have taken place every five years starting in 1994.

Voters are registered to a voting district (VD) and appear on the voter's roll only at the voting station in that voting district. Special votes are allowed before elections for people who are travelling outside the country or voting district on election day or those who are disabled, infirm, elderly, or heavily pregnant. Prisoners are allowed to vote in national and provincial elections.

MUNICIPAL ELECTIONS

Municipal elections take place every five years. A mixed or hybrid system of both the ward system (a constituency system) and the proportional representation (PR) system is used for municipal elections. The first democratic municipal elections took place in 1995/6, and the first municipal elections run by the IEC took place in 2000.

There are 3 types of Municipal Councils in South Africa:

1. Category A: Metropolitan Councils
2. Category B: Local Councils (LC)
3. Category C: District Councils (DC) (have executive and legislative powers in areas that include local municipalities)

For metropolitan municipalities, there are 2 types of elections and ballots:

1. Metropolitan Council ward ballot with individual's names to elect one ward councillor in each ward and
2. Metropolitan Council proportional representation ballot with party names

In all local municipalities other than metropolitan municipalities, there are 3 types of elections and ballots:

1. Local Council ward
2. Local Council proportional representation
3. District Council proportional representation

MUNICIPAL BY-ELECTIONS

By-elections take place within 90 days after a municipal ward council seat becomes vacant due to the death, expulsion or resignation of a ward councillor.

SPECIAL VOTES: MUNICIPAL ELECTIONS

A special vote allows a registered voter who can't vote at their voting station

on election day to apply to vote on special vote days before election day.

Lobbying (campaigning, petitioning)

Lobbying means trying to influence or persuade individuals or groups with decision-making powers, such as people who make policy or laws, to support a position you believe is right or to take certain action. Organisations and individuals can lobby to directly influence decisions being made in all spheres of government.

WHO CAN YOU LOBBY?

In the work you and your organisation do, it is important to identify people whose cooperation or influence you need to help you with your work. These are usually decision-makers or key role-players. So, you lobby people who have the power to take action to support the needs and interests of those who do not have direct power and influence. Lobbying can be used to influence anyone with power, for example:

- Parents can lobby the school governing body to provide after-care at school
- Civics can lobby the police commissioner to have more police on duty at night
- HIV/AIDS activists and support organisations can lobby the president to provide affordable treatment for people who are HIV positive
- Civics can lobby local councillors to pass a by-law that says everyone should be given access to electricity
- Organisations can lobby members of parliamentary standing committees, cabinet ministers and heads of government departments to influence them in policy and law-making

The two main categories of decision-makers and role-players that you can target are people who support your cause and people who oppose you.

TIMING OF LOBBYING (CAMPAIGNS AND PETITIONS)

Make sure you understand where, when and by whom a decision will be made. Find out what rights you have in terms of public participation.

BUILDING GOOD RELATIONSHIPS WITH DECISION-MAKERS AND KEY ROLE-PLAYERS

One of the most important parts of lobbying is building relationships with people that you are planning to engage, in other words, decision-makers and key role-players

The stronger the ties of trust, mutual support and credibility between you and the person you are lobbying, the more effective your action will be.

These are some guidelines for building good relationships with key role-players:

- Provide useful, accurate, context-specific and truthful information:
- It is important for you and your organisation/network to understand and identify issues of protocol and to raise issues with the appropriate office first. For example, if there is a problem at a clinic, first raise this with the head of the clinic, then the area manager, then the provincial or district authority and finally with the MEC for Health, rather than the other way around. When making a submission to the municipal council, provincial legislature or parliament, it is protocol to take the issue to the relevant decision-making body to consider rather than going to the media first.
- It is important to identify the group/constituency you represent and to have affected persons and community representatives participate where possible in the submission/presentation
- Recognise what the person you are lobbying has done to benefit the community, so start with a positive and encouraging comment
- Offer to help with issues that they care about (so long as it doesn't conflict with your own interests), for example, helping to spread information
- Establish ways to work together in the future. Promote win-win solutions where the people you represent, as well as the decision-makers gain something positive
- Keep in regular contact, and don't be impatient if nothing happens immediately
- Follow up in writing with those you made a petition/submission to, thank them for their consideration, repeat what you have requested/called for and ask, if needed, when you can meet again
- Keep the community or interest groups informed of the latest developments
- Ensure that they own the lobbying strategy and can sustain it
- Keep the media informed about any changes or developments that may affect the issue

EXAMPLE

You want your municipality to test the drinking water of your community.

You believe a local factory has been pumping their waste into the water and it has been making people sick. You will have more chance of someone co-operating with you if you provide them with accurate information, for example, by showing them a record of the illnesses in the last month in the affected area (get these from a clinic or hospital) or providing evidence of the company dumping waste in the water.

TYPES OF LOBBYING

There are many different ways of lobbying, campaigning and petitioning. The different lobbying activities around an issue must be coordinated to make sure they have the greatest impact. It is important that strategic thinking precedes your action.

These strategies can broadly be categorised into 2 groups:

- Inside lobbying
- Outside lobbying

INSIDE LOBBYING

Inside lobbying includes a mix of the following:

- Holding meetings with decision-makers, such as local council representatives and members of parliament for your area
- Providing information to role-players, committees and government officials
- Making submissions to committee meetings/public hearings
- Attending hearings where policy is discussed
- Negotiating with decision-makers and other lobby groups
- Writing formal letters stating your position
- Submitting petitions to relevant committees
- Having discussions with people in informal situations, for example, before or after meetings, during social occasions

OUTSIDE LOBBYING

If inside lobbying is not effective, you should mobilise more support for your

issue through outside lobbying, for example:

- Speaking to the media, holding news conferences, visiting news editors, helping reporters with stories
- Building alliances with other organisations
- Public letter-writing campaigns
- Public campaigns such as rallies and demonstrations

METHODS OF LOBBYING

The following is a summary of methods you can use for lobbying:

Even before you engage in lobbying it is critical to mobilise support for your position or issue. With modern technology, support can happen via social media sites such as Facebook and Twitter, though it is important to have a local core group engaging with decision-makers.

MEETINGS: Ask if you can have a face-to-face meeting to present your case. Visit the person in their office or invite them to attend a meeting in the community. Always state clearly why the meeting is important and give them an agenda and a list of possible outcomes from the meeting. Remember to say what is in it for the decision-maker, for example, "*This meeting will provide you with the opportunity to make direct contact with more than 100 people from the community and to hear their concerns on the issue*", or "*We will publish your response on our Facebook page where we reach 15 000 people from this city.*"

WRITE LETTERS: Letters, emails and sms messages are the easiest method to use to lobby but they are not always the most effective. Many people in positions of power have administrative staff who read their mail and sms messages and summarise them for them. It is always advisable to call a meeting with decision-makers, after writing a letter or sending a message.

The different activities around an issue must be coordinated to make sure they have the greatest impact. So, for example, civil society organisations worked together on the Right to Know Campaign from 2011 to 2014 to raise concerns about the Protection of Information Bill. They used inside and outside lobbying, campaigning and petitioning to delay the passing of this bill. Their work helped to improve the law and address strong concerns from various civil society organisations and the media.

ASK FOR AN ON-SITE INSPECTION OR SURPRISE VISIT: Invite decision-makers to come and make on-site inspections if appropriate. For example, get the person to

come and look at the condition of a school. Committees of parliament have scheduled site visits that can be used to arrange engagements with affected communities or organisations.

Elected officials and municipal officials are the closest to people. Visits and meetings can be arranged more easily with this sphere of government. For example, invite an official or councillor to explain the budget to a ward committee or organised group in your area.

INFORMAL TALKS: Talk informally to committee members and decision-makers during tea breaks, etc. Introduce yourself and share your opinions.

PRIVATE MEETINGS: Organise meetings with national and provincial ministers, mayors and their advisors, and local councillors to explain your position.

PUBLIC MEETINGS: Attend and observe parliamentary committee debates/local council meetings.

PETITIONS: Petitions can be used to show how much popular support your issue has. You can use a petition to get as many signatures as possible from people in the community, or you can get a smaller number of key individuals or organisations to sign a petition to support your submission.

PUBLIC HEARINGS: When a bill is tabled in parliament, public hearings are often held where the public can make their submissions to the parliamentary committee dealing with the issue. This is a key moment to get the policy or law changed.

PHONE CALLS, SMS, FAXES & EMAILS: Get as many people as possible to telephone the decision-maker. Also, use SMS, faxes and email, if possible. Try to contact influential and well-known people by telephone. If you cannot speak to the decision-maker, leave a clear message, for example, "*We are phoning to object to the council closing the local health clinics*".

USE THE MEDIA: Use radio, newspapers and TV to spread the word and get publicity for your story. It always helps to make individual contact with a reporter who is prepared to follow the issue through.

MAKE SUBMISSIONS: If formal submissions to committees are unsuccessful, you can also make the submission to an influential member, such as a parliamentary member or a member of a local council committee. You can make a submission to draw attention to an issue or to try and influence the policy and law-making process.

USE THE LEGAL SYSTEM: Take a case to court or to one of the human rights commissions set up under the Constitution to investigate claims of human rights abuses. This is usually the last resort when all avenues of lobbying have failed, where there has been a failure to address an issue for a long period, or where drastic intervention is needed. This is called public interest litigation. ***(See next page: Example of lobbying)***

EXAMPLE

This example shows the lobbying role played by an NGO or civil society network during the process of amending The Choice on Termination of Pregnancy Act.

February 2007
Women's health activists come together and develop a draft abortion policy proposal, which is submitted to the Department of Health and the ad hoc Select Committee on Abortion

August 2007
NGOs mobilise the media and make their own submissions to the public hearings

NGOs mobilise public opinion by running community workshops on abortion reform.

NGOs form an alliance

March 2008
The alliance of NGOs lobbies parliament through the distribution of pamphlets to parliamentarians and decision-makers and gives evidence to parliament in favour of abortion reform.

May 2008
Alliance collects data from focus groups to assess community opinion on The Choice on Termination of Pregnancy Act. Research helps in providing improved abortion access for women.

July 2008
Parliamentary hearing on implementation of the Act: Alliance mobilises support from other organisations to give input for the hearing

GUIDELINES TO EFFECTIVE LOBBYING

These are some practical tips on how to petition decision-makers and/or key role-players:

ENGAGE & INTERVENE EARLY: It is usually better to intervene as early as possible in the process of developing policy and laws. By the time an issue is being debated in

parliament, within a municipal council or being finalised in a government department, it is hard to get it changed significantly.

For this reason, it is important for your organisation to regularly check invitations to public hearings in newspapers, and in the media. There are dedicated websites and organisations that alert one to these developments. Examples include the Parliamentary Monitoring Group (PMG). At a local level, it is important to check local papers as regularly as possible.

RESEARCH OR DATA COLLECTION: When government publishes a draft strategy, policy paper, draft regulations or any form of discussion document, you should research the issue properly to be clear about it and, where necessary, collect evidence.

IDENTIFY DECISION-MAKERS: Analyse who has the power to make decisions on your issue and target your strategies in a very focused way at specific decision-makers. Remember, not everyone will agree with your position. Think how the role-player can benefit from agreeing with you and include this in your arguments.

Realise that your target audience may respond in three ways:

- People who support your position
- People who neither support your position nor oppose it and who can, therefore, be persuaded to support you (those who 'sit on the fence' or are undecided)
- People who are against you

For your cause/issue to be heard, every effort needs to be made to ensure that decision-makers thoroughly discuss your concerns and do not simply see you as an opponent.

Amongst those who support your cause, all must agree on the same way forward so that you do not confuse decision-makers. This requires time, patience and lots of communication.

BE CLEAR ABOUT YOUR AGENDA AND GOALS: Only use advocacy and lobbying that will address issues that have jointly been identified as core matters to improve the quality of life of the community or the interests of the group. Ensure that your arguments are tight and clear, and where possible, provide evidence to support your case.

Be clear about your issue and plan your own alternative or compromise position. Make sure you have thought through all the options. Know what it is that you want. For example, do you want a parliamentary committee to investigate why a government department has not done a certain job, are you asking for a law to be amended or a by-law or regulation to be scrapped?

This will form the basis of your submission to government, your media campaign, your representations to individual ministers or government officials and your networking with other organisations. It is important to -

- Know your issue (don't confuse by raising too many issues)
- Know your position
- Decide what you want to get out of the visit, for example, a commitment to vote for your issue, to provide information only
- Keep it simple
- Make recommendations to solve the situation rather than only describe the challenge or problem at length
- If it is a group visit, decide who will start the discussion and put your agenda on the table
- Seek endorsements from networks or organisations that support your position and or submission, and bring people from the affected community to also speak
- Only after engaging with the decision-makers share the entire submission with the media

PROPOSE SOLUTIONS: Propose to committee members or government officials a solution that can work. Avoid threats or aggressive language.

PREPARE FOR RESISTANCE & OPPOSITION: Analyse the opposition's position (to your issue) and develop counter-arguments. Often, arguments of affordability and resources are used to counter your submission. Make sure you have sufficient evidence to motivate why additional resources are required to meet your request/demands.

If additional resources are required or amendments to existing legislation are proposed, try to get professional advice on legal and cost issues.

LISTEN WELL: When making your submission:

- Look for opportunities to provide good information.
- Know your issue, but don't feel you have to have all the answers. Admit when you do not know something.

- Ask questions to get a better understanding.
- Share the opinions and concerns of other people in your community.
- Find out how much time you have been allocated for your submission or presentation – and aim to complete it in a shorter time. Often, programmes run late, or sudden changes are introduced.
- Take enough copies of your presentation for everyone present.
- Establish who will be presenting to the committee/decision-makers before or after you if your submission is part of public hearings.
- Make sure beforehand that the time, venue and date have not changed.
- Always assess afterward what worked well, what may require more work and what your future strategies are.

NEVER USE BLACKMAIL: Using blackmail, gifts or bribery to persuade someone to take a certain action is corruption and unethical behaviour, not lobbying.

DON'T BE AGGRESSIVE: Don't be argumentative or confrontational and don't get involved in mud-slinging. Be open to counter-arguments, but don't get stuck on them. Attack with correct facts, but avoid personal attacks or insulting slogans. Treat everyone with respect.

BUILD, DON'T DAMAGE WORKING RELATIONSHIPS: If the person has supported you in the past then acknowledge them and your appreciation of their support. If they haven't supported you in the past, they may well do so in the future, so don't turn them into a permanent enemy. Your response might stop them from becoming active opponents.

GET COMMITMENT & SUPPORT: Try and get a commitment from the person, for example, a written declaration or a public statement, if it is within their powers to do so. If you are unable to get a commitment and the conversation isn't going anywhere, thank the person and say that you would like to continue the discussion at another time.

FOLLOW-UP: After the meeting, if appropriate, send a thank-you note to all in attendance or to the chairperson of the committee. If commitments were made in the meeting, repeat your understanding of them. If staff members were present, thank them, and write to the administration too.

LOBBY ALL TARGET GROUPS/ RELEVANT AUTHORITIES: Don't only lobby one department or entity on an issue. Identify the target role-player's supporters, allies and opponents and include all of them. For example, an environmental health matter may require engagement with the provincial health department, the municipal

environment health department and the agency responsible for refuse collection, as a start. You should also lobby all political groups, not just the majority party.

CONSOLIDATE & BUILD YOUR LOBBY GROUP: Analyse which individuals and organisations can influence the decision-makers and/or role-players and try to mobilise them to support your issue. Never lobby alone. People with political power are usually more sensitive to lobbying action which represents their voters.

BRIEF ALL ROLE-PLAYERS: Keep other stakeholders informed about what is happening and the outcome of any lobbying action. Use meetings, regular emails, newsletters, SMS, WhatsApp, phone calls and other social media networks.

Structures of national government and public participation in these structures

The different branches of government at national level provide different opportunities for public participation. The following section looks at the structures of national government and the possibilities for public participation within these structures.

Structures of national government

THE EXECUTIVE BRANCH

The executive branch is responsible for the day-to-day running of the country. It consists of the president, deputy president and cabinet, and they oversee the public service. Some of the functions of the executive are to:

- Initiate laws and policy
- Carry out laws passed by parliament
- Carry out policies
- Co-ordinate the functions of the government departments and administrators
- Provide direction to heads of government departments
- Plan, monitor and evaluate government programmes

KEY ROLE-PLAYERS AND STRUCTURES IN THE EXECUTIVE

It is important to know what structures exist as they can be useful as a point of entry for your lobbying action.

The president, cabinet and deputy ministers are called the executive. The head of state is the president who leads the cabinet. The national assembly elects the president from among its members and leads the country following the Constitution and the law. The key role-players in the executive that may play a role in formulating policy or drafting law will be:

- The president
- The deputy president
- Ministers, directors general and other senior managers who are in charge of different government departments
- Inter-departmental committees. Often policy will cut across a number of ministries and departments. Inter-departmental committees are set up using representatives from different departments to deal with the policy as a whole and provide direction to directors general who head the public service. For example, in the case of delivery of water, this may involve the departments of water and sanitation, environmental affairs, human settlements, finance and cooperative government.

LEGISLATIVE BRANCH

The functions of the legislative branch of government are to:

- Develop and pass laws
- Contribute to developing policy
- Act as a watchdog on the activities of government
- Pass budgets and get reports from departments

The legislature consists of the national parliament made up of different structures, for example, a National Assembly, National Council of Provinces (NCOP) and various parliamentary committees. These are the key structures that you can lobby in the legislature:

PARLIAMENTARY COMMITTEES

The national parliament usually divides the members of parliament into small groups which focus on specific areas of governance. These smaller groups

are called parliamentary or portfolio committees. The main role of the portfolio committees is to:

- Make sure that policy issues and new bills are properly debated and looked at carefully
- Allow members of parliament to become specialised in a particular field of interest, such as defence or agriculture
- Provide a forum where the public can interact with parliament and government on specific issues and new bills
- Discuss and assess the activities of other government departments

There are about 40 portfolio committees in national parliament, one for each government department and several internal to parliament. For example there are portfolio committees on correctional services, health and international relations and cooperation.

The parliamentary committees of the National Council of Provinces are called Select Committees. There are 11 Select Committees that manage the issues sent to them by the portfolio committees of national parliament.

OTHER IMPORTANT ROLE-PLAYERS IN THE LEGISLATURE

- The speaker of parliament
- Political party whips (responsible for each party's members of parliament)
- Parliamentary committee chairpersons
- Committee secretaries
- Political party caucuses, where party members meet to discuss the party positions on an issue (these are closed to the public, but key members can be lobbied before meetings to raise issues)

Public participation in the process of making laws and policies at national level

It is important to know how laws and policies are made as these processes provide opportunities for public participation.

WHAT IS THE DIFFERENCE BETWEEN A LAW AND A POLICY?

A law is a set of legally binding rules passed by parliament and sets out standards, procedures and principles which must be followed. If a law is not followed, those responsible for breaking them can be taken to court.

A policy outlines a ministry's goals and the methods and principles it will use to achieve them. It is not a law, but it will often identify the need for new laws to achieve its goals.

So, policy sets out the goals and planned activities of government but it needs laws to implement the policy. Laws, on the other hand will be guided by the current policy when they are drafted.

All laws and policies are made according to the Constitution and may not contradict the rights embedded in it.

THE DIFFERENCE BETWEEN LAW AND POLICY

A policy statement says: "All citizens should have access to 15 litres of water a day".

The law says: "The national government has the power to regulate the amount of free basic water a municipality must supply."

MAKING NEW POLICY

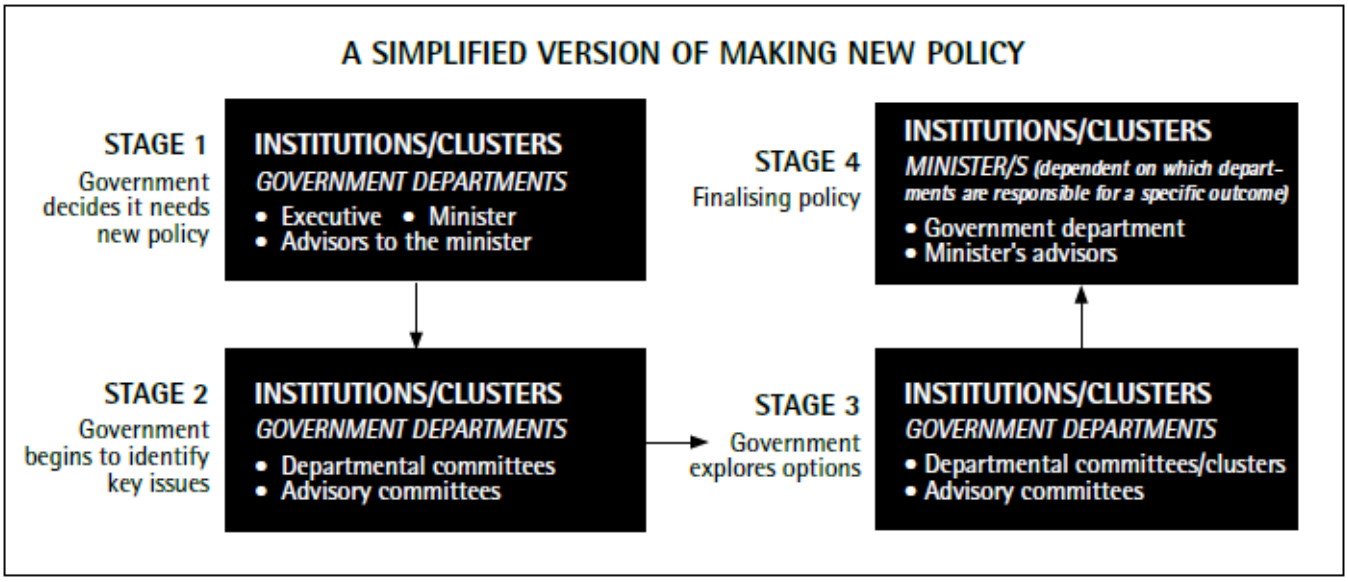
This is a basic format to show the process of making a new policy:

1. The government identifies the need and drafts a new policy.
2. Government identifies key issues. The appropriate department will identify key issues that are relevant to the problem. This is done through research and consultation with people in the field.
3. Government explores policy options. Once the department has explored the key issues, it will draw up a document outlining the key issues and give suggestions for solving the issues. This document is called a green paper or discussion document and is open to the public for comment (typically for a few months)
4. Government finalises the policy. The Department and Ministry look at all the issues and options and decide which issues are important and how they

intend to address these. They also take into account public comment on the green paper or discussion document. Cabinet will have to approve the government's final policy positions. The policy is then published as a white paper and adopted by parliament as the official policy of government. The white paper often forms the basis of laws that have to be passed to give effect to the policy.

NOTE

The ruling party in government will base their approach on the manifesto and policies of their party. Often, new policies are first discussed in party congresses, and the party's public representatives use these as a basis for the work they do in government. It is also important to try and influence political parties and to participate in their policy-making process whenever you have the opportunity. You can do this as a member of a party or as a participant in any public policy discussions held by the party. You can also lobby senior leaders in the party.



WHEN CAN YOU PARTICIPATE DURING THE POLICY-MAKING PROCESSES?

There are critical key moments in the policy and law-making process when it is best to lobby. These are linked to:

- The stage in the process of developing policy or law

- Knowing the institution and person involved who has the power to make changes

PARTICIPATING DURING THE POLICY-MAKING PROCESS		
POLICY STAGE	**INSTITUTION/ROLE-PLAYERS**	**OPPORTUNITY FOR LOBBYING**
Government decides it needs new policy	• Government departments/ clusters • Cabinet committees • Minister • Advisors to the minister	• Media pressure • Alert government to the need for new policy it is considering • Meet with ministers and advisors • Alert parliament to the need for new policy (via parliamentary committees)
Government begins to identify key issues	• Government departments/ clusters • Departmental task forces • Advisory committees	• Become part of advisory committees or task forces • Meet with relevant departments • Comment on discussion documents • Attend workshops
Government explores options	• Government departments/ clusters • Departmental task forces • Parliamentary committees	• Comment on draft policy • Meet with department • Attend parliamentary hearings and make submissions • Attend workshops • Media pressure
Finalising policy	• Minister • Government departments/ clusters (upper level officials) • Minister's advisors • Parliamentary committees	• Comment on revised draft policy • Meet with department or minister • Lobby parliament and attend committee meetings • Use media to stimulate public debate
Acknowledgement: Based on Voices in Action: The Contact Trust		

MAKING NEW LAWS

The job of drafting new laws is most often done by government departments. The government may decide it needs new laws to achieve its objectives or to carry out policies that have been drawn up. A draft bill is a draft law that has not been passed by parliament. 'Passed' means approved. An act is a law that has been passed by parliament.

This is a summary of the basic steps for making or passing a new law:

1. A draft bill is drawn up. A bill can be introduced in the National Assembly by a cabinet minister or deputy minister, a parliamentary committee, or a member of the National Assembly. If the bill comes from a department, the minister will first take it to Cabinet for discussion to make sure it does not clash with any other laws or policies. Once Cabinet approves it, it is tabled in the National Assembly. The draft bill can be made available for comment to the public. Once the public has commented, the department will make any changes that they think are necessary.
2. The minister tables the bill in parliament. The Bill is given a number, for example, *Bill 25 of 2011.*
3. Parliament looks at the contents of the Bill and sends it to a *parliamentary portfolio committee* for consideration.
4. The Parliamentary Committee debates the Bill. The Parliamentary Committee may ask the public for comment on the Bill. They will then usually hold hearings for anyone to attend where they debate the Bill. Once they have made any changes, they must send their report back to Parliament.
5. Parliament votes on the Bill. *At least half the members of the national assembly* must vote in favour of the Bill for it to be approved. If there is no majority, the Bill is rejected.
6. If the National Assembly has approved the Bill it gets sent to the *National Council of Provinces* (NCOP). The NCOP considers the Bill. It can approve, suggest changes or reject the Bill. If it approves the Bill, it refers it back to the *national assembly* to be passed.

   If the bill is about something that only the national assembly can make law on (a Section 75 bill): The NCOP can approve the Bill or suggest changes, but the National Assembly decides what the Bill finally says. Each member of the NCOP has one vote, and a simple majority of members is needed to approve the Bill. (A simple majority means half the votes plus at least one vote must be in favour of the Bill.) Examples of Section 75 Bills are defence and international relations bills.

   If the matter is one that provinces can make law on (a Section 76 bill): The NCOP can approve, suggest changes or reject the Bill. To approve the Bill, each province has one vote, and at least five of the nine provinces must vote in favour of it. *If the NCOP suggests changes or rejects the bill and the national assembly doesn't agree, the NCOP can refer the bill to a mediation committee to resolve any differences.* Examples of Section 76 Bills are Bills on environmental affairs, cultural issues, etc.

- The mediation committee consists of 9 members of the NCOP and 9 members of the national assembly.
- If the mediation committee resolves the differences, it refers the bill to the national assembly to be passed.
- If the national assembly and NCOP still can't agree, then the national assembly has to have a special vote to make the bill law. It will only become an act if it gets a two-thirds (66%) majority in the national assembly.

7. The NCOP may advertise public hearings on Bills where they ask for public comment. People can also send their written submissions to the NCOP.
8. The National Assembly passes the Bill.
9. The President signs the Bill and it gets published in the Government Gazette. When this has happened, the Bill becomes law and is called an Act.

MAKING NEW LAWS: NATIONAL SPHERE	
PROCESS STAGE	**INSTITUTION/ROLE PLAYERS**
1. Bill tabled in parliament	**PARLIAMENT** • Minister
2. Referred to parliamentary committee	**PARLIAMENTARY COMMITTEE** • Government department • The public
3. Committee debates bill	**PARLIAMENTARY COMMITTEE** • Department/ministry • The public
4. Debate and vote on bill	**MINISTER** • Government department • Minister's advisors
5. In the case of a section 76, bill referred to NCOP for debate *approves, suggests, changes, rejects*	**NCOP**
6. Bill goes back to national assembly *changes implemented, bill passed by parliament*	**PARLIAMENT**
7. Bill sent to president for signature	**PRESIDENT'S OFFICE**

WHEN CAN YOU PARTICIPATE DURING THE LAW-MAKING PROCESS?

There are critical key moments in the law-making process when it is best to lobby. These are linked to:

- The stage in the process of developing law
- Knowing the institution and person involved (who has the power to make changes)

PARTICIPATING DURING THE LAW-MAKING PROCESS		
LAW-MAKING STAGE	**INSTITUTION/ROLE PLAYERS**	**OPPORTUNITY FOR INPUT**
1. Bill tabled in parliament	• National assembly • Minister • Party whips	
2. Bill referred to parliamentary committee which holds public hearings	• Parliamentary committee • Department	• Written submissions • Oral representations • Informal lobbying • Media pressure
3. Committee debates bill and refers it back to parliament	• Parliamentary committee	• Written comment • Informal lobbying • Oral submissions • Media pressure • Lobbying related structures
4. Debate and vote on bill	• Parliament and NCOP	• Written comment • Public hearings (NCOP) • Media pressure
5. Bill sent to president's office for signature	• President's office	• Letter of objection • Media

EXAMPLE: SUMMARY OF THE POLICY AND LEGISLATIVE PROCESS LEADING UP TO THE PASSING OF AN ACT OF PARLIAMENT (THE WATER MANAGEMENT ACT)	
DATE	**WHAT HAPPENED**
2005	• Technical study team appointed to review water management policy
2006	• Green Paper on water management policy for South Africa published
2007 January	• Deadline for comments (on green paper)
2007 January to July	• Executive (cabinet) approves broad policy principles of draft White paper • Draft White Paper on Water Management Policy published
2007 August	• Deadline for written submissions (on White Paper) • Parliamentary committee briefed on draft White Paper
2007 August to October	• Parliamentary committee holds public hearings
2008 up to May	• Draft White Paper amended and adapted
2008 up to May	• Executive (cabinet) approves final draft of White Paper
2008 May	• Copy of draft bill sent to various government departments • Parliamentary committee (portfolio committee) briefed on draft bill
2008 July	• Draft Water Management Bill published • Deadline for comments on draft bill
2008 August	• Changes made to bill • Public hearings in parliament
2008 September	• Parliamentary committee debates bill and refers bill to parliament • National Assembly passes bill
2008 September to October	• Bill referred to National Council of Provinces • Passed by NCOP with amendments
2008 November	• Parliamentary committee agrees to amendments • Refers bill to National Assembly
2008 6th November	• National Assembly accepts changes • Refers bill to president's office
2008 27th November	• President signs the bill, and it is published in the Government Gazette
Acknowledgements: Adapted from Voices in Action: published by The Contact Trust	

DUTIES OF GOVERNMENT TO FACILITATE PUBLIC PARTICIPATION DURING THE LAW-MAKING PROCESS

The National Assembly, National Council of Provinces and provincial legislatures all have a duty to facilitate public participation in terms of the Constitution. Parliament can choose whatever method it believes will be best for public participation but it must make sure that members of the public and all interested parties are given a 'reasonable opportunity' to know about the issues and to have a proper say. A 'reasonable opportunity' means a meaningful opportunity that has the potential to influence a lawmaker's decision and Parliament must take account of the public's views. If there is insufficient public participation in a specific law, then it can be made invalid.

In the Constitutional Court case *Mogale and Others v the Speaker of the National Assembly and others* (2023), the question was whether the National Assembly, the National Council of Provinces and the Provincial legislatures fulfilled their constitutional duty to allow 'reasonable' public participation when they passed the *Traditional Khoi-San Leadership Act 3 of 2019* (TKLA). The Court found there was insufficient public participation, and the TKLA was declared unconstitutional and invalid.

There are three factors that the Constitutional Court said must be considered to decide whether public participation has been 'reasonable':

1. What does Parliament itself determine is reasonable
2. How important the legislation is and its impact on the public
3. Whether there are time constraints with passing a particular law

Structures of provincial government and public participation in these structures

You can use the same methods to participate in the provincial sphere of government as the national sphere. This is a summary of how you can participate in the law- and policy-making processes in the provincial government.

Structures of provincial government

THE EXECUTIVE BRANCH

The executive branch is responsible for the day-to-day running of the province. Some of the functions of the executive are to initiate laws and policy, carry out laws passed by parliament, carry out policies and coordinate the functions of the provincial government departments and administrators.

KEY ROLE-PLAYERS AND STRUCTURES IN THE PROVINCIAL EXECUTIVE

The key role-players in the executive that may play a role in formulating policy or drafting law will be:

- The premier, who is the head of the provincial government executive
- 10 members of the executive council (MEC), also called provincial ministers

THE LEGISLATIVE BRANCH

The legislative branch of government is responsible for making laws and developing policy. Every province has a Legislature made up of Members of the Provincial Legislature (MPLs). These are the functions of the legislature:

- to develop and pass laws
- to contribute to developing policy
- to act as a watchdog on the activities of government in the province (in the executive)

The legislature consists of the provincial legislature and various committees. These are the key structures that you can lobby in the provincial legislature:

LEGISLATURE COMMITTEES

The provincial legislature usually divides the MPLs (members of provincial legislatures) into small groups that focus on specific areas of governance. These smaller groups are called portfolio or standing committees. The main roles of the portfolio committees are to:

- Make sure that issues and new bills are properly debated and scrutinised

- Allow members of provincial parliament to become specialised in a particular field, such as finance or agriculture
- Provide a forum where the public can interact with provincial government on specific issues and new bills
- Oversee, discuss and assess the activities of government departments

There are two types of Committees; however, the names and institutional arrangements differ from province to province:

Standing committees are permanent. There are standing committees for each of the portfolios of the executive, for example, the education committee, public transport and roads and works committee. These are also called portfolio committees. There are also other standing committees which are not linked to portfolios but more to the running of the legislature, for example, the Special Committee on Public Accounts (SCOPA) which oversees all government spending.

Ad hoc committees are not permanent and only last for the time it takes them to finish a task.

Other important role-players in the provincial legislature include:

- The political party whips
- The parliamentary committee chairpersons
- The committee secretaries
- Political party caucuses and study groups (these are not open to the public, but you can lobby key members before meetings to raise issues)

Public participation in the process of making provincial laws and policies

MAKING NEW POLICY

The process of making policy follows the same format in the provincial legislature as in the national legislature. ***(See pg 115: Public participation in the process of making laws and policies at national level)***

MAKING NEW LAWS

The process of making laws follows the same basic format as in the national legislature. However, there are a few important differences. These are the basic steps for passing a law in the provincial legislature:

1. **A draft bill is drawn up**, either by an MEC an MPL or a standing committee. The bill is published in the Provincial Gazette and notices which bring the bill to the attention of the public are placed in various newspapers. The public has at least 14 days to comment on the bill. Once the public has made its comment, the department will make any changes that they think are necessary.
2. **The Speaker introduces the bill in the provincial legislature.** It will be sent to the appropriate legislature committee.
3. **The legislature committee debates the bill.** The legislature committee may ask the public for additional comments on the bill. They will then usually hold public hearings (for anyone to attend) where they debate the bill, call in experts to comment on the bill and make any changes. Once they have made any changes, they must send their report back to the legislature.
4. **The legislature debates the bill and votes on it.** If there is a majority of votes in favour of the bill, it is passed. If there is no majority, the bill is rejected.
5. **The bill becomes an Act.** If the legislature passes the bill it then goes to the Premier to sign. It then becomes an Act.
6. **The Act is published in the provincial Government Gazette.**

MAKING LAWS AT PROVINCIAL LEVEL	
PROCESS STAGE	**INSTITUTION/ROLE PLAYERS**
1. Bill tabled in provincial parliament	• Legislature • Minister
2. Referred to parliamentary committee	• Legislature committee • Government department • The public
3. Committee debates bill	• Legislature committee • Department/ministry • The public
4. Debate and vote on bill	• Legislature • MEC
5. Bill sent to Premier for signature	• Premier's office

HOW CAN YOU PARTICIPATE IN THE LAW AND POLICY-MAKING PROCESSES OF PROVINCIAL GOVERNMENT?

You or your organisation can participate in the policy- and law-making processes by:

- Attending provincial legislature committee meetings where policy and new laws are being discussed
- Making a written submission to a committee or to the legislature
- Attending public hearings during the early stage of writing a bill and/or
- Sending a petition and a letter or a document which is signed by many people. ***(See pg 123: Duties of government to facilitate public participation during the law-making process)***

Structures of local government and public participation in these structures

All the methods of public participation described under national and provincial structures can be used at the local level of government.

Structures of municipal councils

Each municipality has a council where decisions are made: an executive or mayoral committee that coordinates the work of the municipality, a municipal manager that manages the municipality, and municipal officials and staff who carry out the work of the municipality. The council also sets up smaller committees ***(See pg 152 Structures of a Municipality)***. The municipality is made up in the following way:

The council
Elected members (councillors) who represent the people have legislative powers to pass by-laws and approve policies for their area. The council also sets up smaller committees.

The mayor
Elected by the council to co-ordinate the work of the council; the mayor and/or executive committee act as the executive of the council. The mayor is assisted by a mayoral executive committee.

The executive or mayoral committee
Made up of councillors with specific portfolios which match the departments within the municipal administration; they oversee the work of the municipal manager and department heads.

The municipal manager
The chief executive officer is head of the administration of the municipality and legally accountable for the finances and work of the municipality.

Municipal council officials
People who work for the administration.

Ward committees
Mainly advisory committees which can make recommendations on any matter affecting the ward. A ward committee consists of the councillor and a maximum of 10 people from the ward who are elected by the community. The ward committee, therefore, plays a very important role as a link between the community and decision-makers. It provides important opportunities for public participation. **(*See pg 154: Ward committees*)**

Ways of participating in local government

The most important opportunities for public participation at the local level are through using ward councillors and ward committees. The ward councillor is the direct link between the local council and the public, operating mainly through the structure of the ward committee. It is the councillor's responsibility to make sure that people are consulted and kept informed about council decisions, development and budget plans and any council programmes that will affect them. The *Municipal Systems Act* requires that municipalities take steps to ensure the participation of communities in decision-making.

Section 16 of the Act considers the following as key areas requiring community participation:

ASSESSING AND APPROVING THE BUDGET

Approving the budget is one of the most important functions of the council.

The ward councillor should not approve the budget until there has been proper consultation with the ward committee and other stakeholders. So, ward committees play an important role in the process, and they should look carefully at all the parts of the budget that will affect the people in their area. Of special importance are new developments or projects in the ward and the tariffs (prices) set for services like water and refuse removal. All members of the community have the right to observe the special council meeting when the budget is debated and voted on.

Ward committees should also be given regular feedback on the 'cash flow' of the municipality. 'Cash flow' means the movement of money into (income) and out of (expenditure) the municipality's bank account. Ward committees have a right to ask questions about how well the 'cash flow' is being planned and monitored.

PLANNING AND DEVELOPING THE INTEGRATED DEVELOPMENT PLAN (IDP)

Ward committees should work closely with the councillor and other community organisations (community-based organisations and NGOs) to identify priority needs and make sure these needs are included in the budget proposals and Integrated Development Plans.

MONITORING COUNCIL ACTIVITIES ON A REGULAR BASIS

Ward committees should insist on regular reports and feedback on municipal projects and services, either at ward committee meetings or at public hearings.

PERFORMANCE MANAGEMENT

The municipality must have clear goals and specific targets of what has to be done to make sure the goals are achieved. Every department and staff member should be clear on what they have to do and how their performance will contribute to achieving overall goals and targets. Performance management means that the performance of individuals, departments and the municipality as a whole should be monitored to make sure the targets are met and that resources are being used efficiently. Council should prepare a report for the ward committee at least once a year that shows how it has performed in relation to its objectives and the budget. This usually happens at the end of the financial year (July of each year). The report and audited financial statements must be made available to the public.

DIRECT ADVICE AND SUPPORT

Ward councillors are the most direct form of access people have to government. Usually people will turn to a ward councillor for direct advice and support. Once a

problem has been referred to a ward councillor, the person should demand to know what the ward councillor is doing or has done to deal with the problem.

ASK FOR A COUNCILLOR CLINIC TO BE SET UP

Request the councillor to set up a regular clinic on specific days at a certain place in the community. This means the councillor must be available to see anyone from the community at these agreed times. Advertise these dates around the community.

LOBBYING

Communities can use their councillors to lobby committees, the Mayor and other spheres of government. ***(See pg 140: Problem 1: Lobbying local government) (See pg 104: Lobbying)***

ATTEND PUBLIC MEETINGS AND PUBLIC HEARINGS

Attend public meetings called by the councillor, ward committee or council. Identify which committees are making decisions about issues that concern you and attend public hearings of these committees. These meetings are open to the public.

USE THE MEDIA

Approach a local newspaper or community radio station and ask them to write or present a story on an issue that concerns the community, explaining what role the municipal council should play in dealing with the issue.

GET PUBLICITY AND GROW SUPPORT

Hold public demonstrations and mobilise public support (avoid violence and damage as you will lose public support with these actions). Build partnerships, alliances, and networks amongst local organisations and civic groups.

PLANNING AND IMPLEMENTATION OF MUNICIPAL SERVICE PARTNERSHIPS

Service delivery partnerships can be made between the municipality and the private sector, other spheres of government, or with CBOs and NGOs. Ward committees and the community can play an important role in the following ways:

- Help the municipality decide which services to develop and improve
- Develop proposals (with the help of CBOs and NGOs) for council to consider
- Have council appoint a committee of community representatives to monitor processes and to advise the municipality on priorities for service development

Communities or their representatives can evaluate future service providers and monitor the performance of those providing services.

Mechanisms, procedures and processes for community participation in local government

Section 17 of the *Municipal Systems Act* requires municipalities to put in place systems for communities to participate in the decision-making process. These include:

- The process of receiving, processing and consideration of petitions
- Procedures for notifying the public of issues being considered by the council and a process that allows for public comment
- Procedures for public meetings and hearings by councillors and municipal officials
- Regular sharing of information on the state of affairs of the municipality through consultation with community organisations and traditional leaders.

Municipalities must ensure that people who cannot read or write, people with disabilities, women and other disadvantaged groups are able to participate in these processes.

Each municipality should also have a system for processing and responding to complaints about service problems.

Inter-governmental relations and cooperative governance

Inter-governmental relations are the relationships between the three spheres of government. The Constitution states, 'the three spheres of government are distinctive, interdependent and interrelated'. According to this clause, local government is a sphere of government in its own right and is not a function or administrative implementing arm of national or provincial government. Although the three spheres of government are autonomous, they exist in a unitary South Africa and have to work together on decision-making and must coordinate budgets, policies and activities, particularly for those functions that cut across the spheres.

Co-operative governance

Co-operative governance means that the three spheres of government should work together (co-operate) to provide citizens with a comprehensive package of services. The Constitution states that the three spheres have to assist and support each other, share information and coordinate their efforts.

Implementation of policies and government programmes requires close cooperation between the spheres of government, especially at executive level. For example, local government is represented in the National Council of Provinces, the Financial and Fiscal Commission and the Budget Council where the Minister of Finance discusses the proposed budget with provincial and local government.

Since 2009, ministries have been created within the presidency to strengthen long-term planning and performance monitoring. Ministries have been set up by different presidencies to address special issues like the electricity crisis, gender equality and youth employment. The National Planning Commission develops long-term planning for the economic and social development of South Africa.

The *Money Bills Amendment Procedure and Related Matters Act*, passed in 2009, enables parliament to exercise its true oversight role – and empowers the legislature to influence the budget directly.

The different spheres of government depend on each other for support in project implementation, and regular communication is essential. For example, when a municipality proposes the development of a new township in its integrated development plan, health and education services have to be provided by provincial government.

Water services have to be provided by national government, and finances for housing development have to be transferred from national to provincial government, from where it goes to the housing developers approved by the municipality.

Inter-governmental relations

In 2005, the *Inter-governmental Relations Framework Act* was passed to ensure that the principles in Chapter 3 of the Constitution on co-operative government are implemented. The Act seeks to set up mechanisms to coordinate the work of all spheres of government in providing services, alleviating poverty and promoting development. The Act also establishes a line of communication that goes from municipalities to the provinces and directly to the Presidency.

NATIONAL INTER-GOVERNMENTAL STRUCTURES

The President's Coordinating Council (PCC) is the main coordinating body at national level. It consists of the president, the deputy president, key ministers, premiers and the South African Local Government Association (SALGA). The PCC meets regularly to oversee the implementation of national policies and legislation and to ensure that national, provincial and local development strategies are aligned with each other.

At national level, each department has an inter-governmental forum where ministers meet with provincial MECs and SALGA. These forums are called MinMECs and are also attended by heads of departments. The purpose of MinMECs is to consult, coordinate, implement and align programmes at national and provincial level.

PROVINCIAL INTER-GOVERNMENTAL STRUCTURES

The premier in each province is responsible for coordinating relationships between national, provincial and local government in the province. A Premier's Inter-governmental Forum (PIF) consists of the premier, the provincial MEC for local government, other MECs, metro and district mayors and other mayors where necessary. Provinces use different names for these forums. The PIF meets regularly and consults on broad development in the province, as well as on the implementation of national and provincial policy and legislation. It also seeks to coordinate the alignment of provincial and municipal development planning and strategic planning. The PIF reports through the premier to the PCC.

Further optional forums can be established by the premier. In the Western Cape, for example, there is a Metro Inter-governmental Forum (MIF) where the provincial cabinet meets with the Cape Town mayoral committee regularly. The reason for this is that around 70% of the provincial population lives in the metro, and most of the economic and urban development is taking place in that area. There is therefore a huge overlap between the metro's budget and responsibilities and those of the province.

Inter-governmental forums may also be established at district level, where they would consist of the district mayor and local council mayors. Most of the inter-governmental structures are supported by senior management in the public service and in local government. At times, they will meet separately to prepare for the inter-governmental meetings. The Act provides for technical support structures to be established. Every inter-governmental structure must adopt its own rules to

govern internal procedures. Further inter-provincial or inter-municipal forums can also be established where necessary.

JOINT IMPLEMENTATION AND DISPUTES

In many development projects, more than one sphere of government may be involved in implementation. Where necessary, the different organs of state may enter into an implementation protocol (called a memorandum of understanding, or service level agreement) that describes the role and responsibility of each organ of state; outlines priorities and desired outcomes; and provides for monitoring, evaluation, resource allocation and dispute settlement procedures.

Any organ of state may declare an inter-governmental dispute. They must ensure that every reasonable effort has been made to avoid or settle the dispute before declaring it. Different organs of state cannot institute judicial proceedings against each other unless an inter-governmental dispute has been declared, and all efforts have been made to resolve the dispute. Once a dispute has been declared, organs of state must designate a facilitator and resolve the dispute.

It is very important for the principles of cooperative government, as contained in the Constitution, to be respected and observed by all spheres of government. Different spheres of government shouldn't take each other to court. The *Inter-governmental Relations Act* has been set up to facilitate cooperation and avoid legal proceedings between different spheres of government.

Inter-governmental relations go beyond the Act, and the *Municipal Finance Management Act* also requires consultation in the budgeting and planning process. At provincial level, technical committees should meet regularly to facilitate contact between departments and municipalities and to make sure that there is an alignment of planning priority strategies and resources between provincial and municipal government.

It is not enough for discussion to take place at the Premier's Inter-governmental Forum (PIF) – regular contact is necessary to ensure that development is coordinated and fast-tracked and that obstacles are removed where they impede delivery. This requires ongoing communication and open lines between the different spheres of government.

Traditional leadership, government and public participation

Traditional leaders and traditional councils have an active and important role to play in local government development programmes and service delivery. The *Traditional Leadership and Governance Framework Act (No 41 of 2003)*, recognises tribal authorities as traditional councils with important functions linked to local government.

The Department of Cooperative Governance and Traditional Affairs provides support to the National House of Traditional Leaders; the Commission on the Disputes and Claims (that hears disputes on kingship and traditional leadership); and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Cultural Rights Commission). Provincial committees deal with all claims and disputes about categories of traditional leadership below the kingship.

The Traditional Khoi-San Leadership Act (No. 3 of 2019) (TKLA)

The was passed to address shortcomings in the *Traditional Leadership and Governance Framework Act (TLGFA)* which denied certain constitutional rights to people living under traditional leaders. The TKLA recognized Khoi and San leadership, but some people criticized it because it gave new and extended powers over land to traditional authorities.

The TKLA was challenged in Court by rural communities and land rights organisations in 2021. In the case of *Mogale and Others v the Speaker of the National Assembly and Others (2023)* the Constitutional Court found the TKLA was invalid because parliament and provincial legislatures had not held a meaningful public participation process before the law was passed. The Court said that public participation must provide a reasonable opportunity for the public to influence the decision-making process. It said that the TKLA's public participation process was wrong because there was insufficient notice of community hearings, a lack of pre-hearing education, and limited access to hearings. The Court suspended the TKLA, saying it was invalid for 24 months to give parliament time to facilitate a meaningful public participation process.

Recognising traditional communities

A community can be recognised as a traditional community if it follows a system of traditional leadership according to its own community's rules and it follows a system of indigenous and customary law.

Establishing and recognising traditional councils

Once the premier of the province has recognised a traditional community it can establish a traditional council. The traditional council must be representative of the community in the following ways:

- 33% of its members must be women
- 40% of its members must be democratically elected
- The remaining members can be selected by the chief in terms of custom

The traditional council will be able to operate within a defined area.

Functions of traditional councils

The functions of traditional councils are to:

- Facilitate involvement of the traditional community in the development of a local government's integrated development plan ***(See: Drawing up an Integrated Development Plan)***
- Support municipalities in identifying community needs
- Recommend interventions to government that will contribute to development and service delivery in the area controlled by the traditional council
- Participate in development programmes of municipalities and of the provincial and national spheres of government
- Promote indigenous knowledge systems for sustainable development
- Administer the affairs of the traditional community according to custom and tradition
- Assist, support and guide traditional leaders in the use of their powers and how they perform their functions
- Participate in the development of policy and legislation at local level
- Enter into service delivery agreements with municipalities regarding the provision of services to rural communities

- Promote the ideals of cooperative governance, integrated development planning, sustainable development and service delivery
- Warn the municipality about any danger that threatens the area or people living in a particular traditional council area
- Perform their duties and use their powers according to customary law in a way that is consistent with the Constitution.

Traditional councils have to be accountable to the provincial government by keeping proper financial records, by disclosing any gifts received and by following a prescribed code of conduct.

Partnerships between municipalities and traditional councils

Partnerships between municipalities and traditional councils are encouraged, and laws must be passed to strengthen these partnerships.

Withdrawal of recognition of traditional communities

Provincial laws must provide for the withdrawal of the recognition of a community as a traditional community as well as the withdrawal of the recognition of traditional councils.

A community can request that its recognition as a traditional community be withdrawn and it can request that it be divided into separate traditional communities or merged into single traditional communities. Before a community or council's recognition is withdrawn, there must be consultation with the provincial House of Traditional Leaders.

Leadership and removal of traditional leaders

A traditional leader can be removed from office on any of the following grounds:

- Conviction by a criminal court without an option of a fine on any criminal charge
- Physical or mental incapacity or age
- Where the finds that the traditional leader was wrongly appointed or recognised.

Houses of Traditional Leaders

Houses of traditional leaders are structured as follows: a national house of traditional leaders, provincial houses of traditional leaders and district houses of traditional leaders.

DISTRICT HOUSES OF TRADITIONAL LEADERS

A district house of traditional leaders must be established in a district municipal area or metropolitan municipality where there is more than one chieftainship. There should be between 5 and 10 members of the district house. The members are elected by an electorate consisting of all kings, queens or their representatives, chiefs and chieftainesses living in the district or metro municipality.

The functions of the district house are to advise the district or metro municipality on matters of:

- Indigenous and customary law, custom, traditional leadership and the traditional communities
- Development of planning frameworks that impact traditional communities
- Development of by-laws that impact traditional communities
- To participate in local programmes that have the development of rural communities as an object
- To participate in local initiatives that are aimed at monitoring, reviewing or evaluating government programmes in rural communities

Where a district house cannot be established, the functions of the district house must be performed by the different traditional councils within the district municipality or metropole.

Resolving disputes in indigenous and customary law

Where there is a dispute involving indigenous and customary law, members of the community and traditional leaders should try and resolve the dispute internally and according to custom.

If a dispute cannot be resolved internally, then it must be referred to the relevant provincial house of traditional leaders.

If a provincial house of traditional leaders cannot resolve the dispute, then the dispute must be referred to the premier of the province in consultation with the parties to the dispute and the provincial house of traditional leaders.

The Commission on Traditional Leadership Disputes and Claims

The Act establishes a *Commission on Traditional Leadership Disputes and Claims*. The powers and functions of the Commission are to investigate the following cases:

- Where there is doubt about a kingship, chieftainship or headmanship
- Contests over traditional leadership
- Claims by communities to be recognised as traditional communities
- Establishment or breakdown of tribes
- Disputes over traditional authority boundaries and the merger of tribes

Anyone can lodge a dispute with the Commission. They must say what the dispute or claim is about and give all relevant information. The Commission can decide not to consider the dispute or claim because they don't have enough information.

The Commission can also choose to do its own investigations.

Problems

1. Lobbying local government

The Municipal Council of Maluti-a-Phofung promised that it would provide running water to the whole town before the end of the year. It is now a year later, and there is still no running water in some parts of the town. In addition, the rubbish removal service only works sometimes and the rubbish is piling up and causing a health hazard. The residents of the town have been to see the council, but nothing seems to help. They say it is their right in terms of the Constitution to have running water and a proper rubbish removal service.

WHAT IS THE LAW?

The Constitution says people have the right to a clean and healthy environment

It is the job of the municipal council to provide facilities and services equally to the whole community. The integrated development plan should include a specific plan for the implementation of services, and communities have a right to know why the council is not implementing its plan.

It is government policy to provide a basic amount of free water (6,000 litres per month) to each poor household, wherever possible.

WHAT CAN YOU DO?

People can lobby local government and put pressure on them to force them to provide the facilities and services. It is important to check what the municipal council has committed itself to in the IDP and lobby it to implement the plan. There are different ways of doing this, and you can help people plan a campaign around the implementation of services. These are some of the ways to lobby for better services:

- Write to newspapers and build up a support base
- Build community support through speaking to people, for example, in their homes, at schools and religious gatherings
- Attend municipal council meetings that are open to the public and make your demands known
- Organise a peaceful demonstration throughout the town to tell people what the council needs to do
- Send around a petition for people to sign and take this to the council
- Organise public meetings and ask local councillors to attend

- Arrange for a delegation that is representative of the community to meet with councillors
- Make a complaint to the South African Human Rights Commission based on the discrimination against your community and your right to have access to a healthy and safe environment. ***(See pg 57: Making a complaint to the South African Human Rights Commission)***

Checklists

Lobbying

Find answers to these questions before you start lobbying or campaigning:

- What do you want to campaign for? Be clear about the result you want to achieve
- Who has the power to decide on that issue?
- Who else can influence the decision-maker, and how can they be mobilised?
- What will the opposition say?
- How will the decision-maker benefit from the result you want to achieve?
- What lobbying methods should you use?

Making a written or verbal submission

Plan what you are going to say when you make your submission or what you are going to write in your submission. Focus on your main objective and keep this in mind as you develop a simple message. Use this format when planning the content:

- Introduction: present the issue that has led to you making the submission
- Make two or three points about why it is important to act on the issue
- Present your demands
- State the facts that support your demands (including legal grounds for the demands)
- Give evidence that can prove the facts
- Make suggestions for resolving the issue
- If you use charts or graphs, keep them very simple and clear
- Keep your presentations short, simple and very clear
- Don't be aggressive, threatening or imply that the person knows nothing about the issue.

WRITTEN SUBMISSION

A written submission should follow the same basic format described in the previous point, but you should include the following:

- Explain who you are and what your organisation represents
- Describe what support you have from other organisations or individuals in respect of the issue
- Say how the person will benefit if they support your proposed action.

VERBAL SUBMISSION

When you make a verbal submission, you should aim to:

- Gain the respect of the committee members
- Provide a clear and convincing explanation of your position and the facts or reasons behind it
- Win the support of the committee on your issue.

You can use the written submission as the basis for a verbal presentation. However, there are additional factors that apply to a verbal submission. These are:

- Organise your presentation carefully and leave out non-essential information
- Before beginning your presentation, introduce yourself and your group
- Address the Chair of the committee and follow the rules made by the Chairperson
- Try and make your presentation interesting both in terms of style and content
- End with a strong statement of what you want to achieve
- Summarise your presentation in writing and leave it with the group.

Local government

Introduction

Chapter 7 of the Constitution creates a framework for local municipalities. They are a separate and autonomous sphere of government, but their work and plans are interdependent on those of provincial and national government.

The Constitution and municipalities

The municipal council is the legislative authority of a municipality. It has the right to pass by-laws, budgets and policies to govern the local government affairs of its community, subject to national and provincial legislation. The council also elects the executive that oversees implementation (mayor plus committee).

The Constitution also requires that the three spheres of government engage with each other in cooperative government. Section 154 specifically requires national and provincial governments to support and strengthen the capacity of municipalities. Provincial departments of cooperative or local government monitor and support the work of local government.

There are Constitutional limitations to describe the extent to which other spheres of government can intervene when municipalities are unable to exercise their mandate. Section 139 of the Constitution limits the powers that provincial governments have to intervene in the affairs of local government. It says the provincial government can only intervene or take over when it is clear that the local government has not done what it was supposed to do under the law.

DEVELOPMENTAL DUTIES OF MUNICIPALITIES

The key duties of a municipality are to:

- Structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community
- Promote the social and economic development of the community
- Participate in national and provincial development programmes

LAWS AND POLICIES THAT GOVERN LOCAL GOVERNMENT

Local government is governed by the:

- *Municipal Demarcation Act No. 27 of 1998* sets out how the boundaries of municipalities and wards must be decided

- *Municipal Structures Act No. 117 of 1998* sets out categories and types of municipalities and provides for elections and other matters
- *Municipal Systems Act No. 32 of 2000* sets out systems within which municipalities should operate and procedures that they should follow in their day-to-day operations
- *Municipal Property Rates Act 2003* regulates the power of a municipality to impose rates on property; exclude certain properties from rating in the national interest; make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through their rating policies.
- *Municipal Finance Management Act, 2004* provides for secure, sound and sustainable management of the financial affairs of municipalities.

Government response to problems

To address the problems with service delivery and finances in local government, the Department of Cooperative and Traditional Affairs in 2014 adopted the 'Back to Basics' programme that focuses on the following:

1. Putting people first – listening to and communicating with communities through regular ward and consultation meetings and other means
2. Adequate service provision – making sure basic services are delivered, and problems are addressed quickly
3. Good governance and administration – proper systems for planning, implementation and accountability
4. Proper financial management – to ensure that resources are well used and waste and corruption are rooted out
5. Capable administration and institutions – employ qualified people to manage the municipality and build the capacity of councillors

Cooperative governance and local government

'Inter-governmental relations' means the relationships between the three spheres of government. The Constitution states, "*the three spheres of government are distinctive, interdependent and inter-related*". Local government is a sphere of government in its own right, and is not an administrative implementing arm of national or provincial government. Although the three spheres of government are autonomous, they exist in a unitary South

Africa and they have to work together on decision-making and must co-ordinate budgets, policies and activities.

Although the three spheres of government are autonomous, they have to work together on decision-making and must coordinate budgets, policies and activities, particularly for those functions that cut across the spheres.

Co-operative governance means that the three spheres of government should work together (co-operate) to provide citizens with comprehensive service delivery. The Constitution states that the three spheres have to assist and support each other, share information and coordinate their efforts.

Implementation of policies and government programmes requires close cooperation between the spheres of government, especially at the executive level. Local government is represented in the National Council of the Provinces, although the representatives do not have voting rights. It is also represented in other important institutions like the Financial and Fiscal Commission. The Financial and Fiscal Commission (FFC) is an independent body set up under the Constitution to advise government on the portion of revenue that should go to provincial and local government to subsidise services for poor people (the equitable share).

The *Division of Revenue Act* (DORA) lays down how the total government income (revenue) should be divided and allocated between the spheres of government and within government. Local government is also represented on the Budget Council where the Minister of Finance discusses the proposed budget with provincial and local government.

The South African Local Government Association (SALGA) is the official representative of local government. SALGA has nine provincial offices. Local municipalities join SALGA at provincial level. Executive elections and decisions on policies and programmes happen at provincial or national general meetings. SALGA is also an employers' organisation for all municipal workers, and sits as the employer in the South African Local Government Bargaining Council. SALGA's main source of funding is membership fees payable by municipalities.

The different spheres of government depend on each other for support in project implementation, and regular communication is essential. For example, when a municipality proposes the development of a new housing development in its spatial development framework and integrated development plan, health and education services have to be provided by provincial government. Water services have to be provided by national government, and funding for housing development has to be transferred from national to provincial government, from where it goes to the housing developers approved by the municipality. Some spheres of government are responsible for initial funding, others for medium-term operational costs, while others have to provide capital costs.

Inter-governmental relations

In 2005, the *Inter-governmental Relations Framework Act* was passed to ensure that the principles in Chapter 3 of the Constitution on co-operative government are implemented. The Act seeks to set up mechanisms to coordinate the work of all spheres of government in providing services, alleviating poverty and promoting development. The Act also establishes a line of communication that goes from municipalities to the provinces and directly to the Presidency.

The legislative framework includes the *Intergovernmental Fiscal Relations Act (1997)*, the *Intergovernmental Relations Framework Act (2005)*, *Public Finance Management Act (1999)*, the *Municipal Finance Management Act (2003)*, and the *Division of Revenue Act*.

Different categories of local government

The structure of local government is dealt with in terms of the *Municipal Structures Act (No. 117 of 1998)* which sets out the categories and types of municipalities and provides for elections and other matters. Municipalities may be established in certain categories.

South Africa has 257 metropolitan, district and local municipalities. This is made up of 8 metropolitan, 44 district and 205 local municipalities.

Category A municipalities

Metropolitan municipalities are set up in large cities with more than 500 000 voters and are divided into smaller wards (and in some cases, sub-councils, within which wards are located). Metro municipalities are responsible for delivering all services the Constitution provides for. South Africa has eight metropolitan municipalities, namely:

- Buffalo City (East London)
- City of Cape Town
- Ekurhuleni Metropolitan Municipality (East Rand)
- City of eThekwini (Durban)
- City of Johannesburg
- Mangaung Municipality (Bloemfontein)
- Nelson Mandela Metropolitan Municipality (Gqeberha)
- City of Tshwane (Pretoria)

For more information about Category A municipalities, please visit www.sacities.net and http://www.gov.za/about-government/government-system/local-government

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Category B municipalities

These are areas that fall outside the eight metropolitan areas. Local municipalities also fall in a district and share powers and functions with District Municipalities.

There are 205 local (Category B) municipalities, and each municipality is divided into wards. People in each ward are represented by a ward councillor.

Category C (District) municipalities

District municipalities are made up of several local municipalities that fall in one district. Except for the 8 metros, the rest of the country is covered by the 44 district municipalities, which are divided into local municipalities and share responsibilities with them. Typically, there are between 4-6 local municipalities that fall under one district council.

The purpose of district municipalities (Category C) and local municipalities (Category B) sharing the responsibility for local government in their areas is to ensure that all communities, particularly disadvantaged communities, have equal access to resources and services. This arrangement is made to help local municipalities who do not have the capacity (finances, facilities, staff or knowledge) to provide services sustainably and adequately to their communities. It also helps to cut the costs of running a municipality by sharing resources with other councils.

For detailed maps and population statistics of each district in South Africa, please visit http://en.wikipedia.org/wiki/Districts_of_South_Africa.

Elections for local government

Elections work differently in the different categories of municipalities.

Category A: Metropolitan municipality

Half the councillors are elected according to proportional representation (PR), where voters vote for a party (not a specific person). The other half of the councillors are elected

as ward councillors by the residents in each ward. Two ballot papers are given to the voter – a ward ballot with individual names and a PR ballot with party names.

Category B: Local municipality

Half the councillors are elected according to proportional representation (PR), where voters vote for a party. The other half are elected as ward councillors by the residents in each ward. Voters get these two ballot papers plus a third one for the district council.

Category C: District municipality

Voting for the district municipality is done on a separate ballot paper at local and DMA levels. The district council is made up of two types of councillors:

- 40% of councillors are elected to the district council by all voters in the area according to proportional representation, where voters vote for the party (40% of the district councillors)
- 60% of councillors are drawn from elected councillors of local municipalities in the district who are sent by their councils to represent them on the district council.

Each council gets a portion of the councillors determined by the number of voters in their municipality.

The following table summarises the types of councils, the areas they cover, how voters living within the council areas can vote, the number of councillors each may have, and how the council is made up of councillors.

TYPE OF COUNCIL	AREAS	TYPE OF ELECTION	NUMBER OF COUNCILLORS	WHERE THE COUNCILLORS COME FROM
A: METRO COUNCIL	8 largest cities in South Africa	2 Ballots 1 Ward vote 1 PR vote for metro council	Not more than 270	50% from ward votes 50% from PR votes
B: LOCAL COUNCIL	All town plus surrounding rural areas	3 Ballots 1 Ward vote 1 PR vote for local council 1 PR vote for district council	3-90	50% from ward votes 50% from PR votes
C: DISTRICT COUNCIL	Area with a number of local municipalities	PR Ballot Voting is done at local council voting stations	3-90	40% from local council PR vote for district council 60% from local council representatives

PR = Proportional Representation

PR means proportional representation, where voters vote for a political party, not an individual candidate within a party. The ballot paper just shows the political parties. Then, the party gets the same share of the number of councillors as the share of total PR votes it got. The party decides which members fill those councillor places. The party can remove a PR councillor at any time and replace her or him with someone else.

With a ward vote, the ballot paper shows the names of candidates and the party they represent (some candidates may be independents). When a ward councillor resigns, dies, or is disqualified, a by-election is held to elect a new councillor in their place. A ward councillor who leaves the party they represented in the election must resign.

The structures of a municipality

Each municipality has a council where decisions are made, and municipal officials and staff carry out the work of the municipality.

Composition of a municipality

ELECTED COUNCILLORS

Elected members have legislative powers to pass by-laws and approve policies for their area. By-laws must not conflict with other national and provincial legislation. They have to pass a budget for the municipality each year, and they have to decide on development plans and service delivery for their municipal areas. This development plan is commonly known as the IDP (integrated development plan). Councillors meet in committees to develop proposals for council. ***(See pg 154: Role of a ward councillor on the ward committee)***

THE MAYOR

The functions of the mayor and councillors are set by the *Municipal Structures Act*. The mayor is elected by the municipal council to coordinate the work of the municipality. The mayor is the political head of the municipal executive and is assisted by the executive committee or the mayoral committee.

THE EXECUTIVE OR MAYORAL COMMITTEE

There are two systems for the appointment of an executive:

- The executive mayor is elected by the council, and they appoint a mayoral committee
- The mayor works with an executive committee (Exco) elected by the council

So, 'the executive' refers to the executive mayor and the mayoral committee OR the mayor plus the executive.

The executive or mayoral committee is made up of councillors with specific portfolios that match the departments within the municipal administration, for example, health. The executive and the mayor oversee the work of the municipal manager and department heads. The executive proposes policy and presents budget proposals and implementation plans to the whole council. The executive is accountable to the council and has to get approval from the council.

Once policies, budgets and implementation plans are approved by council, the executive is responsible for ensuring that the municipal administration implements them.

Councillors play a monitoring and oversight role in this process.

THE MUNICIPAL MANAGER AND MUNICIPAL OFFICIALS

The municipal manager is the chief executive officer and is the head of the administration of the council. They are responsible for the overall functioning of the administration, for managing the finances and for hiring and disciplining staff. Municipal officials work for the administration and report to the municipal manager.

WARD COMMITTEES

A ward committee can be set up for each ward councillor to assist and advise the councillor and improve public participation. Ward committees can be set up in category A and B municipalities where the ward committee model is being used. Ward committees are mainly advisory committees that can make recommendations on any matter affecting the ward. The municipal council makes the rules that guide the ward committees. The rules say how the members of the ward committee will be appointed, how often ward committee meetings will take place and the circumstances under which a member of a ward committee can be told to leave the committee. The purpose of a ward committee is to:

- Get better participation from the community to inform council decisions
- Make sure that there is more effective communication between the council and the community
- Assist the ward councillor with consultation and report back to the community
- Advise the ward councillor on issues and development in the community

STRUCTURE OF WARD COMMITTEES

A ward committee consists of the councillor who represents the ward as elected in the local government elections, and a maximum of 10 people from the ward who are elected by the community they serve. Women should be equally represented on ward committees.

The councillor is the chairperson of the ward committee. Members of the ward committee must participate as volunteers and are not paid for this work.

ROLE OF A WARD COUNCILLOR ON THE WARD COMMITTEE

A ward councillor is directly elected to represent and serve the people in a specific ward. There are usually between 3 000 and 20 000 voters in a ward. The ward councillor should make sure that the interests of the people in the ward are represented as properly as possible. The ward councillor should be in touch with the issues in the area, understand the key problems and monitor development and service delivery. In committees, caucuses and

council meetings, the ward councillor should act as a representative for the people in the ward. The ward councillor chairs the ward committee.

The ward councillor is the direct link between the council and the voters. They make sure that voters are consulted and kept informed about council decisions, development and budget plans that affect them.

People can also bring their problems to the ward councillor and they should properly deal with these, for example, by taking up matters with council officials.

ROLE OF THE WARD COMMITTEE

The main role of the ward committee is to make sure that voters are involved in and informed about council decisions that affect their lives. The ward committees should be set up in a way that they can reach most sectors and areas in the ward.

The ward committee's main tasks are to communicate and consult with the community in respect of development and service plans. It has no formal powers, however to force the council to do anything. The council should provide support, for example, providing publicity for meetings, giving financial and administrative support to enable ward committees to do their work. This is a summary of their tasks:

- Prepare, implement and review the integrated development plan
- Establish, implement and review municipality performance management systems
- Monitor and review municipality performance
- Prepare municipality budgets
- Participate in decisions about the provision of municipal services
- Communicate and disseminate information on governance matters

MAIN TASKS OF WARD COUNCILLORS AND WARD COMMITTEES

Ward councillors and committees must know their communities and the people they represent. They should know:

- Who the people are in the ward (spread of age groups, gender, employment status)
- What problems they experience, and their needs
- What their attitudes and opinions are towards council plans and proposals
- The environment of the ward (types of housing, services provided or not provided, for example, water, sanitation and electricity, schools,

hospitals, clinics, shops, markets, factories, places of worship, community halls, access to transport)
- What is happening in the community (what organisations or bodies exist in the community: political parties, cultural groups, civic forums, business, youth organisations, women's organisations, NGOs, traditional leaders, gangs, crime, sport, school governing bodies, etc.)

Ward councillors and committee members can find out more about their communities through general community meetings and direct consultation (going door-to-door and conducting a survey).

They should also keep up to date with developments in the council in order to pass this information on to people in their ward.

The *Local Government Laws Amendment Act of 2008*, an amendment of *Section 73 of Act No. 117 of 1998 (Municipal Structures Act)*, ensures that 'out-of-pocket' expenses (of ward committee members) must be paid from the budget of the municipality in question. Metro or local councils must develop a policy and determine criteria for calculating the 'out of pocket' expenses and can allocate funds and resources to enable ward committees to perform their functions, exercise their powers and undertake development in their wards within the framework of the law.

The difference between councillors (elected representatives) and administration officials (employees)

The distinction between the roles of elected representatives (councillors) and municipal employees is very important. Councillors are elected public representatives to serve for five years. Councillors are elected by the people onto a local council and only keep their positions if they are re-elected.

Officials or employees are appointed by municipal management to specific jobs within the municipal administration and are like any other employee in a job. Senior officials, such as the municipal manager, chief operating officers, director of finance, director of housing etc, should have employment contracts subject to annual performance. Their performance agreements must be made public on the websites. Together they make up the management of a municipality.

Councillors give political direction and leadership in the municipality, depending on the balance of power between the political parties elected to the council.

Councillors and officials determine the policies and direction of the municipality.

Officials should have the knowledge and skills in the technical and specialised aspects of municipal affairs. Councillors who don't have this knowledge have to rely on the reports of officials to help them make decisions. Councillors have to weigh up recommendations from officials with community needs and interests.

Once the council has reached a decision then officials are expected to carry these out in the most efficient and cost-effective way.

Links between the council and administration/employees

The main formal contact persons between councillors and the municipal administration are the executive mayor and the municipal manager. There should also be an informal relationship between each mayoral or executive committee member and the matching head of department within the municipal administration, for example, between the councillor responsible for health and the head of the health department.

There should be clear lines of communication, accountability, and separation of roles. A councillor should not interfere in the management or administration of a department, for example, by giving direct instructions to municipal employees or interfering with the implementation of a council decision. Officials may not try to unduly influence the council or provide it with misleading information.

CODE OF CONDUCT FOR MUNICIPAL COUNCILLORS

The Code of Conduct for Councillors is outlined in *Schedule 1 of the Municipal Systems Act of 2000*, and an additional Code was inserted in 2002. The code of conduct refers to *general conduct*, such as performing their functions of office in good faith, honestly and in a transparent matter, at all times acting in the best interest of the municipality, without compromising the credibility and integrity of the municipality.

Councillors *must attend each meeting*. Leave of absence is granted within the rules and orders of the council. Councillors may be sanctioned for non-attendance. Councillors should also disclose direct or indirect public or private business interest.

Personal gain: A councillor may not use their position or privilege as a councillor, or use confidential information obtained as a councillor, for their benefit or gain, or to incorrectly benefit another person. They also cannot be a party to, or be a beneficiary under a contract for the provision of goods or services to the municipality, or for the performance of any work other than as a councillor for the

municipality. They cannot have a financial interest in any business of the municipality, or acquire a fee by appearing on behalf of any other person before the council or a government committee.

A councillor should, within 60 days of their appointment or election, *declare in writing their financial interests*, including shares and securities in any company, membership of a close corporation, interest in any trust, directorships, partnerships, pension, interest in property, subsidies, grants and sponsorship by any organisation, gifts above a prescribed amount must be declared. Full-time councillors may not undertake any other paid work.

A councillor *may not request, solicit or accept any gift for voting/not voting on any matter*; disclose privileged or confidential information; disclose any privileged or confidential information of the council or committee to any unauthorised person.

Other than provided by law, *may not interfere in the management or administration of any department* of the council unless mandated by council, give or purport to give any instruction to any employee of the council except when authorised to do so, encourage or participate in conduct that would cause or contribute to maladministration within the council.

A councillor *may not use, take, acquire or benefit from any property or asset owned, controlled or managed by the municipality* to which that councillor has no right.

A councillor *may not be in arrears to the Municipality for rates and service charges for a period longer than 3 months.*

Councillors are barred from doing business with the state.

REPORTING CORRUPTION IN MUNICIPALITIES

Corruption is the abuse of a position in government and/or resources for personal gain. Corruption makes government weak, reduces transparency and accountability and removes trust in government and private institutions. For example, when public funds that could have been spent to meet essential basic services such as water and sanitation, education and health care or developmental needs such as poverty alleviation are either misused, misappropriated, or stolen. Corruption affects everyone negatively, but mostly the poor and vulnerable.

All government bodies are required to give employees a copy of guidelines which explain procedures for receiving and dealing with information about corrupt behaviour.

Municipalities should have a whistleblowing policy or established channels for reporting corruption. Check the municipality's official website or contact their

office. There might be dedicated phone lines, email addresses, or web portals for people wanting to report corruption.

The *Protected Disclosures Act (No. 26 of 2000) (Whistleblowers Act) Regulations* provide that a whistleblower can make a protected disclosure to:

- The Public Protector which investigates complaints from the public against government bodies or officials
- The South African Human Rights Commission
- The Commission for Gender Equality
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- The Public Service Commission
- The Auditor General

A protected disclosure can be made to a Chairperson of a Municipal Council, Minister or Member of the Executive Council (MEC) of a province.

These are other options for reporting corruption:

Contact the authorities:

- *South African Local Government Association* (SALGA): As an association representing the interests of municipalities, SALGA can be approached for advice or to report corruption.
- *South African Police Service* (SAPS): If you believe a crime has been committed, you can report it to your nearest police station. You can also report any crime anonymously to the SAPS toll-free hotline, Crime Stop: 0860010111

Hotlines and platforms:

- *National Anti-Corruption Hotline* (NACH): Managed by the Public Service Commission. You can report corruption to:
    - The toll-free number: 0800 701 701, or
    - Email them at: publicservicecorruptionhotline.org.za; integrity@publicservicecorruptionhotline.org.za; or,
    - SMS: 39772
- *Corruption Watch:* This is an NGO that gathers and reports on corruption complaints from the public. You can use their online platform to submit a report on corruption. Go to www.corruptionwatch.org.za and click on 'Report'.

PROTECTING WHISTLEBLOWERS

A whistleblower is a person who discloses information about wrongdoing in the workplace and reasonably believes that there is evidence of gross mismanagement or activity that is illegal, criminal, unethical, corrupt, or it violates the law.

South Africa has laws to protect whistleblowers under the *Labour Relations Act*, the *Company's Act*, the *Protection Against Harassment Act (No. 17 of 2008)* and the *Protected Disclosures Act (PDA) (No. 26 of 2000) (Whistleblowers Act)*.

The *Whistleblowers Act* is the main law used to protect whistleblowers. It protects people who blow the whistle on corrupt activities at work. The Act says that every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace. Employers have a responsibility to make sure that an employee who discloses information is protected from any negative consequences to their work, such as:

- Disciplinary action
- Dismissal, suspension, demotion, harassment, or intimidation
- Transfer against an employee's will
- Refusal of transfer or promotion
- Changing a term or condition of employment or retirement which impacts negatively on the employee

The PDA provides that an employee may not suffer any negative consequences from their employer if they report conduct so long as it is made:

- In good faith, which means the whistleblower believes it is true
- According to a correct procedure
- Not for personal gain
- Without committing a criminal offence
- To the right authority

Contact a lawyer or Legal Aid if you think you need legal advice or protection as a whistleblower.

Summary of key principles

The mayor and executive or mayoral committee are responsible for making policy and monitoring outcomes, while the municipal manager is responsible for managing the administration to implement policy and achieve the specified outcomes.

- Councillors approve policy or amend budgets and priorities proposed by the executive or committees.
- Councillors pass by-laws that reflect their policies and objectives.
- The executive or mayoral committee sets the vision, mission, outcomes and outputs required of the administration.
- The municipal manager must carry out the instructions given by the executive on behalf of the council.
- The municipal manager and administration must give the executive regular reports on its activities.
- The executive checks that the municipal manager is carrying out their duties under the employment contract.
- The council monitors the performance of the mayor and executive.
- A councillor cannot give an official direct instruction to do something - this goes against the lines of accountability.
- Officials may not try to unduly influence the council or provide it with misleading information.
- To avoid corruption, councillors and officials may not be in a business venture together.

The *Municipal Structures Act* sets out codes of conduct for councillors (these codes apply equally to traditional leaders).

How decisions are made in council

Most councils follow the same pattern of decision-making as follows:

- Agendas are prepared before meetings, and any committee reports, petitions, or motions have to appear on an agenda before they can be discussed
- Some reports appear on pink or green paper, and that is classified as confidential
- When an issue comes up for discussion at a council meeting, it is often referred to a committee or to the executive for further discussion, and a deadline is given for when a report should be made
- If the matter is referred to a committee, the committee will report to the executive committee. The executive will consider the issue and either support the recommendations or put forward opposing recommendations to the council meeting
- The council then votes on the matter

RAISING ISSUES WITH COUNCIL

There are many different ways that councillors (and the public) can raise issues with the council. These are:

PETITIONS

Councillors or individuals are allowed to send petitions to the municipal manager. The purpose of the petition is to inform the council and the administration that a large number of people want something to be done, for example, if a law is not being applied properly.

Petitions are handed to the council secretary at the council meeting. The petition is usually referred to the management committee, which will then report to council. The officials send the petition around to the relevant departments who will make recommendations to the relevant committees. These committees then make recommendations to the executive. The executive discusses the petition and then makes recommendations to the council.

The councillor or group that has sent the petition must follow its progress by keeping in contact with the relevant departments.

QUESTIONS TO COUNCIL

Questions can be used to monitor progress and implementation and get reliable information about council policies and programmes. Questions can be sent in writing or asked during a meeting. Written questions must be submitted 10 days before the council meeting so that the officials have time to prepare the answers. Answers will often be given at the meetings themselves. The executive chairperson can often answer a question verbally or provide a reply in writing. Any councillor can ask a question about executive recommendations or decisions and any executive member can make immediate verbal replies.

REQUESTS

Collective and individual requests are the easiest way to get information or to bring problems to the attention of officials. When councillors table requests on behalf of their constituency, this should be done in a manner that respects rules and protocol. If by-laws exist to address a request, then a positive response may be done quickly.

For example, if someone has a blocked water drain, you can go to the relevant official and make a request to get it fixed. But if you want something new in your ward and there is no policy on this, then a request will not work.

The role of municipal councils

The roles played by municipal councils are to:

- Pass by-laws - local laws and regulations about any of the functions they are responsible for. By-laws may not go against any national laws and are subject to the Constitution.
- Approve budgets and development plans - every year a municipal budget must be passed that sets down how money will be raised and spent. The council must also approve the integrated development plan.
- Impose rates and other taxes, for example, property tax
- Charge service fees - for using municipal services like water, electricity, libraries, and so on
- Impose fines - for people who break municipal by-laws, for example, traffic fines, littering
- Borrow money - the council can take a loan for a development or other project and use the municipal assets as surety
- Draw up, approve or amend integrated development plans (IDPs)

In playing their role, municipal councils have a duty to:

- Use their resources in the best interests of the communities
- Be democratic and accountable in the way they govern
- Encourage communities to be involved in the affairs of local government
- Provide services to the community
- Make sure the environment is safe and healthy

RESPONSIBILITIES OF MUNICIPALITIES PART B: SCHEDULE 4 & PART B: SCHEDULE 5 OF THE CONSTITUTION

Municipal councils have executive and legislative powers for these functions.

In other words, they have the right to make laws and decisions about the affairs of residents and communities in their areas and to claim service fees from residents regarding:

- Electricity delivery
- Water for household use
- Sewage and sanitation
- Storm water systems
- Refuse removal
- Fire fighting services
- Municipal health services
- Decisions around land use
- Local roads
- Local public transport
- Street trading
- Abattoirs and fresh food markets
- Parks and recreational areas
- Other community facilities
- Local tourism

The role of district councils

District Municipalities must see to the development of their areas as a whole. They must build the capacity of local municipalities in their areas so that the local councils can carry out their functions. District Councils must also ensure those resources and services are distributed fairly amongst the local municipalities.

These are some of the functions and powers of District Councils:

- To plan for the development of the district municipality as a whole
- Bulk supply of water for the municipalities in the district
- Bulk supply of electricity for the municipalities in the district
- Bulk sewage purification works and main sewage disposal
- Waste disposal sites for the whole district council area
- Municipal roads, if support is needed, and gravel roads for the whole district council area
- Regulating passenger transport services
- Municipal health services for the whole area
- Fire-fighting services for the whole area
- Control of fresh produce markets
- Control of cemeteries
- Promoting local tourism for the whole area
- Municipal public works

National or provincial government can also delegate other functions to municipalities, though these must be within the limits of legislative provisions to do so.

Where local municipalities lack capacity, the district should provide the service directly to the people at local level – for example, fire trucks and road scrapers are often based in district municipalities and serve all the locals.

The developmental role of local government

Local governments must play a developmental role in their communities. This means working with communities (leaders and organisations) to find sustainable ways to meet the social, economic and material needs of people and to improve the quality of their lives. In particular, local governments should target people who are most often marginalised or excluded, such as women, disabled people and very poor people.

The four main aims of developmental local government

1. **TO DEVELOP COMMUNITIES AND PROVIDE FOR ECONOMIC GROWTH IN THE AREA**

   Municipalities must be serious about their responsibility to provide services to meet the basic needs of the poor in the most cost-effective and affordable way. They should do this in the following ways:

   - Consult communities about services, affordability of service fees and service levels
   - Provide effective relief for the poor, for example, a specific allocation of free water and electricity to people who don't have access to these services or who are unable to pay for them, and an indigent policy for people who are too poor to pay for additional services they need.
   - Set up partnerships with the community, local businesses and organisations to develop and improve the conditions people live under
   - Work in partnership with local businesses to improve economic development, job creation, and investment in the area.

2. **CO-ORDINATE THE DIFFERENT SECTORS INVOLVED IN DEVELOPMENT OF THE AREA**

   There are many different sectors involved in the development of an area, for example, national and provincial departments are all involved in some way in establishing and maintaining health clinics, schools, etc. There are also parastatals (partly government, partly private) like Eskom and Transnet, trade unions, businesses and non-government organisations that play a role in developing an area. The municipality must take responsibility for co-ordinating all their activities for the benefit of the whole community.

3. **ENCOURAGE PARTICIPATION IN DECISION-MAKING PROCESSES**

   Local councillors should make sure that the broader community is involved in the decision-making processes. They can do this through the ward committees and community consultation.

4. **LEARN ABOUT NEW WAYS TO ENCOURAGE COMMUNITY DEVELOPMENT AND LEAD THE COMMUNITY**

   People around the world are always thinking of new and better ways to build communities. For example, there are new ideas on how to create jobs, protect the environment, save water, do away with poverty, and so on. Local government leaders need to know about these changes and build them into their policies.

Is your local government playing a developmental role?

Ask yourself these questions to see whether your government is playing a developmental role. Do they:

- Provide services to everyone, for example, local roads, stormwater drainage, refuse collection, electricity, water?
- Try and integrate living areas – for example, the poor often live far away from the business and industrial areas?
- Introduce schemes to promote job creation?
- Provide adequate services to encourage people to live and work there?

Drawing up an Integrated Development Plan (IDP)

Integrated development planning is an approach to planning that involves the whole municipality and its citizens in finding the best solutions to achieve effective long-term development. An IDP is a broad plan for an area that gives an overall framework for development. It looks at existing conditions and facilities, at the problems and needs and finally at the resources available for development.

The six main reasons why a municipality should have an IDP are to:

- Make good use of scarce resources
- Help speed up delivery of services to poor areas
- Attract additional funds (government departments and private investors are more willing to invest their money where municipalities have an IDP)
- Strengthen democracy
- Overcome the inequalities and discrimination of the apartheid system
- Promote coordination between local, provincial and national government

All municipalities have to draw up an IDP in consultation with local forums and stakeholders. In other words, the public must participate fully in the process. The final IDP document has to be approved by the council. The plan must show:

- The basic needs of disadvantaged sections of the community
- The long-term vision for meeting those needs
- The need for these sections of the community to advance socially and economically
- How the plan will be financed and whether it is financially sustainable, that there will be money in the future to keep the plan going
- The capacity of the municipal council to carry out the plan and what resources are available to help carry out the plan.

The municipality is responsible for coordinating the IDP and must draw in other stakeholders in the area who can help and/or benefit from development in the area. Decision-making is devolved from the executive mayor or Exco, who pass on responsibility to the municipal manager and municipal officials. All municipal planning must take place using the IDP, related policies, by-laws and plans as a guide. The annual council budget should be based on the IDP.

LOCAL ECONOMIC DEVELOPMENT (LED)

LED is an approach towards economic development that allows and encourages local people to work together to achieve sustainable economic growth and development and, in this way, bring economic benefits and improved quality of life to all residents in a municipal area.

Municipalities decide on LED strategies, and the process of arriving at an LED strategy must be part of the integrated development planning (IDP) process. Local economic development must aim to create jobs by making the local economy grow. This means that more businesses and factories should be started in the municipality.

As part of the IDP, people in a municipality must come together to reach an agreement and make decisions to make the economy grow and create income opportunities for more people, especially the poor.

The LED strategies should be based on the overall vision outlined in the IDP and should take into account the result of the analysis phase. It should also look at things like integrating our residential and work areas, building development corridors between areas and supporting the economy with good public transport.

Key principles underlying Local Economic Development include:

- Making job creation and poverty alleviation a priority in any LED strategy
- Targeting previously disadvantaged people, marginalized communities and geographical regions, black economic empowerment enterprises and supporting SMMEs to allow them to participate fully in local economies
- Promoting local ownership, community involvement, local leadership and joint decision-making
- Involving local, national and international partnerships between communities, businesses and government to solve problems, create joint business ventures and build local areas
- Using local resources and skills
- Integrating diverse economic initiatives in a comprehensive approach to local development
- Applying flexible approaches to respond to changing conditions

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Municipal service delivery

Municipalities have the responsibility to make sure that all citizens are provided with services to satisfy their basic needs. The most important services the municipality must provide are:

- Water supply
- Sewage collection and disposal
- Refuse removal
- Electricity and gas supply
- Municipal health services (mostly environmental health)
- Municipal roads and stormwater drainage

- Street lighting
- Municipal parks and recreation

Municipalities provide services to people by using their own resources – finances, equipment and employees. People must pay a certain rate to the municipality for providing these services.

FREE BASIC MUNICIPAL SERVICES

The government provides free basic levels of water, electricity and sanitation for the poor. This is only a small amount each month, and those who use more than the free allocated amount have to pay for it.

Free basic water
The free basic water amount allocated to poor households is 6 000 litres per household per month. This might vary from municipality to municipality so households should contact their municipality directly to find out exactly what the free basic water service is that they provide.

Free basic electricity (FBE)
The amount of free electricity is 50kWh per household per month. This is approximately the amount of energy needed for basic lighting, running a small black and white TV and radio, basic ironing, and basic water boiling through an electric kettle. Households that use above this amount will have to pay for it.

FBE is intended for indigent or low-income households. In many municipalities FBE is automatically provided to households using a pre-paid electricity meter, but some municipalities might require households to apply and prove their low-income status.

Users who have pre-paid electricity meters will receive their FBE allocation at the beginning of each month. Once the free units are used up, the household will need to buy more electricity at the normal rate. The free allocation doesn't roll over to the next month. This means if a person doesn't use all of their FBE in a given month, they lose any unused portion and will have to start again with the new month's allocation.

Users with traditional meters (where they pay at the end of the month) will usually have to go through a means test to qualify for the FBE. Their FBE will normally be deducted from the monthly bill (if they qualify). These users will not easily be able to see when they have used up their FBE units. They will be charged for additional use at the end of each month.

How to claim Free Basic Electricity (FBE)
If you qualify for FBE your municipality will include you on the list of FBE

beneficiaries (qualifying people) and then submit the list to Eskom so that you can claim your FBE token.

Once you are registered you are entitled to a monthly amount of free electricity. This electricity is usually provided in the form of a prepaid FBE token (a number code that is punched into a prepaid meter). You can access the FBE token number through your mobile device. If you are a new beneficiary, you can claim your free electricity as follows:

- Dial *130*269#
- Select the FBE prompt
- Select 'NEW'
- Enter the electricity meter number
- Confirm that the number is correct
- Click Dismiss
- An SMS will be sent to you

If your household is already registered for FBE, you can access the FBE token number through your mobile device by dialling *269*120# or *130*869#

The FBE tokens are effective from the 1st of the month and can be collected anytime during the specific month. One only FBE token will be accepted by the meter during a specific month and it will expire at the end of the month. In other words, the tokens cannot be carried over from month to month. For traditional credit meters, the total units used by a household in a month will be reduced by the amount of free basic units.

Free basic sewage and sanitation

Sewage and sanitation, as well as solid waste management, are subsidised up to R50 per month or 100% subsidy for indigent households.

Who qualifies for free basic municipal services?

Only indigent households qualify for free basic services. To qualify for free basic services, a household must be classified as an indigent household by their local municipality. Free basic services of the first 50kw or 6000 litres are usually automatically given to all households that are on prepaid meters. For households using traditional billing meters they will need to do a means test to qualify. Their FBE will normally be deducted from the monthly bill (if they qualify).

The means test will decide whether households meet the criteria set by the municipality to qualify for indigent status. Municipalities determine their own categories of subsidies. In some municipalities, households qualify for 100% subsidies, while others qualify for less than 100% depending on the criteria set.

Once a household qualifies for free basic services, they will be included on the list of FBE beneficiaries.

MUNICIPAL SERVICE PARTNERSHIPS

Municipalities can 'outsource' to other bodies, businesses or people to provide these services. This means it can choose to hire someone else, an NGO, CBO or private company to deliver the service but the municipality is still responsible for choosing the service provider and for making sure that they deliver the service properly.

When a municipality 'outsources' to someone else, this is called a municipal service partnership (MSP). This is not the same as privatisation but must be done carefully so that the municipality keeps control over the quality and cost of services.

So, an MSP is an agreement between a municipality and a service provider. Under this agreement, a service provider agrees to provide a particular municipal service on behalf of the municipality within a certain time frame and budget. The service provider can provide a service to the whole community or part of it. For example, it may be responsible for collecting rubbish in a certain part of the community.

MSPs can also be made with other spheres of government or government projects like the expanded public works programme. Work opportunities, such as expanded public works programmes and the community work programme are being rolled out to help unemployed people and engage them in doing community work for a small stipend. They often clean streets, do safety patrols, manage food gardens, look after old and bedridden people or help with extra classes or sports at schools.

MUNICIPAL INFRASTRUCTURE GRANT (MIG)

The MIG is a financial grant made by the national government to support and promote infrastructure development in municipalities. The MIG aims to remove municipal infrastructure backlogs in poor communities to ensure the provision of basic services such as water, sanitation, roads and community lighting.

The Department of Cooperative Governance (COGTA) is responsible for managing and transferring the MIG and provides support to provinces and municipalities in implementing the grant projects.

Here's how the MIG works:

Allocation: The allocation of the MIG to various municipalities is based on a formula that takes into account the population, economic activity, and poverty level of the area. Municipalities that are less

developed or have a larger infrastructure backlog will generally receive a larger proportion of the grant.

Project-based: The MIG is project-based, meaning that municipalities apply for funding based on specific infrastructure projects. Each project needs to be well-defined and must cater to the basic needs of the community.

Conditions: While the grant is intended to offer flexibility to municipalities, there are conditions attached to ensure that funds are used efficiently and for the purpose that they were intended. The national government requires municipalities to provide detailed plans, monitoring, and reporting on the progress of the projects funded by the MIG.

Compliance: Municipalities are expected to comply with various frameworks and guidelines when implementing projects funded by the MIG. This includes considerations for community involvement, environmental impact, and sustainability.

Monitoring and reporting: Regular monitoring and reporting are essential components of the MIG. Municipalities need to submit periodic progress reports to the Department of Cooperative Governance and Traditional Affairs (COGTA) detailing the implementation and financial status of the funded projects.

Capacity building: Recognising that some municipalities may lack the technical expertise or capacity to implement large-scale infrastructure projects, a portion of the MIG can also be used for capacity-building. This ensures that municipalities can effectively and sustainably implement, operate, and maintain infrastructure projects.

INFORMAL SETTLEMENTS UPGRADING PARTNERSHIP GRANT (ISUPG)

The Informal Settlements Upgrading Partnership Grant (ISUPG) is a conditional grant that provides funding to municipalities for the upgrading of informal settlements. The funding aims to facilitate a programmatic, inclusive and municipality-wide approach to the upgrading of informal settlements and sets new conditions for provincial departments of human settlements and metropolitan municipalities that will receive this grant.

URBAN SETTLEMENTS DEVELOPMENT GRANT (USDG)

The USDG provides funding to supplement the funding of functions from municipal budgets of metropolitan municipalities. The funding should be to

implement infrastructure projects that promote equal, inclusive and sustainable urban development.

COMMUNITY DEVELOPMENT WORKER PROGRAMME (CDWP)

This is a national government programme aimed at mobilising communities to:

- Assist with improving service delivery and accessibility of services to communities
- Assist with inter-governmental coordination between government departments
- Facilitate community development and stronger interactions and partnerships between government and communities
- Support participatory democracy

The role of Community Development Workers (CDWs) is to act as a link between Community and Government by informing communities of the government services available while informing government of community needs.

Usually, CDWs are chosen from the communities in which they will work. This ensures they will be familiar with the local issues and needs. CDWs receive training to equip them with the skills to perform their duties effectively.

The responsibilities of CDWs include:

- Information dissemination: CDWs provide communities with information about government services, programs, and projects.
- Facilitation: They help in facilitating access to government services by guiding community members through processes, helping fill out forms, etc.
- Feedback mechanism: CDWs collect feedback from the community regarding the effectiveness and quality of government services and relay this feedback to the relevant government agencies.
- Capacity building: They may also play a role in building capacities within communities, such as organizing workshops, training sessions, and awareness campaigns.

Financial management

One of the most important duties of a municipal council is to manage its funds effectively. This means:

- Drawing up a budget – working out what income the municipality will receive and balancing this with what they think they will have to spend it on
- Protecting the income, capital and assets, such as money in the bank, motor vehicles, and computer equipment, by putting in proper controls
- Monitoring the actual income and expenditure and comparing this to the budget through regular financial reporting and taking action to correct things when necessary
- Auditing on a regular basis and reporting the financial statements to all stakeholders

DRAWING UP A BUDGET

Municipalities must prepare budgets for each financial year (which runs from 1 July of each year to 30 June of the next year). Council must approve these budgets before the new financial year begins, after proper planning and consultation with ward committees and other stakeholder groups in the area. However, the Council must prepare a draft budget a few months before this to allow for proper consultation to take place.

ROLE OF THE WARD COMMITTEE IN DRAWING UP A BUDGET

Ward committees have the right and duty to ask questions and make recommendations to the council on the best ways to generate (make) income, keep costs down, prevent corruption and protect the assets of the municipality. Approving the budget is one of the most important functions of the ward councillor, who should not approve the budget until there has been proper consultation with the ward committee and other stakeholders. So, ward committees play an important role in the process, and they should look carefully at all the parts of the budget that will affect the people in their area. All members of the community have the right to observe the special council meeting when the budget is debated and voted on.

Ward committees should also be given regular feedback on the 'cash flow' of the municipality. 'Cash flow' means the movement of money into and out of the municipality's bank account.

If too much money is spent and not enough money is raised, then the municipality will eventually go bankrupt. Ward committees have a right to ask questions about how well the 'cash flow' is being planned, monitored and followed up by the

treasurer and executive or mayoral committee. Ward committee members can also play a positive role in the 'cash flow' of the municipality by:

- Setting an example and paying all rates and taxes for services
- Encouraging others to pay their property rates, accounts for water, power, sanitation, etc.
- Challenging any waste of municipal money that they hear about and asking for an investigation
- Making councillors accountable for fighting corruption or wastage of municipal funds

Community participation in local government

Municipal councils must be accountable to their local communities. In addition, the Constitution says it is important that communities participate in local government. The most important way that communities can participate in local government is through the structure of the ward committee. ***(See pg 154: Ward committees)***

There are three Acts of Parliament that can be used to enforce the accountability of local councillors and the local council. These are:

- *Promotion of Access to Information Act (No. 2 of 2000)* gives people the right to have access to any information which the government has if they need it to protect their rights. Officials can only refuse to give information in certain limited situations.
- *Protection of Disclosure Act (No. 26 of 2000)* which protects people who speak out (whistle-blowers) against government corruption, dishonesty or bad administration
- *Promotion of Administrative Justice Act (No. 3 of 2000)* which says all decisions of administrative bodies have to be lawful, procedurally fair and reasonable. People have a right to be given reasons for decisions taken by government officials.

There are different ways that individuals can participate in local government and influence decision-making. ***(See pg 92: Democracy, government and Public Participation)***

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:

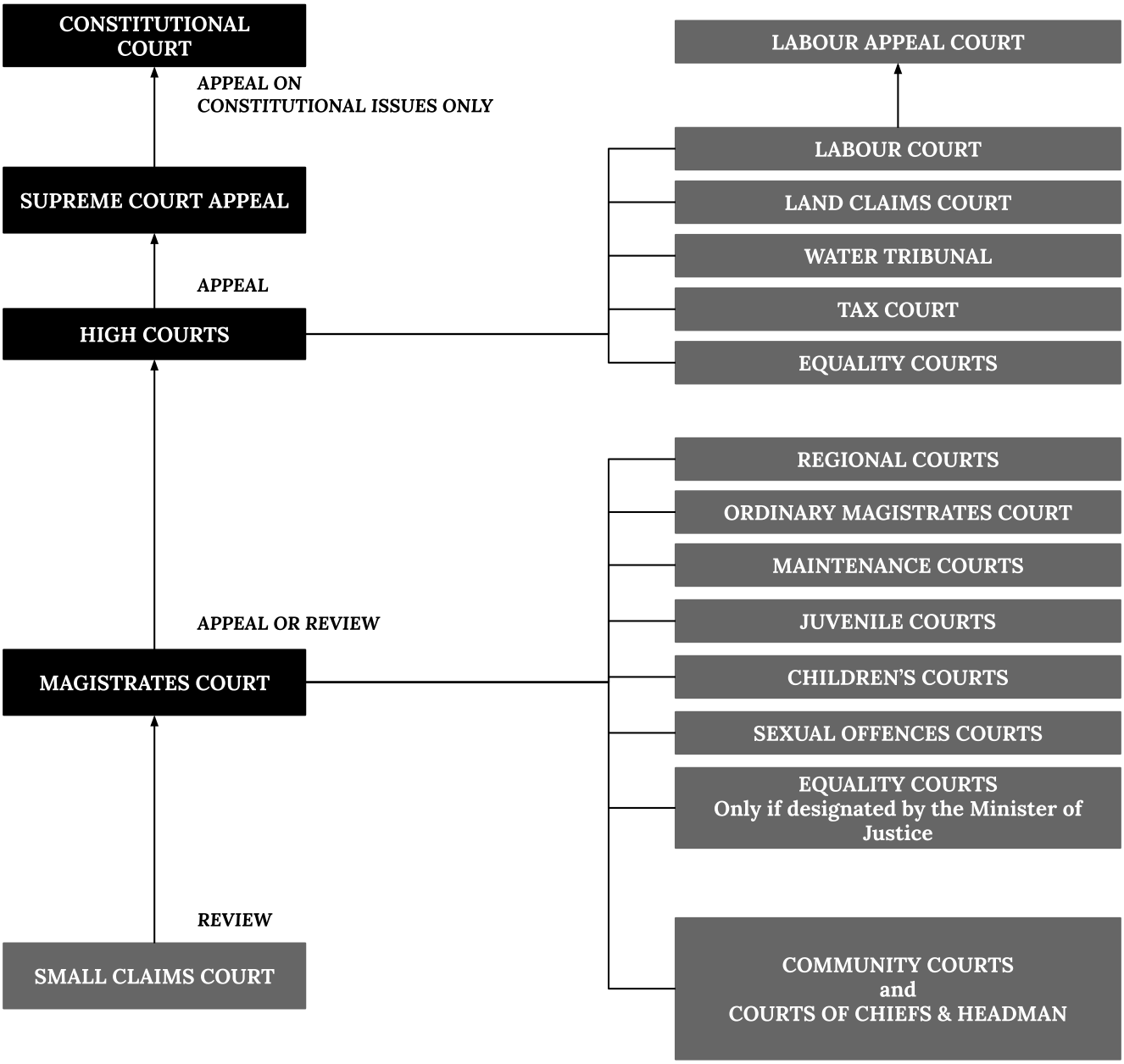
- Labour Appeal Court: deals with appeals from the Labour Court
- Labour Court: deals with disputes under the Labour Relations Act
- Land Claims Court: deals with land claims and land tenure issues
- Family Courts: deal with family matters, like divorce (fall under Regional Courts)
- Maintenance Courts
- 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.

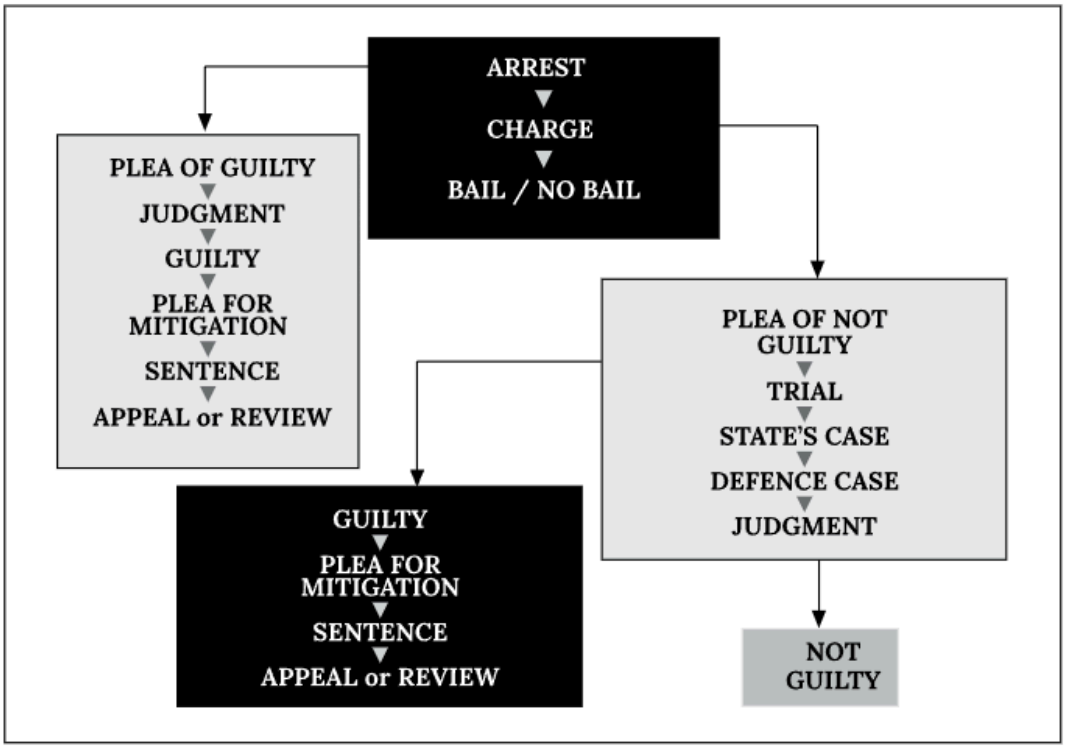
THE CRIMINAL PROCEDURES SECOND AMENDMENT ACT (BAIL LAW)

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.

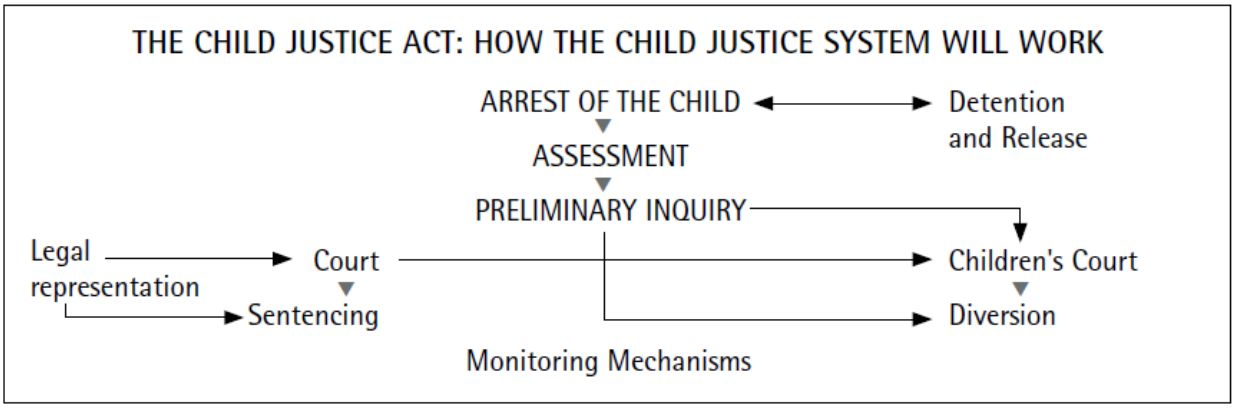
The purpose is to try and find ways of assisting the child to accept that they did wrong and that they have responsibility for the crime. If the child accepts responsibility, a plan is developed to assist the child not to repeat the crime. This may include diversion ***(See pg 219: Diversion)***.

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.'

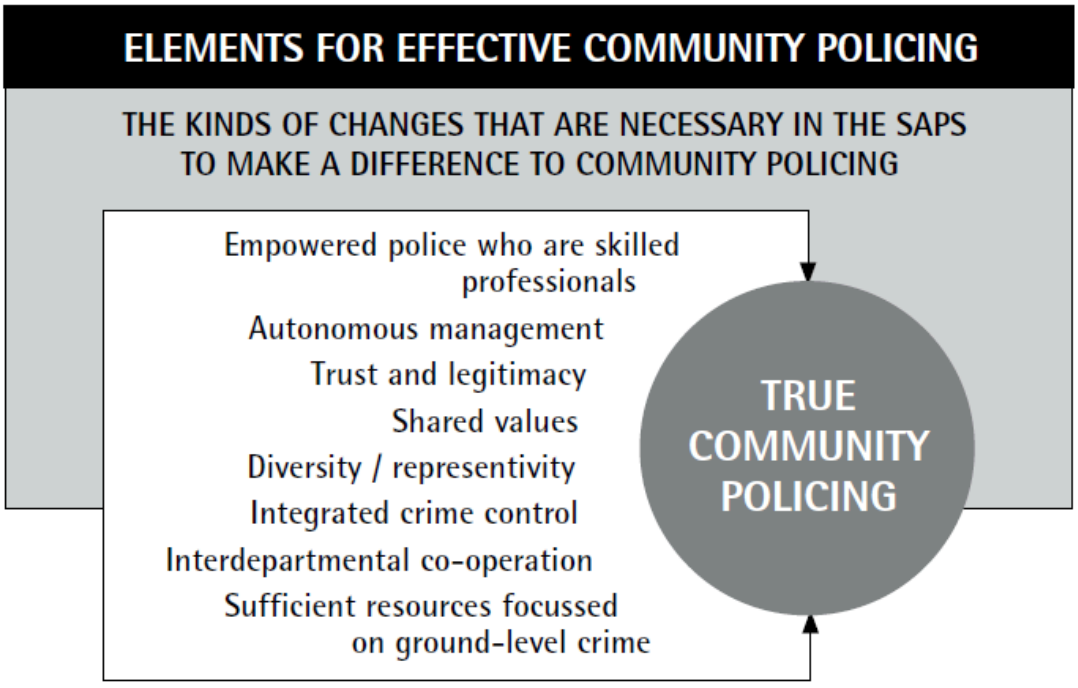
By working together, the SAPS hopes to make communities safer places to live in. This forms part of the National Crime Prevention Strategy, which has meant a shift from crime control to crime prevention. It also emphasises crime as a social problem rather than a security issue. The National Crime Prevention 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

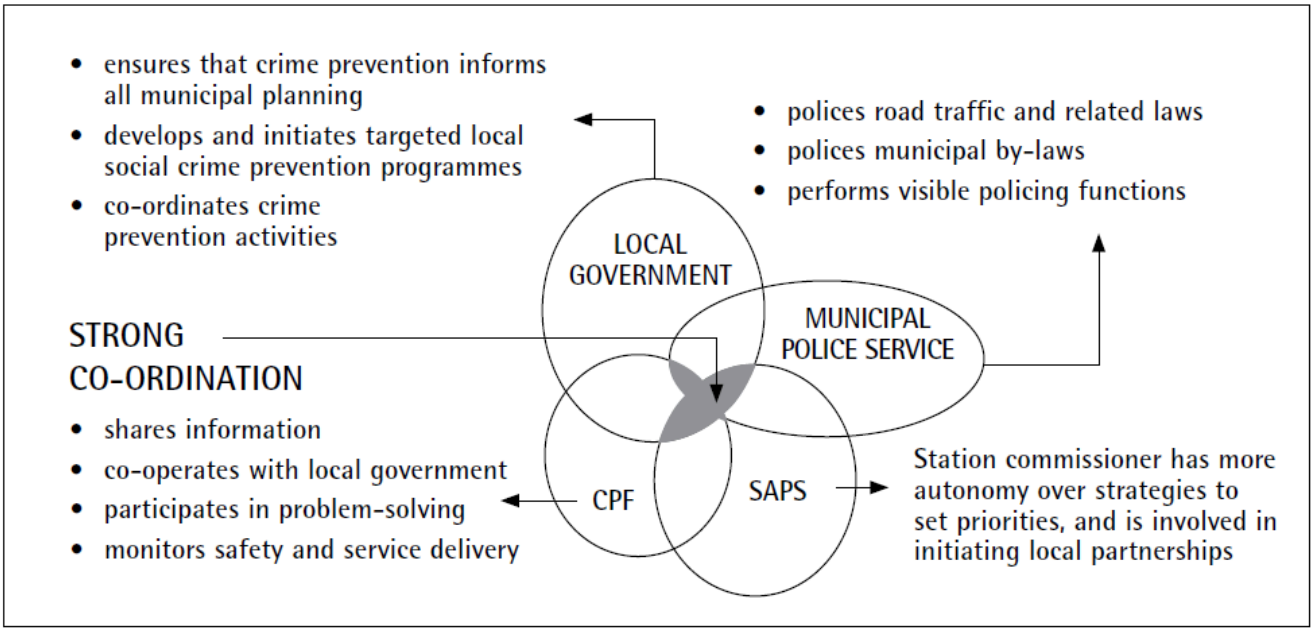
Local government should work with CPFs and Area Community Police Boards to set priorities and objectives for the forum.

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

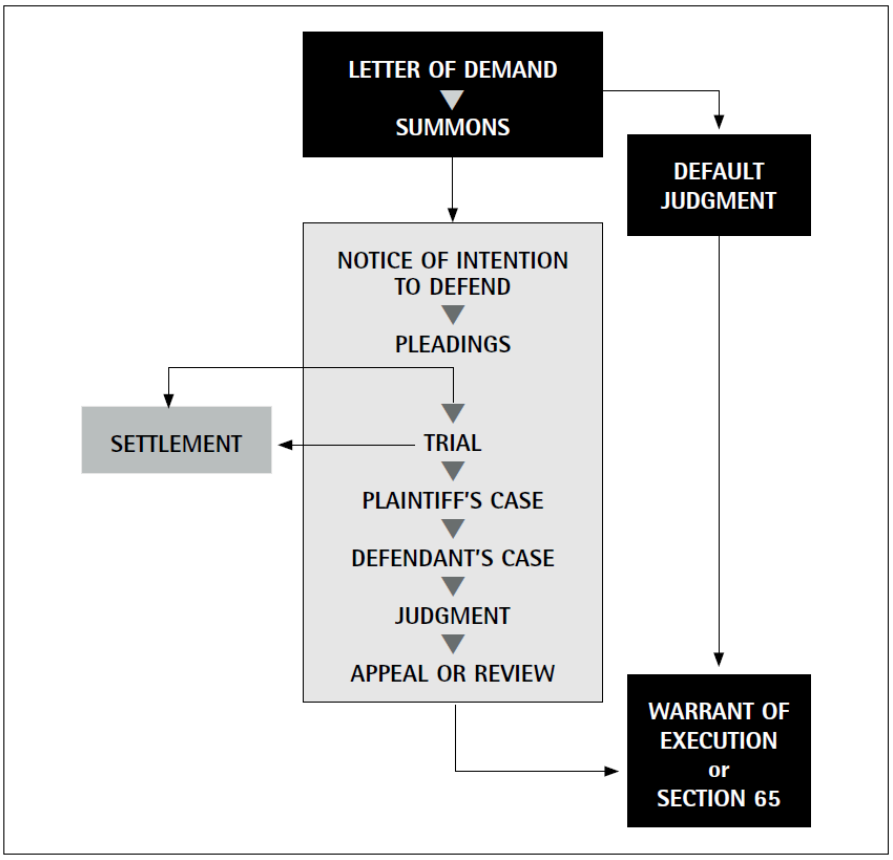
Before the steps in a civil claim can begin, this is what you must do:

- **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).

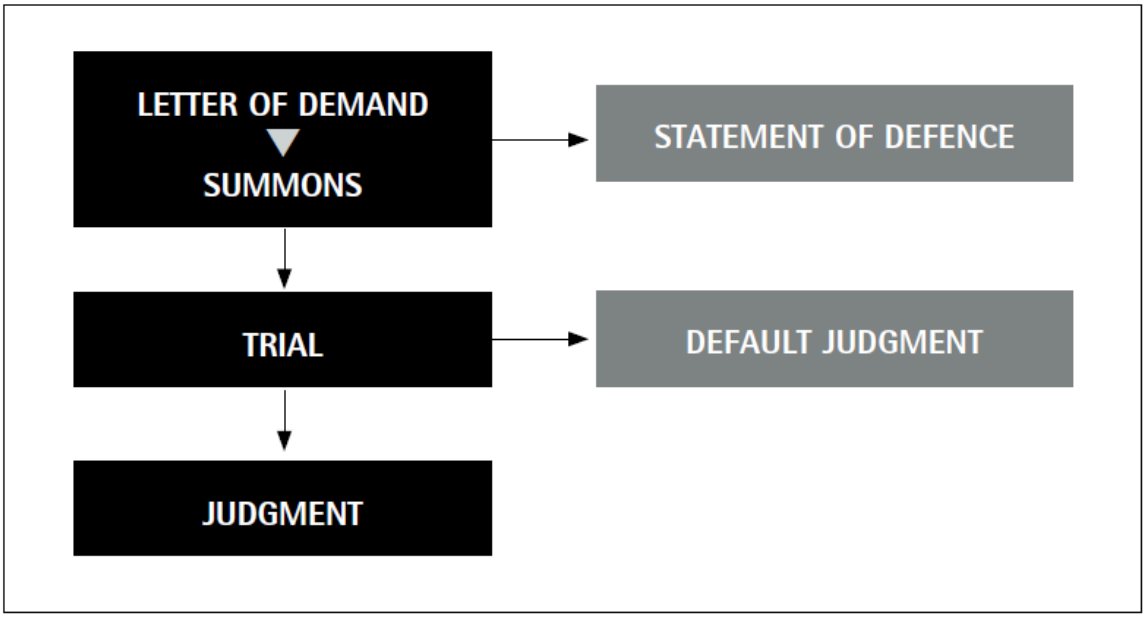
EXAMPLE

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

Labour law

Introduction

This Chapter covers laws in South Africa that directly affect the working conditions of employees as well as disputes in the workplace and ways of resolving these. We focus on the following laws, Regulations and Codes of Good Practice that affect employers and employees.

- Laws about terms and conditions of employment:
    - *Basic Conditions of Employment Act (No. 75 of 1997) (BCEA)*
    - *Occupational Health and Safety Act (No. 85 of 1993) (OHSA)*
    - Sectoral Determination 13: Farm Worker Sector
    - Sectoral Determination 7: Domestic Worker Sector
    - *National Minimum Wage Act (No. 9 of 2018)*
    - Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace
    - Code of Practice on the Protection of Employees During Pregnancy and After the Birth of a Child
- Disputes and ways of settling disputes:
    - *Labour Relations Act (No. 66 of 1995) (LRA)*
    - *Employment Equity Act (No. 55 of 1998) (EEA)*
- Employee social welfare and benefits:
    - *Unemployment Insurance Act (No. 63 of 2001)*
    - *Compensation for Occupational Injuries and Diseases Act (No. 130 of 1993) (COIDA)*
    - *Skills Development Act (No. 97 of 1998)*
    - *Skills Development Levies Act (No. 9 of 1999)*
    - *Medical Schemes Act (No. 131 of 1998)*

The contract of employment

If you agree to work for someone, and that person agrees to pay you for this work, then you and the employer have entered into a **contract of employment**.

You are called the employee. The type of work that you must do, hours of work, wages, a place to live (where appropriate), and so on can all be part of your agreement with your employer. These are called terms and conditions of employment. They are **express** terms of the contract.

Even if you and the employer did not talk about terms and conditions of employment, for example, taking annual leave **in December**, and it is the custom that all employees take annual leave **over the December period,** then you can also take annual leave over this period. This is part of your contract, even if you did not talk about it. These are **implied** terms of the contract.

The law says that a contract does not have to be in writing. If two people speak and they agree about the contract, then this contract is called a verbal contract. A **verbal** contract is also legal and enforceable.

A **written** contract is better. If all the conditions of the contract are written on a piece of paper, and the employer signs the paper, then you have proof of what was agreed. This is useful if ever there is a dispute about what was agreed between you and the employer.

Section 29 of the *Basic Conditions of Employment Act* (BCEA) says that, except for employees working less than 24 hours per month, the employer must give employees certain particulars in writing about the job. These particulars include:

- A description of the job and the place of work
- The date on which the employment began
- The hours that the employee will be expected to work
- Ordinary and overtime rates of payment, including payment in kind (for example, accommodation) and its value
- Any deductions to be made
- How much leave the employee will get
- The notice period
- The name and address of the employer
- The date of payment

If an employee can't read, the particulars must be explained in a language the employee understands.

If you have a contract, but you do not do what was agreed in the contract, then you break the contract. The law says that if one person breaks a contract, then the other person can use the law to force that person to do what was agreed or they can stop and withdraw from the contract. Breaking a contract is also called a **breach of contract**. ***(See: S29(1)(a)-(p) of the BCEA for particulars of employment that must be provided in writing to employees when they start their employment with someone)***

A contract of employment must comply with terms and conditions of employment in the BCEA, Bargaining Council Agreement or collective agreement or Sectoral Determination (depending on what the employee is covered by), and any other laws which protect employees, such as the *Labour Relations Act* and the *Occupational Health and Safety Act*. If a contract breaks any of these protective laws, it is not enforceable unless the conditions are

'on the whole' more favourable to the employee. If an employee is covered by the BCEA, terms and conditions of employment in the BCEA override those in any contract of employment which are less favourable to the employee than those in the BCEA. In other words, the contract cannot be less favourable to the employee than the conditions laid down in the law. ***(See pg 437: Model contract of employment)***

How can a contract of employment be used?

Suppose the employer breaks a contract of employment. In that case, an employee can sue the employer in a civil court case for breach of contract or can refer the dispute to the Department of Employment and Labour (for example, if you have not been paid your annual leave or overtime payment). The employee (who earns less than the earnings threshold of R21 812 per month) can also refer a case to the CCMA in terms of Section 73A of the *Basic Conditions of Employment Act* (BCEA) regarding a failure to pay any amount owing to the employee in terms of a contract of employment, a Sectoral Agreement or a Collective Agreement. This involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.' ***(See pg 317: Minimum Wages; See pg 318: Enforcement and dealing with disputes about minimum wages)***

It is easier to prove that an employer broke a contract of employment if the contract is in writing. If the contract is verbal, it is always better to have witnesses. If you don't have witnesses, then it is the employee's word against the employer's word. ***(See pg 236: Civil claims)***

The employee is always entitled to at least the terms and conditions in the BCEA. If the breach of contract goes against a term or condition in the BCE, then the employee (who earns less than the threshold) can refer a case to the CCMA in terms of Section 73 A of the BCEA concerning a failure to pay any amount owing to the employee, in terms of a contract of employment, a Sectoral Agreement or a Collective Agreement.

The employee can also go to the Department of Employment and Labour and lay a complaint. The Department will investigate the complaint and if it is found that the employer has not followed the contract of employment or the BCEA, then the Inspector may issue a Compliance Order which tells the employer to comply with the BCEA.

Changing the contract of employment

A change in a contract of employment is like writing a new contract. An employer may not unilaterally change the terms and conditions of employment of an employee. This means changing the contract on their own without any form of consultation with the employee. An employer can change the contract after proper negotiation even if the employee does not agree to the changes. A change in a contract is like a new contract. To change the

contract, the employer must give notice of the proposed change to the employee and must attempt to negotiate the new terms and conditions with the employee.

If the employer and employee/s cannot agree on the changes in the contract, then the employer may decide to go ahead to introduce the changes. If the employee accepts the new conditions and goes on working, then the new conditions become part of the contract.

If the employee does not agree to the changes, then the following options will apply:

> **OPTION 1:** Refer a dispute to the CCMA or Bargaining Council in terms of section 64(4) of the *Labour Relations Act*. The **employee can ask the CCMA to issue a notice to instruct the employer** to not proceed to change the terms of employment or to reinstate the previous terms of employment which applied before the change took place. The employer must comply with this notice within 48 hours of receiving it, failing which the employees (there must be two or more) or trade union may embark on a protected strike.
>
> **OPTION 2:** Refer a dispute to the CCMA or the Bargaining Council (if one is in that industry) for conciliation. If conciliation fails, then that employee and other employees covered by the dispute may go on strike after giving the employer 48 hours' notice of the strike. Remember, individual employees may not strike but can only do so as a collective group. Employees are entitled to go on strike after following the correct procedures, even if they do not belong to a trade union.
>
> **OPTION 3:** If the employee refuses to accept the changes, and the employer then dismisses the employee, it might well be anautomatically unfair dismissalin terms of Section 187 of the LRA. This is because an employer is not able to unilaterally amend the contract of an employee or employees and the 'employee has been dismissed because of their refusal to accept a matter of mutual interest between them and the employer.'
>
> **OPTION 4:** Where an employer can justify the need to change the terms and conditions of employment and there is no agreement between the employer and the affected employee even though consultations have taken place, then the employer has the right to consider possible retrenchments if the employee is not prepared to accept the reasonable offer of alternative terms of employment, instead of being retrenched. This should be the last resort and cannot be based on arbitrary reasons. For example, if a change to the contract could prevent a business from closing then this would be seen as a justifiable reason.
>
> - If the employer wants to change the terms of an employment contract and can justify the need to do this but is unable to negotiate these changes with the employee in consultations in terms of Section 189 of the LRA, then the employer could approach this as a possible retrenchment in terms of

Section 189 of the LRA and dismiss the employee for refusing to accept a reasonable alternate offer to that of retrenchment.

- Finally, the employer could engage in a lock out after failed Conciliation at the CCMA, to pressure employees to accept the new terms and conditions of employment.
- If the employee was forced to resign, or was retrenched or dismissed as a way to get the employee to accept the changes, it will be considered an automatically unfair dismissal. Employers may not use the threat of dismissal to force an employee to agree to a new contract.

NOTE

The National Minimum Wage Act (NMWA) states that it is an unfair labour practice for an employer to unilaterally change wages, hours of work, or other conditions of employment if this is a result of the implementation of the national minimum wage. If there is a collective agreement, the employer must negotiate with the trade union(s) concerned before changing the terms and conditions of employment that form part of that collective agreement.

OPTION 5: Where a registered trade union has signed a collective agreement with the employer and where the employer changes this agreement without the agreement of the union, the union and its members can go to the CCMA or the Bargaining Council (if this applies) to claim that the employer has broken the Collective Agreement. This referral of the dispute will be in terms of Section 24 of the LRA and will ask for an arbitrator to decide whether the employer has breached the collective agreement.

Types of contracts

There are two types of contracts:

1. Indefinite (permanent)
2. Fixed-term (temporary)

INDEFINITE CONTRACTS

FULL-TIME CONTRACT OF EMPLOYMENT

Most employment contracts are indefinite contracts. This means that when an employee starts working for the employer, no one knows when the contract will end, but it is expected that the employment will continue until the employee reaches the retirement age of the company. An indefinite contract can only be ended in the following ways:

- By dismissal or termination of the contract of employment as a result of the misconduct of the employee, or the incapacity of the employee or on account of retrenchment
- When the employee reaches the normal retirement age laid down by the company or the industry
- By the death of the employee
- By the employee or employer giving notice to terminate their contract

PART-TIME CONTRACT OF EMPLOYMENT

This section only applies to 'part-time' employees where the employer employs less than ten employees and does not apply during the employee's first three months of continuous employment.

Part-time employees are permanent employees who work less than the 'normal' working hours (between 40 to 45 hours per week), depending on what the norm is for an industry in terms of a wage regulating measure, bargaining council agreement, collective agreement or according to the standard contract of employment of the employer's other employees.

The threshold between full-time and part-time work is usually 30 to 35 hours per week. For example, a part-time contract could apply to a domestic employee who works one day per week for five different employers. So, a part-time employee can be permanent part-time or fixed-term part-time. For example, it could be an employee who works 20 hours a week on a fixed-term contract for 3 months; or it could be an employee who works 20 hours a week for an indefinite period which means they are permanent.

Section 198© of the LRA requires a part-time employee who earns under the *Basic Conditions of Employment Act* (BCEA) threshold of R21 812 per month and who works for a period of more than three months, to be treated equally ('on the whole no less favourably') as a full-time employee if they are doing the same or similar work in the same workplace unless different treatment is justified. A justifiable reason for different treatment may include:

- Seniority
- Experience or length of service

- Merit
- The quality and quantity of work performed

Equal treatment to a comparable full-time employee also means providing:

- The same or similar skills training and development
- Receiving a written contract of employment
- Protection under the LRA and BCEA as long as they work more than 24 hours a month
- Opportunities to apply for vacancies in the same company
- Entitlement to be paid severance payment if the contract is terminated after twenty-four months.

FIXED-TERM CONTRACTS

This does not apply to employers employing fewer than ten employees, or where the employee earns above the BCEA threshold of R21 812 per month, or where the employer employs less than 50 employees and has been in business for less than 2 years.

If the employee and the employer both agree at the start of the contract that the contract is going to end within a fixed period or when certain work is completed, then it is a fixed-term contract.

A fixed-term contract means a contract of employment that terminates:

- When a specific event happens, for example, a person is employed to perform a specific job for a company event
- When a specified task or project is completed, for example, a person is employed for a 3-month fruit harvesting season
- On a fixed date, for example, if a person is employed for 3 months to stand in for someone who is on pregnancy leave

The law provides various conditions and limitations on fixed-term contracts. Section 198B of the LRA aims to ensure fair and equal labour practices by employers and to avoid exploitation of temporary employment by employers using fixed-term contracts to get around having to provide benefits that only apply to permanent employees.

Contract employees and **seasonal employees** are two kinds of employees with fixed-term contracts.

It often happens, particularly on farms, that the employer goes to other areas to get people to work on the farm on a temporary basis. The employees then leave their homes and go to work on this farm. These employees may be referred to as **contract employees**. Usually, the farmer and these employees have a fixed-term contract for

a specified time. If an employee has a contract with the farmer, then the conditions of that contract are the conditions of employment.

If the contractor earns under the BCEA threshold of R21 812 per month, the contract is more than three months, and there is not a 'justifiable reason' for the temporary nature of the contract, then the conditions of the contract may not be less favourable than those of permanent employees who perform similar work. If employees work on a fixed-term contract, for three months or longer, they may not be treated on the whole less favourably than permanent employees.

Some farms have times when extra employees are needed. These times are called seasons. If an employee only works on the farm for a season, then they are called a **seasonal employee**. The seasonal employee knows when the contract starts and when the contract ends. This is a fixed-term **contract**.

LENGTH OF A FIXED-TERM CONTRACT

A fixed-term contract of employment can be renewed at the end of the contract if there is a 'justifiable reason' for the renewal of the contract for a temporary period. For example, if workers are contracted for 3 months to complete the harvest on a farm and then the harvest continues beyond the 3-month contract, then the fixed-term contract of an employee can be renewed as this is a justifiable reason. Justifiable reasons include:

- Replacing another employee who is temporarily absent from work (parental leave)
- A temporary increase in work volume, which is not expected to go beyond 12 months (seasonal increases in workload)
- A student or recent graduate who is employed to do training or get work experience
- Exclusive work on a specific project that has a limited or defined duration
- A non-citizen who has been granted a temporary work permit
- Seasonal work
- An official public works scheme or similar public job creation scheme
- The position is funded by an external source for a limited period
- The employment of a person beyond the normal or agreed retirement age

A fixed-term employee who is employed for more than 3 months (without a justifiable reason) and who earns below the earnings threshold of R21 812 per month in the BCEA, will be regarded as a permanent employee and termination of the fixed-term contract will constitute a dismissal. The

employee may then apply to the CCMA or Bargaining Council (in terms of Section 186 of the LRA), alleging "reasonable expectation" for renewal of a fixed-term contract.

As a permanent employee, an employee may not be treated less favourably than any other permanent employee doing the same or similar work. They should be given the same work opportunities as permanent employees.

For fixed-term employees (including seasonal employees), the employer must pay employees according to the terms of the contract for the full contract time, even if there is no more work for the employees to do. If an employee's contract is for one year, then the employer must pay the employee for the full year, unless the contract ends because of the employee's fault or unless the contract includes a term that provides for 'early termination' of the fixed term contract. If the fixed term contract is to be terminated early before the end date of the contract, this still needs to be done using proper procedures, for example retrenchment consultations, if these apply. If the contract is for one season, then the employer must pay the employee for the whole season in terms of the provisions in the contract unless early termination takes place in terms of normal practices provided for in the Code of Good Practice: Dismissal as contained in the LRA.

The employer cannot stop the fixed-term contract earlier than the contracted period unless the contract makes provision for this and the employer follows a fair process in terms of the law.

RENEWING A FIXED-TERM CONTRACT

If an employer offers to renew an employee's fixed-term contract, then it must be done in writing, and reasons must be given for the renewal.

CREATING A 'REASONABLE EXPECTATION' OF PERMANENT EMPLOYMENT

If an employer creates a reasonable expectation of permanent employment to a fixed-term employee and then terminates the contract without following the correct legal procedures, the employee can make a claim to the CCMA for unfair dismissal, alleging "reasonable expectation" for renewal of their fixed-term contract. The CCMA will decide if the employee had good reason to expect a renewal of a fixed-term contract based on all the surrounding circumstances.

Case law on fixed-term contracts and 'reasonable expectations'

In *Ntsoko v St John the Baptist Catholic School* (2019) 28 CCMA, the employee was employed as an educator at the school in terms of four fixed-term

contracts, the first of which was signed in February 2015 and the last on 31 October 2017. The contract was to run from 1 January to 31 December 2018. On 15 November 2018, the employee was advised that his fixed-term contract would not be renewed for 2019. The employee claimed he had formed a reasonable expectation that his contract would be renewed and wanted to challenge this decision. He referred a dispute to the CCMA relying on Section 186 of the LRA. The CCMA found that the nature of the employee's work was not of a limited or definite duration. The employer had failed to provide any justifiable reason for employing the employee on a fixed-term contract. The employee was, therefore, a permanent employee of the employer.

FIXED-TERM CONTRACTS AND SEVERANCE PAY

An employee on a fixed-term contract who is employed for longer than 2 years is entitled to severance pay on termination of employment or alternative employment, if possible. Severance pay includes one week's compensation for each completed year of the contract. Severance pay is made in cases where employers terminate an employee's employment based on operational requirements such as retrenchment.

EXCLUSIONS FROM THE PROVISIONS OF FIXED-TERM CONTRACTS

The provisions on fixed-term contracts DO NOT apply to employers in the following cases:

- If an employee earns above the legal earnings threshold which is R261 748 per year (or R21 812 per month) before income tax, pension, medical aid, etc. This threshold changes from year to year, so remember to check for the correct amount from April 2026.
- Employers with less than 10 employees
- Start-up companies with less than 50 employees if they have been in operation for less than two years
- Specific fixed-term contracts permitted by law, sectoral determination or collective agreement

CASUAL EMPLOYEES

A casual employee is employed for a short period and works for parts of the week, for example, a domestic employee who only comes in one day a week for 5 hours. If an employee works more than 24 hours a month, they qualify for proportional rights such as annual leave and sick leave and are covered by all the provisions in the BCEA. They should also get written particulars of employment when they start the job. If the employee works more than 24 hours in a month, they become entitled to

one day of annual leave for every 17 days worked and one day of sick leave for every 26 days worked.

Casual employees do not have much legal protection under the BCEA. Chapter 2 of the BCEA regulates working time but doesn't protect employees who work less than 24 hours a month. However, casual employees are protected under the *Labour Relations Act* (*LRA*) where they can refer an unfair dismissal to the CCMA.

'ZERO-RATED' CONTRACTS

A 'zero-rated' contract is an agreement between two parties where an employee is asked to perform work with no set minimum number of hours. The contract states what the employee will earn for the work they do and possibly how they will be offered work.

In the case of a 'zero-rated' contract, employees are only paid for work they have done, and the contract is offered without guaranteeing the employee actual working hours. The working hours are controlled by the employer, who will offer work when it is available. With 'zero-rated' contracts, employees are dependent on the employer and may go for months without being called to work, which prevents them from earning a salary even though they are employed.

However, in terms of Section 9A of the BCEA, an employee earning under the BCEA threshold who works for less than four hours on any day must be paid for four hours of work on that day. This payment will be at the normal minimum hourly rate of pay. The BCEA provides maximum working hours that an employee can work but does not provide for minimum working hours. However, Section 29(1) of the BCEA requires employers to provide employees with their ordinary working hours and days of work, what they will be paid and the frequency with which they will be paid. So, 'zero-rated' contracts may not comply with Section 29 of the BCEA.

VOLUNTEERS

The *Basic Conditions of Employment Act* (BCEA)(*Section* 3(1)(*b*)) specifically excludes "unpaid volunteers working for an organisation serving a charitable purpose" from the BCEA. The *National Minimum Wage Act* (NMWA)(*Section* 3) also excludes a person who works for another person but does not receive any remuneration for their services. These laws therefore exclude a volunteer from being seen as an employee, and they are excluded from the rights included under the BCEA and NMWA.

However, if a volunteer regards themselves as being an employee, for example, if they receive an allowance from the organisation they work for, then there are different tests to determine whether there is an employment relationship.

The *Code of Good Practice: Who is an employee* has a list of factors to determine whether someone should be considered an employee. Both the LRA (Section 200A) and the BCEA (Section 83A) presume a person is an employee if the following factors are present:

- How the person works is controlled by another person
- In the case of a person who works for an organisation, the person is seen as being part of that organisation
- The person is economically dependent on the other person for whom they work or provide services to
- The person's working hours are fixed and the person is paid a fixed remuneration.

These factors only apply if a person earns below the BCEA earnings threshold which is R261 748 per year (R21 812 per month). The Courts have dealt with cases where individuals in volunteer positions claimed they were employees. They found that both parties must have a clear intention to create a legally enforceable employment contract either orally or in writing. In deciding whether there is an intention, the courts look at the following:

- The documents that were signed to identify whether it is a volunteer or employment relationship
- Whether an organisation normally enters into employment contracts with a specific type of person (within its organisation) claiming to be an employee
- Whether there is any contractual arrangement, regardless of the form

The nature and terms of the relationship must be clearly set out in an agreement to avoid any uncertainty and disputes at a later stage.

Differential wage

If the employer tells an employee to do someone else's job in a higher category of pay than the employee's own job, then the employee should get the higher wage if they perform this work for an extended number of days. ("Equal pay for work of Equal value').

An employer can ask an employee to do work below their own pay category, but the employee should not get paid less than their own normal wage and also provided the employer is not doing this to make the employee's life at work intolerable.

Section 6 – particularly subsection 4 – of the *Basic Conditions of Employment Act* (BCEA) deals with equal pay for equal work, with grievances for unfair discrimination being an option if a commissioner or the courts deem the employee to be correct.

Bonus pay

Bonus pay' means money paid to employees which is over and above their wages and overtime money. The law does not say that an employer must pay a bonus to employees although some Bargaining Council Agreements do. This is 'extra' money. It is usually paid out at the end of the year, for example, for good performance during the year, or for targets reached in the production of goods. Bonuses should always be paid equally and fairly to employees with similar productivity – with no preference being given to certain employees. Bonus pay must be paid if:

- An employer gave a bonus to the employees at the end of every year in the past, the employer created an 'expectation' in the employees that they will get a bonus every year. And it has become the custom to get the bonus. The employees then have a right to demand the same bonus every year. If the employer suddenly decides not to give a bonus, the employees can claim the bonus as a custom and practice.
- It says in a contract of employment or a collective agreement that the employee will get a bonus. The employer must pay the bonus as agreed (unless it depends on the employee doing something that the employee did not do).

Long service awards

The law does not say that employers must pay long service money to employees who have worked for a long time for the same company. If the employee retires, it is up to the employer to decide whether to give any long service money to the employee.

Job references

A job reference letter is a letter from an ex-employer saying whether the employer thought the employee was a good employee or not. The *Basic Conditions of Employment Act* (BCEA) says employees are entitled to a written certificate of service when the employee stops working for that employer. The **certificate of service** sets out the full name of the employer and the employee, the job/s that the employee was doing, the date that the employee began working, the date that the employee ended work, and the wage at the time that the job ended, including payment in kind. ***(See pg 315: Written particulars in a contract of employment and payslips (for details on what has to be included on the Certificate of Service)***

Laws about terms and conditions of employment

There are different laws about conditions of employment. Employees' terms and conditions of employment may be covered by:

- Centralised collective agreements, like Bargaining Council Agreements, under the *Labour Relations Act* (where applicable) ***(See pg 320: Collective agreements)***
- Sectoral Determinations under the *Basic Conditions of Employment Act* (BCEA), or Wage Determinations under the *Wage Act* (where applicable) ***(See pg 301: Sectoral determinations)***
- Special exceptions to centralised collective agreements, Sectoral Determinations, or the BCEA, made by the Minister of Employment and Labour (called deregulation) ***(See pg 345: Deregulation)***
- Workplace-based collective agreements under the BCEA ***(See pg 320: Collective agreements)***
- An individual agreement between an employee and employer – the contract of employment ***(See pg 281: The contract of employment)***
- *Basic Conditions of Employment Act* ***(See pg 302: Summary of provisions in the BCEA)***
- *National Minimum Wage Act* ***(See pg 317: Minimum wage)***

The *Merchant Shipping Act* covers conditions of employment for employees who are at sea within South Africa's territorial waters while members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service are covered by different laws. The *Occupational Health and Safety Act* gives employees rights to health and safety at work. ***(See pg 355:The Merchant Shipping Act; See pg 346: Occupational Health and Safety Act)***

Wage regulating measures

Collective agreements, Bargaining Council Agreements (BCAs), Wage Determinations and sectoral determinations (S/WDs), which regulate terms and conditions of employment, are commonly called wage regulating measures. They contain different conditions of employment for different employees in different sectors. In other words, all these agreements and determinations talk about a period of notice, but in one wage determination, the notice period may be one week, while in another, it may be two weeks. Below is a list of the more common aspects relating to conditions of employment that appear in all wage regulating measures:

- **Area and scope:** defines the geographical area where the BCA or S/WD applies and describes the type of work covered by the BCA or S/WD

- **Definitions:** defines the different categories of employees, including casual employees
- **Remuneration:** describes minimum wages for different categories of employees and includes monies received by the employee, excluding ex gratia payments or bonuses paid at the discretion of the company
- **Payment of remuneration:** how and when employees should be paid their wages
- **Deductions:** from an employee's wage
- **Hours of work and pay:** this includes public holidays, Sundays, etc
- **Annual leave and sick leave**
- **Piece work and commission work:** Piece work means that an employee is paid for the number of items produced and not for the hours worked
- **Termination of contract of employment:** how much notice an employer must give or be given
- **Prohibition of employment:** for example, pregnant women and children may not be allowed to do certain work
- **Dispute resolution:** the Labour Relations Act allows employees and employers to collectively agree to dispute resolution procedures that differ from those in the Act.

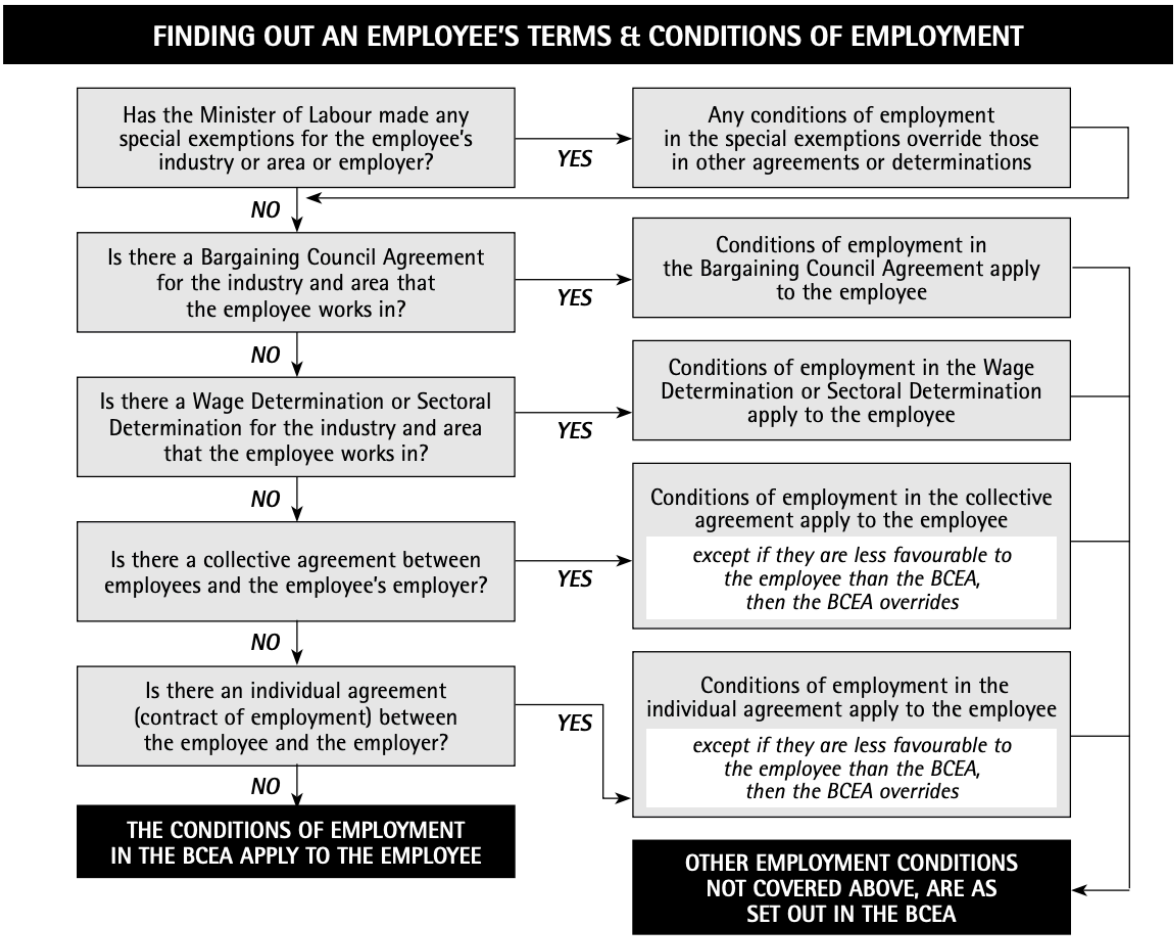
If there are any particular terms or conditions of employment that are not specified by a Bargaining Council Agreement or a Sectoral Determination, then those terms or conditions of employment in the *Basic Conditions of Employment Act* will apply to employees.

How do you know which law applies to an employee?

All employees will fall under one of the above laws about conditions of employment. Many employees fall under more than one of these laws.

The laws work in order of priority. For example, if a Bargaining Council Agreement (or other centralised collective agreement) covers the work done by an employee, then that Agreement applies to that employee. If there is no Bargaining Council Agreement, then you must see whether a Sectoral Determination or Wage Determination applies. If no Bargaining Council Agreement or Sectoral/Wage Determination applies, then the *Basic Conditions of Employment Act* (BCEA) will apply unless they are specifically excluded by the BCEA.

An individual contract of employment may override the *Basic Conditions of Employment Act* provided it is more advantageous for the employee and provided it does not affect certain 'core' rights that are identified in the BCEA. These core rights which cannot be changed by agreement, include normal working hours, regulations applying to maternity leave, sick leave and annual leave, and the prohibition against the employment of children amongst others.



Basic Conditions of Employment Act (BCEA)

Who is covered by the Basic Conditions of Employment Act?

All employees are covered by the *Basic Conditions of Employment Act (No. 75 of 1997)* except the following:

- Members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service
- Unpaid voluntary employees who work for a charitable organisation
- Employees who work for an employer for less than 24 hours a month
- Employees on vessels at sea where the *Merchant Shipping Act* (1951) is applicable

Certain special provisions apply to companies employing fewer than ten employees.

PEOPLE EARNING ABOVE A CERTAIN AMOUNT

If a person is earning a gross salary of more than R261 748 per year (or R21 812 per month) (referred to as the BCEA earnings threshold which increases at different intervals), then the following sections of the BCEA **will not** apply to them:

- Section 9: Limitations on ordinary hours of work
- Section 10: Overtime work and payment
- Section 11: Compressed working week
- Section 12: Averaging of hours of work
- Section 14: Provision of meal intervals
- Section 15: Daily and weekly rest period
- Section 16: Pay for work on Sundays
- Section 17: Night work
- Section 18(3): Public holidays (where an employee may work on a public holiday on which they would not have ordinarily worked) ***(See pg 302: Summary of provisions in the BCEA).***

PART-TIME, CASUAL AND TEMPORARY EMPLOYEES

A **part-time employee** is permanently employed but only works part of a working day or working week. A **casual employee** is employed on a short-term basis but only works part of a working week. If they work less than 24 hours in a month the BCEA does not apply to them. An employee who works more than 24 hours during any month is now fully covered by the provisions of the BCEA including provisions for leave and sick pay, overtime and public holiday and Sunday rates.

A **temporary employee** is not permanently employed but only works for a specific length of time or until a specific job is completed. This is often referred to as a 'fixed-term contract' of employment.

An employer may try to circumvent a permanent contract of employment by taking on an employee in a 'fixed-term' capacity, but if the employee meets the definition of what an employee is, the CCMA will offer protection against unfair dismissal should this be required. An employer may try to avoid giving an employee a permanent contract of employment by continuously renewing their fixed-term contract but if an employee works for more than 3 months and earns below the earnings threshold in the BCEA of R21 812 per month, then the contract is seen to become permanent unless there is a justifiable reason to continue with the fixed-term contract. ***(See pg 287: Fixed-term contracts; See pg 358: Who is an employee?)***

In most cases, part-time, casual and temporary employees will be entitled to the same benefits as other employees, but on a pro-rata basis. They are excluded from some provisions of the BCEA, for example, they are not entitled to Family

Responsibility Leave unless they work on the contract for more than four months and at least four days a week.

Generally, the temporary or casual employee will be entitled to one day annual leave for every 17 days worked and one day sick leave for every 26 days worked for the same employer.

PIECE WORK

Piece work means that an employee is not paid according to the hours that they work. The employee is paid for the number of items produced. For example, seasonal farm employees may be paid for the amount of fruit they pick, provided they earn at least the minimum hourly or daily wage laid down for that industry or sector.

FREELANCE OR OUTSOURCING

An employer may pay someone who is not an employee in the company to do work. This person is not an employee but is running their own small business and is often referred to as an independent contractor. The contractor is generally paid for producing an agreed level of work or providing a service and is not supervised or controlled by the employer. The independent contractor is not covered by the BCEA.

EXAMPLE

Sakumsi cuts patterns for dresses. He pays Trevor to sew the pieces together. Trevor works from his house. Trevor is not employed by Sakumsi, and Sakumsi does not have to make sure that Trevor's pay and working conditions are according to the BCEA.

Temporary Employment Services (TES)

Temporary employment services (TES) are commonly called labour brokers who supply labour to businesses. TES are regulated mainly by the *Labour Relations Act* (LRA) and the *Basic Conditions of Employment Act* (BCEA). The LRA defines a TES as *a person who, for reward, procures for or provides to a client, the services of employees who it remunerates.*

The LRA (Section 198) states the following regarding employees of the TES:

- The employee must earn below the BCEA threshold of R261 748 per year or R21 812 per month

- The employee only works for a client for less than 3 months
- The employee works for a client as a substitute for an employee who is temporarily absent from work
- The employee works for a client to perform a category of work that is seen to be a temporary service by a Bargaining Council or a Sectoral Determination

If a TES employee works for a client for more than 3 months and earns under the BCEA earnings threshold of R21 812 per month, they are seen to be an employee of the client and are entitled to the same terms and benefits as the client's permanent employees. This means there is joint and several liability which both the employer and the TES provider (labour broker) take on after the 3-month window period. This means that both the employer or the TES provider can be taken to the CCMA if equal treatment is not applied or if the employer fails to apply the terms of the BCEA, for example, paying overtime or Sunday rate of pay or treating the employee unfairly.

Section 198(4a)(a) provides that an employee can bring a claim against a TES, the client of the TES, or both the TES and the client if the TES contravenes the *Basic Conditions of Employment Act* or a Sectoral Determination or a collective agreement (in a bargaining council).

Variation of basic conditions

Certain rights in theBasic Conditions of Employment Act (BCEA)are fundamental and will not be able to be varied in terms of Section 49 of the BCEA. (These include the prohibition on employing child labour/reduction in protection for night work / the reduction in annual leave to less than two weeks / the reduction in entitlement to maternity leave / the reduction in entitlement to parental leave, adoption leave or commissioning leave / or reduction in entitlement to sick leave).

In collective agreements, for example, Bargaining Council Agreements, employees may agree to conditions that are different to conditions in the BCEA, as long as the agreement is consistent with the purpose of the BCEA and does not give them less protection than they had under the BCEA, nor reduce an employee's annual leave (to less than 2 weeks), nor remove maternity leave or sick leave. ***(See: S49(1) (a)–(f) of the BCEA).***

Employees may be covered by the BCEA, but have terms and conditions of employment which vary from those in the BCEA. The BCEA allows for the following ways of varying basic conditions of employment:

- The individual employment contract between an employee and employer (although the scope for variation by this method is extremely limited)
- Collective bargaining and agreement at a bargaining council

- Sectoral Determinations
- The labour minister can make special exceptions

So, an employee who is covered by the BCEA has the conditions of employment as specified in the Act, unless:

- The employee has an individual agreement (employment contract) with the employer, which is more favourable than the terms of the BCEA
- The employee is part of a collective agreement which has been agreed with a Trade Union and the employer
- There is a Sectoral Determination (like a Wage Determination) or a Ministerial exemption which overrides the conditions in the BCEA. ***(See pg 296: Finding out an employee's terms and conditions of employment)***

Individual contract of employment

The contract may have different conditions to those in the BCEA, as long as they are more favourable to the employee than the BCEA. The BCEA sets out the minimum conditions of employment. Any contract of employment must at least comply with all its provisions. If a contract breaks any part of the BCEA, (and a variation order has not been obtained from the Department of Employment and Labour), it is not enforceable, and the BCEA conditions override the conditions in the contract. ***(See pg 281: The contract of employment)***

Collective bargaining

The *Basic Conditions of Employment Act* (BCEA) and the *Labour Relations Act* (LRA) aim to promote collective bargaining, and therefore allow variation of certain specified conditions through collective bargaining between an employer and employees who work for that employer. They can reach a collective agreement.

A collective agreement under the BCEA may have different conditions to those in the BCEA as long as they are more favourable to the employee than the BCEA.

If an agreement breaks any part of the BCEA, it is not enforceable, and the BCEA conditions override the conditions in the agreement.

There are also centralised agreements (Bargaining Council Agreements) under the LRA. In centralised collective bargaining, employees may agree to conditions that are different from BCEA conditions. This may be because in exchange, they gained something else they wanted more. ***(See pg 320: Collective agreements)***

Sectoral Determinations

The *Basic Conditions of Employment Act* (BCEA) provides for the establishment of an Employment Conditions Commission. They investigate conditions in a particular industry or sector and make recommendations to the Minister of Employment and Labour. When the Minister approves a recommendation from the Commission, this is published in the Government Gazette as a Wage determination or Sectoral determination. ***(See pg 324: Summary of the Sectoral Determination for farm workers; See pg 335: Summary of the Sectoral Determination for domestic workers)***

Ministerial exemptions

The Minister of Employment and Labour may override the provisions of the BCEA for particular groups of employees.

Prohibited employment

CHILD LABOUR

- Children below the age of 15 years are not permitted to work.
- Children between the ages of 15 and 18 years may not perform work that places their well-being, education, or physical and mental health at risk.

The Department of Employment and Labour and the state prosecutor will be primarily responsible for enforcing the rules about child labour. To employ children is a criminal offence and comes with a jail sentence of up to 6 years.

FORCED LABOUR

No one may force employees to work (for example, to redo and perform work because the employee made a mistake and produced unacceptable work). This is a criminal offence.

Enforcement of the Basic Conditions of Employment Act (BCEA)

The Department of Employment and Labour is responsible for enforcing the BCEA. The department appoints inspectors who have wide powers to make sure employers obey the Act.

An employee whose employer is not obeying the BCEA can complain to the Department of Employment and Labour or the CCMA in terms of Section 73A of the BCEA.

If the complaint is to the Department of Employment and Labour, a labour inspector will investigate. An inspector no longer needs to get a written undertaking from an employer who they believe is defaulting and can now issue a compliance order which is enforceable through the Labour Court.

The inspector may issue a 'compliance order' to employers who do not obey the BCEA. If the employer ignores the compliance order, the Department of Employment and Labour must refer the matter to the Labour Court to force the employer to obey. Employers are also entitled to appeal against compliance orders to the Director General of Labour or the Labour Court.

If an employee and employer are in a dispute about a matter covered by the *Labour Relations Act* and they are busy trying to resolve the dispute at the Commission for Conciliation, Mediation and Arbitration (CCMA), then the CCMA can also order the employer to pay money or for example, annual leave that is owed to the employee in terms of the employee's BCEA rights. For example, if a dismissal is being contested at the CCMA, the CCMA will be able to order an employer to pay outstanding leave owed to the employee.

The law is made like this just to simplify procedures and to avoid the matter having to go to both the Department of Employment and Labour and the CCMA (and possibly the courts).

Employees can also make their own civil case in the Magistrate's Court and the Small Claims Court to get money that is owed to them.

Summary of provisions in the Basic Conditions of Employment Act (BCEA)

WORKING TIMES AND PAY

- The maximum hours of work is 45 hours **per week** for ordinary pay. ***(See: Section 9 of the BCEA)***
- The maximum length of a working day is 9 hours if the employee works a 5-day week, but 8 hours a day if the employee works a 6-day week. Where the working week is compressed (squashed) into fewer days, then shifts of longer hours may be introduced with the employee's consent. For example, an employee can agree to work shifts of 12 hours over 4 working days, where overtime is only paid once more than 45 hours have been worked in that week.
- Overtime is voluntary and can only be worked where agreed to by the employee. No employee may work more than 10 hours of overtime per week, (subject to the

provisions of the applicable Sectoral or Bargaining Council Agreement). For example, farm workers may work up to 15 hours of overtime in any week in terms of the Farm Worker Sectoral Determination. Overtime must be paid per hour of overtime worked, at a rate of one and a half times the employee's ordinary hourly wage. In addition, no employee may work more than 3 hours overtime in any day (including overtime on that day).

Even though overtime is voluntary, if the employee agreed in the original contract to work overtime when necessary, then reasonable overtime must be worked. If the employee refuses to work overtime, then they are in breach of the contract and the employer can take disciplinary action against the employee.

The employer can also agree by way of a Collective Agreement covering the employee to work up to 15 hours overtime during a week as against the normal ten hours.

NOTE

While individual overtime is voluntary (subject to an agreement), a collective or joint refusal by a number of employees to work normal overtime will probably constitute a strike or industrial action. This could be a protected strike if the dispute process in the Labour Relations Act has been followed.

SUNDAY WORK

Payment for Sunday work must be the greater of:

- Either double the normal hourly rate for the amount of Sunday hours worked, OR
- One full day's pay, even if the employee only worked three hours that Sunday.

If it is normally part of an employee's normal shift and job to work on a Sunday, then they must be paid at a rate of time and a half their normal hourly rate instead of double time.

Paid time off: An employer and employee can have an agreement that allows the employer to give the employee who works on a Sunday paid time off. The paid time off must be given to the employee within one month of the

employee becoming entitled to it unless there is an agreement in writing which extends this period.

Calculating overtime hours on Sunday: Any time worked on a Sunday by an employee who does not ordinarily work on a Sunday is not used when calculating an employee's ordinary hours of work but the overtime hours are taken into account when calculating the total overtime worked by the employee during that week. For example, if an employee has already worked 5 hours overtime for the week, they may not work more than another 5 hours on the Sunday because the total number of overtime hours allowed per week is 10 hours.

Shift spread over Sunday and another day: If a shift worked by an employee falls on a Sunday and another day, for example, Monday, the whole shift is regarded as being worked on the Sunday, provided the majority of hours worked, fall on the Sunday. However, if the bigger portion of the shift was worked on Monday, then the whole shift is regarded as being worked on Monday. So if the employee starts work at 20h00 on Sunday evening and works through to 06h00 on Monday morning, the majority of hours falls on the Monday and Monday rate of pay will apply.

Limitations on using Sundays to make up working hours: If an employee is contracted to work 45 hours per week, but has only worked 40 hours for the week for whatever reason, the employer cannot demand that they work 5 hours on the Sunday to make up their normal time.

PUBLIC HOLIDAYS

Employees are entitled to be paid for **public holidays** that fall on a day that they normally would have worked – even though they will be off and not working on the public holiday.

An employee can agree to work on a public holiday, but this is voluntary.

If an employee does agree to work on a public holiday, which would have been a normal working day, they must get paid double the daily rate of pay, or they must be paid double the normal hourly rate for the amount of hours worked on the public holiday, whichever is the greater (if they work ten hours on a public holiday, they must be paid 10 x 2 = 20 hours or double the normal daily rate of pay, whichever is the greater).

Where a public holiday falls on a Sunday, the following Monday is regarded as a public holiday. The public holidays are:

- 1 January - New Year's Day

- 21 March - Human Rights Day
- Variable - Good Friday
- Variable - Family Day
- 27 April - Freedom Day
- 1 May - Workers' Day
- 16 June - Youth Day
- 9 August - National Women's Day
- 24 September - Heritage Day
- 16 December - Day of Reconciliation
- 25 December - Christmas Day
- 26 December - Day of Goodwill

Shift spread over a public holiday and another day: If a shift worked by an employee falls on a public holiday (e.g.Tuesday) and another day (e.g. Wednesday), the whole shift is regarded as being worked on the public holiday (e.g. Tuesday) if the majority of the hours worked, falls on the Tuesday. But if the bigger portion of the shift was worked on the other day (e.g. Wednesday), the whole shift is regarded as being worked on the other day (e.g. Wednesday).

Night shifts on public holidays: With night shift employees, part of the work may be done on an ordinary day and part on a public holiday (after midnight). The whole shift will be regarded as worked on the public holiday, except if the hours worked before midnight are greater than the hours worked after midnight.

Exchanging a public holiday for another day: This can only be done by agreement with the employee. The permission to exchange is not regulated in the BCEA but rather in the *Public Holidays Act*, and, therefore, has nothing to do with the payment for the public holiday. The Public Holidays Act states that, by agreement with the employee, a public holiday may be exchanged for another day.

NIGHT WORK

Night work after 6 p.m. and before 6 a.m. is voluntary. employees must be paid an extra 'night work allowance' or have their normal working hours reduced. Transport must be available for the employees to get from their homes to work and back. The law is unclear as to who must 'provide or pay' for such transport, but at least there must be transport available so that the employee can get home at late or early hours.

Health and safety requirements for night work

In terms of s17(3) of BCEA, an employer who wants an employee to work regularly after 23:00 and before 06:00 the next day must do the following:

- Inform the employee in writing or verbally (if the employee can't read) in a language that the employee understands of any health and safety hazards linked to the night work
- Inform the employee of their right to have a medical examination
- If the employee asks for a medical examination, this must be done before the employee starts the shift or within a reasonable time of starting the shift. Medical examinations should continue at appropriate intervals while the employee is doing this work
- The employer should transfer the employee to a suitable day shift within a reasonable time if the employee suffers from health conditions associated with working night work and if it is practical for the employee to be transferred to day work

FLEXIBILITY IN WORKING HOURS

The BCEA allows for some flexibility in the arrangement of working hours by agreement between the employer and employees (collective agreement) or one employee (individual agreement):

- **Compressed working week by collective or individual agreement:** Employees can work up to 12 hours of normal work on any day without receiving overtime pay. But, the employees may still not work more than 45 normal hours per week and may not work more than 5 days in a week. Any time worked beyond 45 hours in the week as part of a Compressed Working Week, should be paid at overtime rates of time-and-a-half.
- **Averaging of working hours by collective agreement only:** Averaging means employees can agree to work longer normal daily working hours than the BCEA usually allows if they get the same number of extra hours worked, off at a later time. This would for example mean that employees could agree to work longer hours in one week for normal pay if they work reduced hours for normal pay the following week. However, the employees may still not work more than an average of 45 ordinary hours per week during this period of up to four months. The agreement cannot go on for longer than 4 months. Where reference is made to a collective agreement, then this agreement should be made through the employees' trade union.

WORKING SHORT-TIME

Short-time means a temporary reduction in the number of ordinary hours of work owing to operational reasons such as reduced orders or profits. An employee is classified as being on short-time if the following applies:

- It is for a temporary period and there is only a limited amount of work available for an employee
- The employee still has a contract of employment with their employer
- The employee expects to return to full-time employment with the same employer

Short-time is an alternative to retrenchment. If for some reason there is less work available but the same number of employees to do it, short-time means that the work can be shared equally amongst employees.

Short-time cannot be imposed unilaterally by the employer because it means changes will be made to employees' working hours and remuneration. The employer must notify and consult with employees or union representatives before introducing short-time. This consultation must be undertaken as part of a Section 189 (Retrenchment) consultation process and is normally introduced for a temporary period, as an alternative to retrenchment.

Provision for short-time may also be included in the contracts of employment or a collective agreement if it is a custom and practice of the company to do so and employees are aware of this and agree to it.

Short-time has always been regarded as a temporary measure, such as work being reduced to three days a week for a limited period, with the understanding that normal hours of work will resume in the near future.

How are employees selected to work short-time?

When an employer selects employees for short-time work, they should apply the same criteria as they would for retrenchment. For example, this could be the *Last in First Out* principle or a combination of skills depending on operational needs. The criteria used for short-time should be reasonable and applied in a fair manner and should not discriminate against employees on grounds included in the *Employment Equity Act*. Employers should explain to the affected employees the reason for the short-time and also keep them informed of the situation during the time they are working short-time. Short-time may also be introduced as an outcome of a retrenchment consultation process.

How are employees paid if they are on short-time?

Employees only get paid for the time worked. Ordinary deductions may be aligned to the change in payment. Where employees belong to a pension fund, the employer should engage with the fund in order not to prejudice the future of the employee's contribution and benefits. Deductions should be made with the written consent of the employee.

Can employees claim UIF while on short-time?

Employees can claim unemployment benefits based on receiving a reduced income due to short-time. They will not qualify for the full payout of UIF benefits but a portion of this depending on the extent of the short-time.

PAYMENT IN KIND

Wages can be paid partly in kind if the law provides for this. Payment in kind means that an employer pays an employee their wage by giving them housing, use of land or food, as well as money.

However, this can only be done if the Minister of Employment and Labour decides that payment in kind should apply to a certain sector. The Minister will also decide what formula to use to determine the value of the payment in kind.

In the event of a strike, an employer may not withhold payment in kind and is obligated to ensure its continuation. An employer should then claim back from the employees after agreement has been reached. The Labour Court may be approached in the event of a dispute.

DEDUCTIONS

Deductions from wages (other than those required by law) are not permitted without the written consent of the employee.

The **deductions required by law** that an employer makes from the wages of an employee are as follows:

- Unemployment Insurance Fund (UIF)
- PAYE (tax)
- Any deduction ordered by a court

The **lawful deductions** that an employer can make from the wages of an employee, if the employee instructs the employer in writing to make the deduction, are as follows:

- Trade union subscriptions

- Medical aid contributions
- Pension or provident fund
- Money to pay back a housing loan or other loan from the employer - The maximum amount that can be deducted to pay the employer for accommodation, food or transport should not exceed 10% of an employee's wages
- Money for food and accommodation - The maximum amount that can be deducted from an employee's wage for accommodation is 10% of their wages; and 10% of their wages for food.

Deductions can be made up to 25% of the employee's wage for loss or damages suffered at work as a result of the employee's negligence or misconduct, provided the employee has been given a hearing to explain the facts and has agreed in writing to the deduction. (Section 34 of the BCEA)

Often, employers also make **unlawful deductions** from employees' wages. Examples are when:

- The employer says there were shortages in a till and the employee has to pay back the shortages
- The employee breaks something at work
- The employee owes the employer money but did not agree that the amount owing should be deducted
- The employee is off sick and the employer deducts money for the days not worked

If an employer wants to deduct a fine from an employee's wage, to compensate the employer for loss or damage, the employer can only deduct the fine if:

- The loss/damage happened during the 'course and scope of employment'
- The employee was at fault
- A fair hearing was held to give the employee a chance to state their case
- The employer does not deduct more than the actual value of the loss or damage
- The total amount deducted is no more than 25% of the employee's wages
- The employee gives consent in writing ***(See pg 416: Problem 1: Money is deducted from an employee's wages)***

DAILY AND WEEKLY REST PERIODS

- No employee's hours of work may be spread over more than 12 hours per day. ('Spread over' means from the start of work to the end of work, including any breaks for meals or rest and any overtime.)

- A rest period of 1 hour is required after every 5 hours worked. This can be reduced to 30 minutes if the employee and employer agree in writing
- Every employee is entitled to a daily rest period of 12 hours from the end of work on one day to the start of work on the following day. This rest period can be reduced to 10 hours if an employee lives on the premises and gets a meal break of at least 3 hours (this may be relevant to domestic employees, caretakers, farm workers, and so on)
- Every employee is entitled to a weekly rest period of 36 continuous hours. For many employees, this is over the weekend
- An agreement in writing between the employer and employee may reduce the meal interval to not less than 30 minutes or do away with a meal interval if the employee works less than 6 hours on a day

The agreement can also provide for a rest period of at least 60 consecutive hours (hours in a row) every two weeks.

The BCEA makes no provision for tea intervals although it is common for the employer to grant one or two tea intervals per shift. These intervals are normally deemed to be 'paid time.'

LEAVE

Leave can be annual (yearly) leave, sick leave, maternity leave, parental leave, commissioning parental leave, adoption leave, family responsibility leave, or unpaid leave.

ANNUAL LEAVE

- Every employee is entitled to 21 consecutive days paid leave per year. This is the equivalent of three weeks off, and for the employee who works 'a five-day week,' this leave amounts to fifteen working days. An employee who normally works six days every week is entitled to eighteen working days leave, which is also twenty-one consecutive days of leave.
- The employee is entitled to take 21 days all in one go but can choose to use the annual leave to take occasional days off work. The employer then deducts these days of occasional leave that an employee took during the year from the annual leave days.
- Annual leave must be taken within 6 months of the end of an annual leave cycle (a year's work).
- If the employee is off work on any other kind of leave, these days do not count as part of annual leave. Another way of saying this is that annual leave cannot be taken at the same time as sick leave, family responsibility leave or maternity leave.

- If the leave period covers a public holiday, then the public holiday does not count as part of the employee's leave and the employee should be given an extra day's leave. (Paid public holidays are: 1 January New Year's Day, 21 March Human Rights Day, Good Friday, Family Day, 27 April Freedom Day, 1 May Employees' Day, 16 June Youth Day, 9 August National Women's Day, 24 September Heritage Day, 16 December Day of Reconciliation, 25 December Christmas Day, 26 December Day of Goodwill.)
- Annual leave cannot be taken at the same time as the notice period
- Leave pay is not a bonus on top of normal pay. It simply means that an employee gets a holiday every year, and gets normal pay for those days. If an employee doesn't take leave, or all the leave, the employer will not pay out leave pay instead of leave unless specified through agreement.
- If an employee leaves a job without having taken all the leave that is due to them, the employee must be paid for the days of leave that they have not taken unless this has been specified in the contract of employment or company policy. This is called pro-rata accrued annual leave pay. **(See pg 417: *Problem 2: Employee wants to claim notice pay and leave pay*)**

SICK LEAVE

- A permanent employee is entitled to paid sick leave of 30 days over any 3-year cycle (36 days if the employee works a 6-day week). This amounts to a 6-week period over 3 years and may not be broken down into two weeks per year. During the first 6 months that an employee works for an employer, they get 1 day paid sick leave for every 26 days worked. Once all these paid sick leave days are used up, the employer does not have to pay the employee when they are off sick.
- Only an employee who works more than 24 hours during any month earns sick leave, and this is on the basis of one day's leave for every 26 days worked.
- Seasonal or temporary employees are entitled to 1 day's sick leave for every 26 days worked over the first 6-month cycle.
- Employees who are sick for more than 2 days or are sick on two separate occasions within an 8-week cycle may be required to produce a doctor's certificate. If an employee lives on the premises and it is difficult for him/her to get to a doctor (for example, in rural areas), the employee does not have to produce a certificate unless the employer gives the employee reasonable assistance to get the certificate.
- Sick leave pay is not a bonus on top of normal pay. It simply means that if an employee is genuinely sick and has to take time off work, the employer must pay the employee up to a certain number of days. For example, if a waitress

in a restaurant only takes 3 days sick leave this year, the employer does not owe her the money for the remaining sick leave days at the end of the year.

PARENTAL LEAVE

An employee who is a parent of a child but who is not the primary carer is entitled to 10 consecutive days' parental leave following the birth of their child. For example, if a child is born on a Tuesday, the parent may take leave from that Tuesday until the following Thursday. This leave applies regardless of gender, so it includes parents in same-sex relationships. Parental leave is unpaid (like maternity leave), but employees can claim benefits from the UIF if they have been employed for at least 13 weeks before claiming the benefit.

COMMISSIONING PARENTAL LEAVE

This type of leave refers to surrogate motherhood. The commissioning parent who will primarily be responsible for looking after the child (primary commissioning parent), will be entitled to commissioning parental leave. If there are two commissioning parents, they can choose: if one takes commissioning parental leave, the other can take normal parental leave. The one who takes commissioning parental leave will be entitled to 10 consecutive weeks' commissioning parental leave. The other parent would be entitled to 10 consecutive days' normal parental leave.

Leave can start on the date of the birth of the child.

This leave is unpaid (like maternity leave), but employees can claim benefits from the UIF if they have been employed for at least 13 weeks.

FAMILY RESPONSIBILITY LEAVE

Every employee with more than 4 months of service with an employer, and who works more than 4 days a week, is entitled to 3 days paid family responsibility leave per year. This can be taken if a direct family member dies, (this includes a wife or husband or a life partner, the employee's parent, child, adopted child, grandchild or brother or sister) or if the child is ill. A total of three days is allocated for this kind of leave and not three days for each event.

An employee may break these days up, e.g an employee may take half a day off to attend to a child that may be sick at school. Additionally, family responsibility leave allowance lapses at the end of the financial year and is not automatically carried over.

MATERNITY LEAVE

This period of maternity leave is unpaid, and the employee can, if she wishes, go on maternity leave four weeks before the expected date of birth, and stay off work for up to another three months after the child is born.

Maternity Leave is unpaid, though the mother is entitled to claim Maternity Benefits from UIF for up to four months of such leave, subject to the employee having worked for thirteen weeks.

ADOPTION LEAVE

This leave applies to the adoption of a child that is below the age of two. A single adoptive parent is entitled to 10 consecutive weeks' adoption leave. If there are two adoptive parents, only one would be entitled to 10 consecutive weeks' adoption leave. However, the other adoptive parent would be entitled to 10 consecutive days of normal parental leave. It is up to the adoptive parents to decide who takes adoption leave and who takes parental leave.

Leave can start on the day that the adoption order is granted, or the day that a competent court places the child in the care of a prospective adoptive parent.

This leave is unpaid (like maternity leave) but employees can claim benefits from the UIF if they have been employed for at least 13 weeks.

Any leave taken by a mother due to the illness of the baby, following soon after its birth, will be considered maternity leave rather than family responsibility leave.

If the mother wants to come back to work earlier than six weeks after her child has been born, she can do this, provided a doctor has given a certificate saying that this is safe for the mother to do. ***(See pg 387: Maternity benefits)***

UNPAID LEAVE

An employer may agree to let an employee take extra days of annual leave, or the employee may be sick for longer than the paid sick leave. Then the employer does not have to pay the employee for these days and this is known as Unpaid Leave.

ABSENT WITHOUT LEAVE

If an employee takes leave without getting permission from the employer and is not sick, the employer does not have to pay the employee for the time taken off. If the employee takes off many days in a row without permission

and without communicating with the employer (normally more than 4 consecutive days), the employer may presume that the employee has deserted (left without giving notice) their employment. The employer will be entitled to hold a hearing and consider the dismissal of the employee who has deserted employment and after this they may employ someone else to do the job.

In this case the employer may dismiss the employee and will not be required to give the employee notice. But if the employee returns, they will have to indicate why they did not communicate with the employer during the extended period of absence and to provide proof of a valid reason for the prolonged absence. The employer will need to consider these facts.

Employers should, in cases of extended absenteeism, always attempt to genuinely contact the employee, should always hold a disciplinary hearing in their absence and should focus the need of replacement on a business imperative based on objectifiable facts.

NOTICE

- During the first six months of employment, employees will be entitled to at least 1 week's notice of the termination of their services
- After the first six months, but during the first year of employment, employees will be entitled to 2 week's notice
- If they have worked for more than one year, employees are entitled to 4 week's notice
- If an employment contract has a longer period of notice than the BCEA, the longer notice must be given and it must be the same for both the employee and the employer
- Notice works both ways! If an employee resigns without giving the employer the correct amount of notice, for example, one week, the employer can claim one week's pay from the employee. ***(See pg 360: Dismissals)***
- Notice must be in writing, which will include written communication via social media, such as Whatsapp
- Neither the employer nor the employee can give notice while the employee is on annual leave.
- Farm workers and domestic workers who have been employed for more than 6 months are entitled to 4 weeks' notice ***(See pg 417: Problem 2: Employee wants to claim notice pay and leave pay)***

All employees are entitled to a written **certificate of service** when the employee stops working for that employer. The certificate of service sets out the full name of the employer and the employee, the job/s that the employee was doing, the date

that the employee began working, the date that the work ended, and the wage at the time that the job ended, including payment in kind.

WRITTEN PARTICULARS IN A CONTRACT OF EMPLOYMENT AND PAYSLIPS

Except for **employees who work less than 24 hours a month**, when the job starts, the employer must give the employee **written particulars** about the job, including:

- A description of the job
- The hours that the employee will be expected to work
- Ordinary and overtime rates of payment, including payment in kind and its value
- Any deductions to be made
- How much leave the employee will get
- The notice period

This document is like a contract of employment, but the employee doesn't have to sign it. If an employee can't read, the particulars must be explained in a language the employee understands.

The BCEA says an employer must hand the employee their wages with certain details on a payslip, including:

- The period for which the employee is being paid
- The number of overtime hours worked
- The number of hours worked on a Sunday or public holiday
- The wages due to the employee (both normal and overtime)
- The amount and reason for any deductions made for tax, pension, UIF and so on
- The actual amount paid

The BCEA says the employers must keep the following records:

- The time worked by each employee
- The wages paid to each employee

The BCEA (Sections 28 and 29) says an employer who employs less than 5 employees does not have to give the employee detailed information about their wages when they are paid.

PROHIBITION OF VICTIMISATION AND EXPLOITATION

An employer may not victimise or discriminate against, an employee who refuses to do something that is against the BCEA. For example, if an employee says she cannot work overtime because her baby is sick at home, the employer cannot dismiss her,

because the BCEA says that an employer cannot make an employee work overtime without the employee's consent.

PREGNANCY IN THE WORKPLACE

The Code of Practice on the Protection of Employees During Pregnancy and After the Birth of a Child was issued under Section 87(1) (B) of the BCEA.

Many women work during pregnancy, some even working right up until they give birth and returning while breastfeeding their children. The purpose of this Code is to provide guidelines to both employers and employees on the possible hazards and the steps that should be taken to protect the working environment and the health of a pregnant employee, after birth and during breastfeeding.

The provisions in the BCEA on Parental Leave entitle a mother to take up to four months maternity leave and to claim maternity benefits from UIF. A mother is prevented from returning to resume work after giving birth to her child for a period of six weeks after the child's birth, unless she has a medical certificate from a medical practitioner authorising the early return to work.

S26(1) of the BCEA prohibits employers from requiring pregnant mothers and breastfeeding mothers to perform work which is hazardous to the mother and the child. Each workplace is different with respect to the chemical and biological hazards that may affect them. Employers should take the following steps to protect pregnant and breastfeeding women in the workplace:

- Not allow them to perform work that is hazardous to her health and the health of the unborn child
- Assess and control any risks
- Identify, record and review potential risks and protective measures to put in place at work
- List alternative risk-free jobs
- Advise employees to notify them when they are pregnant and inform them of hazards linked to the job
- Encourage employees to notify them immediately they know they are pregnant so that the employer can identify risks and take preventative measures
- Keep a record of each pregnancy
- Evaluate the employee's position in the workplace, including a medical doctor's examination of the employee's physical condition, the job done by the employee; workplace practices and potential workplace exposures that may affect them

- If there are potential risks, find ways to reduce the exposure and provide training to the employee on how to prevent any exposure to hazards
- Make adjustments to the employee's station if required and, if possible, or transfer the employee to safe alternative work
- Allow employees to attend ante and post-natal classes
- Allow breastfeeding mothers to breastfeed for 30 minutes twice per day or express milk daily for the first 6 months of the child being born

Minimum wages

The *National Minimum Wage Act* (NMWA) provides for a minimum wage for all employees except members of the South African Defense Force, The National Intelligence Agency and the South African Secret Service. The NMWA does not apply to a volunteer who performs work for another person and who is not paid for their services.

The national minimum wage is reviewed at regular intervals, often annually, by the National Minimum Wage Commission, which makes recommendations to the Minister of Employment and Labour regarding any adjustments to the national minimum wage.

Any increase to the minimum wage normally applies from the 1st of March every year.

Summary of provisions in the National Minimum Wage Act (NMWA)

WHAT IS THE MINIMUM WAGE?

The current minimum wage is R28.79 per hour and is reviewed at different times. The same minimum wage applies equally to farm employees and domestic employees whether they are working in an urban or rural area and includes a gardener, driver for a household, or caretaker of children, disabled or elderly.

Employees on an expanded public works programme are entitled to a minimum wage of R15.83 per hour (a programme providing public or community services through a labour-intensive programme and which is funded by public resources).

The prescribed minimum wages do not include benefits such as transport, meals, accommodation allowances and so on, unless the Minister makes a determination that these benefits may be included for a specific group of employees.

MINIMUM WAGES IN DIFFERENT SECTORS

Sectoral Determination 9 (SD9): Wholesale and Retail Sector - this provides its own regulation on minimum wages and depends on the job category. The lowest minimum wage for the Wholesale and Retail Sector is R28.79 per hour.

Sectoral Determination 1 (SD1): Contract Cleaning Sector – provides a minimum rate of R31.69 in metropolitan areas and R28.79 in certain rural areas.

Learnership programmes - The NMWA provides minimum wages relating to employees who are part of a learnership programme. However, the minimum wage is determined per week and depends on the number of credits already earned by the learner

CAN AN EMPLOYER REDUCE A SALARY TO THE MINIMUM WAGE?

If an employment agreement already exists between an employer and employee and provides for a salary higher than the prescribed minimum wage, the employer cannot unilaterally reduce this. On the other hand, if the employment contract provides for less than the prescribed minimum wage, the employer must increase the employee's salary to be in line with the minimum wage.

It is an unfair labour practice for an employer to unilaterally change an employee's hours of work or other conditions of employment in implementing the national minimum wage.

Enforcement and dealing with disputes about minimum wages

Disputes around minimum wages can be referred to the CCMA or the Department of Employment and Labour. A dispute cannot be referred to both. This only applies to employees who earn below the BCEA earning threshold of R261 748 per year or R21 812 per month. Employees who earn above the threshold can claim in either the Labour Court, High Court, Magistrates Court or Small Claims Court, depending on the jurisdictional requirements for each of these courts.

REFERRING THE DISPUTE TO THE CCMA:

The BCEA provides that any employee (defined in S1 of the BCEA or S1 of the NMWA) may refer a dispute to the CCMA if the employer fails to pay any amount owing to an employee. An employee can make an application to the CCMA for conciliation and if the dispute cannot be resolved, it will then automatically go to arbitration on the same day. No legal representation is allowed in these disputes. This process involves

sending the CCMA Referral of Dispute Form 7:11 to the employer and then the CCMA and ticking Section 73A under 'Nature of Dispute.'

This provision only applies to employees who earn below the BCEA earning threshold of R261 748 per year or R21 812 per month. Employees who earn above the threshold can claim in either the Labour Court, High Court, Magistrates Court or Small Claims Court depending on the jurisdictional requirements for each of these courts.

REFERRING THE DISPUTE TO THE DEPARTMENT OF EMPLOYMENT AND LABOUR:

A dispute regarding minimum wages can also be referred to the Department of Employment and Labour. Inspectors can get a written undertaking from employers to pay the minimum wage or they can issue compliance orders to employers for non-enforcement instructing them to pay the minimum wage. Both the compliance orders and written undertakings may be made into arbitration awards by the CCMA. If the award is not complied with, the employee can apply to the CCMA to certify the award and it may be enforced as if it were an order of the Labour Court.

An employee can refer a dispute about minimum wages to either the CCMA or the Department of Employment and Labour but not to both.

PENALTIES FOR FAILING TO COMPLY WITH THE NATIONAL MINIMUM WAGE ACT

An employer may be issued with a fine if an employee is paid less than the prescribed minimum wage. This fine may be either one of the following (whichever is the higher amount):

- Twice the value of the amount the employee is paid below the prescribed minimum wage. For example, an employer pays an employee R5 less than the prescribed minimum wage. This means that the fine will be twice that amount, which is R10.
- Twice the employee's monthly wage. For example, if an employee earns R900 per month, the fine can be R1 800.

EXEMPTIONS FROM PAYING THE MINIMUM WAGE

NMWA provides for an employer to apply for exemption from paying the national minimum wage.

Collective agreements

Collective bargaining is where employees, normally represented by a trade union and employer/s negotiate with each other about terms and conditions of employment to reach a collective agreement. The collective agreement may have different conditions to those in the *Basic Conditions of Employment Act* (BCEA).

A collective agreement overrides any individual contract of employment. Collective agreements can be of two kinds:

- The BCEA allows variation of certain specified conditions in the BCEA through collective bargaining between a group of employees represented by a registered union working for the same employer (usually at one workplace) and the employer
- The *Labour Relations Act* allows centralised collective bargaining between groups of employees in the same industry or sector and employers in that industry or sector. They draw up a Bargaining Council Agreement, which businesses covered by that agreement in that sector have to follow
- The Act also allows for a Collective Agreement to be entered into within an organisation between a registered trade union and the employer

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Workplace-based collective agreements

A group of employees working for the same employer who join a Trade Union (usually at one workplace) and the employer, negotiates and makes a collective agreement. The collective agreement covers terms and conditions of employment for employees working for that employer.

The BCEA says what things employees and employers are free to make collective agreements about. For example, employees and their employer cannot collectively agree that child labour will be allowed. Certain core rights can only be altered if they are deemed to be more favourable than what the law allows. These include normal working hours (45 hours) maternity leave, night work provisions etc.

A workplace-based agreement may have different conditions to those in the BCEA, as long as they are more favourable to the employee than the BCEA. The BCEA sets out the minimum conditions of employment. If an agreement breaks any part of the BCEA, it is not enforceable and the BCEA conditions override the conditions in the agreement.

If the collective agreement does not cover certain terms and conditions of employment, then those terms and conditions in the BCEA apply to the employees.

Notice to terminate a collective agreement must be given in writing. Employers should always be wary about terminating collective agreements as this may be deemed under law to be a unilateral alteration of a working condition which is considered an unfair labour practice.

A collective agreement can be made mandatory and applicable for all employees in a bargaining unit (in other words, non-union members) if the registered trade union is a majority union and the agreement specifies those employees to be covered by such agreement.

ENFORCEMENT OF A WORKPLACE-BASED COLLECTIVE AGREEMENT

> If you are helping an employee with a problem which is covered by a collective agreement under the BCEA, then you refer the problem to the CCMA or Bargaining Council if you have failed to solve the problem with the employer on your own. If there is disagreement over an interpretation of a collective agreement or how it is being applied, then this can also be referred to the CCMA or appropriate bargaining council for conciliation and final arbitration in terms of Section 24 of the *Labour Relations Act.*

Bargaining Council Agreements

A Bargaining Council Agreement is the outcome of centralised collective bargaining under the *Labour Relations* Act (LRA).

A Bargaining Council Agreement sets out terms and conditions of employment for a particular industry in a particular area. The conditions in the collective agreement may be better for employees than those in the *Basic Conditions of Employment Act* (BCEA), or employees may agree to conditions less favourable than the BCEA provided they do not affect certain core rights and the agreement is better for the employees concerned. ***(See Section 49 of the BCEA)***

HOW ARE BARGAINING COUNCIL AGREEMENTS MADE?

> Bargaining Councils are permanent structures. They are made up of representatives of employers on the one hand and of trade unions on the other. The LRA sets out conditions for setting up Bargaining Councils. The two parties to a Bargaining Council negotiate together to make a Bargaining Council Agreement, which is reported in the Government Gazette.

A Bargaining Council may ask the Minister of Employment and Labour in writing to extend a collective agreement to any non-parties to the agreement, who are within the 'scope' of the council.

If there is no Bargaining Council in a sector, unions or employer organisations can apply to establish a Statutory Council under the LRA. For a Statutory Council to be introduced, the unions in that sector must represent 30% or more of employees in the sector, and the employers' organisation must represent 30% or more of employers in the sector. Statutory Councils can negotiate education and training, benefit funds and dispute resolution in the sector. In Statutory Councils, employers are not forced to negotiate over wages and conditions of employment.

A Statutory Council may become a Bargaining Council later. At present, only three Statutory Councils have been created: they are the Statutory Council of the Printing, Newspaper and Packaging Industry of South Africa; the Statutory Council for the Fast Food, Restaurant, Catering and Allied Trades (SCFFRCAT) and the Statutory Council for the Squid and Related Fisheries of South Africa.

ENFORCEMENT OF A BARGAINING COUNCIL AGREEMENT

It is an offence for employers or employees working in a particular industry and are not to obey the terms of the Bargaining Council Agreement. Any problems with any of the working conditions in the Agreement must be referred to the Bargaining Council for investigation. The Bargaining Council's agents have powers of inspection similar to Labour Inspectors in terms of the BCEA. Such agents can provide Compliance Orders where employers are in breach of the council agreement. ***(See pg 418: Problem 3: Employee is paid below the minimum wage)***

SETTLING DISPUTES UNDER A BARGAINING COUNCIL

The Bargaining Council also plays a role in settling disputes, such as unfair labour practices or unfair dismissals in a particular industry. Disputes must be referred to the relevant Bargaining Council for conciliation if a Bargaining Council exists in the sector. The Council appoints conciliators to act as conciliators to try to help the two parties negotiate a solution. If the conciliation does not resolve the dispute, either of the parties may refer the matter for arbitration to the Bargaining Council, which has its own accredited arbitrators. The Bargaining Council dispute resolution procedure is similar to the CCMA dispute resolution procedure. A Bargaining Council or CCMA Arbitrator may make an award ordering the employer to pay unpaid annual leave for example, an amount owing, or make an appropriate award. ***(See pg 370: Solving disputes under the LRA)***

Sectoral determinations

A sectoral determination controls the terms and conditions of employment for employees in a particular sector. It may set minimum wages in sectors, regulate payment in kind, regulate pension and medical aid schemes, prohibit or regulate piecework, set minimum standards for housing for employees who live on the employer's premises, and so on. Sectoral determinations will be set in sectors where there is no centralised collective bargaining and which require detailed and specific regulations (e.g. the agricultural sector). Sectoral determinations may have different conditions to those in the Basic Conditions of Employment Act (BCEA). The conditions in the Sectoral Determinations will override the conditions in the BCEA.

How are Sectoral Determinations made?

The Basic Conditions of Employment Act (BCEA) provides for the establishment of an Employment Conditions Commission, which investigates conditions in a particular industry or sector. Meetings are held to discuss the establishment of a sectoral determination. Anyone interested in having a say in a particular industry can attend these meetings which are advertised in the government gazette.

When the Employment Conditions Commission has heard all the information, it makes recommendations to the Minister of Employment and Labour. Once the minister approves the recommendations, they are published in the Government Gazette as a wage determination or sectoral determination.

Enforcement of a Sectoral Determination

It is the Department of Employment and Labour's job to make sure that all employers and employees obey the conditions of employment laid out in sectoral determinations and wage determinations. If you are helping an employee who is covered by a sectoral determination or wage determination, you may refer a breach to the CCMA in terms of Section 73A of the BCEA or refer the problem to the Department of Employment and Labour if you have tried and cannot solve the problem with the employer on your own. ***(See pg 317: Problem 3: Employee is paid below the minimum wage)***

Alternatively, a breach of the Sectoral Determination could be referred to the CCMA as part of an Unfair Dismissal claim made at the CCMA or can be referred to the CCMA in terms of

Section 73A(1) for payment to be made. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'

Settling disputes under a Sectoral Determination

It is the Department of Employment and Labour's job to help with settling of disputes.

Summary of the Sectoral Determination for Farm Workers

The employment conditions of farm workers are regulated by Sectoral Determination 13(SD13) and the *Labour Relations Act* (LRA). This is a summary of the provisions contained in SD13.

(See the website: www.labour.gov.za; click on Sectoral Determination 13 for the full version).

NOTICE PERIOD AND TERMINATION OF EMPLOYMENT

Any party to an employment contract must give written notice, except when an illiterate employee gives it, as follows:

- One week – if employed for 6 months or less
- Four weeks – if employed for more than 6 months

Notice must be explained verbally by or on behalf of the employer to a farm worker if they are not able to understand it. If the farm worker lives in accommodation provided by the employer, then the employer must give him/her one month's notice to leave the accommodation or allow the employee to remain in the home until the contract of employment ends.

The farm worker is allowed to keep livestock on the premises for a period of one month or until the contract of employment could lawfully have been terminated. The farm worker who has standing crops on the land is allowed to tend to those crops, harvest and remove them within a reasonable time after they become ready for harvesting unless the employer pays the farm worker an agreed amount for the crops.

All money that is owed to the farm worker, for example, wages, allowances, pro rata leave, paid time-off not taken, and so on, must be paid to the employee if the employee leaves the farm.

PROCEDURE FOR TERMINATING EMPLOYMENT

A farm worker's contract of employment may not be terminated unless a valid and fair reason exists and a fair procedure is followed. If an employee is dismissed without a valid reason or without a fair procedure, the employee can refer the case to the CCMA. This should be done within thirty days of being dismissed from the farm.

If a farm worker cannot return to work because of a disability, the employer must investigate the nature of the disability and decide whether or not it is permanent or temporary. The employer must try to change or adapt the duties of the employee to accommodate the employee as far as possible. But, if it is not possible for the employer to change or adapt the duties of the farm worker then the employer can terminate their services for what is called "Incapacity."

The *Labour Relations Act* sets out the procedures that must be followed when a person's services are terminated.

WAGE/REMUNERATION/PAYMENT

All farmers have to pay their employees a minimum wage. Wage rates are normally adjusted every year.

The current minimum wage is R28.79 per hour.

Farmers who can prove that they cannot afford the minimum wage can apply to the Department of Employment and Labour for a variation or exemption from this requirement. The Department will consider variations only where the farmer can give good financial reasons for this.

Additional payments (such as for overtime or work on Sundays or Public holidays) are calculated from the total remuneration.

TRANSPORT ALLOWANCE

The Sectoral Determination does not regulate transport, so it is open to negotiation between the parties. However, the allowance cannot exceed 10% of the employee's remuneration.

HOURS OF WORK

NORMAL HOURS (EXCLUDING OVERTIME)

A farm worker cannot work more than:

- 45 hours per week
- 9 hours per day for a five-day work week
- 8 hours a day for a six-day work week

EXTENSION OF ORDINARY HOURS OF WORK

Ordinary hours of work can be extended by written agreement but by no more than 5 hours per week for a period of up to four months. The ordinary hours of work should be reduced by the same number of hours during a quiet period in the same twelve-month period. A

Averaging of working hours during season time

Averaging means employees can collectively agree to work shorter or longer hours than the Sectoral Determination allows. Any agreement to work longer hours means employees must get the same number of extra hours off at a later time.

Any agreement regarding longer or shorter working hours must be in writing and should be done with the support of a trade union where possible.

Farm workers can agree to work up to 50 hours a week for their ordinary wages but this can only go on for four months. However, if the parties want to extend this arrangement, they can agree in writing to do this and they must then notify the Department of Employment and Labour of this agreement so that a 'Variation Order' is made by the Department of Employment and Labour. In return, normal working hours must be reduced by the same amount (in other words to 40 hours) during the quiet periods.

The employer must pay the farm worker the wage they would have received for their normal hours worked. If hours have been extended and not reduced at a later stage, then the hours must be paid as overtime.

OVERTIME

A farm worker may not work more than:

- 15 hours of overtime per week, and
- 12 hours spread over any day, including overtime

Overtime is paid at one and a half times the employee's normal wage or an employee may agree to take paid time off on the basis of one and a half hours off for every overtime hour worked.

DAILY AND WEEKLY REST PERIODS

A farm worker is entitled to a daily rest period of 12 consecutive hours (hours in a row) and a weekly rest period of 36 consecutive hours, which must include Sunday, unless otherwise agreed.

The daily rest period can be reduced to 10 hours if the parties agree and if the employee lives on the premises and takes a meal interval that lasts for at least 3 hours.

The weekly rest period can by agreement, be extended to 60 consecutive hours every two weeks or be reduced to 8 hours in any week if the rest period in the following week is also extended.

NIGHT WORK

- Night work means work performed after 8 p.m. and before 4. a.m.
- Night work can only happen if the farm worker has agreed to this in writing. The employee must be compensated for night work by an allowance of at least 10% of the ordinary daily wage.

MEAL INTERVALS

A farm worker is entitled to a one-hour break for a meal after five hours work of continuous work. The interval may be reduced to 30 minutes by agreement. When a second meal interval is required because of overtime worked, it may be reduced to not less than 15 minutes. If an employee has to work through their meal interval, then they must be paid for this.

WORK ON SUNDAYS

Farm workers should be paid for work on Sundays as follows:

- One hour or less: Double the wage for one hour
- Longer than one hour but less than 2 hours: Double the wage
- Longer than two hours but less than 5 hours: The normal daily wage
- Longer than 5 hours: Either:
    - Double the wage for the hours worked, or
    - Double the daily wage, whichever is greater

A farm worker who does not live on the farm and works on a Sunday must be regarded as having worked at least two hours on that day.

PUBLIC HOLIDAYS

Farm workers are entitled to all the public holidays in the *Public Holidays Act*, but the parties can agree to other public holidays. Work on a public holiday is voluntary which means a farm worker may not be forced to work.

The official public holidays are: New Years Day, Human Rights Day, Good Friday, Family Day, Freedom Day, Employees Day, Youth Day, National Woman's Day, Heritage Day, Day of Reconciliation, Christmas Day, Day of Goodwill.

Where the government declares an official public holiday at any other time then this must be granted. The days can be exchanged for any other day by agreement.

If the employee works on a public holiday, which would ordinarily have been a normal working day, they must be paid double the normal daily wage. If on a Saturday, then they must be paid the normal daily wage plus the normal hourly rate for each hour worked on that public holiday.

ANNUAL LEAVE

Full-time farm workers are entitled to 3 weeks leave per year. If the parties agree, they can take leave as follows: 1 day for every 17 days worked or one hour for every 17 hours worked.

The leave must be given not later than 6 months after completing 12 months of employment with the same employer. The leave may not be given at the same time as sick leave, nor at the same time as a period of notice to terminate work.

SICK LEAVE

During the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked.

During a sick leave cycle of 36 months, an employee is entitled to paid sick leave that is equal to the number of days the employee would normally work during a period of 6 weeks.

The employer does not have to pay an employee if the employee has been absent from work and does not produce a medical certificate stating that they were too sick or injured to work:

- For more than two days in a row
- On more than two occasions during an 8-week period

MATERNITY LEAVE

A farm worker is entitled to up to 4 consecutive months of maternity leave. The employer does not have to pay the employee for the period for which she is off work due to her pregnancy. However, the parties may agree that the employee will receive part of her whole wage for the time that she is off, and the mother is able to claim from the UIF for maternity leave benefits.

PARENTAL LEAVE

In terms of Section 25A of the BCEA, an employee who is a parent of a child will be entitled to 10 consecutive days' unpaid parental leave during each leave cycle. Parental leave can start on the day that the child is born or, if the child is adopted,

the date the adoption order was granted or the adoptive child was placed in the care of the parents, whichever comes first.

The 10 consecutive days of parental leave are calendar days, not working days. An employee must notify the employer in writing of the date on which they intend to start their parental leave and return to work after parental leave. This notification must at least be given 1 month before the birth of the child or whenever it is practical to do so.

An employee who contributes to the UIF may apply for parental benefits from the Department of Employment and Labour.

FAMILY RESPONSIBILITY LEAVE

Employees who have been employed for longer than 4 months and for at least 4 days a week are entitled to take 3 days of paid family responsibility leave during each leave cycle in the following circumstances:

- When the employee's child is sick
- If one of the following people dies:
    - the employee's husband/wife/life partner
    - parent/adoptive parent
    - grandparent
    - child
    - adopted child
    - grandchild
    - brother or sister

Employees need not take a whole day off and can request half days off or any shorter period. Again, the granting of this leave is at the employer's discretion.

ADOPTION LEAVE

Adoption leave applies to the adoption of a child who is below the age of 2 years. A single adoptive parent is entitled to 10 consecutive weeks' unpaid adoption leave. If there are two adoptive parents, only one would be entitled to 10 weeks' adoption leave. However, the other adoptive parent would be entitled to 10 consecutive days of normal parental leave. It is up to the adoptive parents to decide who takes adoption leave and who takes normal parental leave.

Leave starts on the day that the adoption order is granted or the day that a court places the child in the care of an adoptive parent. An employee who contributes to the Unemployment Insurance Fund can apply for adoption benefits from the Department of Employment and Labour.

COMMISSIONING PARENTAL LEAVE

Commissioning parental leave refers to surrogate motherhood. In terms of Section 25© of the BCEA, the parent who will primarily be responsible for looking after the child (primary commissioning parent) will be entitled to 10 consecutive weeks of unpaid commissioning parental leave. If there are two commissioning parents, they can choose: if one parent takes commissioning parental leave, the other can take normal parental leave. The other parent would be entitled to 10 consecutive days' normal unpaid parental leave. An employee who contributes to the UIF may apply for Commissioning Parental benefits from the Department of Employment and Labour.

DEDUCTIONS FROM REMUNERATION

An employer is not allowed to deduct any monies from the employee's wages without their written permission.

Section 8 of SD13 states that an employer may not make any deductions from a farm employee's wages, except:

- A deduction of up to 10% of the employee's wage for food
- A deduction of up to 10% from the employee's wage for accommodation where the farm employee lives
- A deduction of up to 10% to repay a loan made by the employer to the farm employee
- A deduction of an amount which the employee has asked the employer to pay to a third party (for example, a pension fund or medical aid fund)
- A deduction of any amount which the employer is required to make by law or in terms of a court order (such as a garnishee order) or arbitration award

An employer can make a deduction in respect of accommodation and food if:

- The food or accommodation is provided free of charge to the farm employee
- The food or accommodation is provided consistently as part of a condition of employment
- No additional deduction is made by the employer for food, accommodation, water and electricity

So, an employer can deduct 10% for accommodation, 10% for food and 10% for any loan – a maximum of 30%. The employer can deduct an additional 25% of the employee's wages to pay for "loss and damage' but only if the correct procedures have been followed.

Where 10% is deducted for accommodation, no further deductions can be made for electricity.

Communal living - If more than 2 employees live together in accommodation, the maximum deduction that an employer can make is 25% of the minimum wage for an individual employee. For example, if the minimum wage is R4 953, the maximum deduction that can be made in total from the employees is 25% of the minimum wage, which is R1 238 per month. If 3 employees are living together in a hous,e this amounts to R412 per employee per month. This amount should not be higher than 10% of the employee's wage. If an employee is paid the minimum wage of R4 953, then 10% of the employee's wage is R495. The amount of R412 is therefore lower than 10% of the employee's wage and would be a legal deduction for accommodation.

OTHER ISSUES

Other issues that are not dealt with in the Sectoral Determination include:

- Probationary periods
- Right of entry to the employer's premises
- Afternoons/weekends off
- Pension schemes
- Medical aid Training/school fees
- Funeral benefits/saving accounts

These can all be negotiated between the parties and included in the contract of employment

PROHIBITION OF EMPLOYMENT

No one under the age of 15 can be required or permitted to work.

OTHER CONDITIONS OF EMPLOYMENT

There is no provision which prevents other conditions of employment from being included in a contract of employment but any new conditions may not be less favourable than those set by the Sectoral Determination.

GENERAL ADMINISTRATIVE REQUIREMENTS

The Sectoral Determination states that farmers must comply with the following administrative processes:

- Provide employees with a pay slip, which should be kept for a period of 3 years
- Provide employees with an employment contract (*See: www.labour.gov.za for more information*)

NOTE

Farm workers are also covered by the Labour Relations Act, and have a right to belong to unions and to organise with other employees. Union organisers have to negotiate access to the farms with the farmers. If the farmer refuses, the matter can be taken up with the Department of Employment and Labour or the Commission for Conciliation, Mediation and Arbitration.

A union which has signed up approximately 30% of employees in an organisation or a farm, as its members, is entitled to have access to the farm or the establishment to hold meetings and to run union business and to have paid stop orders implemented in respect of that employer. If this is a problem, the matter can be referred to the CCMA in terms of Section 12 of the Labour Relations Act. Also, a thirty per cent representation of a farm entitles the trade union to 'stop order facilities' on the farm in terms of Section 13 of the Labour Relations Act.

EXAMPLE: FARM WORKER CONTRACT OF EMPLOYMENT

Name of employer .....

Address of employer.....

Name of employee .....

1. COMMENCEMENT OF EMPLOYMENT

   Employment started/will start on .....
   and continue until terminated in terms of this contract.

2. PLACE OF WORK .....

3. JOB DESCRIPTION

   Job title: .....
   Duties: .....

4. HOURS OF WORK

   4.1 Normal working hours will be..... hours per week, made up as follows:
   Monday/Tuesday/Wednesday/ Thursday / Friday ..... a.m. to p.m.
   Meal intervals will be from: ..... to.....
   Other breaks: .....
   Saturdays: ..... a.m. to p.m
   Meal intervals will be from: ..... to.....

Other breaks: .....

Sundays:..... a.m. to p.m

Meal intervals will be from:..... to .....

Other breaks: .....

4.2 Hours of work will be extended by not more than 5 hours per week during ..... and reduced by the same hours during .....

4.3 Overtime will be worked as agreed from time to time and will be paid at the rate of one and a half times of the total wage as set out in clause 5.1 and 5.2 of this contract.

5. WAGE

5.1 The employees wage shall be paid either in cash or electronically into a bank account on the last working day of every week/month and shall be: R .....

5.2 The employee shall be entitled to the following allowances/other cash payments in kind:

5.2.1 Accommodation per week/month to the value of R .....

5.2.2 Food per week/month to the value of R .....

5.3 The following deductions are agreed upon: R .....
R .....

5.4 The total value of the above remuneration shall be : R .....
(the total of clauses 5.1 to 5.2.2 – change or delete clauses as needed)

5.5 The employer shall review the employee's salary/wage on or before 1 March of every year.

6. TERMINATION OF EMPLOYMENT

Either party can terminate this agreement with one week's notice during the first six months of employment and with four weeks' notice thereafter. Notice must be given in writing except when it is given by an illiterate employee. In the case where the employee is illiterate notice must be explained orally by or on behalf of the employer.

On giving notice the employer is to provide the employee who resides in accommodation that belongs to the farmer, accommodation for a period of a month. The employer is also obliged to allow the employee who has standing crops on the land a reasonable time to harvest the crop or the farmer may pay the employee an agreed amount for that crop.

7. SUNDAY WORK

Any work on Sunday will be by agreement between parties and will be paid according to the Sectoral Determination.

8. PUBLIC HOLIDAYS

Any work on holidays will be by agreement and will be paid according to the Sectoral Determination.

9. ANNUAL LEAVE

The employee is entitled to three weeks paid leave after every 12 months of

continuous service. Such leave is to be taken at times convenient to the employer and the employer may require the employee to take their leave at such times as coincide with that of the employer.

10. SICK LEAVE

10.1 During every sick leave cycle of 36 months the employer will be entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.

10.2 During the first 6 months of employment the employee will be entitled to one day's paid sick leave for every 26 days worked.

10.3 The employee is to notify the employer as soon as possible in case of their absence from work through illness.

10.4 A medical certificate is required if absent for more than 2 consecutive days or if absent on more than two occasions during an 8 week period.

11. MATERNITY LEAVE

(Tick the applicable clauses in the space provided)

The employee will be entitled to ..... months maternity leave without pay, OR

The employee will be entitled to ..... months maternity leave on pay

12. FAMILY RESPONSIBILITY LEAVE

The employee will be entitled to three days family responsibility leave during each leave cycle if they work on at least 4 days a week and provided the employee has been employed for longer than four months.

13. PARENTAL LEAVE

The employee will be entitled to 10 consecutive days' (calendar days) unpaid parental leave during each cycle, starting on the day that the child is born, or if the child is adopted, the date the adoption order is granted or the adoptive child is placed in the care of the parents, whichever comes first.

14. ACCOMMODATION

(Tick the appropriate box)

14.1 The employee will be provided with accommodation for as long as the employee is in the service of the employer, which shall form part of their remuneration package.

14.2 The accommodation may only be occupied by the employee and their immediate family, unless by prior arrangement with the employer

14.3 Prior permission is necessary for visitors who wish to stay the night. This will not apply to members of the employee's direct family if they are visiting.

15. CLOTHING

(delete whichever is not applicable)

..... sets of uniforms/protective clothing

..... sets of boots

will be supplied to the employee free of charge by the employer and will remain the property of the employer.

16. OTHER CONDITIONS OF EMPLOYMENT OR BENEFITS

.....

17. GENERAL

Any changes to the written contract will only be valid if agreed by both parties.

.....

EMPLOYER

..... Date: .....

EMPLOYEE (Signed in acknowledgement of receipt)

Summary of the Sectoral Determination for Domestic Workers

Working conditions of domestic workers are regulated by Sectoral Determination 7 and the *Labour Relations Act*. ***(See pg 301: Sectoral Determinations)***

NOTICE PERIOD AND TERMINATION OF EMPLOYMENT

Any party to an employment contract must give written notice as follows (except when an illiterate employee gives notice):

- One week – if employed for 6 months or less
- Four weeks – if employed for more than 6 months

Notice must be explained verbally by or on behalf of the employer to a domestic employee if they are not able to understand it.

If the domestic worker lives in accommodation provided by the employer then the employer must give them one month's notice to leave the accommodation or until the contract of employment could lawfully have been terminated.

All money that is owed to the domestic worker, for example, wages, allowances, pro rata leave and paid time-off not taken, must be paid.

An employer who has to dismiss an employee due to a change in their economic, technological, or structural set-up (called operational requirements in the Sectoral Determination) is responsible for paying severance payment to the employee.

PROCEDURE FOR TERMINATING EMPLOYMENT

A domestic worker's contract of employment may not be terminated unless a valid and fair reason exists and a fair procedure is followed. If an employee is dismissed without a valid reason or without a fair procedure, the employee can refer the case to the CCMA for Unfair Dismissal within thirty calendar days of their termination.

If a domestic worker cannot return to work because of a disability, the employer must investigate the nature of the disability and decide whether or not it is permanent or temporary. The employer must try to change or adapt the duties of the employee to accommodate the employee as far as possible. But, if it is not possible for the employer to change or adapt the duties of the domestic employee then the employer can terminate their services.

The *Labour Relations Act* sets out the procedures that must be followed when a person's services are terminated.

WAGE/REMUNERATION/PAYMENT

All employers of domestic workers throughout South Africa have to pay their employees a minimum wage of R28.79 per hour

GUARANTEED MINIMUM RATE

Some domestic workers might work less than 4 hours per day. If this is the case, they should be paid for 4 hours worked.

ANNUAL INCREASE

Wages are normally increased every year and the new wage increases are published by the Department of Employment and Labour.

CALCULATING THE MINIMUM WAGES

Employers who cannot afford to pay the minimum wage can choose to reduce the number of hours to be worked instead of retrenching the employee. However, it is against the law to pay less than the minimum hourly rate. If an employer pays more than the prescribed hourly rate, they cannot reduce the rate to make it the same as the minimum wage because it will be an unfair labour practice.

EXAMPLE

CALCULATING A DOMESTIC WORKER'S WAGE

Sarah is a domestic worker who works 6 hours a day from Monday to Friday for an employer who lives in Soweto. What is the minimum rate that Sarah can be paid according to the Sectoral Determination for domestic workers?

6 hours per day x 5 days = 30 hours worked per week

(She must be paid at the minimum wage rate)

30 hours per week x R28.79 = R827.40 per week

Additional payments (such as for overtime or work on Sundays or Public holidays) are calculated from the total remuneration.

TRANSPORT ALLOWANCE

The Sectoral Determination does not regulate transport, so it is open to negotiation between the parties.

HOURS OF WORK

NORMAL HOURS (EXCLUDING OVERTIME)

A domestic worker may not work more than:

- 45 hours per week
- 9 hours per day for a 5-day work-week
- 8 hours a day for a 6-day work-week

OVERTIME

Overtime is voluntary and a domestic worker may not work more than:

- 15 hours of overtime per week, and
- 12 hours on any day, including overtime.

Overtime is paid at one and a half times the employee's normal wage, or an employee may agree to take paid time off.

DAILY AND WEEKLY REST PERIODS

A domestic worker is entitled to a daily rest period of 12 consecutive hours (hours in a row) and a weekly rest period of 36 consecutive hours, which must include Sunday, unless otherwise agreed.

The daily rest period can be reduced to 10 hours if the parties agree and if the employee lives on the premises and takes a meal interval that lasts for at least 3 hours.

The weekly rest period can by agreement be extended to 60 consecutive hours every two weeks or be reduced to 8 hours in any week if the rest period in the following week is also extended.

STANDBY

Standby means any period between 8 p.m. and 6 a.m. when a domestic worker might need to be at the workplace and is allowed to rest or sleep but must be available to work if necessary.

This may only be done if the parties have agreed in writing and not more than 5 times per month.

An employer must pay a domestic worker for any time worked in excess of three hours during any period of stand-by. The employee must be paid at the normal overtime rate or given paid time off.

NIGHT WORK

- Night work means work performed after 6 p.m. and before 6. a.m.
- Night work is allowed only if the domestic worker has agreed to this in writing. The employee must be compensated by an allowance of at least 10% of the ordinary daily wage.

MEAL INTERVALS

A domestic worker is entitled to a one-hour break for a meal after five hours of continuous work. The interval may be reduced to 30 minutes by agreement. When a second meal interval is required because of overtime worked, it may be reduced to not less than 15 minutes. If an employee has to work through their meal interval, then they must be paid for this.

WORK ON SUNDAYS

Work on Sundays is voluntary, and a domestic worker cannot be forced to work on a Sunday.

A domestic worker who works on a Sunday must be paid double the daily wage.

If the employee ordinarily works on a Sunday, they should be paid one and a half times the wage for every hour worked, with a minimum of the normal rate for the full day. If the parties agree, the employee can be paid by giving them time off of one and a half hours for each overtime hour worked.

PUBLIC HOLIDAYS

Domestic workers are entitled to all the public holidays in the *Public Holidays Act* but the parties can agree to other public holidays. Work on a public holiday is voluntary which means a domestic worker may not be forced to work. The official public holidays are:

- New Years Day
- Human Rights Day
- Youth Day
- National Woman's Day

- Good Friday
- Family Day
- Freedom Day
- Workers' Day
- Heritage Day
- Day of Reconciliation
- Christmas Day
- Day of Goodwill

Where the government declares an official public holiday at any other time then this must be granted. The days can be exchanged for any other day by agreement.

If the employee works on a public holiday, they must be paid double the normal day's wage or, if it is greater, double time for each hour worked on that public holiday.

ANNUAL LEAVE

Full-time domestic workers are entitled to 3 weeks leave per year. If the parties agree, they can take leave as follows: 1 day for every 17 days worked or one hour for every 17 hours worked.

The leave must be given not later than 6 months after completing 12 months of employment with the same employer. The leave may not be given at the same time as sick leave, nor at the same time as a period of notice to terminate work.

SICK LEAVE

During the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked.

During a sick leave cycle of 36 months, an employee is entitled to paid sick leave that is equal to the number of days the employee would normally work during a period of 6 weeks.

The employer does not have to pay an employee if the employee has been absent from work:

- For more than two days in a row, or
- On more than two occasions during an 8-week period and does not produce a medical certificate stating that they are too sick or injured to work. The certificate can be from a doctor, a traditional healer or a qualified nurse.

MATERNITY LEAVE

A domestic worker is entitled to up to 4 consecutive months maternity leave. The employer does not have to pay the employee for the period for which she is off work due to her pregnancy. However the parties may agree that the employee will receive part of her whole wage for the time that she is off. The mother can also claim maternity benefits from UIF for the full four months.

PARENTAL LEAVE

In terms of section 25A of the BCEA, an employee who is a parent of a child and not the designated Carer of the Child, will be entitled to 10 consecutive days' unpaid parental leave during each leave cycle. Parental leave can start on the day that the child is born, or, if the child is adopted, the date the adoption order was granted or the adoptive child was placed in the care of the parents, whichever comes first.

The 10 consecutive days of parental leave are calendar days, not working days. An employee must notify the employer in writing of the date on which they intend to start their parental leave and return to work after parental leave. This notification must at least be given 1 month before the birth of the child or whenever it is practical to do so.

An employee who contributes to the UIF may apply for parental benefits from the Department of Employment and Labour.

FAMILY RESPONSIBILITY LEAVE

Employees who have been employed for longer than 4 months and for at least 4 days a week are entitled to take 3 days of paid family responsibility leave during each leave cycle in the following circumstances:

- When the employee's child is sick
- If any one of the employee's relations dies: a spouse or life partner; a parent, adoptive parent or grandparent; a child, adopted child or grandchild; a brother or sister

DEDUCTION FROM THE REMUNERATION

An employer is not allowed to deduct any monies from the employee's wages without their written permission.

There can be a deduction of no more than 10% for accommodation if the accommodation:

- Is weatherproof and generally kept in good condition
- Has at least one window and door, which can be locked
- Has a toilet and bath or shower, if the domestic employee does not have access to any other bathroom.

OTHER ISSUES

Other issues that are not dealt with in the Sectoral Determination include:

- Probationary periods
- Right of entry to the employer's premises
- Afternoons/weekends off

- Pension schemes
- Medical aid
- Training/school fees
- Funeral benefits/saving accounts

These can all be negotiated between the parties and included in the contract of employment.

PROHIBITION OF EMPLOYMENT

No one under the age of 15 can be required or permitted to work.

OTHER CONDITIONS OF EMPLOYMENT

There is no provision which prevents other conditions of employment from being included in a contract of employment but any new conditions may not be less favourable than those set by the Sectoral Determination.

GENERAL ADMINISTRATIVE REQUIREMENTS

The Sectoral Determination states that employers must comply with the following administrative processes:

- Provide employees with a written contract of employment
- Payment must be made by cash in a sealed envelope or EFT deposit into the employee's bank account, and must include a detailed payslip. The employer must keep copies of these payslips for 3 years.

(See www.labour.gov.za and click on Sectoral Determination for Domestic Workers for more information.

EXAMPLE: DOMESTIC WORKER CONTRACT OF EMPLOYMENT

Name of employer .....

Address of employer.....

Name of employee .....

1. COMMENCEMENT OF EMPLOYMENT
   Employment started/will start on .....
   and continue until terminated in terms of this contract.

2. PLACE OF WORK .....

3. JOB DESCRIPTION

Job title: .....

Duties: .....

4. HOURS OF WORK

4.1 Normal working hours will be .....hours per week, made up as follows:

Monday/Tuesday/Wednesday/Thursday/Friday..... a.m. to p.m.

Meal intervals will be from: ..... to.....

Other breaks: .....

Saturdays: ..... a.m. to p.m

Meal intervals will be from: ..... to.....

Other breaks: .....

Sundays:..... a.m. to p.m

Meal intervals will be from: ..... to.....

Other breaks: .....

4.2 Hours of work will be extended by not more than 5 hours per week during ..... and reduced by the same hours during .....

4.3 Overtime will be worked as agreed from time to time and will be paid at the rate of one and a half times of the total wage as set out in clauses 5.1 and 5.2 of this contract.

4.4 Standby will only be done if agreed from time to time whereby an allowance will be paid per standby shift.

5. WAGE

5.1 The employee's wage shall be paid in cash on the last working day of every week/month and shall be: R .....

5.2 The employee shall be entitled to the following allowances/other cash payments in kind:

5.2.1 Accommodation per week/month to the value of R .....

5.2.2 Food per week/month to the value of R .....

5.3 The following deductions are agreed upon: R .....

R .....

5.4 The total value of the above remuneration shall be : R .....
(the total of clauses 5.1 to 5.2.2 – change or delete clauses as needed)

5.5 The employer shall review the employee's salary/wage on or before 1 November of every year.

6. TERMINATION OF EMPLOYMENT

Either party can terminate this agreement with one week's notice during the first six months of employment and with four weeks notice thereafter. Notice must be given in writing except when it is given by an illiterate employee. In the case where the employee is illiterate notice must be explained orally by or on behalf of the employer.

On giving notice the employer is to provide the employee who resides in accommodation that belongs to the employer accommodation for a period of one month.

7. SUNDAY WORK

Any work on Sunday will be by agreement between parties and will be paid according to the Sectoral Determination.

8. PUBLIC HOLIDAYS

Any work on holidays will be by agreement and will be paid according to the Sectoral Determination.

9. ANNUAL LEAVE

The employee is entitled to three weeks paid leave after every 12 months of continuous service. Such leave is to be taken at times convenient to the employer and the employer may require the employee to take their leave at such times as coincide with that of the employer.

10. SICK LEAVE

10.1 During every sick leave cycle of 36 months the employer will be entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.

10.2 During the first 6 months of employment the employee will be entitled to one day's paid sick leave for every 26 days worked.

10.3 The employee is to notify the employer as soon as possible in case of their absence from work through illness.

10.4 A medical certificate is required if absent for more than 2 consecutive days or if absent on more than two occasions during an 8 week period.

11. MATERNITY LEAVE

(Tick the applicable clauses in the space provided)

- The employee will be entitled to ..... months maternity leave without pay, OR
- The employee will be entitled to ..... months maternity leave on pay

12. PARENTAL LEAVE

An employee is entitled to 10 consecutive days' (calendar days) unpaid parental leave during each leave cycle. Parental leave can start on the day that the child is born, or, if the child is

adopted, the date the adoption order is granted, or the adoptive child is placed in the care of the parents, whichever comes first.

13. FAMILY RESPONSIBILITY LEAVE

The employee will be entitled to three days family responsibility leave during each leave cycle if he/she works on at least 4 days a week and has worked more than four months for the employer.

14. ACCOMMODATION

(*Tick the appropriate box*)

14.1 The employee will be provided with accommodation for as long as the employee is
- in the service of the employer, which shall form part of their remuneration package.

14.2 The accommodation may only be occupied by the employee and their immediate
- family, unless by prior arrangement with the employer

14.3 Prior permission should be obtained for visitors who wish to stay the night. However,
- where members of the employee's direct family are visiting, such permission will not be necessary.

15. CLOTHING

(*insert whathever is applicable*)

Sets of uniforms/protective clothing will be supplied to the employee free of charge by the employer and will remain the property of the employer.

16. OTHER CONDITIONS OF EMPLOYMENT OR BENEFITS

17. GENERAL

Any changes to the written contract will only be valid if agreed by both parties.

..... Date .....

EMPLOYER

..... Date: .....

EMPLOYEE (Signed in acknowledgement of receipt)

Deregulation

Deregulation means removing laws and regulations so that there is less restriction and 'red-tape' for people who want to operate in an area. For example, where an industry applies for exemption from a Bargaining Council Agreement or Wage Determination, or where areas are designated as “industrial hives’ where wage regulating measures don’t apply.

Deregulation can have a positive effect, for example, the lifting of regulations that control the granting of hawkers' licenses so that more people can work as hawkers or street traders because the laws about getting a hawker's license aren't so strict. Deregulation is controlled by the Department of Employment and Labour whose role is to ensure that any form of deregulation will not have a negative impact on people in the workplace.

Other laws that apply to terms and conditions in the workplace

Employment Equity Act (EEA)

The *Employment Equity Act No. 55 of 1998* aims to create an environment of equality and non-discrimination in the workplace. It states grounds for non-discrimination in the workplace, including:

- Race
- Gender
- Sex
- Pregnancy
- Marital status
- Ethnic origin
- Social origin
- Colour
- Sexual orientation
- Age
- Disability
- Religion
- Conscience
- Belief
- Culture
- Language
- Birth
- Family responsibility
- HIV status
- Political opinion

The EEA is important because it includes three grounds for non-discrimination that are not included in the Constitution or the Equality Act: family responsibility, HIV status and

political opinion. A case can be referred to the Labour Court if an employee believes that an employer is discriminating against him or her on any of these grounds in order to:

- Demote or not promote the employee
- Block the employee from having access to training and development
- Make an unfair distribution of employee benefits to the employee

The EEA also sets out regulations on affirmative action in the workplace to create equal opportunities for all employees and for people applying for jobs. It says that an employer who employs over 50 people must take steps to include and advance previously disadvantaged groups (black people, women and the disabled) in their workforce. This involves setting up an Employment Equity Committee which works to improve equal opportunity in the company, promote equal opportunity and remove unfair discrimination.

So, when a company makes new appointments or promotes staff, it must give 'preferential treatment' to properly qualified people who are from one of these previously disadvantaged groups (female, black or disabled). In other words, formal qualifications or relevant experience are not the only reasons for deciding whether a person is suitable for a job or not.

The EEA covers everyone except the South African National Defence Force (SANDF), the National Intelligence Agency (NIA) and Secret Services.

The Occupational Health and Safety Act (OHSA)

The *Occupational Health and Safety Act No. 85 of 1993* gives employees specific rights in health and safety at work. It gives health and safety guidelines for the workplace to employers and gives inspectors wide powers to ensure that these are being implemented.

WHO DOES THE OHSA COVER?

The Act excludes employees in mines and on ships, where other laws apply. The OHSA covers all other employees, including farm workers, domestic workers and state employees.

THE EMPLOYEE'S DUTIES

Employees must take reasonable precautions for their own health and safety at work. They must follow precautions and rules about safety and health. They must report any unsafe circumstances or accidents as soon as possible to the safety representative.

Anyone who acts recklessly or damages any safety measures can be charged, and a claim for damages can be brought against them.

THE EMPLOYER'S DUTIES

The employer must make sure that the workplace is safe and healthy, and must not allow any employee to do potentially dangerous work. The employee must know what the dangers of the work are.

The **general duties** of the employer are to:

- Choose safety representatives
- Consult with the employees' trade union about the safety representatives
- Inform employees of the dangers in the workplace
- Reduce any dangers to a minimum before issuing protective clothing
- Issue protective clothing where necessary
- Give necessary training to employees who use dangerous machines or materials, to make sure they know the safety precautions
- Prevent employees from using or working with dangerous materials or machines, unless all the necessary safety rules have been followed
- Ensure that dangerous machines are in good working order and are safe to work with
- Make sure that dangerous machines carry warnings and notices
- Make sure that someone who knows the work is supervising the operations to ensure the safety of the employees
- Keep the workplace open so that employees can escape from danger if necessary
- Not move any evidence of an accident before an inspector has given permission, unless someone has been badly injured and needs treatment

The chief inspector can ask any employer for a **report** of the safety precautions.

An employer **cannot take action** against any employees who do the following:

- Give information about their conditions at work or that the Act says they have to give
- Give evidence in court
- Respond to any request of an inspector
- Refuse to do anything that is against the law

REPORTING ACCIDENTS OR INCIDENTS

The employer must keep a report of all accidents and safety or health incidents in the workplace. The employer must report certain accidents or incidents to the safety representative and to the Department of Employment and Labour.

SAFETY REPRESENTATIVES AND SAFETY COMMITTEES

The employer must appoint one safety representative for every 20 employees. There must be at least one representative for every 50 employees. The employer must explain to the employees' organisation what responsibilities the safety representatives will have and how the representatives will be selected.

In every workplace where there are two or more safety representatives, there must also be a safety committee. This committee must meet at least every three months. The committee must deal with all safety and health issues that affect employees. The safety committees have certain functions and powers. You can find out more about these in the Act or by contacting the Department of Employment and Labour.

ENFORCEMENT OF THE OHSA

OHSA falls under the administration of the Department of Employment and Labour. Inspectors from the Department have wide powers to search the workplace, question people, ask for explanations from an employer, and so on.

An inspector can fine a person for breaking the Act. If that person wants to appeal against the inspector's decision, they can appeal to the chief inspector. They can appeal against the chief inspector's decision in the Labour Court.

If an employee is hurt at work as a result of the employer not following a safety regulation, then that employer can be fined up to R1 million and/or two years in prison.

Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace

The *2022 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace* replaces the previous Code of Good Practice on Handling Sexual Harassment in the workplace.

WHO DOES THE CODE APPLY TO?

The Code applies to all employers (including trade unions) in all sectors, including the informal sector. It also applies to anyone having dealings with an employer, for example, customers, clients, suppliers and volunteers.

All employees are covered as well as unpaid volunteers, job seekers, job applicants and trainees. It also applies not only to the physical workplace but also to those who work remotely, travel to work with transport provided by the employer, those in training or staying in accommodation provided or paid for by the employer. It places

obligations on employers and trade unions to prevent harassment, take disciplinary and other action when it happens, and provide various types of assistance to victims of harassment.

TYPES OF HARASSMENT

The Code includes:

- Physical harassment (physical attacks or threats)
- Verbal bullying (threats, shaming, hostile teasing, insults, constant negative judgement, constant criticism, racist, sexist or LGBTQIA+phobic language)
- Psychological abuse (emotional abuse)
- Online harassment, including cyber-bullying
- Harassment, teasing and insults based on someone's race, sex or sexual orientation
- Bullying (use of power in the workplace)
- Intimidation that could cause someone to feel afraid they will be harmed
- Mobbing which is harassment by a group of people targeted at one or more individuals
- Any actions that can create a barrier to equity and equality in the workplace

WHAT IS HARASSMENT?

Harassment exists when conduct (of an employer, employee, customer, etc.) is:

- Unwanted
- Creates a hostile working environment that is physically, emotionally or psychologically unsafe and affects employee well-being or mental health
- Is related to one of the prohibited grounds in the EEA

The test for harassment is an objective one. If all these factors are present, then harassment is established, and it will be up to the harasser to defend the allegation. A defence could be that the alleged harassment is not discrimination or that it was justified in the circumstances. If a person is found guilty of harassment, they could pay compensation, fines or even imprisonment.

VICARIOUS (INDIRECT) LIABILITY OF EMPLOYERS

Employers are also vicariously (indirectly) liable for the wrongful acts of their employees if these are committed in the course and scope of employment, unless it can prove that it has taken all reasonable steps to prevent this happening. So, for example, if an employee experiences harassment while travelling with work colleagues, the employer could be jointly liable for that.

AWARENESS AND INTENTION

An incident of harassment is seen from the perspective of the person who is laying the complaint. This means that even if the harasser wasn't aware or didn't have the intention to harass someone, it can still be unwanted and grounds for a complaint. The test is whether a reasonable person would have known that the conduct was harassment.

UNREASONABLE COMPLAINTS

The Code allows for an employer to show that the complainant's perception is 'not consistent with societal values reflected in the Constitution'.

RACIAL, ETHNIC OR SOCIAL ORIGIN HARASSMENT

Racial harassment is a form of unfair discrimination. The test for racial harassment is whether, on a balance of probabilities, the conduct complained of was related to race, ethnic or social origin or a characteristic associated with such a group.

If a complaint of racial harassment is made, the employer must take the following factors into account:

- Was the conduct persistent and harmful
- Was the language or conduct abusive, demeaning, or humiliating, and did it offend the dignity of the person or create a hostile working environment
- Was the language or conduct directed at a particular employee(s)
- Was the language or conduct insulting, abusive or derogatory
- The extent of the abuse or humiliation to a person's dignity
- The impact of the conduct

WHAT MUST THE EMPLOYER DO IN CASES INVOLVING HARASSMENT?

Employers are required in terms of the Code to adopt a zero-tolerance approach to harassment. It needs to do the following:

- Develop a harassment policy in consultation with employees and their representatives that includes steps to be taken to prevent harassment and actions to follow if there is a complaint of harassment
- Provide training and awareness for employees, including:
    - Informing them of the harassment policy
    - Making the reporting mechanisms clear
    - Making the harassment policy available on all the company platforms
    - Creating ongoing awareness about the duty to report harassment

- Establish a committee that will investigate claims of harassment and provide them with relevant training

HARASSMENT POLICIES AND PROCEDURES

The Code requires the employer to adopt a Harassment Policy and says what should be included in this policy, for example:

- That harassment constitutes unfair discrimination, that it infringes the rights of the complainant and that it represents a barrier to equity in the workplace;
- That harassment in the workplace will not be permitted or condoned;
- Complainants have the right to follow the procedures in the policy, and appropriate action must be taken by the employer;
- That it will constitute a disciplinary offence to victimize or retaliate against an employee who, in good faith, lodges a grievance of harassment.

The policy should also outline the steps and procedures to be followed by a complainant who wants to lodge a harassment complaint or grievance. The Code sets out the procedures that should be followed when a complaint of harassment is made.

PROCEDURES FOR DEALING WITH COMPLAINTS OF HARASSMENT

The Code says the following procedures should be included in the policy:

Reporting harassment: Conduct involving harassment must immediately be reported to the employer. 'Immediately' means as soon as is reasonably possible in the circumstances and without delay, taking into account the nature of harassment (as a sensitive issue), the fear of a negative response, and the positions of the complainant and the alleged harasser in the workplace. The employer must:

- Consult the parties
- Take steps to address the complaint
- Take steps to stop the harassment

IMPLEMENTING FORMAL PROCEDURES WITHOUT THE CONSENT OF THE COMPLAINANT

The Code says that a complainant can choose to follow a formal procedure or an informal procedure. If the complainant chooses NOT to follow a formal procedure, the employer should still assess the risk to other people in the workplace. The employer must take into account all relevant factors, including:

- How serious the alleged harassment was, and

- Whether the alleged harasser has a history of harassment

If the employer believes after a proper investigation that there is a serious risk of harm to the people in the workplace, they can choose to follow a formal procedure, regardless of what the complainant wants. The complainant must obviously be informed of this.

WHEN IS AN EMPLOYER LIABLE IN A CASE OF HARASSMENT?

If an employer is liable for harassment this could have severe financial implications.

Section 60 of the EEA says that if an employee, while at work, engages in any conduct that goes against the Act (for example, harassment), then the conduct must immediately be brought to the attention of the employer.

The employer must consult all relevant parties and take necessary steps to stop the conduct. If the employer fails to take the necessary steps and it is proved that the employee is guilty of harassment, then the employer could be vicariously liable for the conduct.

However, if the employer can prove that they did everything reasonably possible to create an environment free of harassment, for example, by adopting a harassment policy and communicating this to the workplace, then these actions could shift the liability of the employer.

COMMON LAW

An employer can be liable in terms of the common law if they do not provide a safe working environment. In the *Media 24 Ltd and another v Grobler* case, the court held that the employer has a legal duty to take reasonable steps to prevent sexual harassment of its employees in the workplace and is obliged to compensate **the victim for harm caused because of this.**

The court also said that if a person gets Post-Traumatic Stress Syndrome arising out of or in the course of employment, the victim would have to claim compensation under the COIDA and would not be able to proceed with a civil claim against the employer.

WHAT IS THE ROLE OF A TRADE UNION IN DEALING WITH HARASSMENT IN THE WORKPLACE?

Management has certain obligations in terms of the Code which the trade union needs to see are enforced. These include to:

- **Adopt a Harassment Policy in line with the 2022 Code:** The Code does not say how a policy should be adopted, but certainly it should be done in

consultation with union representatives and employees. The failure to adopt a workplace policy could impact the employer's liability in the future.

- **Communicate the policy to employees:** An employer must communicate the policy effectively to employees. The employer must, therefore take active steps to provide education and training on harassment and people's rights and obligations in the workplace.
- **Conduct investigations:** When management is informed of a harassment complaint, it must:
    - Consult all relevant parties
    - Take necessary steps to address and eliminate the harassment; these steps include informing the complainant that they can follow formal or informal procedures to deal with the complaint
    - Offer the complainant advice, assistance and counselling
    - Advise the complainant of the procedures to follow whether this is in an informal or formal way
- **Create an environment that is free of harassment:** Management, together with the union, must aim to create an environment that is free of harassment by having a Harassment Policy; communicating the policy to employees, and dealing effectively - in terms of the policy - with cases brought to its attention. This obligation also means implementing formal procedures where the risk is serious to other employees (even where the complainant has no wish to proceed with action).

SEXUAL HARASSMENT

WHAT IS SEXUAL HARASSMENT?

Sexual harassment is defined in the Code of *Good Practice on the Prevention and Elimination of Harassment In The Workplace* 2022 as *unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace* and takes into account the following factors:

1. Was the conduct on prohibited grounds (sex, gender or sexual orientation)?
2. Was it unwelcome? Ways to show behaviour is unwelcome include verbal and non-verbal actions like walking away or not responding to the harassor.
3. What was the nature and extent of the sexual conduct? The conduct can be physical, verbal or non-verbal:

a. Physical includes unwelcome physical contact ranging from touching to sexual assault and rape as well as strip search by or in the presence of the opposite sex.
b. Verbal includes unwelcome suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and sending sexually explicit text by electronic means or otherwise.
c. Non-verbal includes unwelcome gestures, indecent exposure and displaying or sending sexually explicit pictures or objects.

The conduct can also be victimisation, where a person gets victimised for failing to respond to sexual advances and the intention is to humiliate them, or sexual favouritism – 'rewards' for sex.

4. What was the impact on the employee? This is a subjective test and involves looking at the effect of the action on the victim's dignity. It takes into account the circumstances of the employee and the positions of power between the victim and the alleged harasser.

SEXUAL HARASSMENT AS A FORM OF UNFAIR DISCRIMINATION

The Code says that sexual harassment is a form of unfair discrimination and that harassment on the grounds of sex and/or gender and/or sexual orientation is prohibited.

TEST FOR SEXUAL HARASSMENT

The Code defines which factors must be taken into account when deciding whether an action constitutes unwelcome conduct. It gives guidelines as to what constitutes sexual harassment and explains what is understood by the 'nature and extent' of the conduct **(See pg 349: *definition of 'unwelcome conduct'*).**

When it comes to the impact of the conduct, the code says the conduct must be an impairment of the employee's dignity. The relevant considerations here are the circumstances of the employee and the positions that the employee and the alleged harasser hold in the organisation. When assessing the impact of the conduct, the test is a subjective one where the focus is not only on the actions that constitute sexual harassment, but more substantially on the effects and the circumstances surrounding these actions. So, it requires the employer to look at the psychological impact of the sexual conduct on an employee and not only at how an objective person might judge the action.

Digital harassment is also conduct that can constitute sexual harassment.

Cases involving sexual harassment must be dealt with in terms of the company's harassment policies and procedures.

The Merchant Shipping Act

The *Merchant Shipping Act No. 57 of 1951* (MSA) says that the *Labour Relations Act* and the *Wage Act* apply to all employees at sea. It says that if there is conflict between the provisions of the MSA and the provisions of a Bargaining Council Agreement or Wage Determination, the provisions of the Agreement or Determination will apply.

The MSA covers employees who are at sea within South Africa's territorial waters. If employees at sea are outside the territorial waters of South Africa, then an Agreement or Determination will apply to employees who:

- Are employed on a ship that is registered in South Africa
- Even if the ship is not registered in South Africa, are employed on a ship which spends all its time working between ports in South Africa

Disputes and ways of settling disputes

What is a dispute?

A dispute is any serious disagreement between two parties. For example, there could be a dispute over a problem of discipline in the workplace, over complaints (also called 'grievances') that employees have, or over dismissals. There can also be disputes over wages and other working conditions.

So, there are different kinds of disputes. You can have a **dispute about making new rights**, for example, employees wanting to get paid higher wages or the employer bringing in a new pension or provident fund scheme to which employees must belong. These disputes are also called **disputes of interest**. These disputes are often handled by a union and are the subject of negotiation and possible industrial action (strike action) where agreement cannot be reached. The *Labour Relations Act* describes structures and processes which can be used to resolve disputes of interest. The Act also governs the procedures for taking industrial action.

There are also **disputes over rights that already exist** in a contract, a law, an agreement or in custom and practice. These kinds of disputes are called **disputes of rights**. They usually

involve an unfair dismissal (for example, retrenching employees without consulting with the employees), unfair discrimination or an unfair labour practice (such as 'removal of benefits'). The *Labour Relations Act* sets out how disputes over rights in the workplace must be handled, and the *Employment Equity Act* sets out how discrimination will be dealt with in the workplace. ***(See pg 357: Labour Relations Act; See pg 345: Employment Equity Act)***

A dispute of right can also happen when an employer or employee doesn't obey a term or condition of a wage regulating measure, for example, the *Basic Conditions of Employment Act*, a Bargaining Council Agreement (or other collective agreement), Wage Determination, Sectoral Determination, or a ministerial exemption. ***(See pg 294: Laws about terms and conditions of employment)***

EXAMPLE

An example of a dispute of right is where an employer doesn't pay an employee the correct leave pay or where an employee is dismissed without the employer following a fair procedure. Enforcement and disputes about terms and conditions of employment that fall under these laws should be dealt with by the relevant Bargaining Council or the Department of Employment and Labour.

DISPUTES OF INTEREST

The *Labour Relations Act* (*LRA*) sets out structures and processes which can be used to resolve disputes of interest. The outcome of disputes of interest will depend on the relative strength of employees and employers. Each party may use different strategies to win what they want.

Employees can take **industrial action** over disputes of interest, like strikes, work stoppages and go-slows once they have complied with prescribed dispute procedures. Employees cannot strike over disputes of rights under the LRA (e.g. unfair labour practices and unfair dismissals). Disputes of right are referred to arbitration at the CCMA or the Bargaining Council.

The LRA governs the procedures that must be followed before industrial action can be taken by employees (strikes) or by the employer (lock outs).

DISPUTES OF RIGHT

WHERE THERE IS NO BARGAINING COUNCIL

If it is a dispute about **enforcing** a right under the *Basic Conditions of Employment Act* (*BCEA*), a Sectoral Determination or a Wage Determination

or the *Occupational Health and Safety Act*, then a complaint can be sent to the CCMA in terms of Section 73A of the BCEA or to the Department of Employment and Labour.

The complaint to the Department of Employment and Labour can include a request for a 'compliance order' which is issued by an inspector of the Department. ***(See pg 301: Enforcement of the BCEA; See pg 321: Enforcement of a workplace-based collective agreement; See pg 323: Enforcement of a Sectoral Determination; See pg 346: The Occupational Health and Safety Act)***

If it is a matter of **enforcing** a right or a **dispute of rights** under the *Labour Relations Act (LRA)* (for example, an alleged unfair dismissal) where no bargaining council exists in that sector, then the matter should be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. If the dispute concerns a dismissal, it must be referred within 30 days of the date of dismissal. If it concerns an Unfair Labour Practice, then the dispute must be referred within 90 days of the alleged unfair practice occurring. ***(See pg 370: Solving disputes under the LRA)***

If conciliation fails, then refer the dispute to arbitration within 90 days of receiving the certificate of failed conciliation from the CCMA. The CCMA will hear disputes over a BCEA issue if it is related to a matter that is being arbitrated by the CCMA (for example, a claim of unfair dismissal is before the CCMA, together with a claim for unpaid leave pay).

WHERE THERE IS A BARGAINING COUNCIL

If it is a dispute of rights (for example, Unfair Dismissal) under a Bargaining Council Agreement, then the problem should be referred to the Bargaining Council for enforcement or conciliation. If conciliation fails, then refer the dispute to arbitration within 90 days of receiving the certificate of failed conciliation from the Bargaining Council.

The Labour Relations Act (LRA)

The *Labour Relations Act (No. 66 of 1995)* governs how employers and employees should deal with each other and what rights trade unions and employer organisations have in the workplace. It is not about terms and conditions of employment.

The LRA deals with the rights of individuals regarding fairness, bargaining and dispute resolution, and the rights and obligations of trade unions.

WHO IS COVERED BY THE LRA?

Except for members of the South African National Defence Force, National Intelligence Agency and Secret Service, all employees are covered by the LRA. So this includes farm employees, domestic employees and public sector employees (such as teachers, nurses, police, etc, who work for the state).

An independent contractor is not defined as an 'employee' and is therefore excluded from the LRA and BCEA provisions.

WHAT DOES THE LRA COVER?

The LRA covers things like:

- Rights of employees to form and join a union
- Rights of employers to form and join an employers' organisation
- The rights of trade unions in the workplace
- Collective bargaining
- Bargaining councils and statutory councils
- The establishment of workplace forums, which allow employees to participate in management decisions at work
- Fair and unfair labour practices
- Procedures that must be followed for dismissals to be fair
- Dispute resolution structures and procedures, including the Commission for Conciliation, Mediation and Arbitration
- Industrial action

Who is an employee?

According to the *Labour Relations Act*, an employee meets one or more of the following standards:

- The person's hours are subject to control
- The person forms part of the organisation
- The person has worked for an average of 40 hours or more over the last three months for that company
- The person is economically dependent on the company to whom the services are rendered
- The person is provided with the tools for the completion of the work by the employer, or
- The person only has one employer to whom their services are rendered

The criteria for an 'employee' are set out in Section 200A of the LRA, and are 'indicators' of an employment relationship rather than that of an 'independent contractor'. They apply to people earning below the earnings threshold (R21 812 per month) prescribed in the *Basic Conditions of Employment Act.*

Unfair Labour Practices

The *Labour Relations Act* (LRA) prohibits unfair labour practices. An unfair labour practice is any unfair act or omission at the workplace, involving:

- Unfair conduct of an employer relating to the promotion, demotion or probation of an employee
- Unfair conduct relating to the provision of training of an employee
- Unfair conduct relating to the provision of benefits (for example, pension, medical aid, etc) to an employee
- Unfair suspension of an employee or disciplinary action against an employee (short of a dismissal) (for example, a final written warning or unfair suspension)
- The refusal to reinstate or re-employ a former employee in terms of any agreement (for example, following a retrenchment)
- An occupational setback in contravention of the *Protected Disclosures Act (No. 26 of 2000)* because an employee has made a protected disclosure defined in that Act. For example, an employee is denied overtime because they made a disclosure in terms of the *Disclosure of Information Act.*

References to unfair discrimination against an employee in the LRA have been transferred to the *Employment Equity Act (No. 55 of 1998)* (EEA), so 'unfair discrimination' in the workplace is no longer defined as an unfair labour practice in the LRA. The EEA lists the grounds for non-discrimination in the workplace and describes the steps that a person can take if they believe they have been discriminated against on any of the listed grounds. ***(See pg 345: Employment Equity Act)***

WHAT STEPS CAN BE TAKEN IF AN UNFAIR LABOUR PRACTICE IS COMMITTED?

Disputes over alleged unfair labour practices must be referred within 90 days of the alleged unfair labour practice being committed (or of the employee becoming aware of the Unfair Labour Practice). The referral must be to the CCMA or Bargaining or Statutory Council. ***(See pg 370: Solving disputes under the LRA)***

Dismissals

What is a dismissal?

Dismissal means that:

- An employer terminates a contract of employment with or without notice:
    - **With notice** means the employer tells the employee to leave work after working for the required term of notice as prescribed in the contract of employment. The employee gets paid for the time they worked, plus any leave pay (if this is owed)
    - **Without notice** means the employee leaves immediately and is not paid out notice. Dismissal without notice is called '**summary dismissal**'. Whilst summary dismissal might take place where an employee is guilty of a very serious act (for example theft), it will still be procedurally unfair if a fair hearing has not been held before the dismissal
    - Where notice is to be paid, the notice pay must be what is prescribed as notice in the contract of employment, for example, 1 week's pay instead of 1 week's notice. The payment must include the value of payment in kind if this applies to a particular sector. Employees must therefore get wages for the hours worked, plus any leave pay plus payment in lieu of notice. If the employee has been summarily dismissed (with fair reasons and following a fair hearing), this means the employee has to leave immediately, and the employer does not have to make any payment in lieu of notice
- A contract employee whose fixed-term contract is suddenly ended or renewed on less favourable terms, where the employee expected the contract to be renewed because it has often been renewed before or because an expectation exists that the employment will be ongoing.
- A woman who is not taken back into her job after her maternity leave
- An employer dismisses a number of employees for some reason (for example, for being on strike) and offers to re-employ one or more but not all.
- An employee who was forced to walk out or resign because the employer made the working environment impossible to tolerate. This is called 'constructive dismissal.'
- The employee leaves their work (with notice or without notice) because a new employer has taken over the business and is not paying the employee the same wages, and conditions of employment are not the same as they enjoyed before.
- Employees have been **retrenched**. The employer must pay the employee severance pay of at least 1 week's remuneration for every full year that the employee worked for the employer. The payment must include the value of payment in kind. So the

employee must get wages for the hours worked, plus any leave pay, plus notice or payment in lieu of notice, plus severance pay.

Employees in these circumstances are entitled to fair dismissal reasons and fair dismissal procedures under the LRA. An employee could claim unfair dismissal through the CCMA or relevant Bargaining Council or Statutory Council.

Automatically unfair dismissals

The LRA defines certain dismissals as 'automatically unfair'. An automatically unfair dismissal must be referred to the CCMA or Bargaining Council for conciliation. If the dispute is not resolved at conciliation, then the matter automatically goes to the Labour Court for adjudication. The following reasons for dismissal are invalid and any dismissal will be regarded as 'automatically unfair' if the employee is dismissed for:

- Exercising any of the rights given by the LRA or participating in proceedings in terms of the Act.
- Taking part in lawful union activities (i.e. organising members in the trade union)
- Taking part in a legal strike or other industrial action or protest action
- Refusing to do the work of someone who was on strike
- Being pregnant, or any reason related to pregnancy
- Refusing to accept a change in working conditions, unless this is part of genuine consultations in terms of Operational Restructuring of the organisation
- Reasons that are due to arbitrary discrimination (except that an employer may retire someone who has reached the normal or agreed retirement age, or if the reason is based on an inherent requirement of the job, for example, being able to speak a certain language in order to do the job properly)
- A reason related to a transfer following a merger of the company with another organisation
- Where the employee is dismissed following a disclosure made by him in terms of the *Disclosure of Information Act*.

When is a dismissal fair or unfair?

The *Labour Relations Act (LRA)* has a *Code of Good Practice for Dismissals* that employers must follow. The 'fairness' of dismissal is decided in two ways – *substantive fairness and procedural fairness.*

SUBSTANTIVE FAIRNESS

Was there a 'fair' reason to dismiss the employee?

Was dismissal appropriate under the circumstances? In other words, did the punishment fit the crime?

The employer must have a proper and fair reason for dismissing the employee. A 'fair' reason can be one of these:

- **Misconduct** – the employee has done something seriously wrong and can be blamed for the misconduct. ***(See pg 364: Dismissal for misconduct)***
- **Incapacity** – this includes poor performance where the employee does not do the job properly, or the employee is unable to do the job due to illness or disability, or a lack of skills or training. ***(See pg 365: Dismissal for incapacity)***
- **Retrenchment or redundancy** – the employer is cutting down on staff or restructuring the work and work of a particular kind has changed. ***(See pg 367: Retrenchment or redundancy dismissal)***

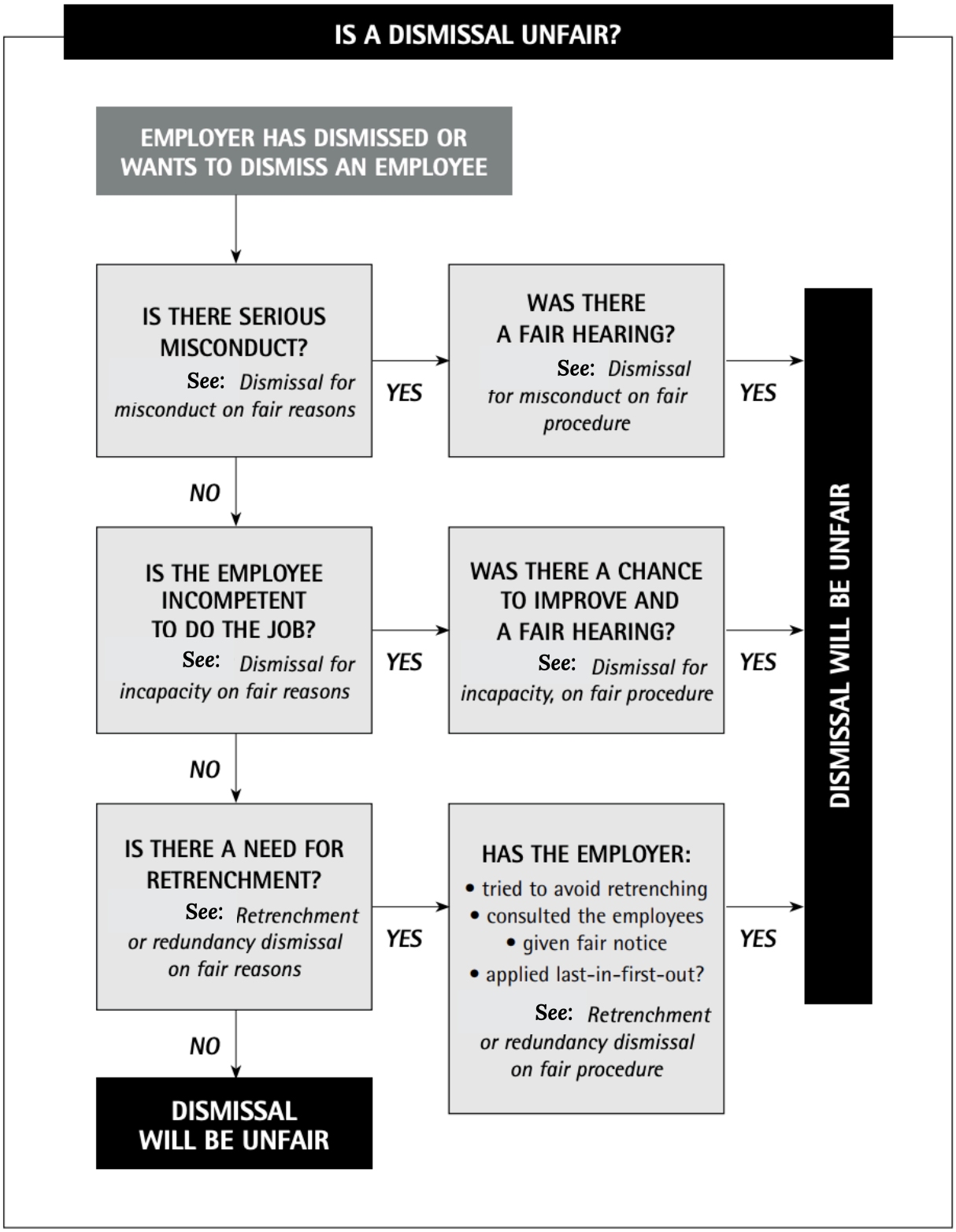
PROCEDURAL FAIRNESS

Was a fair procedure followed before the employee was dismissed?

The employee must always have a fair hearing before being dismissed. In other words, the employee must always get a chance to give their side of the story before the employer decides on dismissal.

The employee must also be allowed to bring any witness (a witness who can provide supporting evidence, etc.), have the meeting conducted in a language which they are comfortable in, and should be allowed representation by a fellow employee if they feel that it is necessary. A shop steward may be asked to go with the employee in the hearing. Unless by agreement, an external union official or person is not ordinarily allowed to attend the internal disciplinary hearing.

If an employee feels a dismissal was unfair, either substantively or procedurally, then this can be referred to the CCMA for conciliation and thereafter arbitration, if this is necessary. The referral of the dispute must be made within 30 days of the date of dismissal. Other aspects of a fair procedure are explained under the different reasons for dismissal. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation; See pg 423: Problem 6: Employee is dismissed for being under the influence of alcohol on duty (no previous record of alcohol abuse)***


IS A DISMISSAL UNFAIR?
EMPLOYER HAS DISMISSED OR WANTS TO DISMISS AN EMPLOYEE
IS THERE SERIOUS MISCONDUCT?
See: Dismissal for misconduct on fair reasons
YES
WAS THERE A FAIR HEARING?
See: Dismissal for misconduct on fair procedure
YES
NO
IS THE EMPLOYEE INCOMPETENT TO DO THE JOB?
See: Dismissal for incapacity on fair reasons
YES
WAS THERE A CHANCE TO IMPROVE AND A FAIR HEARING?
See: Dismissal for incapacity, on fair procedure
YES
NO
IS THERE A NEED FOR RETRENCHMENT?
See: Retrenchment or redundancy dismissal on fair reasons
YES
HAS THE EMPLOYER:
• tried to avoid retrenching
• consulted the employees
• given fair notice
• applied last-in-first-out?
See: Retrenchment or redundancy dismissal on fair procedure
YES
NO
DISMISSAL WILL BE UNFAIR
DISMISSAL WILL BE UNFAIR

Dismissal for misconduct

FAIR REASONS

Employers are encouraged to adopt clear rules of conduct that are known to all employees. Some rules may be so well established or obvious that everyone can be expected to know them, for example, that violence at work is not acceptable.

Dismissals for misconduct will only be fair if:

- The employee broke a rule of conduct in the workplace
- The rule was reasonable and necessary
- The employee knew of the rule or should have known of the rule
- The employer applied the rule consistently (there are no other employees who have been allowed to get away with this misconduct)
- It is appropriate to dismiss the employee for this reason, rather than taking less serious disciplinary action or imposing a lesser penalty such as a final warning

Corrective or progressive discipline must be used for misconduct. Corrective discipline aims to correct the employee and help them overcome the problem. Progressive discipline can get stronger every time the employee repeats the misconduct.

Employees should not be dismissed for a first offence, unless it is very serious, such as gross insubordination or dishonesty, intentional damage to the employer's property, putting others' safety at risk, or physical assault of a co-employee.

Employees can be dismissed for misconduct if they go on strike without following the procedures. The employer should contact a trade union official and tell the official of the planned dismissals and try to give employees an ultimatum with enough time to consider the ultimatum.

Before deciding to dismiss the employee for misconduct, the employer must consider the following:

- The employee's circumstances (for example, length of service, previous disciplinary record, personal circumstances)
- The nature of the job
- The circumstances in which the misconduct took place

FAIR PROCEDURES

Employers must keep records for each employee, which say what offences an employee committed, what disciplinary action was taken, and why the action was taken.

If there is repeated misconduct, the employer should have warned the employee. A final warning for repeated misconduct or serious misconduct must be given in writing.

For a serious disciplinary matter, there must be a fair hearing:

- If the employee is a shop steward, the employer must first inform and consult the union before initiating the disciplinary hearing
- The employee must know in advance what the charges are against them
- The employee must be given enough time to prepare for a hearing (approximately 1 or 2 working days)
- The employee must be present at the hearing and be allowed to state their case
- The employee must be allowed to be represented at the hearing by a shop steward or co-employee of their choice
- The employee must be allowed to see documents and cross-examine evidence used against them
- The employer should bring all witnesses against the employee to the hearing
- The employee should have a chance to cross-examine witnesses called against them
- The employee should be allowed to call witnesses
- The employee must be given reasons for any decisions taken
- The chairperson of the hearing should be impartial and unbiased against the employee charged with misconduct

Sometimes, if the employer has only a very small business, there might be some leniency as to how the employer meets all these requirements.

Dismissal for incapacity

FAIR REASONS

A dismissal for incapacity can be for:

- Poor work performance
- Physical disability or ill health

- Incompatibility, or where the employee is unsuitable to continue in the position
- Inability of the employee to be at work due to domestic, transport or personal problems.

When deciding whether a dismissal for incapacity was fair or not, the following must be considered:

- Whether the employee failed to work to a required standard
- Whether the employee was aware of the standard
- Whether the employee was given a fair chance to meet the standard
- Whether the employee has received counselling, guidance, and assistance to meet the standard
- Whether dismissal is the appropriate outcome for failing to meet the standard
- Whether the incapacity is serious and what the likelihood is of an improvement
- Whether the employee could be accommodated in an alternative position should one be available

FAIR PROCEDURES

Dismissals for poor performance will only be fair if the employer:

- Has given the employee proper training, instructions, evaluation, guidance and advice
- Assessed the employee's performance over a reasonable period of time
- Investigated the reasons for continued poor performance
- Investigated ways of solving the problem without resorting to dismissal
- Gave the employee a chance to be heard before deciding to dismiss
- Considered employing the employee in an alternate and appropriate position should one be available

Dismissals for (temporary/permanent) ill health or disability will only be fair if the employer:

- Investigated the degree and duration of the injury or incapacity
- Considered ways of avoiding dismissal, for example, getting a temporary employee until the sick employee is better
- Tried to find alternative work for the employee to do
- Tried to adapt the work so that the employee could still do it
- Gave the employee a chance to be heard before deciding to dismiss

How badly ill or disabled the employee is (degree of incapacity) and for how long they are likely to remain ill or disabled (duration of incapacity), as well as the reason for the incapacity, will be considered when deciding whether the dismissal is fair or not. More effort is expected of the employer if the employee was injured or got sick because of their work. ***(See pg 434: Problem 18: Employee is injured on duty and loses the job)***

Retrenchment or redundancy dismissal

FAIR REASONS

An employer is allowed to retrench employees for 'operational requirements' based on the employer's 'economic, technological, structural or similar needs'.

EXAMPLES

ECONOMIC REASON: *The employer says the business is losing money.*

TECHNOLOGICAL REASONS: *The employer is getting a machine to do work that employees did by hand before, or the employer's new machines need different skills to operate them than the existing employees' skills.*

STRUCTURAL REASON: *The employer is restructuring the business by combining two departments so has no further need for two Heads of Departments.*

FAIR PROCEDURES

When an employer considers retrenchment, they must consult:

- Whoever a collective agreement says must be consulted, for example, a trade union, or if there is no trade union:
- The workplace forum, or if none exists:
- The union, or if none exists:
- The employees themselves

The employer must issue a written notice in terms of Section 189 of the *Labour Relations Act* inviting the other party to consult with it and make all the relevant information available in writing at the consultations, including:

- Reasons for the proposed retrenchment
- Alternatives to retrenchment considered including redeployment

- Proposed number of employees to be retrenched
- How it will be decided which employees to retrench
- When the dismissals will take place
- Severance pay to be paid to any employee retrenched
- What other help the employer will give to the employees who will be retrenched
- Possibilities of future re-employment for these employees
- Number of employees employed by the employer
- Number of employees the employer has retrenched during the past 12 months

The employees who are being consulted must be allowed to have their say and make suggestions on any of these issues. If the employer rejects what the employees say, they must give reasons in writing if the employees have submitted their representations in writing.

The consultation process is a 'joint consensus-seeking' process. In other words the parties try and reach an agreement on the different issues, such as:

- Whether retrenchment is justified and ways to avoid retrenchment
- Ways to reduce the number of people retrenched
- Ways to limit the harsh effects of retrenchment
- The method and criteria for selecting employees to be retrenched; if there is no agreement, the employer must use fair and objective criteria
- Severance pay: employees can negotiate for higher severance pay than the *Basic Conditions of Employment Act* prescribes (which is 1 week's pay for every completed year of continuous service)

If employees and the employer cannot agree, disputes over the procedures for retrenchment can be referred to the CCMA for conciliation and thereafter the Labour Court. If the retrenchment involves a single employee, or where the employer employs fewer than ten employees, the employee can challenge the fairness of the dismissal at the CCMA rather than the Labour Court, if they wish to do this. A dispute about the amount of severance pay, is finalised at the CCMA by arbitration. Section 189A of the *Labour Relations Act*, has special provisions for retrenchments in companies that employ more than fifty employees and where the proposed number of employees to be retrenched is more than a specified limit. This is referred to as 'Large Retrenchments.'

The provisions can be used by either party to help them reach an agreement. The provisions allow for an outside facilitator from the CCMA to help facilitate the process and the right to strike over retrenchments as a final resort. ***(See pg 422: Problem 5: Retrenchment)***

What steps can be taken if there is an unfair dismissal?

If an employee thinks that the dismissal was unfair, in other words that the employer didn't follow fair procedures or there is not a 'good reason' for the dismissal, then the employee can try to challenge the dismissal. If a dismissal is found to be unfair, the employee will be able to get reinstated or re-employed, or get compensation money.

Reinstatement means the employee gets the job back as if they were never dismissed. Re-employment means the employee gets the job back, but starts like a new employee.

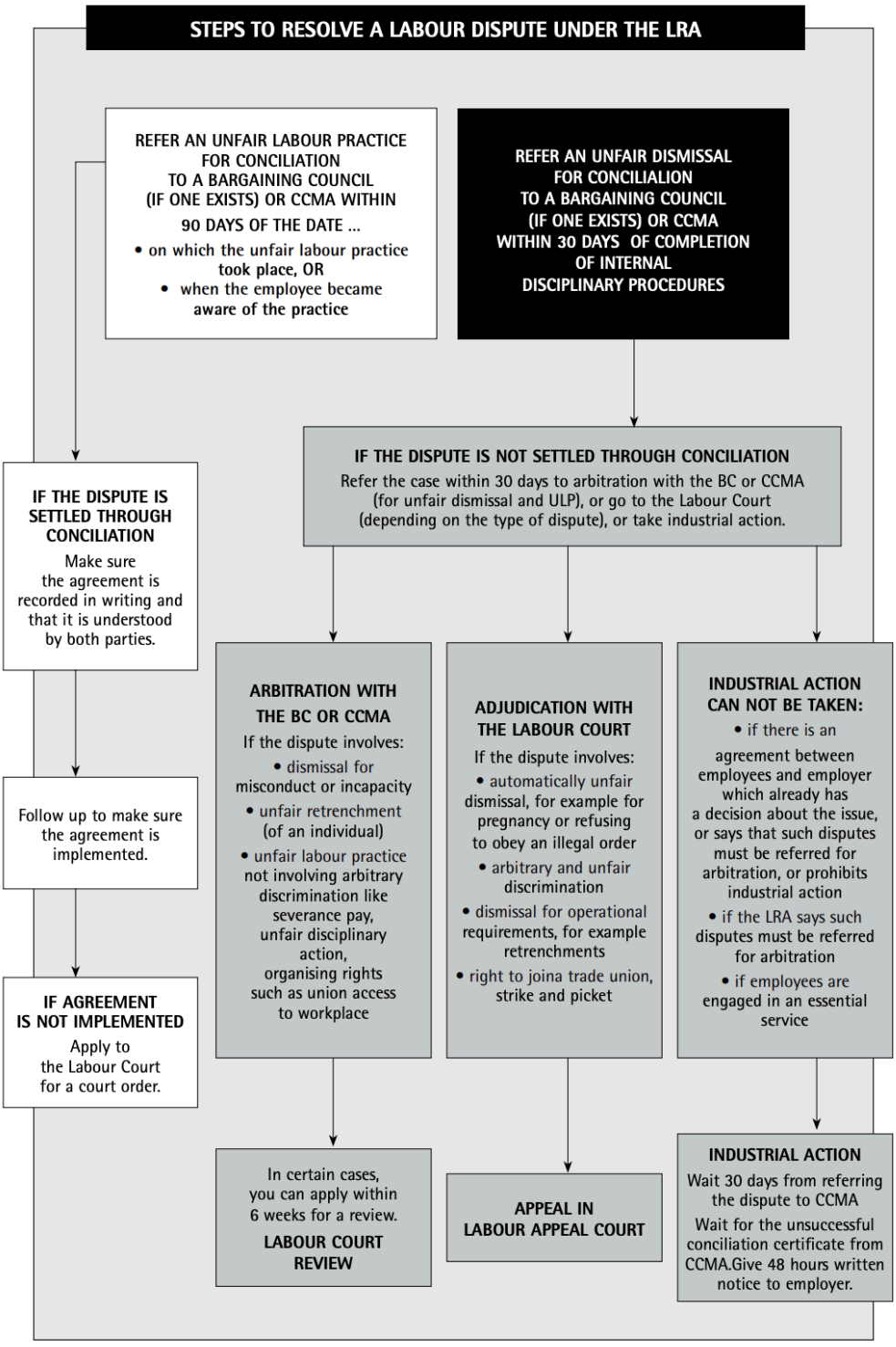
The employee is likely to get compensation if:

- The employee does not want the job back
- The circumstances surrounding the dismissal would make the relationship between employee and employer intolerable
- It is not reasonably practical for the employer to take the employee back
- The dismissal is unfair merely because the employer failed to comply with a fair procedure, but there was a good reason for dismissal (procedural or substantive unfairness)
- The dismissal was grossly unfair, yet they still returned to their old job, and back pay is awarded

The employee can get up to 12 months' wages as compensation for an unfair dismissal relating to misconduct, incapacity or operational requirements. If it was an automatically unfair dismissal, the employee could get up to 24 months' wages as compensation.

The *Labour Relations Act* sets out the procedures to be followed to resolve disputes over unfair labour practices and unfair dismissals. The steps are summarised in the chart below. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation; See pg 423: Problem 6: Employee is dismissed for being under the influence of alcohol on duty (no previous record of alcohol abuse)***

Solving disputes under the LRA



Conciliation by the CCMA or Bargaining Council

Conciliation is a process to bring the two sides in a dispute together after they have reached a deadlock. In conciliation, an independent and neutral third party is used to mediate between the two sides. Under the *Labour Relations Act*, the conciliator/ mediator is a commissioner from the CCMA or Bargaining Council.

HOW TO REFER THE DISPUTE TO THE RIGHT BODY

Find out whether there is a Bargaining Council covering the sector that the employee works in. If there is a Bargaining Council, phone that Council and find out the steps you should take to refer the matter for conciliation. If there is no Bargaining Council, the dispute must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. Do the following:

- Fill in form LRA 7.11. The application can be done online on the CCMA website: https://cmsonline.ccma.org.za/Defaiult.aspx
- Send a copy of the form to the employer, by e-mail, fax, registered mail or personal delivery. If the application was done online it will be sent to the email address of the employer
- Send a copy to the CCMA, by e-mail, fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example, a fax transmission slip, registered mail slip, or affidavit confirming personal delivery of form LRA 7.11. If the application was done online it will automatically be sent to the CCMA

If the employee does not want conciliation and arbitration (known as 'Con-Arb) to take place on the same day with the same commissioner, they must note this in the appropriate space on the dispute Form 7.11. ***(See pg 455: LRA Form 7.11)***

APPLYING FOR CONDONATION IF THE REFERRAL IS LATE

If more than 30 days have passed since the dismissal (or 90 days if it is an unfair labour practice) took place, the employee will have to apply for condonation, which is like an extension of the deadline and an application for late submission. If a Bargaining Council will deal with the matter, they will need to make an application for condonation and submit this application together with the LRA 7.11 form.

If the CCMA deals with the matter, the employee can apply for condonation in form LRA 7.11, or the CCMA will ask them to fill in condonation forms if they didn't do it on form LRA 7.11. If the application is late, the CCMA will not process the referral if

the employee has not made an application for condonation together with the referral of LRA 7.11 form.

Condonation may be granted if the employee can give good reasons for being late with the application. When applying for condonation the employee should focus on the following:

- 'Degree of lateness' of the application (how many days/weeks/months late is it) and an explanation of why the application is late
- The prejudice to the parties
- The likelihood of success of the case
- The measure of 'public interest' that applies if the case goes ahead (only if this is appropriate)

Application for condonation must be in the form of an affidavit. ***(See pg 974: Affidavits)***

THE CONCILIATION MEETING

The commission will arrange a venue and time for the conciliation, and will inform both parties. At the conciliation meeting, the commissioner meets with the two parties to the dispute to find ways to settle the dispute to everyone's satisfaction. The meeting is conducted in an informal way and the commissioner can meet the parties together or separately, as often as is needed. The commissioner has the power to subpoena any person to attend the meeting.

The commissioner must try to resolve the dispute within 30 days of it being referred to the CCMA or Bargaining Council. The employee/s and employer are free to agree to any solution to settle the dispute at a conciliation meeting.

A certificate will be issued by the commissioner at the end of the meeting to say whether the dispute has been settled or not. If 30 days have expired from the date of referral to the CCMA and no resolution has been made, the employee can ask for a Certificate of Non-Resolution from the CCMA and to proceed to fill in an application form for Arbitration.

WHO CAN REPRESENT EMPLOYEES AND EMPLOYERS IN A CONCILIATION MEETING?

Employees can be represented by a co-employee, or a trade union office bearer or official. If the dispute does not concern alleged unfair dismissal for misconduct or incapacity either party can be represented by an attorney.

The employer can be represented by an employee of the business (like the Human Resources Manager) or by a representative of an employer's organisation, but not an attorney.

SUCCESSFUL CONCILIATION

If the conciliation is successful, an agreement is reached which both parties must follow. If they do, the matter is resolved and ends here.

WHAT HAPPENS IF THE CONCILIATION AGREEMENT IS NOT COMPLIED WITH?

If either party breaks the agreement, the other party may apply to the CCMA to have the agreement made into a court order. These are the steps to follow:

- Obtain the application forms from the Registrar of the Court and fill them in. Attach a copy of the agreement and an affidavit to the application. The affidavit must state:
    - When the dispute was referred for conciliation
    - When the conciliation meeting was held
    - When the agreement was made
    - What happened after the agreement was made
    - Whether demands have been made
    - Whether the employee has kept their part of the agreement
- Serve the application on the employer
- File the application with the Registrar of the Court together with proof that you have served notice on the employer

UNSUCCESSFUL CONCILIATION

If the two parties cannot reach an agreement, or the employer refuses to attend the conciliation meeting, the commissioner will issue a certificate stating that the matter has not been resolved. The certificate will be sent to both parties by the commissioner's office. Either party can then refer the matter for arbitration to the CCMA or adjudication at the Labour Court, depending on the nature of the dispute.

Disputes over these matters are referred to the **CCMA or Bargaining Council for arbitration:**

- Claims for Unfair Discrimination if the employee earns under the threshold prescribed in the BCEA
- Unfair labour practices that do not involve discrimination
- Dismissals for acts of misconduct (the employer says the employee did something wrong)
- Dismissals for incapacity (the employer says the employee can't do the work properly)
- Severance pay
- Disputes concerning organisational rights for a trade union

- Alleged unfair retrenchment where the retrenchment involved an individual employee.
- Breach of a collective agreement
- Disputes over the granting of organisational rights

Disputes over these matters are referred to the **Labour Court for adjudication**:

- Disputes that involve discrimination, where the employee earns above the earnings threshold (R21 812 per month) laid down in the BCEA.
- Retrenchments
- Automatically unfair dismissals ***(See pg 361: Automatically unfair dismissals)***

If the parties believe that it is going to be too expensive to take the matter to the Labour Court, they can agree to have the matter arbitrated by the CCMA or Bargaining Council, even if the matter falls within the jurisdiction of the Labour Court.

Arbitration by the CCMA or Bargaining Council

WHAT IS ARBITRATION?

Arbitration means the two sides (or parties to the dispute) agree to use a third party to settle a dispute. A third party is someone who is not from the union or employer's side. **The arbitrator acts as judge to decide the dispute.** Under the LRA, the arbitrator is a commissioner from the CCMA or Bargaining Council. After hearing what both parties have to say, the commissioner can make a ruling that is legally binding and must be accepted by both parties.

HOW TO REFER A CASE FOR ARBITRATION

If there is a Bargaining Council that regulates the sector that the parties work in, then the matter must be resolved according to the rules of that Council. Contact the relevant Council to find out what to do if the employee wants to refer the matter to arbitration. In some cases, even though there is a Bargaining Council, the arbitration may be done by the CCMA.

To refer the matter to the CCMA for arbitration:

- Fill in form LRA 7.13. This can be done online through the CCMA website: https://cmsonline.ccma.org.za/Default.aspx
- Send a copy of the form to the employer, by e-mail, fax, registered mail or personal delivery. If the form is completed and submitted online, it will

automatically be sent to the email address that has been provided for the employer

- Send a copy to the CCMA, by e-mail, fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example a fax transmission slip, registered mail slip, or affidavit confirming personal delivery. If the application was done online, it will automatically be sent to the CCMA
- This referral form LRA 7.13 must be sent to the CCMA or the Bargaining Council within 90 days of receiving the certificate from the CCMA indicating that conciliation has not been successful

THE ARBITRATION HEARING

The CCMA or Bargaining Council will appoint a commissioner to arbitrate, will set the time and venue, and inform both parties. The arbitration hearing is relatively informal and the commissioner will encourage the parties to focus on the merits of their cases, and to avoid legal technicalities.

After hearing evidence from both parties under oath, the commissioner can make a ruling that is legally binding and must be accepted by both parties.

If the commissioner decides that the employer was wrong or unfair, the commissioner can order the employer to take certain steps or to pay compensation. ***(See pg 460: Checklist to prepare for an arbitration)***

WHO CAN REPRESENT EMPLOYEES AND EMPLOYERS IN AN ARBITRATION PROCEDURE?

Employees can only be represented by a fellow employee, an attorney (where the case does not involve misconduct or incapacity dismissal), a union official or union office bearer. Employers can only be represented by an attorney where the dispute is not a misconduct or incapacity dismissal, an employee of the business, or a representative from an employer's organisation.

In cases involving dismissal for misconduct or incapacity, attorneys are not allowed unless the commissioner specifically allows this.

Legal aid will only be granted to an employee in cases where the LRA allows for attorneys to be present, and cases where the commissioner specially allows attorneys. ***(See pg 257: Applying for legal aid)***

ARBITRATION APPEALS

There is no appeal against an arbitration award.

But either party may request the Labour Court to review the arbitrator's decision, if they think:

- The arbitrator exceeded their powers
- There was something legally wrong in the proceedings
- The arbitrator did not consider relevant issues in accordance with the law.
- They must ask for a review within 6 weeks of receiving the arbitration decision.

Adjudication by the Labour Court

WHAT IS ADJUDICATION?

Adjudication is a formal court judgement, that is legally binding on all parties.

The Labour Courts are set up under the LRA and are based at the High Court in each province. The Labour Court has the same status as the High Court.

HOW TO REFER A CASE FOR ADJUDICATION

If a case goes to the Labour Court for a court judgement (adjudication), phone the Registrar of the nearest Labour Court to get the necessary referral forms. The judge will hear evidence from both sides and make a judgement.

WHO CAN REPRESENT EMPLOYEES AND EMPLOYERS IN A LABOUR COURT CASE?

Employees and employers are entitled to be represented by a attorney in Labour Court cases. Legal aid may be granted to pay for the employee's attorney. ***(See pg 257: Applying for legal aid)***

ADJUDICATION APPEALS

A Labour Appeal Court can hear appeals and has the same status as the Supreme Court of Appeal. If either party does not agree with the decisions of the Labour Court, they can appeal to the Labour Appeal Court.

Taking industrial action

Industrial action is used where employees want new or better conditions at the workplace and wish to use strike action in a 'dispute of interest' which involves creating new terms and conditions of their employment. Stayaways, strikes, work stoppages, go-slows, work-to-rule, and union bans on overtime, and lock-outs, are all forms of industrial action. Industrial action can be protected (legal) or unprotected.

Protected industrial action complies with the rules and procedures set out in the *Labour Relations Act (LRA)*. If the industrial action complies with the law, then employees may not be dismissed by their employer for taking such action. In this situation, the striking employees are protected from being dismissed, unless they misconduct themselves in the period of the strike and are dismissed for misconduct.

Unprotected industrial action does not comply with the rules and procedures set out in the LRA. The courts are not sympathetic towards employees who go on an unprotected strike. If an employer dismisses employees who go on an unprotected strike, it is not likely that the court will help these employees.

When is industrial action not permitted?

Industrial action is not permitted when:

- The employers and employees have entered into a collective agreement that prohibits strikes or lock-outs around the issue being disputed
- The employers and employees have entered into an agreement that regulates the issue being disputed
- The law or the collective agreement says that the issue being disputed should be resolved through arbitration or the labour court. For example, the LRA says that unfair dismissals and unfair labour practices must be referred to arbitration or the Labour Court. **Employees cannot strike over unfair dismissal or unfair labour practices. Strikes over retrenchments are legal if the correct consultation processes have been followed.**
- There has already been arbitration about the issue, and an arbitration decision was made which regulates the issue.
- Employees are employed in an **essential service** or a maintenance service. An essential service is where the life, safety, or health of another person will be endangered if work is interrupted to go on strike. A maintenance service is where

machinery or the factory will be damaged if work is interrupted. In these cases, disputes must go to arbitration. Parliament and the South African Police Services are classified as essential services in the LRA. There is an Essential Services Commission that decides which other employees provide an essential or maintenance service, and so may not go on strike.

Although employees in essential services may not go on strike, the LRA provides other ways for them to resolve disputes. In most cases, where the parties are unable to reach an agreement around their dispute, either party may refer the dispute to compulsory arbitration by the Commission for Conciliation, Mediation and Arbitration or the relevant Bargaining Council.

In all other cases, employees have the right to strike, and every employer has the right to lock-out, provided they follow the correct procedures first. This includes the right to strike over wages and conditions of employment, and to strike in solidarity with other legally striking employees.

What procedures must be followed before industrial action is protected?

- If employees are planning to strike in solidarity with other employees in another company who are legally striking (a secondary strike), the employees must give their employer 7 days' notice in writing.
- If the employees are not part of a collective agreement with an alternate dispute resolution procedure, the dispute must be referred to the CCMA or the relevant Bargaining Council after the opposing party has received a copy of the Referral of Dispute Form (LRA 7.11).

In order for other strikes or lock-outs about disputes to be protected, employees or the employer must follow these steps:

- If the employees are part of a collective agreement that has a dispute resolution procedure, then that procedure must be followed.
- Otherwise, the dispute must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant Bargaining Council. The CCMA or Bargaining Council must try to settle the dispute within 30 days of receiving the dispute. If conciliation is successful, it means both parties are satisfied, and no industrial action will be taken.
- If conciliation within 30 days is unsuccessful, the parties must wait until the CCMA or Bargaining Council sends or provides them a certificate that states that the dispute has not been resolved. Only then can either party take further steps towards industrial action.

- In the case of a proposed strike, the employees must give the employer at least 48 hours' written notice that they intend to take industrial action. If the employer is the state, the employees must give at least 7 days' notice. This notice must be specific about the time of the strike and what form the strike will take.
- In the case of a proposed lock-out, the employer must give the employees at least 48 hours written notice that it intends to lock the employees out.

If the employer locks employees out without following the procedures, the employees can immediately go on strike without following the procedures. If employees go on strike without following the procedures, the employer does not have to follow procedures to lock them out.

Where the employer illegally locks out the employees, a claim for compensation should be made against the employer because of this illegal lockout.

If an employer unilaterally changes conditions of employment

If an employer makes changes to employees' conditions of employment without negotiating with employees, employees can refer a dispute to the CCMA or Bargaining Council in terms of Section 64(4) of the LRA. They can then give the employer 48 hours' notice to restore the status quo (to take things back to what they were,) failing which they can go on a 'protected' strike.

When referring the dispute to the CCMA or Bargaining Council and giving notice to the employer, employees can demand:

- That the employer does not implement the changes if the employer still plans to change their conditions, OR
- That the employer restores their original conditions of employment if the employer has already changed their conditions

The employees can demand that the changes should be delayed until the matter has been addressed by the CCMA.

The employer must comply with the demand within 48 hours of receiving the Referral of Dispute notice. If they fail to do so, the protected strike may begin.

Employee's and employer's rights in protected industrial action

- A court order cannot stop protected industrial action unless it is deemed to be in the 'public interest' to do so. But an employer can ask the Labour Court to stop a

solidarity or ‘secondary’ strike if it is unrelated to the ‘primary’ (first) industrial action.

- The employer may not discipline, victimise, intimidate or dismiss employees who take protected industrial action or who are being locked out, nor those who refuse to do the work of another employee who is on a protected strike. Disciplinary action might be taken if the striking employees are responsible for misconduct or breaking the picketing rules during the strike.
- The employer can dismiss or take disciplinary action against employees for misconduct while taking industrial action, for example for violence or if they vandalise the employer's property. The employer cannot claim damages for lost production during the protected industrial action. (The employer **can** claim damages if the industrial action is unprotected!)
- The employer does not have to pay employees while they are on strike or legally being locked out. But employees who receive payment in kind (things like housing, electricity, water or food instead of money) can ask the employer to give them this part of their pay, and the employer cannot refuse. When the strike or lock-out is over, the employer can claim the value of the payment in kind made during the strike or lock-out back from the employees. This must be done through the Labour Court. The money cannot be deducted from the employees' pay without a court order or the employees' permission.
- An employer is entitled to recruit temporary (scab) labour while employees are on strike or when the employees are locked out by the employer where the lock out was introduced, only after the employees had gone on strike. If the employer locks out employees who have already started a strike, then the employer can use strike breakers to replace the strikers for the period of the strike.
- In exceptional circumstances, the employer can retrench employees on strike. The employer must follow the procedures for retrenchment. If the employer then employs other employees in place of the retrenched employees, the employees can take the dispute to the Labour Court, where the lockout is in response to a strike. If the employer did the lockout first, then they cannot employ temporary replacement labour.

Trade unions

Employees can organise themselves into employee organisations called trade unions. A trade union is controlled, run and paid for by its members. Organised employees in factories elect shop stewards and committees to represent them and report back to them in the workplace. The shop stewards and employees discuss the problems in the workplace, and the shop stewards take the employees' problems to the management.

WHAT ARE THE AIMS OF TRADE UNIONS?

- To **negotiate** with employers for proper working conditions
    - For decent wages and conditions of work
    - For recognition by the employer of the unions and shop stewards in the workplace
- To **protect** employees:
    - From unfair dismissal and unfair labour practices
    - From discrimination and abuse
- To **educate** employees:
    - On their rights and how to enforce these rights
    - On how to carry out their tasks in the trade union
- To **represent** employees:
    - To the employers and other authorities
    - To get benefits
- To take **legal action** when necessary

PAYING UNION SUBSCRIPTIONS

When an employee joins a union, they will be asked to pay a subscription fee every month to become a member. These fees are also called 'subs'. The union uses the 'subs' to pay for its expense, such as salaries for union staff, office rental, transport for union staff, etc.

THE RIGHT OF EMPLOYEES TO FORM, JOIN AND TAKE PART IN TRADE UNIONS

The Constitution and the *Labour Relations* Act say that employees have the right to form and join trade unions. This right is called **freedom of association**. Employers are not allowed to make it a condition of employment that an employee must or must not belong to a trade union. It is the employee's choice. An employee also cannot be victimised because they are a member of a trade union. This means the employer cannot treat the employee unfairly or badly because the employee is a trade union member.

TRADE UNION RIGHTS IN THE WORKPLACE

A registered union that has less than 50% membership of the workforce but which is sufficiently representative (around 30% of the membership of the workforce as members) can apply for these organisational rights:

- Access to the workplace for union office bearers and officials to hold meetings, etc
- To ballot its members

- To provide stop-order facilities for the deduction of 'subs' or trade union subscriptions

This percentage of membership (30%) is commonly regarded as being 'sufficiently representative' and entitles the trade union to be granted stop-order facilities.

A registered union that has a majority (more than 50%) of the employees as members at a workplace can apply for the above rights as well as the following:

- Election of shop stewards/employee representatives
- Disclosure of information/the employer must give the union any information that is relevant for meetings and negotiations
- Time off for a representative to undertake trade union duties or have training

The union applies to the employer for these rights. Within 30 days the employer must meet the union. They make a collective agreement about these rights. The union can ask the CCMA to intervene if the employer refuses. The CCMA will try to mediate and if that fails, will conduct an advisory arbitration. This advisory arbitration award does not have to be complied with by the parties, but the parties should consider the advice of the commissioner.

Unions that belong to Bargaining Councils or Statutory Councils automatically have these rights, even if they don't have many members at the workplace.

The CCMA is now required to consider the composition of the workforce, extending its parameters to include Temporary Employment Employees and any other in atypical working conditions.

Social services and benefits in the workplace

Unemployment Insurance Fund

The government has established the Unemployment Insurance Fund (UIF) to provide short-term relief to employees when they become unemployed or have reduced employment, or are unable to work because of illness, maternity or adoption leave and also to provide relief to the dependants of a contributor who has died. If an employee becomes unemployed, the UIF will pay the employee for a maximum period of 12 months, subject to UIF credits accumulated by the employee, while that employee is unemployed. Employees, companies and the state contribute to this fund.

There are five kinds of benefits covered by UIF:

1. Unemployment benefits

2. Sick benefits
3. Maternity benefits
4. Parental / Adoption benefits
5. Dependent's benefits

For more information on the UIF, look up the Department of Employment and Labour website: www.labour.gov.za

WHO IS A CONTRIBUTOR TO THE UIF?

All employees who work for more than 24 hours per month must contribute to the Fund. It is illegal for employers not to make deductions from the employee's earnings. Even people earning high salaries (unless they are earning commission only) must contribute to the Fund, regardless of how much they earn. The Fund sets a ceiling amount of R261 748 per year (or R21 812 per month). Any employee who earns above this threshold will only contribute up to this amount. If they become unemployed, they will receive benefits at the level of the ceiling.

EXAMPLE

Vernon is a company administrator, and he earns R30 000 per month. The current threshold for UIF is R21 812, so Vernon will pay 1% of R21 812, and the company will pay 1% of R21 812 every month on his behalf to the UIF. If Vernon becomes ill and wants to claim Illness Benefits, the UIF will only pay him a percentage of R21 812 (not of his current salary). The actual amount he will be paid will depend on the number of days he has been contributing to the Fund.

WHO IS NOT COVERED BY UIF?

Certain employees do not contribute to the Fund, and they therefore cannot claim from the Fund if they are unemployed. The following people are not covered by UIF:

- Employees who work less than 24 hours per month
- Employees who receive payment under a learnership agreement negotiated under the *Skills Development Act (No. 97 of 1998)*
- National and provincial government employees (public servants)
- People whose earnings are calculated on a commission basis
- Foreign contract employees (unless they have permanent residence) ***(See pg 75: Immigrants and migrants)***

HOW DO EMPLOYEES BECOME CONTRIBUTORS TO UIF?

In terms of the Act, all employers have to become registered with the UIF and make a declaration of all their employees to the UIF. Whenever there is a change of staff, for example, new appointments made, or contracts terminated, employers must inform the UIF of these changes. So, there are two very important things an employer must do when employing an employee:

- Send details of the employee to the UIF
- Deduct UIF contributions from the employee's wage and send these plus the employer's own contributions to SARS (or the UIF if not registered with SARS for PAYE, e.g. in the case of a domestic employee). ***(See pg 430: Problem 13: Employer does not register employee with the UIF)***

HOW MUCH DO EMPLOYEES CONTRIBUTE TO THE FUND?

Every week (or month, if the employee is paid monthly), the employer deducts 1% of each employee's wages for UIF. This works out to 1c for every R1 the employee earns. The employer also pays 1% of the employee's wage. So, for every cent the employee pays to UIF, the employer pays the same. The company then pays all these contributions to the South African Revenue Services (SARS) (if the company is registered with SARS for tax purposes (PAYE) or for Skills Development Levies (SDL)) or to the UIF using their online portal.

The *Unemployment Insurance Contributions Act* says all employers have to submit their UIF payments together with their payments of PAYE and SDL before the 7th of each month. This is all written on one form called the EMP 201 return form (the form used to submit returns to SARS). ***(See pg 382: Unemployment Insurance Fund [UIF])***

Where employers are not required to register with SARS for PAYE or SDL purposes, they must pay the UIF contributions to the Unemployment Insurance Fund using the UF 3 return form.

HOW MUCH DO PEOPLE GET PAID WHEN APPLYING FOR BENEFITS?

In the case of unemployment, illness, adoption and dependants benefits, benefits will be paid for a maximum of 12 months or for the number of days credits that the person has built up during the 4 years leading up to the application for benefits. Credits are given to employees as they work and contribute to the Fund. Employees can earn credits in the following way: for every 4 days that an employee works and contributes to the Fund, they receive 1 day's credit. So, to qualify for the full 12 months credits the employee must work and have been contributing to the Fund for at least 4 years and not have claimed any days benefits during that period (except maternity benefits).

Maternity benefits will be paid at a flat rate of 66% of the earnings threshold in the BCEA (R21 812 per month)

The employee is regarded as having contributed to the Fund from the first day of employment to the day that the services are terminated. A notice period worked before termination of service is also regarded as a period employed.

WHEN IS A CONTRIBUTOR NOT ENTITLED TO RECEIVE BENEFITS?

An employee who has been a contributor to the Fund is not entitled to receive benefits if the contributor:

- Is receiving a monthly state pension
- Is receiving payment from the compensation fund for illnesses or injuries that caused the temporary or total unemployment of the contributor
- Is receiving benefits from any other scheme established by a Bargaining Council
- Fails to comply with the provisions of the law
- Has been caught working and collecting benefits or has committed fraud (offence)

TYPES OF UIF BENEFITS

UIF pays five kinds of benefits:

1. Unemployment benefits
2. Illness benefits
3. Maternity benefits
4. Adoption benefits
5. Dependant's benefits

UNEMPLOYMENT BENEFITS

These benefits are for employees who lose their jobs because they have been dismissed or retrenched, or when the employees' contract expires. If an employee resigns from the job or absconds from work, then they will not qualify for benefits unless the employee can prove it was a constructive dismissal. To get unemployment benefits, the employee must satisfy the following conditions:

- The employee has been contributing to the fund and money has been deducted from their salary for UIF every month.
- The claim must be made within 12 months of becoming unemployed
- The claim must be made on the proper form
- The employee has been unemployed for more than 14 days

- The services of the employee were terminated (dismissal or retrenchment or insolvency of the employer) by the employer, and the employee did not resign or abscond (unless they can prove it was constructive dismissal)
- The employee is registered as a work seeker with an employment office in terms of the *Skills Development Act*, 1998 (the employee must be capable of and available for work)

Benefits will be paid for a maximum of 12 months or for the number of days credits that the person has built up during the 4 years leading up to the application for benefits. Credit is accumulated by the employee of one day benefit for every four days worked. The employee must report at times and at places that the claims officer determines to sign the unemployment register, and they must undergo training and vocational counselling if the claims officer tells them to do this. If the contributor refuses to do this without a good reason, they will not be entitled to benefits.

Employees who leave to go and study or to go on a pension cannot claim UIF because they are not available for work. Employees who go on a company, Bargaining Council or civil pension can claim UIF as long as they say they are still available, able and willing to work.

Employees who work for reduced hours or short time can claim UIF benefits for the lost hours. For example, if an employee has been temporarily put on short-time because the employer has run into financial problems and there is less work available, they can claim for the reduced hours from UIF, provided the remuneration being earned in the week, is less than the amount of the benefit they could receive.

ILLNESS BENEFITS

Employees can claim **additional sick leave and illness** benefits if they are off work because of illness for more than 7 consecutive days. Benefits are paid from the date on which the employee stopped working because of illness and may be up to 365 days, subject to the number of credits earned by the employee prior to the illness.

To get illness benefits, the employee must satisfy the following conditions:

- The employee has been contributing to the fund, and money has been deducted from their salary for UIF every month
- The employee must have been sick for more than 7 days
- The claim must be made within 6 months of the illness

- The claim must be made on the proper form, which includes completing a medical certificate by the doctor or recognised homeopath

If the employee has been paid by the employer during the period of illness, then the benefits paid by the Fund will be the difference between what the employer paid and the benefit that the employee would have been entitled to.

Benefits can be paid up to a maximum of 365 days, subject to the credits earned by the employee prior to their illness.

MATERNITY BENEFITS

Maternity benefits can be paid to a contributor who is pregnant. Section 25 of the *Basic Conditions of Employment Act* says a pregnant woman can take maternity leave at any time from 4 weeks before the expected date of birth, and she may not work for six weeks after the birth. Benefits are paid at a flat rate of 66% of the employee's wage for a maximum of 121 days or 17.32 weeks in any period of 4 years. If an employee has applied for maternity benefits this does not affect her right to claim unemployment benefits. To qualify for maternity benefits, the mother must have contributed to the fund for at least 13 weeks before applying for maternity leave.

To get maternity benefits the employee must satisfy the following conditions:

- The employee has been contributing to the fund for at least thirteen weeks before claiming maternity benefits, and money has been deducted from her salary for UIF every month
- The claim must be made at least 12 months after becoming due (or on good cause shown)
- The claim must be made using the proper form

If there is a miscarriage or a stillborn child, then benefits are paid for a maximum of 121 days after the miscarriage/stillbirth.

If the employee has been paid by the employer during the period when she was off on maternity leave, then the benefits paid by the Fund will be the difference between what the employer paid and the benefit that the employee would have been entitled to.

ADOPTION BENEFITS

A person who legally adopts a child less than 2 years old and who leaves work to look after that child can now claim adoption benefits from the Fund from the date of adoption.

Only one of the adoptive parents can apply for benefits.

Benefits are paid from the date on which the Court grants an order for adoption. To get adoption benefits, the employee must satisfy the following conditions:

- The employee has been contributing to the fund and money has been deducted from their salary for UIF every month
- The child must be adopted in terms of the *Child Care Act of 1983*
- The period not working must be spent caring for the child
- The adopted child must be below 2 years old
- The claim for benefits must be made within 12 months of the order of adoption being issued
- The claim must be made using the proper form
- Only one claimant may claim Adoption Benefits in terms of the fund

If the employee has been paid by the employer during the period when they are off caring for the adopted child, then the benefits paid by the Fund will be the difference between what the employer paid and the benefit that the employee would have been entitled to.

DEPENDANT'S BENEFITS

If an employee dies while working, the dependants can claim the dependant's benefits from the Fund. A dependant can be:

- The employee's wife/husband/life partner
- Any dependant child under 21 years old if there is no surviving spouse (husband or wife) or if the surviving spouse/life partner has not made an application for the benefits within 18 months

To get dependant's benefits, the employee must satisfy the following conditions:

- The employee must have been contributing to the fund and money must have been deducted from their salary for UIF every month
- The claim for benefits must be made within 18 months of the death of the employee
- The claim must be made using the proper form

If the surviving spouse or life partner does not claim within 18 months, then a dependant child can apply for the benefits, provided that the claim is made within 14 days after the 18 months has expired (during which the spouse should have applied).

Benefits can be paid up to 365 days in any period of 4 years, depending on the number of credits an employee has earned.

The benefits that are paid are equal to the unemployment benefits that would have been paid if the person was still alive.

HOW DO EMPLOYEES CLAIM UIF BENEFITS?

CLAIMING UNEMPLOYMENT BENEFITS

1. **Register for UIF within 12 months after becoming unemployed at the employment office closest to where the employee lives.**
2. **Sign the unemployment register** (this is called '**signing on**'). Usually, you must sign this register at the employment office every 4 weeks or whenever told to do so by the UIF clerk. If you miss signing, the benefits could be delayed for a long time, as you will have to re-register. If you are ill on one of the signing dates, you must bring a doctor's letter the next time. ***(See pg 430: Problem 14: Failing to sign the unemployment register)***

   You must say that you are available to work, or else benefits will not be paid out. If you are offered work, then you must be available to work. Sometimes, employees are told to go to different companies and ask for work. They get a form that the companies must fill in and sign showing that they have no jobs available.
3. You should start getting money within 8 weeks after applying for benefits. After that, you should get money every 4 weeks or so, until all the benefits are used up. Only the employee who has applied for benefits can collect the money from the employment office. When you go to collect your benefits you must take your ID book with you. Benefits will be paid into the beneficiary's account. ***(See pg 429: Problem 12: Application for UIF benefits is too late)***

CLAIMING ILLNESS BENEFITS

An employee will not get illness benefits:

- If the claims officer decides that the employee's illness arises from their own misconduct

- For as long as the employee unreasonably refuses or neglects to undergo treatment or to carry out the doctor's instructions. The claims officer decides whether the employee's refusal or neglect is unreasonable

To apply for illness benefits, you must submit your claim at the employment office closest to where you live within six months of being released from work. If you are too ill to go to the UIF office, a friend or family member can bring you the form to sign. ***(See pg 386: Illness benefits)***

Illness benefits are claimed on **FORM UF86.** The doctor who is treating you must complete paragraph 15 of this form. This is a medical certificate. The rest of the form is completed by people working at the employment office. If you are also unemployed, in other words, you have also lost your job, you must tell the claims officer that you are unemployed. But if you still have a job and are on unpaid sick leave, then you only need FORM UF86.

Once the application for illness benefits is approved, the employment office will send **FORM UF87** to you. This form must be signed by the doctor as soon as possible. You then fill in the rest of the form and return it to them. No illness benefits will be paid until you have returned the completed FORM UF87. You will only be paid for the period the doctor books you off work.

If you are dismissed when you are ill and the doctor has laid you off for less than 6 months, the balance can be claimed as unemployment benefits.

Illness benefits are not paid for the first week off work. But if the illness lasts longer than seven days and illness benefits are paid, then you will receive benefits for any period in the first seven days for which you did not get normal wages.

Illness benefits can be paid in one lump sum or in several payments. The amount will be paid into a bank account.

CLAIMING MATERNITY BENEFITS

Employees apply for maternity benefits in the same way as for illness benefits. You must submit your claim within 12 months.

If you are pregnant and want to apply for maternity benefits you must go to the nearest employment office yourself and make the application. If you are too ill, you can organise for someone else to go in your place.

When you register for maternity benefits you will get **FORM UF92**. This form must be filled in by a doctor. You must take the form back to the employment office.

Staff at the employment office may ask you to go to the doctor again or to visit the employment office at certain times. You must do what they ask, or you may not be able to claim.

Maternity benefits will be paid into a bank account.

On **FORM UF95** you can apply for further benefits after your baby is born. This form must be signed by the doctor who delivered the baby. An employee can get these benefits even if the baby was stillborn. If you are also unemployed, then you must tell the claims officer. But if you are on unpaid maternity leave, you will only need to fill in forms UF92 and UF95.

Benefits are paid at a flat rate of 66% of your wage (which is capped at the BCEA earnings threshold of R21 812 per month). ***(See pg 387: Maternity benefits)***

CLAIMING ADOPTION BENEFITS

Adoption benefits will not be paid if an application is not made within 12 months of the order of adoption being issued.

An employee should take the following documents to the employment office to apply for adoption benefits:

- The employee's child's birth certificate
- The order of adoption of the child.

Adoption benefits will be paid into a bank account. Payments are paid out until all the benefits are used up. ***(See pg 388: Adoption benefits)***

CLAIMING DEPENDANT'S BENEFITS

Dependant's benefits can be claimed by the husband/wife or life partner of the deceased employee and any minor children of the employee.

The application for benefits must be made within 6 months of the death of the contributor or for the dependent within 2 weeks after the 6 months if the surviving spouse did not claim any benefits.

The surviving spouse or life partner must complete **FORM UF126** when applying for dependant's benefits. They must take the following documents to the Department of Employment and Labour office when applying for benefits:

- Identity document
- A certified copy of the death certificate
- A certified copy of the marriage certificate

If these documents are lost, then the wife/husband or life partner should make a statement at the employment office.

A child or wife/husband of the deceased employee must complete **FORM UF127** when applying for benefits. Any dependant who wants to claim dependant's benefits must take the following documents to the employment office:

- If the dependant is a child, certified copies of the birth certificate, or if the dependant is a husband or wife, the marriage certificate
- A certified copy of the death certificate of the contributor

The employment office will give the dependant **FORM UF128**. This form must be filled in by the last employer of the deceased employee. The child or dependant must then take the form back to the employment office.

Remember that **only one person** can claim dependant's benefits. The wife or husband of the employee who died is given preference.

The money for dependant's benefits is paid in one lump sum in the beneficiary's bank account. The amount that is paid will be the same as the total unemployment benefits that the deceased employee could have drawn at the time of the death. ***(See pg 384: How much do employees get paid when applying for benefits?)***

If an employee dies after claiming all the UIF that is owed to them, there will be no money left for dependant's benefits.

HOW TO GET COPIES OF BIRTH, MARRIAGE AND DEATH CERTIFICATES

Go to your local Home Affairs office and request the certificate you require. Don't forget the following information:

- What type of certificate you want
- Full name and identity number of person
- Date and place of birth/marriage/death
- For birth certificates, full names of parents and their identity numbers
- For marriage certificates, full names of both husband and wife and identity numbers

WHAT IF THE UIF BENEFITS ARE USED UP AND THE EMPLOYEE IS STILL UNEMPLOYED?

If you are still unemployed by the time your UIF benefits have been used up, then you can apply for an extension of unemployment benefits. For an extension of ordinary benefits, you must apply on form UF139. You must write down on this form

details of where you have tried to find work. The form must be handed in at an employment office. If you have received illness benefits, you can apply for an extension of illness benefits on form UF140. This includes a medical certificate to be completed by the doctor.

The UIF treats all applications for extension of benefits on merit. This means they decide whether they think you have good reasons to get more benefits. There is no automatic right to an extension. Extension benefits are not easy to get. Three years is the maximum time for which normal benefits are paid out. But it helps to prove that:

- You are still actively seeking work (show letters of refusal by employers).
- You depend for the necessities of life on the UIF benefits; a list of expenses such as rent receipts, food bills, water and electricity bills and schooling fees should be drawn up.
- You have been working for more than 4 years and have gained the maximum number of credits for which normal benefits are paid out. Twelve months is the maximum time for which normal benefits are paid out.

WHAT IF THE APPLICATION FOR NORMAL BENEFITS IS REFUSED?

If an application is refused the applicant will be sent a registered letter informing them of the decision of the UIF. The letter sets out the reasons for the refusal. You can appeal against the refusal.

UIF APPEALS

If your application for UIF benefits has been turned down you or your representative must write to the **Regional Appeals Committee** within 3 months (or 90 days) of being told that benefits will not be paid out.

What must be included in the appeal?

- Name and address of the person appealing
- Identity number
- Date of applying for benefits
- The office where the application was made
- The date on which the claims officer gave the decision
- The details of the claims officer's decision and why the employee wants to complain
- The reasons for the appeal

All this information must be set out in a statement which the **employee must sign**.

Address the letter to the Regional Appeals Committee of the Provincial Office of the Department of Employment and Labour.

FURTHER APPEALS

If the Regional Appeals Committee again refuses the employee's application, then the employee can appeal again to:

The National Appeals Committee
Unemployment Insurance Board
PO Box 1851
Pretoria 0001

TERMINATION OF BENEFITS

Benefits stop if:

- The full amount has been paid out
- You stop signing the register
- You find work; in this case you must inform staff at the employment office immediately if you find work; if you carry on accepting benefit payments, you will have to pay back the amount received. This is called **fraud**.

Compensation Fund

The Compensation Fund provides compensation for employees who get hurt at work, or sick from diseases contracted at work, or for death as a result of these injuries or diseases.

The Compensation Fund is covered by the *Compensation for Occupational Injuries and Diseases Act (No. 130 of 1993)* (COIDA) and the *Compensation for Occupational Injuries and Diseases Amendment Act (No. 61 of 1997)*. The Compensation Commissioner is appointed to administer the Fund and approves claims of employees. Where an employee is entitled to receive compensation from the Compensation Fund, the Fund, and not the employer, will pay the employee.

(*Go to the Department of Employment and Labour website for more information on the Compensation Fund:* [*www.labour.gov.za*](http://www.labour.gov.za))

When can an employee claim compensation?

- Employees can claim if they are injured in an accident 'in the course and scope of duty' (in other words, while they are doing their work).
- Employees can claim if they get a disease caused by the work (an occupational disease).
- If an employee dies from the accident or disease, their dependants can claim.

Employees who are drivers or who have to be transported as part of their work may be involved in motor vehicle accidents while working. Motor vehicle accidents at work are covered by the *Road Accident Fund Act*. The accident must be reported to the Compensation Commissioner, and will follow the normal Compensation procedure, but the money will be paid by the Road Accident Fund. ***(See pg 397: Motor vehicle accidents while working)***

Who can claim compensation from the Fund?

Any person who is employed or being trained by an employer, and is injured or gets sick on or because of the job can claim compensation. The following employees cannot claim compensation from the Fund:

- Members of the South African National Defence Force and South African Police Services (they have their own fund)
- Out-employees to whom employers give articles to be made up or to wash or clean. Then they are not working under the control of the employer
- Employees who work outside South Africa for longer than 12 months at a time, unless there is a special agreement with the Commissioner

The Act says an employer has to pay compensation to the injured employee for the first 3 months from the date of the occupational injury. Thereafter, the Compensation Fund will pay. The Compensation Fund will repay the employer for the money that was paid.

Who contributes to the Fund?

Employers pay into the Compensation Fund once a month based on a maximum amount of earnings currently of R597 328 per employee per year. Employees do not pay anything to the Fund, so employers cannot deduct money from employees' wages for this. The following employers do not have to pay into the Fund:

- National and provincial state departments
- Certain local authorities
- Employers who are insured by a company other than the Compensation Fund. For example, many employers in the construction industry are insured by Federated Employers Mutual Assurance.

These employers are still covered by the Act and claims are made to and decided by the Commissioner. The only difference is that the payouts are made by the insurance fund of the employer (not by the Compensation Fund).

You can claim if:

- You were injured on duty
- You lost a family member who died on the job
- You are an employee employed by a temporary employment services provider

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When will the Fund not pay compensation?

- No payment is made for claims that are made more than 12 months after the accident or death, or more than 12 months after the disease is diagnosed
- If an employee is off work for 3 days or less, this is not covered by the Compensation Fund. It may be covered by the employee's medical aid or sick fund
- No payment is made if the employee's misconduct caused the accident unless the employee was seriously disabled or died from the accident
- There may be no payment if the employee unreasonably refuses to have medical treatment, for as long as the employee refuses
- When an employee is an 'outsourced employee'

Occupational diseases and injuries

DISEASES

Occupational diseases are illnesses caused by substances or conditions that the employee was exposed to at the workplace. Schedule 3 of the *Compensation for Occupational Injuries and Diseases Act* sets out the working conditions and diseases caused by these conditions that are covered by the Compensation Fund. An employee can claim compensation if exposed to these working conditions and then getting the related disease.

If a disease is not listed, then employees can claim compensation only if they can prove that the disease was caused by conditions at work and not by some other

factor. Medical evidence and reports will have to be submitted to the Commissioner. It may also take some time for a disease to become obvious, and in such cases, employees can claim compensation if they are no longer at a workplace so long as it falls within the time limits for lodging claims. ***(See pg 436: Problem 20: Employees develop an occupational disease)***

The Commissioner will approve or reject the claim. Only if the Commissioner approves the claim will you get compensation (for temporary or permanent disability), and your medical expenses will be paid. If the disease gets worse after a period of time, you can apply to have your compensation increased.

INJURIES

Injuries covered by the *Compensation Act* are only those that occur as a result of or at work. Compensation is paid for temporary and permanent disabilities that lead to a loss of earnings.

MOTOR VEHICLE ACCIDENTS WHILE WORKING

If motor vehicle accidents happen while employees are doing their jobs, then they can get compensation from the Compensation Fund. But if they are injured in a motor vehicle accident caused by someone else's negligent or unlawful driving, even if this is on the job, they can also make a third-party claim from the Road Accident Fund. The money received from the Compensation Fund will be taken off the third-party payment. For example, if the Road Accident Fund agrees to pay damages of R15 000, but the Compensation Fund has already paid R10 000, then the employee will only get R5 000 damages from the Fund.

Employees cannot sue their employer for damages if they are injured on the job. But if the employer caused injury to employees while they were NOT on the job, then the employee could sue them.

What types of compensation payments are made?

Compensation is paid for getting injured at work or for diseases caused by work. These are the main types of compensation payments:

- For temporary disability (the employee eventually recovers from the injury or illness)
- For permanent disability (the employee never fully recovers)
- For death
- For medical expenses
- Additional compensation

Compensation is always worked out as a percentage of the wage the employee was earning at the time the disease or injury was diagnosed. If the employee is unemployed by the time a disease is diagnosed, the wage they would have been earning must be calculated.

The Compensation Fund does not pay for pain and suffering, only for loss of movement or use of your body.

TEMPORARY DISABILITY

Temporary disability means the employee does eventually get better. If an employee is off work for 3 days or less, no compensation will be paid (the employee can claim sick leave from the employer). If the employee is off for more than 3 days, the employee gets compensation which also covers the first 3 days. Temporary disability can be total or partial:

- **Total disability** means the employee is unable to work for a while. The employee will get 3/4 (75%) of the normal monthly wage as compensation.
- The formula is:

  (*monthly wage x* 75) ÷ 100, *if the employee is paid monthly*

  (*for weekly paid employees, multiply the weekly wage by* 4.3 *to get the monthly wage*)

- **Partial disability** means the employee can go to work, but on light duty for fewer hours. If the employee earns less doing the lighter work, they will get 3/4 of the difference between the normal and reduced monthly wage.

EXAMPLE

Thembiso's wages are R2 000 per week. What would his Compensation be for a temporary total disability?

Multiply weekly wage by 4.3: R2 000 *x* 4.3 = R8 600 *per month*

Monthly wage x 75 ÷ 100: R8 600 *x* 75 ÷ 100 = R6 450

Thambiso would get R6 450 per month from the Compensation Fund for Total Temporary Disability.

For an occupational disease, use the wage at the time of the diagnosis and not at the time when the employee first got exposed to the disease. If the employee is now unemployed, use the wage that they would probably have earned if still employed.

Compensation for temporary disability will be paid for up to 12 months. If the condition of the employee has not improved after 12 months, the commissioner may agree to continue payments for up to 24 months. After 24 months, the Commissioner may decide that the condition is permanent and grant compensation on the basis of permanent disability. The Commissioner also pays all medical accounts, including medicine for which accounts must be submitted. ***(See pg 432: Problem 16: Employee does not get the correct amount of compensation money)***

PERMANENT DISABILITY

Permanent disability means that an employee never fully recovers from the injury or sickness. A permanent disability can completely prevent an employee from working, or it can just inconvenience an employee. The most serious is called 100% disability, and least serious is called 1% disability. A doctor must write a medical report about the disability. The Commissioner, with the help of a panel of doctors, works out the degree of disability. The degrees of disability are set out in Schedule 2 of the *Compensation for Occupational Injuries and Diseases Act*. Some examples are:

- Loss of two limbs: 100%
- Total loss of sight: 100%
- Loss of hearing in both ears: 50%
- Loss of sight in one eye: 30%
- Loss of one whole big toe: 7%
- Loss of one other toe: 1%

Compensation for permanent disability is paid either as a monthly pension or as a lump sum:

- If the injury is measured as more than 30%, the employee gets a pension
- If the injury is 30% or less, the employee gets a lump sum.

The formula for the **monthly pension** is:

[monthly wage x (75 ÷ 100)] x (percentage disability ÷ 100)

This amount will be paid once a month for the rest of the employee's life.

EXAMPLE

Joe lost one of his hands while pushing some poles through a saw. At the time of his accident, he was earning R8,000 per month.

The percentage of disability for loss of a hand is 50%. Calculate the amount Joe would be compensated by the Compensation Fund as follows:

Monthly wage x (75 ÷ 100) x (percentage disability ÷ 100)

R8 000 x (75 ÷ 100) x (50 ÷ 100)] = R 6,000 x (50 ÷ 100) = R3 000

Joe will get R3,000 per month for the rest of his life.

The formula for the **lump sum** is:

(monthly wage x 15) x (percentage disability ÷ 100)

This amount will be paid once only and there will be no further payments.

EXAMPLE

Freddie lost an eye while working in a factory. Before the accident, he got R8 000 a month. What compensation should he get for his permanent disability? The percentage of disability for the loss of one eye is 30%. Freddie will get a lump sum because his injury was 30% or less. To work out the lump sum:

(Monthly wage x 15) x (percentage disability ÷ 100)

(R8,000 x 15) x [(30 ÷ 100)] R120 000 x (30 ÷ 100) = R36 000

Freddie will receive R36 000 as a lump sum payment

DEATH BENEFITS

Compensation can be claimed by the widow or dependants if an employee dies as a result of a work-related accident or disease. Claimants for death benefits must submit copies of the following documents:

- Marriage certificate or proof that the couple lived as husband and wife
- Birth certificates or baptismal certificates of children (for proof of children)
- The death certificate
- Declaration by the widow/er (form W.C.L 32)

- The employer's report of the accident or disease Funeral accounts (form W.C.L 46)
- A special Compensation Form must be filled in, giving details of income and property

WHO CAN CLAIM COMPENSATION WHEN AN EMPLOYEE DIES IN THE COURSE AND SCOPE OF DUTY?

- The widow/er:
    - Lump sum payment: 2 x monthly pension of employee (the pension is the amount the employee would have been paid if he/she had been 100% disabled)
    - Monthly pension for life: 40% x monthly pension of employee, paid every month
- Each child under the age of 18 years (including illegitimate, adopted and step-children) is entitled to:
    - 20% x monthly pension of the employee, paid every month until the child is 18 years old
    - The pension can continue for longer if the child is mentally or physically handicapped
- Other dependants, if there is no widow/er or children (parents, sisters, brothers, half-sisters, etc.):
    - Full dependants: get the same as the widow
    - Partial dependants: get a lump sum that is worked out according to the degree of dependence
- The person who pays for the funeral expenses gets paid expenses up to R18 251.

NOTE

The total monthly pension per family cannot be more than the pension the deceased employee would have received if they were 100% disabled (i.e. 75% of the monthly wage).

MEDICAL EXPENSES

All the medical expenses of an employee will be paid for a maximum of two years from the date of the accident. This may include a reasonable amount required for transportation.

ADDITIONAL COMPENSATION

If an employee is injured, dies or contracts an occupational disease because of the negligence of the employer, or a defect in machinery or equipment, the employee can get extra compensation for temporary or permanent disability. Any employee who is under 26 years old at the time of an injury or disease will get extra compensation. An application for additional (increased) compensation must be made on a **Form W930** within 24 months of the injury. The Commissioner can extend the period if good reasons exist.

Steps to claim disability

1. The employee must inform the employer, supervisor or foreman of the accident, injury or disease verbally or in writing.
2. The employer must report the accident or disease to the Compensation Commissioner within 7 days for an injury and within 14 days after gaining knowledge of an alleged occupational disease. The employer must report it, even if they do not believe the injury or disease is work-related. If the employee is unemployed by the time a disease is diagnosed, the employee can send forms directly to the Commissioner.
3. Part of the form must be given to a doctor to complete, to check that the injury or disease falls under the Compensation Fund.
4. The doctor must send a First Medical Report **(W.CL.4)** detailing the disease or seriousness of the injury and the likely period the employee will be off work. This must be done within 14 days of seeing the employee.
5. The employer must send the First Medical Report to the Commissioner.
6. If the employer refuses to complete and send the form, the employee or a representative may send a form directly to the Commissioner. The Commissioner will instruct the employer to fill in the right form.
7. The doctor must also send Progress Medical Reports **(W.CL.5)** monthly while treatment is carried on. If the employee's condition has not improved after 24 months, the Commissioner may decide that the condition is permanent and grant compensation for permanent disability.

8. The doctor must send in a Final Medical Report, stating either that the employee is fit to return to work or that the employee is permanently disabled.
9. The doctor submits this form to the employer, who sends it to the Commissioner. Anyone else can send the medical reports to the Commissioner, as long as the claim number is on the form.
10. The employer sends in a Resumption Report **(W.CL.6)** to the Commissioner, when the employee starts work again or is discharged from hospital. The employer also fills in this form to claim back the compensation money the employer paid to the employee during the first 3 months they were off work.

How is the compensation money paid?

The compensation office waits until it has all the forms, and only then does it pay. ***(See pg 431: Problem 15: Long delay in paying compensation)***

TEMPORARY DISABILITY

The compensation office will pay the employer who gives it to the employee.

PERMANENT DISABILITY

Lump sum: The payment gets sent to the employer, who will pay the employee what is owed.

Pension: This is paid out monthly for the rest of a person's life. The disabled employee can decide where the compensation office must send the pension, for example, to a bank account. Pensions are always back-paid to the date of the accident.

If employers do not send in the forms or the claims take long, employees must contact the nearest employment office and report it.

Objections and appeals

- If an employee disagrees with the decision of the Commissioner, he/she may lodge an objection to the decision within 90 days from the date they became aware of the decision.
- The objection must be done on form **W929** and sent to the Commissioner.
- The commissioner may call a formal hearing to review the decision at which the employee can be represented by a legal representative, trade union official or family member. The employee can call evidence, including expert evidence.

- After the representations are made, the Commissioner will make a final decision.
- If the employee is still not satisfied they can take the decision of the Commissioner on review to the High Court. It is advisable to seek legal assistance with the application. ***(See pg 435: Problem 19: Employee's compensation has been refused)***

Employee's tax

What is employees' tax?

Employees' tax is the tax that employers must deduct from the income of employees (salaries, wages, bonuses, etc.) and pay over to SARS every month.

WHAT IS PAYE?

> PAYE stands for Pay As You Earn. PAYE is the tax that is deducted by an employer from an employee's income where their income is higher than the tax threshold.

When must an employee pay tax?

Every employee who earns more than a certain amount (known as the "threshold") in a year of assessment must pay income tax. The threshold amount for the 2025/2026 year of assessment is R95 750 if you are under 65 years, R148 217 if you are between 65 and 75 years, and R165 689 if you are older than 75 years.

For example, if you are 66 years old, you can earn up to R148 217 for the tax year without having to pay tax; if you are 55 years old and you earn R95 750 in the tax year, you will also not have to pay tax because you are earning below the tax thresholds. Once you earn more than these amounts, you will be taxed either according to the PAYE tax tables based on what you earn.

A year of assessment for an individual consists of twelve months starting on 1 March and ending on the last day of February of the following year.

How much tax do you pay?

This depends on:

- How much you earn (including overtime, bonuses and fringe benefits and before deductions)

- Your age (whether you are under 65 or over 65)
- Whether you are a member of an officially recognised pension fund or pay towards a retirement annuity fund. The amount you pay into a pension scheme or a retirement annuity fund can be DEDUCTED from your wage before tax is calculated. This means you will pay less tax because the tax is worked out on a lower income. Contributions to a Provident Fund cannot be deducted

After the deduction for a pension or a retirement annuity fund, the rest of your wage is taxed according to different rates. The rate you pay depends on how much you earn, and is calculated from tax tables issued by the South African Revenue Services (SARS). The tax tables will determine what rate of tax you will have to pay.

What information must you give to employers?

When you become employed you must fill in an **IRP2 form**. The tax deducted depends on the information that you fill in on this form.

If you are over 65 years old, you must notify your employer. Also, tell the employer if you pay towards a retirement annuity fund, because you will then pay less tax.

If you do not fill in an IRP2 form at all, the employer will tax you at the highest possible rate.

Rebates

A rebate is an amount of money taken off the tax **after** your tax rate has been worked out. This means the tax you pay is lower. You can get different types of rebates. There is a primary rebate and an age rebate (if you are over 65 years old).

Tax on bonus pay and retrenchment pay

Bonus pay is always added to the wage and then the whole amount is taxed. So, the income that is taxed is higher than the normal wage, and the tax you pay will also be higher.

Part-time work and casual work

PAYE must be deducted at a rate of 25% in respect of all employees who:

- Work for an employer for less than 22 hours per week, OR

- Work for an employer for an unspecified period.

Examples include:

- Casual commissions paid, for example, spotters fees
- Casual payments to casual employees for irregular/occasional services
- Honoraria paid to office bearers of organisations/clubs

The following people are exempt from this:

- If an employee works regularly for less than 22 hours per week and provides the employer with a written undertaking that they do not work for anyone else, then they will be regarded as being in standard employment and tax must be deducted according to the normal weekly or monthly tables.
- An employee who is in standard employment (in other words, who works for one employer for at least 22 hours per week).
- Pensions paid to pensioners

Tax assessments

Once a year, your employer must issue you with an IRP5 tax certificate that shows the total wages that you earned and the total tax that was deducted. If you are younger than 65 years and you earn more than R95 750 per year, you have to pay income tax. If you are 65 years or older but younger than 75 years, you only pay tax if you earn more than R148 217 per year. If you are 75 years or older, you only pay income tax if you earn more than R165 689 per year. These figures apply for the 2025/2026 tax year.

If you earn more you qualify for tax and usually it is deducted by your employer and paid over to SARS.

If you earn less than R1 million a year, you will have to pay a fixed percentage and not have to submit a tax return, provided certain criteria are met. Check the SARS website for more information: www.sars.gov.za

If you earn more than R1 million a year the SARS assesses your earnings when you fill in a 'tax return'. You fill in a tax return form and send it with the IRP5 to the SARS.

Assessment means checking up on the tax you pay to make sure you haven't paid too much or too little tax.

Pension and provident funds

The main aim of a pension or provident fund is to provide benefits for its members when they retire from employment. The fund also usually pays benefits when a member dies while still working, is unable to work because of illness, or is retrenched.

The main difference between a pension fund and a provident fund is that if a **pension fund member** retires, the member gets one-third of the total benefit in a cash lump sum, and the other two-thirds is paid out in the form of a pension over the rest of the member's life.

A **provident fund member** can get the full benefit paid in a cash lump sum. Pension funds also offer better tax benefits to employees. An employee's contributions to a pension fund are deductible for tax, while contributions to a provident fund are not.

There are advantages and disadvantages to both types of funds. It will depend on a person's own financial needs. However, one of the strongest arguments in favour of provident funds and the lump sum payment concerns the means test used to work out whether a person qualifies for a state old age pension.

Usually, if a person receives a private pension, that person is disqualified from receiving a state old-age pension. If a person gets a lump sum payment then that person may also qualify for a state pension in some cases.

How does a pension or provident fund work?

If it is a workplace pension fund, money goes into the fund through contributions from employers and employees. An employee cannot get money back from a fund except as benefits according to the fund rules. Employees can also invest privately in their own pension or provident funds where there is no workplace pension or provident scheme in place.

Types of funds and benefits

Different workplace funds have different kinds of benefits, for example:

- **Withdrawal benefits:** paid to employees who resign or are dismissed (employee gets own contributions only)
- **Retrenchment benefits:** paid to employees who are retrenched

- **Retirement benefits:** paid to employees when they retire at 60 (women) 65 (men) (amount paid out depends on how long employee was contributing)
- **Insured benefits:** including benefits paid to an employee who is disabled and benefits paid to the dependants of an employee who dies.

Not all funds provide all these benefits. To understand how any fund works, the member must read the rules of the fund.

Bargaining Council funds

A pension or provident fund may be established by a Bargaining Council Agreement. The Bargaining Council Agreement will lay down the rules for the pension or provident fund. Usually, all employees who fall under a Bargaining Council Agreement have to become members of any fund set up by that Bargaining Council, unless their employer has de-registered from the fund and set up their own fund.

Bargaining Council funds do not allow an employee to withdraw benefits if they leave one company to go and work for another company in the same industry. Usually, an employee can only withdraw benefits after a year of leaving the company, if they are still unemployed or was re-employed outside the industry. If the employee is re-employed in the same industry before one year is up, then contributions carry on as if there was no change in job.

Complaints about payments from pension funds

Any person who has a complaint about benefits from a pension fund can make a complaint to the Pension Funds Adjudicator. ***(See pg 449: How to write a complaint to the Pension Funds Adjudicator)***

The Pension Funds Adjudicator

The law says you must first send your complaint in writing to the pension fund or to the employer. The pension fund or employer then has 30 days to reply to the complaint. If they don't reply, or if you are not satisfied with the reply, then you can send an official complaint to the Pension Funds Adjudicator. Include your letter to the pension fund or employer, and their reply. After you have made a complaint to the Pension Funds Adjudicator, the adjudicator gives the pension fund 30 days to reply. Once the Adjudicator has received the pension fund's reply, they will look at the facts and decide who is right. ***(See pg 450: How to write a complaint to the Pension Funds Adjudicator)***

The Pension Funds Adjudicator does not deal with government pension funds. If a person who works for the government has got a complaint about a government pension then they must send their complaint to the Public Protector. ***(See pg 63: Problem 2: Making a complaint to the Public Protector)***

There is no charge to make a complaint with the Pension Funds Adjudicator.

WHO CAN MAKE A COMPLAINT TO THE PENSION FUNDS ADJUDICATOR?

The following people can make a complaint to the Pension Funds Adjudicator:

- A member or former member of a pension fund
- A beneficiary of a fund or a former beneficiary of a fund (a beneficiary is someone who is written down in your pension fund agreement to get the money from your pension fund, for example, your family if you die)
- An employer who participates in a workplace fund
- A board or board member of a fund
- Any person with an interest in a complaint

TIME LIMITS

You must get your complaint to the Pension Funds Adjudicator within 3 years of the problem arising.

The Two-Pot Retirement System

The two-pot retirement system was introduced on the 1st September 2024.

The system allows employees to access certain funds from their retirement fund before retirement if they need to, and without needing to resign and leave their jobs. It tries to create a balance between a person's immediate financial needs and long-term retirement savings.

All retirement contributions made by employees after the 1st September 2024 will be split with one-third of contributions going to a 'savings pot' and two-thirds going to a 'retirement pot.'

Under this Two-Pot system, employees can access funds accumulated in their 'savings pot' before retirement, but the funds in the 'retirement pot' will continue to remain untouched until retirement. The employee will not be able to access these funds before they retire from their job.

WHAT WAS THE PROBLEM WITH THE OLD PENSION PROVISIONS?

Before the introduction of the new 'two-pot' system, the rules on retirement meant that your contributions to a retirement fund would be 'locked in' until you reached the retirement age (typically 55 years), except if you died or were permanently disabled before this age, or if you resigned from your job. The result of this was that many employees chose to resign from their jobs so that they could have immediate access to their retirement savings. This meant there would be no 'retirement benefits,' or limited retirement benefits remaining when they finally retired.

The two-pot system aims to help South Africans manage their finances and give them some flexibility with the money they have saved for retirement. It allows them to withdraw a certain amount every year for emergencies while at the same time protecting most of the savings for retirement. It also protects people by preventing them from cashing out their full pension savings when they change jobs leaving nothing for retirement.

HOW DOES THE TWO-POT RETIREMENT SYSTEM WORK?

The system means that from 1 September 2024, any new retirement contributions that you make into your retirement fund will be split into two pots: **a savings pot** and **a retirement pot**. One-third of your pension contributions go into the savings pot and two-thirds go into the retirement pot. All your existing retirement savings up to 31 August 2024 will be kept in a **vested pot**.

THE SAVINGS POT

One-third of your pension contributions from 1 September 2024 will go into your savings pot. In addition, a once-off amount of 10% of your savings up to 31 August 2024 (which is kept in your vested pot) will be paid to your savings pot to create an opening balance that you can draw from.

The system allows you to withdraw cash from your savings pot once a year. The minimum withdrawal amount is R2 000. Withdrawals from the savings pot will be included in your gross income and will be taxed with your PAYE tax deductions.

The importance of the savings pot is that you will be able to access funds in your savings pot before retirement and without needing to resign from your job.

Any withdrawals from your savings pot are taxed at your personal tax rate and you will also pay a transaction fee. If you owe SARS any money, this will automatically be deducted before you receive funds.

THE RETIREMENT POT

Two-thirds of your pension contributions from 1 September 2024 will go into your retirement pot. This amount remains 'locked in' and saved until you retire. When you retire, under the two-pot retirement system, you can withdraw one-third of your retirement pot, and the remaining balance will be paid as fixed monthly payments.

This system aims to balance immediate financial needs with long-term financial security and protecting retirement savings.

To summarise: you will be able to use your savings pot before retirement as a 'rainy day' fund, but you will only be able to access the retirement pot when you retire.

THE VESTED POT

All your existing retirement savings up to 31 August 2024 will be kept in a vested pot. You cannot make any additional contributions to the vested pot unless you were contributing to a retirement fund and you were 55 years old on 1 March 2021.

Ten percent (up to a maximum of R30 000) of your existing savings in the vested pot will be moved into your savings pot (if you have retirement savings) as a once-off opening balance. For example, if you have R200 000 in your vested pot, 10% (or R20 000) will be moved into the savings pot to create a once-off opening balance. The vested pot then reduces to R 180 000 but you can use the R20 000 in the savings pot for emergency drawdowns according to the two-pot rules.

You will not be able to withdraw from the vested pot until you retire (or if you die or are permanently disabled before retirement age, or if you resign from your job). However, when you retire, you can withdraw the full amount (or whatever the rules of your pension fund state). In other words, the same rules that applied to your retirement fund before the two-pot system was introduced will continue to apply to funds in the vested pot.

NOTE

If you retire and the total amount of your vested pot and retirement pot is less than R165 000, you will be able to withdraw the full amount from both pots.

Medical aid schemes for employees

A medical aid scheme helps members to pay for their health needs, such as nursing, surgery, dental work and hospital accommodation. It is a type of insurance scheme. For this service, members and their employers pay regular contributions to the scheme. The law says that medical aid schemes must pay for medical expenses such as hospital, doctor and dentist bills, medicines and other medical services like special dentistry and physiotherapy. Some schemes offer more than this.

Advantages and disadvantages of Medical Aid Schemes

The **advantages** of a medical aid scheme are that:

- It protects employees if they suddenly have to pay large, unexpected medical costs, and they don't have to delay their medical treatment because they don't have any money
- Employees get better medical care because they are looked after by private doctors, clinics and specialists instead of overcrowded public hospitals

The **disadvantages** of a medical aid scheme are:

- It is expensive and fees are always increasing
- If an employee has dependants in rural areas it does not help to have medical aid because there are no private healthcare facilities
- There are often many hidden costs in the schemes and the scheme might only pay a small percentage of the costs and the employee has to pay the rest
- Some schemes set limits for benefits, for example, a scheme could set a limit of R720 per year for medicines prescribed by a doctor for a single member. If the member needs to buy more than R720 worth of medicines in a year, they will have to pay for any costs of medicines above this limit.
- Some medical costs are completely excluded from medical aid schemes. Employees must then pay for these costs themselves even though they are paying into the medical aid fund every month.

Medical Schemes Act

The *Medical Schemes Act No. 131 of 1998* made the following changes to medical aid schemes:

- There must be standard-rate fees for people to join medical aid schemes regardless of their health or age
- There can be no discrimination on grounds of peoples' health, for example, refusing to allow a person to join a medical aid scheme because they are HIV-positive, or because they have asthma or diabetes
- The definition of dependants includes spouses (husband or wife) and natural and adopted children

This means that people living with HIV or AIDS can no longer be turned away from medical aid schemes on grounds of their medical condition. The minimum medical benefits included for HIV-related illnesses include hospital admissions as well as necessary medical treatment. The treatment for people with AIDS-related illnesses also continues until death.

The Act also sets out a complaints procedure for people who have a complaint against a medical aid scheme.

Skills Development Act

The *Skills Development Act (No. 97 of 1998)* was passed to develop and improve the skills of people in the workplace. The Act does the following:

- Provides a framework for the development of skills of people at work
- Builds these development plans/strategies into the national qualifications framework
- Provides for learnerships that lead to recognised occupational qualifications
- Provides for the financing of skills development using a levy-grant scheme and a National Skills Fund

The following institutions are established in terms of the Act:

- National Skills Authority
- National Skills Fund
- Skills Development levy-grant scheme
- SETAs

- Labour Centres
- Skills Development Planning Unit

Sector Education and Training Authorities (SETAs) have been established for all the sectors in South Africa for example, for agriculture, construction, wholesale/retail, etc.

SETAs are required to develop sector skills plans for a specific sector and to implement the plans by establishing learnerships, allocating grants, and monitoring education and training in the sector. Learnerships can lead to a qualification registered by the South African Qualifications Authority (SAQA).

The National Qualifications Framework (NQF)

The NQF is a plan for education and training. The aim is for people to continue accumulating qualification credits as they learn and work. The Skills Development Act defines the following structures to implement the NQF:

- **South African Qualifications Authority (SAQA):** Responsible for overseeing the development and implementation of the NQF. SAQA establishes National Standards Bodies, Standards Generating Bodies and Education and Training Quality Assurers.
- **National Standards Bodies (NSB):** Set standards about what needs to be learnt in a particular field of learning. SAQA has established 12 fields of learning, such as Agriculture, Communication, and Manufacturing each with its own sub-fields
- **Standards Generating Bodies (SGBs):** Develops standards called unit standards and qualifications in a particular sub-field of learning.
- **Education and Training Quality Assurers:** Anyone who wants to provide education and training will have to be approved by an Education and Training Quality Assurer. ETQ Assurers will issue qualification certificates to learners.
- **Sector Education and Training Authorities (SETAs):** Each economic sector has a SETA. There are 21 SETAs that cover all work sectors in South Africa, including government sectors. Employers choose which SETA their business falls under. The SETA for each sector must develop and implement a sector skills plan, including approving workplace skills development plans, promote learnerships, act as the Education and Training Quality Assurer, and pay out Skills Development Grants.

The Skills Development Levy-Grant Scheme

The Skills Development Levy was established under the *Skills Development* Act. A levy is an amount of money that employers have to pay to the South African Revenue Service (SARS)

for skills development of employees. If employees undergo training then the employer can claim this amount back from the relevant SETA.

PAYING THE SKILLS DEVELOPMENT LEVY

An employer must pay a skills development levy every month if:

- The employer has registered the employees with SARS for tax purposes (PAYE), and/or
- The employer pays over R500 000 a year in salaries and wages to their employees (even if they are not registered for PAYE with SARS)
- An employer must pay 1% of the total amount paid in salaries to employees (including overtime payments, leave pay, bonuses, commissions and lump sum payments)

The employer must register with SARS and pay the levy monthly. SARS will supply the correct forms to fill in (SDL 201 Return Form). The levy must be paid to SARS not later than 7 days after the end of every month.

HOW ARE THE LEVIES USED?

The levies paid to SARS are put in a special fund. 80% of the money from this fund will be distributed to the different SETAs with 10% of this going towards paying SETA administration. The other 20% will be paid into the National Skills Fund. The SETAs will then pay grants to employers who appoint a Skills Development Facilitator. The National Skills Fund will fund skills development projects that don't fall under the SETAs. Even if an employer's total salary bill is less than R500,000 and they don't have to pay the SDL, they can still claim from the SETA for training and development.

GETTING A SKILLS DEVELOPMENT GRANT

An employer can get money back from the SETA or the National Skills Fund to use on training and developing their own employees' skills.

An employer can get back up to 70% of the levies they paid to SARS from the relevant SETA. The grants that can be claimed back are:

- 20% of the levy in a Mandatory Grant
- 50% of the levy in Discretionary Grants for Learnerships, Skills Programmes, Apprenticeships, Workplace Experience Placements, Internships and Bursaries.

There are also benefits of tax rebates on registered learnership programmes.

The requirements to be able to claim SDLs are:

- Register as a Skills Development Facilitator (SDL)
- Submit a Workplace Skills Plan (WSP) indicating training planned for the next reporting period
- Submit an Annual Training Report (ATR) as proof of the training conducted during the previous reporting period

By submitting company reports on training, employers can also improve their BBBEE score.

Skills Development Facilitators

The *Skills Development Act* makes provision for the employment and use of a skills development facilitator by an employer. This person is responsible for developing and planning the skills development strategy of a business for a specific period.

The skills development facilitator must do the following tasks:

- Help the employer and employees to develop a workplace skills plan
- Send the workplace skills plan to the relevant SETA
- Advise the employer on how to implement the workplace skills plan
- Help the employer to draft an annual training report based on the workplace skills plan
- Advise the employer on the requirements set by the relevant SETA
- Serve as the contact person between the employer and the relevant SETA

An employer can appoint an employee or a formally contracted person from outside the business to perform the functions of a skills development facilitator.

Problems

1. Money is deducted from an employee's wages

Jerry is a cashier working for Speedy G. Every day, he cashes up the money in the till and if it is short he notes this in a book. At the end of the week, all these shortages are counted up and the total amount is deducted from Jerry's wages. Are these deductions correct?

WHAT DOES THE LAW SAY?

The law says that an employer cannot make deductions from the wages of an employee except in certain circumstances.

WHAT CAN YOU DO?

You can take the following steps:

1. Check whether the employee is covered by a Bargaining Council Agreement or Wage Determination, or other agreement about terms and conditions of employment. In this case, Jerry is covered by the Bargaining Council Agreement for the motor industry. This agreement says that these deductions are unlawful. ***(See pg 295: How do you know which law applies to an employee?)***
2. Contact the employer and ask them for the reasons for the deductions. Explain that such deductions are unlawful. Quote Section 49 of the BCEA.
3. Write a letter to the employer giving all the details of the deductions, the weeks, the amounts deducted, and the amount the employee is claiming.
4. If the employer does not pay back the amounts owing to Jerry, write a letter of referral to the Bargaining Council asking them to investigate the problem. Explain to them what steps you have already taken to try and sort out the problem. Alternatively, refer a dispute to the CCMA in terms of Section 73A of the BCEA for breach of Section 34 of the BCEA. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'
5. Note that if losses are made to the employer because of the negligence or misconduct of the employee, a deduction of up to 25% of the employee's wage can be made to repay for the losses, provided the employee has agreed to this and provided the employee has had an opportunity to explain their conduct in a disciplinary hearing. ***(See pg 308: Deductions)***

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2. Employee wants to claim notice pay and leave pay

Faizel lost his job. He was dismissed without any notice and not paid in lieu of notice nor leave owing to him. He does not want to get his job back but wants to claim the notice and leave money that is owed to him.

- Faizel has a right to his notice and leave money if the dismissal was unfair. However, if an employee has been summarily dismissed for example, for misconduct, the employer doesn't owe notice or payment in lieu of notice. But in this case the employer will have to prove the dismissal was justified. In all cases, the employee is entitled to payment of any outstanding leave pay.
- The amount of notice and leave pay owing to him depends on which wage regulating measure he falls under. ***(See pg 295: How do you know which law applies to an employee?)***

- If Faizel was unfairly dismissed, he may be able to claim compensation from the employer. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation)***

You can take these steps to claim the money owed:

1. Check which wage regulating measure protects the industry. Is it a Bargaining Council Agreement, Wage/Sectoral Determination or the BCEA and work out what is owed to Faizel for payment in lieu of notice and outstanding leave pay.
2. Send an email to the employer stating Faizel's claim. ***(See pg 444: Model letter of demand to employer for notice and leave pay)***
3. If the employer refuses to pay Faizel the money that is owed, refer him with a covering letter to the relevant Bargaining Council or Department of Employment and Labour.
4. Alternatively, refer the dispute to the CCMA in terms of Section 73A of the BCEA for non-payment of statutory leave and notice pay. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'
5. Check on the Bargaining Council website to see if there are online options to submit a complaint. The complaint must say what the claim is and what steps have been taken to sort out the problem. If the employer is found guilty of not complying with the Bargaining Council Agreement or the BCEA, an inspector can order the employer to pay Faizel. If the employer refuses to pay him, the inspector can refer the matter to the Director General of Employment and Labour.
6. Faizel has the right to bring a private civil claim against the employer, either in the Small Claims Court or in the Magistrate's Court. ***(See pg 198: Small Claims Court; See pg 301: Enforcement of the BCEA (if he falls under the BCEA); See pg 321: Enforcement of a workplace-based collective agreement; See pg 323: Enforcement of a Sectoral Determination)***

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3. Employee is paid below the minimum wage

Thabiso is employed by Fix-it Tiles. The company makes plastic floor tiles. She thinks that they pay her less than the minimum wage, which the law says she should be paid. She wants to know if this is correct.

WHAT DOES THE LAW SAY?

Collective agreements, Bargaining Council Agreements, Sectoral Determinations and Wage Determinations may set out minimum wages. The *National Minimum Wage Act* lays down a national minimum wage. If the company is only covered by the BCEA, then it must pay the current national minimum wage. Thabiso has the right to claim the wages that she was promised when she started working for the company.

If this is lower than the national minimum wage, then she can claim for the minimum wage amount.

WHAT CAN YOU DO?

- Check which wage regulating measure protects the company that Thabiso works for, for example, a Bargaining Council Agreement or Wage Determination, BCEA. (See: How do you know which law applies to an employee?)
- Once you have established this, check whether there is a minimum wage for the industry. If so, find out what the minimum wage should be for Thabiso. If she is being underpaid according to a BCA or Wage Determination or in terms of the *National Minimum Wage Act*, you can either refer the case to the CCMA OR to the Department of Employment and Labour (or Bargaining Council if it applies). You cannot refer the case to both the CCMA and the Department.
- These are the different procedures you can follow:
    - First you need to contact the employer and ask for details on why Thabiso is being underpaid, as the law says that a minimum wage must be paid to her. If the employer carries on paying below the minimum wage and refuses to take any notice of your request, you can decide whether to go to the CCMA or the Department of Employment and Labour (or Bargaining Council).
    - Using the CCMA: The quickest way to deal with the problem of someone not being paid according to the NMWA, is to refer the dispute directly to the CCMA in terms of Section 73A of the BCEA. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'
- Section 73A of the BCEA says that an employee can refer a dispute to the CCMA if the employer fails to pay any amount owing to an employee in terms of the BCEA or the NMWA, or in terms of a contract of employment, a Sectoral Determination or a collective agreement. An employee can make an application to the CCMA for conciliation and if the dispute cannot be resolved, it will then automatically be referred to arbitration. No legal representation is allowed in these disputes.
- This provision only applies to employees who earn below the BCEA earning threshold of R21 812 per month. Employees who earn above the threshold can make a claim against an employer for failing to pay them what is owed in either the Labour Court, High Court, Magistrates Court or Small Claims Court depending on the jurisdictional requirements for each of these courts.

- Using the Department of Employment and Labour (or Bargaining Council):
    - You can refer the problem in writing to the Bargaining Council (if it is a Bargaining Council Agreement) or to the Department of Employment and Labour in terms of the *National Minimum Wage Act*). The complaint must say exactly what the claim is and what steps have already been taken to sort out the problem.
    - Each Bargaining Council, as well as the Department of Employment and Labour, has its procedures for investigating complaints and enforcing rights. To report a complaint, go to the nearest Department of Employment and Labour and report the complaint. You will need to complete the relevant Labour Complaint Form. The Department of Employment and Labour will appoint an inspector to investigate the complaint. If the inspector finds the employer has not paid the minimum wage, they can get a written undertaking from the employer to pay the minimum wage, or they can order the employer to pay the employee by giving them a compliance order. Both the compliance order and the written undertaking can be made into an arbitration award by the CCMA. If the award is not complied with, the employee can apply to the CCMA to certify the award, and it can be enforced as if it were an order of the Labour Court.
- You can also use the Department of Employment and Labour Impimpa hotline to report the complaint. Using this hotline doesn't need data, airtime or a smartphone. The number to dial when reporting a complaint is 134305# and select the relevant job category. Then follow the prompts. ***(See pg 302: Summary of the provisions in the BCEA [if she falls under the BCEA]; See: Enforcement of the BCEA; See pg 321: Enforcement of a workplace-based collective agreement; See pg 323: Enforcement of a Sectoral Determination; See pg 318: Enforcement and dealing with disputes about minimum wages)***

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4. Dismissed employee wants the job back – how to apply for reinstatement or compensation

Maisie is dismissed from her job for ongoing lateness in arriving at work. She says the dismissal was unfair because she relies on public transport and she can't help it if the trains always run late. She wants to get her job back.

WHAT DOES THE LAW SAY?

The law says that a person who is constantly late for work without good reason can be dismissed on grounds of misconduct or incapacity (poor performance). Generally,

for late coming, Maisie should have received a verbal warning, a written warning and a final written warning before the decision was taken to dismiss her. If Maisie was dismissed for an unfair reason (substantive unfairness), she may be able to be reinstated or compensated. If she was dismissed for good reason but the employer didn't follow the proper procedures (procedural unfairness), it is more likely that she will be compensated but not reinstated. ***(See pg 362: Substantive fairness; See pg 362: Procedural fairness)***

WHAT CAN YOU DO?

Find out whether she does want to be reinstated in the same job or claim compensation for being unfairly dismissed. Sometimes, an employee who was unfairly dismissed does not want to be reinstated or claim compensation. The employee only wants to claim outstanding money for notice, leave and so on. ***(See pg 417: Problem 2: Employee wants to claim notice pay and leave pay)***

The following is an outline of the procedure you can follow after the dismissal of an employee. It should be followed in all cases where an employee is dismissed and wants to be **reinstated** or at least **compensated**.

DETERMINE WHETHER HER DISMISSAL MAY HAVE BEEN UNFAIR

- Ask Maisie to **describe the events** leading up to dismissal. For example, How often was she late? What were her reasons? How did this impact on her job? Was there a hearing? etc. Make a note of all the important dates, for example, when (if at all) she received warnings, in particular note the date on which she was told that she was dismissed. ***(See pg 361: When is a dismissal fair or unfair?)***
- Ask her what reasons were given for her dismissal, if any. Who dismissed her?
- If she was dismissed for misconduct, ask her the following questions to establish the substantive and procedural fairness of the dismissal:
    - Did she know the consequences of being late?
    - Do all people who are late get treated in the same way?
    - What previous warnings of misconduct has she had? When were they given? Were they verbal or written? What were they for? Who handed out the warning(s)?
- If she was dismissed for incapacity (poor performance), ask her the following questions:
    - When she was late, what impact did this have on her performance at work?
    - Was she **counselled** that her lateness at work was unacceptable?

    - Was she given the chance to improve her performance?
    - Was she offered any alternative options, for example, starting work later and working during her lunch break? ***(See pg 365: Dismissal for incapacity)***
- Was she given a fair hearing before being dismissed? Ask the following questions:
    - Was she given proper notice of the hearing before being dismissed?
    - Was she told what the charges were against her?
    - Did she get a chance to prepare for the hearing?
    - Was she provided the opportunity of having a fellow employee with her in the hearing?
    - Was she provided a fair opportunity to present her side of her story and were these properly considered by an unbiased person? ***(See pg 362: Procedural fairness)***

If the answer to any of the above questions is 'NO', then the dismissal of Maisie may be unfair and she should be able to challenge it. If she still wants to get her job back, then you can take the next steps.

CHALLENGING THE DISMISSAL

Refer the unfair dismissal dispute to the relevant body for conciliation within thirty days of her dismissal:

- To the Bargaining Council if she is covered by a Bargaining Council Agreement
- If she is covered by a collective agreement, she must follow the dispute resolution procedure in the agreement
- Otherwise, refer the matter to the CCMA ***(See pg 370: Solving disputes under the LRA)***

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5. Retrenchment

A number of employees are retrenched from a large paper factory. They are unhappy about the way they were treated. Many of them have over ten years of service with the business.

WHAT DOES THE LAW SAY?

The *Labour Relations Act* says that a retrenched employee must be paid at least 1 week's wages for every full year that the employee worked for the employer.

This **severance pay** is money paid to an employee for losing a job, when the employee is not at fault. If employees were not paid severance pay or were paid too little, they have a clear right which must be enforced.

The LRA sets down rules for employers who want to retrench employees. If the employer does not follow these rules, then the employer can be guilty of an unfair dismissal on grounds of 'procedural unfairness.'

The Labour Court will not readily reinstate employees who were retrenched if the employer can show that it was absolutely necessary to retrench those employees. But if the employer did not follow the correct procedures, the Labour Court can order the employer to pay **compensation money** to the employees of up to 12 months payment. ***(See pg 367: Retrenchment or redundancy dismissal)***

WHAT CAN YOU DO?

Find out from the employees if they want their jobs back, get compensation for losing their jobs, or if they only want to claim severance pay. Consider all the guidelines for retrenchment given above. You may believe that the retrenchment was unfair, or that the procedure the employer used to retrench the employees was not correct.

The matter must first be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. ***(See pg 371: Conciliation by the CCMA or Bargaining Council)***

IF CONCILIATION IS UNSUCCESSFUL

If the employees want severance pay, then the case must be referred to the CCMA for arbitration.

If employees want compensation or to get their jobs back, then the matter must be referred to the Labour Court for adjudication. However, if the company employs fewer than ten employees or if only one person has been retrenched, the dispute can be referred for arbitration at the CCMA instead of the Labour Court. **(*See 374: Arbitration by the CCMA or Bargaining Council*; *See pg 376: Adjudication by the Labour Court*)**

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6. Employee dismissed for being under the influence of alcohol on duty (no previous record of alcohol abuse)

Smuts claims that he was dismissed for being under the influence of alcohol while he was on duty. He says this is unfair because he denies being under the influence of alcohol while he was on duty. He says he has no record of misconduct and especially not drinking. He

also says he was not given a hearing before being dismissed. He wants you to help him get his job back. When you telephone the manager Peter, he says that he has witnesses who saw Smuts under the influence of alcohol on duty. When you ask him why he did not give Smuts a disciplinary hearing, Peter says that there was no way he could have given Smuts a hearing – he was too under the influence at the time. Smuts admits that he had been drinking the night before, but he had not drunk anything on the day that he was dismissed.

WHAT DOES THE LAW SAY?

- Being under the influence of alcohol while on duty is an act of misconduct so proper disciplinary procedures must be used to work out whether the employee is guilty of being under the influence while on duty and to discipline the employee.
- To determine whether the employee was under the influence while on duty does not depend on the employer giving the employee a breathalyser test. This only measures the content of the alcohol in the blood. The breathalyser test does not say whether the employee was under the influence of alcohol. You can only work this out by observing the employee's behaviour, or through witnesses who observed the behaviour. The employee's behaviour will tell the employer whether the employee was too under the influence to carry out their job. The employer will have to say how the employee's behaviour showed he was too under the influence to carry on working. For example, did the employee smell of alcohol, could the employee walk straight, was the speech slurred, were the eyes bloodshot, how rational or irrational was the employee being, was the employee acting in a strange way, was the employee being aggressive, insolent or loud?
- Peter should not have dismissed Smuts without first applying corrective and progressive discipline to correct the problem. He should have first given him a warning (although being under the influence of alcohol while on duty might constitute a serious enough offence to justify misconduct depending on what the employee's responsibilities were). If the problem repeated itself the issue becomes one of incapacity, and a different procedure must be applied where he should have instituted other corrective measures, such as counselling.
- Peter also did not follow a fair procedure to dismiss Smuts, including giving him fair notice of a disciplinary hearing, and holding the hearing where witnesses could be called etc. ***(See pg 364: Dismissal for misconduct)***

WHAT CAN YOU DO?

This appears to be a clear case of unfair dismissal based on unprocedural grounds. Write to the employer demanding that Smuts be reinstated. ***(See pg 442: Model letter of demand to employer for reinstatement)*** If Peter does not respond to the letter and/or

continues to refuse to give Smuts his job back, you can refer an unfair dismissal dispute to the relevant body within 30 days of Smuts being dismissed:

- The Bargaining Council if Smuts is covered by a bargaining council agreement
- If he is covered by a collective agreement, follow the dispute resolution procedure in the agreement Otherwise refer the matter to the CCMA ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation)***

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7. Employee dismissed for being under the influence of alcohol while on duty (Employee is suffering from alcoholism)

Manuel, an employee, is dismissed for being under the influence of alcohol while on duty. Bennet, the manager, tells you that this is not the first time that Manuel has been under the influence of alcohol while on duty. On at least 3 occasions in the past 3 months, they have found him passed out at his desk. He was given disciplinary warnings on all three occasions. Bennet says this is the 'last straw' and he does not want Manuel back.

WHAT DOES THE LAW SAY?

- If an employee is often under the influence of alcohol and cannot do the job, then they might be suffering from alcoholism. Alcoholism is a sickness, so if an employee is an alcoholic, then being under the influence of alcohol on duty is not misconduct but rather **incapacity** (in other words, the employee is incapable of doing the job properly)
- Alcoholism is recognised as an illness in terms of the *Unemployment Insurance Act*. This Act provides benefits for alcoholics who are unable to work because of their illness, as long as they agree to undergo treatment
- Before dismissing the employee for incapacity, the employer must counsel the employee and assist them with getting medical treatment if necessary
- Only if the employee's condition does not improve or the employee's ability to do the job properly does not improve, should the employer think of dismissing them
- The employer must still be able to prove that there was a fair reason and a fair hearing before the employee is dismissed. ***(See pg 361: When is a dismissal fair or unfair?)***

WHAT CAN YOU DO?

- Find out from Manuel whether it is true that he has been given warnings for being under the influence of alcohol on duty.
- Find out whether he received any counselling for 'persistent alcoholic tendencies'.
- Did Manuel have a hearing before being dismissed?
- If there was no counselling and no hearing before being dismissed, and the employer refuses to take Manuel back, then you should declare a dispute with the employer. Follow the normal steps for reinstatement to get his job back for him. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation)***

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8. Contract employees are dismissed before the contract is due to terminate

Joe and five other employees have been employed by a sub-contracting company. The employer (from the company) who hired them told the contracting employees the contract would run for 3 weeks. After two weeks, Joe and one other employee are paid for the work they have done and told that the firm no longer needs them for the third week.

WHAT DOES THE LAW SAY?

Joe and the other employees entered into a three-week contract and both parties are bound by this contract of employment. Joe and the other employee have been unfairly dismissed. They can challenge the dismissal in terms of the Labour Relations Act (LRA). ***(See pg 361: Automatically unfair dismissals)***

WHAT CAN YOU DO?

You can help Joe and his co-employee refer the case to the CCMA or a Bargaining Council for conciliation (mediation). **(See pg 369: What steps can be taken if there is an unfair dismissal?; See pg 370: Solving disputes under the LRA)**

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9. Contract employees are not paid overtime

Shezi is employed by a sub-contracting labour broking company. A labour broker ('temporary employment service') is someone who supplies labour to the farmer to assist with the picking or pruning requirements of the farm. The company has hired her services out to a farmer where she works as a picker. After two weeks of working on the farm, Shezi has not been paid for any of the overtime she has worked. When she asks the farmer for

her overtime money, he tells her he agreed to pay a flat rate to the sub-contractor and that he does not have to pay any overtime. He tells her to go to the sub-contractor. She goes to the sub-contractor, who tells her that the overtime has nothing to do with him – she must get payment from the farmer.

WHAT DOES THE LAW SAY?

Shezi is entitled to be paid overtime in terms of the *Basic Conditions of Employment Act* (BCEA). Shezi is employed by the Labour Broker, but the law says if the labour Broker does not comply with the BCEA, Shezi can claim the unpaid monies from either the labour broker or the farmer. She can choose to claim this either from the farmer or from the labour broker. The farmer must pay this overtime - he can either pay this to Shezi or to the sub-contractor, who must pay it to Shezi. If Shezi claims the money from the labour broker, he must pay her, and then he can claim the money from the farmer by reporting him to the Department of Employment and Labour. Alternatively, the employee can go to the CCMA in terms of Section 73A of the BCEA to claim unpaid monies in terms of the NMWA.

Section 73A of the BCEA says that an employee can refer a dispute to the CCMA if the employer fails to pay any amount owing to an employee in terms of the BCEA or the NMWA, or in terms of a contract of employment, a Sectoral Determination or a collective agreement. An employee can make an application to the CCMA for conciliation and if the dispute cannot be resolved, it will then automatically be referred to arbitration. No legal representation is allowed in these disputes. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'

This provision only applies to employees who earn below the BCEA earning threshold of R21,198 per month. Employees who earn above the threshold can make a claim against an employer for failing to pay them what is owed in either the Labour Court, High Court, Magistrates Court or Small Claims Court, depending on the jurisdictional requirements for each of these courts.

WHAT CAN YOU DO?

You can write a letter to the farmer and the labour broker setting out Shezi's right to overtime pay in terms of the BCEA. If the farmer and the labour broker refuse to pay then Shezi can report either the labour broker r or the farmer to the Department of Employment and Labour or refer a dispute to the CCMA in terms of the *Minimum Wage Act. (Section* 73A). If Shezi makes a claim against the labour broker then the labour broker may pay Shezi and make a claim against the farmer.

10. Part-time employee is not paid sick leave

For the past year, Gadija has worked every Saturday and Sunday as a part-time shelf-packer for ShopFast. She works up to 20 hours on a weekend. She had a bad flu' over one weekend, informed her manager that she was too ill to work, and stayed in bed at home. Even though she provided a doctor's certificate, ShopFast refused to pay her for the days she was ill.

WHAT DOES THE LAW SAY?

Gadija is protected by the BCEA, which says that an employee who works more than 24 hours during any month earns one day sick leave for every 26 days worked. **(*See pg 311: BCEA – Sick leave*)**

WHAT CAN YOU DO?

Write a letter to the employer setting out the circumstances and stating what the law says about part-time employees and sick leave. Refer them to the relevant section in the BCEA. If the employer ignores the letter, refer the matter to the Department of Employment and Labour or to the CCMA in terms of the *Minimum Wage Act*, *Section* 73A. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'

11. Fixed-term contract has not been renewed

For the past nine months, Thami has been employed on a three-month contract, which has been renewed twice. At the end of the third three-month period, he is told that the company will not be renewing the contract. However, the company employs someone else for the next three months to do the same job as Thami.

WHAT DOES THE LAW SAY?

Thami's contract is a fixed-term contract which is deemed to become permanent after three months unless there is a justifiable commercial reason for renewing the contract for another three-month period. For example, it could be that the specific project Thami was working on needs him to work on it for another three months to complete it. After this, the employer is not allowed to renew the contract again. If Thami continues working for the company, he will be entitled to a permanent contract of employment. In addition, the company has created a reasonable expectation that the contract will become permanent. By asking Thami to leave

because his contract is up, while replacing him with someone else, this means that Thami has been unfairly dismissed. This is an unfair dismissal, which is covered by the *Labour Relations Act (*LRA). Thami can challenge the dismissal in terms of the LRA. ***(See pg 361 : Automatically unfair dismissals)***

WHAT CAN YOU DO?

You can help Thami first by writing a letter to the employer stating that he believes he has been unfairly dismissed. If the employer refuses to reinstate him, then you can help Thami to apply for reinstatement or compensation through the CCMA or a Bargaining Council. ***(See pg 420: Problem 4: Dismissed employee wants the job back; See pg 369: What steps can be taken if there is an unfair dismissal?; See pg 370: Solving disputes under the LRA)***

---

12. Application for UIF benefits is too late

Iris worked as a cook at the Late Nite Restaurant for 5 years. She paid into the Unemployment Insurance Fund (UIF) for 5 years. She is dismissed from her work on 5 February. On 30 March the following year, she goes to the Department of Employment and Labour to apply for unemployment benefits. Six weeks later they tell her that she will get no benefits because her application is too late. She comes to you for help.

WHAT DOES THE LAW SAY?

The *Unemployment Insurance Act* sets down very strict rules about time for applying for benefits. You get 12 months from the time that you stop working to apply for UIF benefits. ***(See pg 382: Unemployment Insurance Fund)***

WHAT CAN YOU DO?

You must first work out if Iris's application is late. First, take the date Iris was dismissed: 5 February. Then, take the date she made her application: 30 March (of the following year). Work out the number of months between these two dates. From 5 February to 30 March = 12 months 25 days.

According to the law, Iris is too late to apply for unemployment benefits. But the commissioner may accept an application after the 12-month period has expired when she can show just cause (very good reasons why she is late).

13. Employer does not register employee with the Unemployment Insurance Fund

Jack's employer did not register him as a contributor with the Unemployment Insurance Fund (UIF). This means he did not pay any contribution to the Fund.

WHAT DOES THE LAW SAY?

The law says all employers must register all employees with the Unemployment Insurance Fund as soon as they start working for them. An employer must also pay 2% of an employee's wage/salary to the Fund every month (1% is deducted from the employee's salary, and 1% is paid by the employer). ***(See pg 384: How do employees become contributors to UIF?)***

WHAT CAN YOU DO?

Jack's employer is legally obliged to register all his employees for UIF. Jack should report this to the nearest office of the Department of Employment and Labour and they will investigate the complaint and take action against the employer. The employer will have to make back payments to make up the money that should have been paid to the Fund.

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14. Failing to sign the Unemployment Register

Jack's application for unemployment benefits was accepted. When he receives the first cheque, he is told to come and sign the unemployment register every 4 weeks. He does this every month but misses one month. He is not paid for the time he did not sign the register. Is he entitled to get benefits for the time he did not sign the register?

WHAT DOES THE LAW SAY?

The law says that anyone who has applied for unemployment benefits must sign the register every 4 weeks to show that they are still unemployed and looking for work.

But if the employee can show that they were not able to sign for a good reason, for example because of being ill, and if the employee was unemployed during that period and available for work, then they should be paid for the period not signed.

If the employee was not able to sign because of being ill, they will have to produce a doctor's letter.

If the employee did not sign because they were away looking for work, this might not be accepted as a good enough reason not to sign. The employee will have to

re-register for UIF benefits and start all over again. ***(See pg 382: Unemployment Insurance Fund)***

WHAT CAN YOU DO?

You can write a letter of **appeal** to the Department of Employment and Labour office in your area.

If no money was paid out at all because the person did not sign the register more than once, you can send a letter to the regional appeals committee at the provincial office of the Department of Employment and Labour, asking them to investigate why no benefits were paid at all, and to pay out the money owing to the applicant.

(See pg 393: UIF appeals; See pg 446: Model letter of appeal against the refusal to pay UIF; See pg 447: Model letter to UIF because benefits have not been paid)

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15. Long delay in paying Compensation

Zama worked for a delivery firm. On his way to drop off an order, he was involved in a motor vehicle accident and suffered severe injuries in the accident. When he went back to work after being in hospital for 6 weeks his employer told him that there was no longer any work for him. It is now a year after the accident happened. Zama still has not received any compensation. His employer has not paid him anything since the date of the accident.

WHAT DOES THE LAW SAY?

Zama's accident happened during the 'course and scope of his duties' so he is covered by the Compensation Fund. ***(See pg 395: Who can claim compensation from the Fund?)***

The employer must report the accident to the Compensation Fund on FORM W.C.L. 2 as soon as it happens. The doctor must fill in FORM W.C.L. 4 after the first visit by the injured employee. ***(See pg 402: Steps to claim disability)***

An employer has to pay compensation (that the employee would normally receive from the commissioner) to the injured employee for the first 3 months from the date of the occupational injury. The Compensation Fund will repay the employer for the money that was paid.

The employer also owes Zama's wages, notice pay and any outstanding leave pay. The employer should also have followed certain procedures to dismiss him, and have had a good reason to dismiss him. ***(See pg 314: Notice; See pg 360: Dismissals)***

WHAT CAN YOU DO?

- Zama can claim the first 3 months' salary from his employer after suffering from the injury (the commissioner will repay this to the employer).
- If you are concerned that your employer did not report the case to the Compensation Fund Commissioner you can email a letter to them providing details of the name of the employee, the name of the employer, and the date of the accident. You can send the email to cfoutbound@labour.gov.za. ***(See pg 448: Model letter to Compensation Commissioner asking whether the accident was reported).***
- Always include the claim number in any correspondence if you have it. Also include a completed FORM W.C.L.3 which will save the employee time if the accident has not been reported. ***(See pg 459: Compensation Form WCL3)***
- If the employer did not report the accident, the Compensation Commissioner will send a W.C.L.3 form to you. The employee must complete this. The Compensation Commissioner will take action against the employer for not reporting the accident.
- If the accident was reported, send a letter to the Compensation Commissioner asking them why there has been such a long delay in paying out the compensation. Check that the commissioner has all the correct addresses. ***(See pg 449: Model letter to the Compensation Commissioner asking for reasons for the delay in paying)*** The Compensation Commissioner must tell you exactly what is causing the delay. They may ask you to send them a missing form or give them the correct address of the employee.
- You can try to get Zama's wages, notice pay and any outstanding leave pay from the employer. If this is not successful, you can lodge a complaint with the Department of Employment and Labour. ***(See pg 417: Problem 2: Employee wants to claim notice pay and leave pay)***
- Zama may have been unfairly dismissed and he should therefore take action against his employer. However, he has missed the deadline for lodging a dispute with the CCMA so he will have to apply for condonation to make a late application. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation; See pg 370: Solving disputes under the LRA; See pg 434: Problem 18: Employee is injured on duty and loses the job)***

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16. Employee does not get the correct amount of compensation money

An employee who was permanently disabled received a lump sum cheque from the Compensation Commissioner, but does not feel that she was paid the correct amount of compensation money.

WHAT DOES THE LAW SAY?

For all types of disability (temporary and permanent), there are certain ways of working out whether the compensation money has been correctly calculated. For permanent disabilities, a list of percentage disabilities says how much compensation will be paid for each form of disability. It is up to the Compensation Commissioner to decide what percentage disability the employee has, based on the medical reports from the doctor who treats the employee. ***(See pg 397: What types of compensation payment are made?)***

WHAT CAN YOU DO?

- Write a letter to the Compensation Commissioner asking them for the details of how they calculated the compensation money. Remember to include the claim number and all the important details about the claim, which you can find. ***(See pg 449: Model letter to Compensation Commissioner asking for reasons for the delay in paying)***
- Read What types of compensation payments are made? to calculate whether the compensation money was correctly calculated. If it seems that the doctor made a mistake with the percentage disability, the employee has a right to a second opinion from another doctor. This is called a re-assessment of the injury.
- The employee can get a **second opinion** from an independent doctor but the employee must pay this doctor.
- Send the second opinion to the Compensation Commissioner. They will assess it and decide whether to re-open the case. If the Compensation Commissioner decides that the employee should have got more money, the employee will be refunded.
- If the employee wishes to **object** to a decision of the Commissioner, an objection must be sent within 60 days of the Commissioner's decision. Include the claim number and all the details of the employee's claim as listed in the *Model letter to Compensation Commissioner asking for reasons for the delay in paying.*

---

17. Injured employee is off work and is not getting paid

Bethuel was injured in an accident at work. He has not been paid for the past six weeks, and the doctor told him to rest for another two weeks. He comes to you with his problem because he says he and his family cannot survive without his weekly wage. Bethuel earns R2 000 per week.

WHAT DOES THE LAW SAY?

Bethuel has to stay completely off work, but he will be able to go back to work later. So he has a total temporary disability. The employer should pay Bethuel for the first 3 months from the date of his injury. This will be repaid to the employer out of the compensation paid to Bethuel. is the compensation money. ***(See pg 403: How is the compensation money paid?)***

WHAT CAN YOU DO?

- Write a letter to the Compensation Commissioner asking them about the delays in paying Bethuel his compensation or check the website under 'compensation fund claims status'. ***(See pg 449: Model letter to the Compensation Commissioner asking for reasons for the delay in paying)***
- Advise Bethuel's employer to pay him compensation for the first 3 months. Note that Bethuel gets compensation instead of his wages, not as well as his wages.
- Work out how much the Compensation money should be given that Bethuel is paid weekly. ***(See pg 398: Temporary disability)*** The formula for working out compensation is:
    - Multiply weekly wage by 4.3: R2 000 x 4.3 = R8 600 per month
    - Multiply monthly wage by 75 ÷ 100
    - R8 600 x 75 ÷ 100 = R6 450
- Bethuel will get paid R6 450 per month from the Compensation Fund for Total Temporary Disability. The employer should pay Bethuel this compensation amount for the first 3 months (he will get this back from the compensation paid out). The employer already owes Bethuel for the first month. If the employer refuses, report the matter to the Compensation Commissioner.
- The Commissioner will pay all doctor's and hospital bills and any medicines needed. If the employer has reported the accident properly, doctors and hospitals will send their accounts direct to the commissioner. If this has not happened, Bethuel must keep all slips and accounts. You can help him claim them back from the commissioner.

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18. Employee is injured on duty and loses the job

While working on a building site two weeks ago, Piet was standing on a ladder which slipped. He fell and broke both arms. This is only a temporary disability, but he cannot do any work until the broken arms have healed, which could be another 6 weeks.

When he telephones his employer, she tells Piet that his job has already been filled. The employer says she cannot wait for Piet to get better. Piet says this is unfair because the accident was not his fault. He comes to you for help.

WHAT DOES THE LAW SAY?

The employer can only dismiss Piet for a good reason and by following proper procedures. Piet has a right to be reinstated when he is well again. Piet can also claim Compensation because the accident happened while he was working. The employer should have reported the accident to the Compensation Commissioner. ***(See pg 360: Dismissals; See pg 394: Compensation Fund)***

If Piet stays off work for a long time and is unable to even do lighter work, then the employer can go through the correct dismissal procedures and dismiss Piet for incapacity because he is unable to do his job.

If an employee is **permanently disabled** as a result of an injury at work, this employee will never be able to perform their old duties again. If the employee can do light duties, then you should ask the employer to give the employee light duties. It may be very difficult for a permanently disabled employee to find work anywhere else.

WHAT CAN YOU DO?

Because the disability is only **temporary**, you should telephone the employer and ask her to employ the other person in Piet's place on a temporary basis only – until Piet recovers. If the employer dismisses Piet, you can refer the matter to the CCMA as a claim for unfair dismissal. ***(See pg 370: Solving disputes under the LRA)***

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19. Employee's compensation has been refused

The Compensation Fund office refused to pay any compensation to an employee. They gave no reasons for their refusal.

WHAT DOES THE LAW SAY?

Certain employers do not have to contribute to the Fund. So, their employees are not covered by the Fund. The Compensation Fund pays compensation for all accidents which happen 'in the course and scope of duty' but there are circumstances where the Compensation Commissioner will not pay compensation. ***(See pg 395: Who contributes to the Fund? See pg 395: Who can claim compensation from the Fund?)***

WHAT CAN YOU DO?

- Check that the employer was contributing to the Compensation Fund, that the employee was injured in her work and that she does not fall into any of the categories falling outside of the scope of the Compensation Fund.
- Write a letter to the Compensation Commissioner asking them for their reasons for refusing to pay compensation. ***(See pg 449: Model letter to Commissioner asking for reasons for the delay in paying)***
- If the employee wishes to **object** to a decision of the commissioner an objection must be sent to the Compensation Commissioner within 60 days of the decision. ***(See pg 403: Objections and appeals)***
- Remember to include all the necessary details of the employee as listed in *Model letter to the Compensation Commissioner asking for reasons for the delay in paying.*

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20. Employees develop an occupational disease

A number of employees working in an asbestos factory are suffering from similar physical conditions, which they believe is a result of working in an environment of asbestos. This is confirmed by the doctor who is attending to them. What help can they receive?

WHAT DOES THE LAW SAY?

Employees who suffer from sicknesses as a result of the work they do or the environment they have been working in are covered by the *Compensation for Occupational Injuries and Diseases Act* (for the non-mining industry) or the *Occupational Diseases Mine Employees Act* (for the mining industry). These are called occupational diseases. There is sometimes a long period between the exposure at work and the disease which makes it difficult to connect the disease with the work exposure.

WHAT CAN YOU DO?

Assist the employees with claiming compensation from the Compensation Fund. ***(See pg 394: Compensation Fund)***

Contract of Employment

EXAMPLE

. . . . . .
NAME OF THE COMPANY

hereafter called 'the Company'

. . . . . .
NAME OF THE EMPLOYEE + IDENTITY NUMBER

hereafter called 'the Employee'

It is hereby agreed that the Company will employ the Employee as a ..... Job grade..... in its Department
at a rate of R..... per day.

1. **DATE OF ENGAGEMENT**

   The date of commencement of employment is: . . . . . .

2. **PROBATION**

   During the first three months of employment, the employee will serve a probation period. Their performance and suitability for the position will be assessed during this time. If, during the first month of probation, the Employee's performance is regarded as being unacceptable despite attempts to counsel the employee, then the employee's contract may be terminated as per section three (3) below.

3. **TERMINATION OF EMPLOYMENT**

   The company and the employee may terminate this agreement on the following basis:-

   3.1 by giving one week's notice in writing during the first six (6) month period of employment;
   3.2 by giving two weeks' notice in writing where the employee has been employed for more than six (6) months but not more than one (1) year, and four weeks notice where employment has been longer than 12 months;
   3.3 either the company or the employee may summarily terminate this agreement without providing due notice, on any grounds considered appropriate under the law;
   3.4 by both agreeing to terminate;

3.5 where an employee is absent for four working days in a row and has not notified the company or given any indication that they intend to return, then the contract can be terminated immediately on grounds of desertion.

4. DUTIES

The employee must perform their duties as described in the job description as well as any tasks which they may reasonably be asked to do.

5. WAGES

The company shall pay the employee the rate indicated in this contract.

Payment shall be made every week in arrears. The company and the employee accept that the wage rate will only be reviewed once a year during OCTOBER and that this review will be based on the performance of both the company and the employee during the previous 12 month period.

6. WORKING HOURS AND FLEXIBILITY

6.1 The employee shall be required to work up to nine (9) hours per day (excluding meal breaks) and shall remain at work between the hours specified by management on any day. Normal working hours shall be from 07h00 until 17h00, Monday to Friday. It is accepted that start and finish times may be altered in line with operational requirements and as determined by the manager from time to time.

6.2 A fifteen (15) minute tea interval shall be granted not later than 10h00 (morning) and 15h00 (afternoon) daily and shall be taken as determined by management in keeping with the operational requirements of the department.

A lunch break of one (1) hour shall be taken between 12h00 and 13h00 daily. Meal intervals are not regarded as paid working hours.

The employee accepts that overtime and shift working, including weekend work, are an essential part of employment; the employee agrees to work overtime as may be reasonably required by the company. Where overtime is worked, the employee shall be paid at time and a half of the normal hourly wage.

6.3 Payment for overtime shall only be made where the employee works more than 45 hours in any pay week.

7. LEAVE PAYMENT

The employee shall be entitled to 15 working days leave after 12 months continuous employment calculated at 1,25 days for each completed month of service. An employee absent during the year without permission will have their leave calculated on the basis of pro rata leave for the period worked.

It is accepted that annual leave will be scheduled by the employer to meet its manning requirements and will normally be taken during the low season.

8. MEDICAL LEAVE

8.1 Where the employee is unable to work on the grounds of genuine medical incapacity which has not been caused by the employee's negligence or misconduct, then he/she is entitled to paid sick leave.

8.2 During the first 6 months of employment, the employee is entitled to one day sick leave for every completed 26 days of service. After the first six months of employment the employee is entitled to 30 days sick leave in any 36 month cycle.

8.3 The employee must hand in a medical certificate for any period of absence that is longer than 2 days. On the days when the employee is absent, they must notify the immediate supervisor by 09H00 regarding the reason for absence and how long the employee believes they will be absent.

8.4 The employee accepts that the company is dependent on the employee regularly attending work and if they are constantly absent because of illness then this will make the employee unsuitable for employment in the department and could result in the termination of their services on the grounds of incapacity.

8.5 The employee accepts that if necessary they will go for a medical test by a doctor appointed and paid for by the company. The results of the examination will be disclosed confidentiality to the company's medical officer.

8.6 The employee undertakes to bring to management's attention any disease, ailment or disability which they becomes aware of which could in any way impact on the health and safety of fellow employees, the provisions of the Health and Safety Act or their ability to properly perform the job.

8.7 **PARENTAL LEAVE**

The employee shall be entitled to 10 consecutive days unpaid parental leave when their child is born, commencing on the day the child is born if they are not the primary carer. The employee shall give one month's notice of the date on which leave will be taken.

9. FAMILY RESPONSIBILITY LEAVE

The employee who is employed on a contract longer than four months, for four days a week or more, shall be entitled to three days paid leave during every 12 months of service which

may be used:

9.1 When the employee's child is sick;
9.2 When one of the following persons die: spouse or life partner, parents, adoptive parents, grandparents, children, adopted children, grandchildren or siblings.

It is the responsibility of the employee to bring proof of the reason for leave. If no proof is given, then the leave taken will be unpaid and will be regarded as unauthorised leave which may result in disciplinary action.

10. UIF

The company and the employee will both contribute according to the provisions of the Act once the employee has provided a valid ID document to the employer.

11. COMPANY RULES AND REGULATIONS

The employee undertakes to read and follow the following policies and procedures as amended from time to time.

11.1. Company Disciplinary Code of Behaviour and the Disciplinary Procedure;
11.2. Company Grievance and Dispute Procedure;
11.3. Company regulations regarding Leave and Absence Procedures;
11.4. Company rules relating to Protective Clothing;
11.5. The Health and Safety regulations of the company.

12. DEDUCTIONS

The employee accepts that any outstanding loans owing to the company or taken from the company will be deducted from the employee's earnings or any leave entitlement or bonus accruing to the employee.

The employee also agrees that the company may make deductions of up to 25% (one quarter) of the employee's wages in terms of section 34 of the Basic Conditions of Employment Act to repay the company for the loss or damage caused by the employee's actions, provided this has been established during a disciplinary hearing.

13. ACKNOWLEDGEMENT

The employee acknowledges their appointment and that they fully understand the terms of such contract which have been explained to them and fully translated.

....

EMPLOYEE SIGNATURE SIGNED ON (DATE)

....

COMPANY REPRESENTATIVE SIGNED ON (DATE)

....
.

WITNESS/TRANSLATOR SIGNED ON (DATE)

(where appropriate)

ANNEXURE A:

JOB DESCRIPTION

1. Name .....

Physical Address .....

2. Company .....

3. Position.....

4. Key performance areas (the key elements of the employee's job that they will be measured against)
.....

5. Commencement date .....

6. Total cost to the Company.....

COMPLIANCE WITH SECTION 29 OF THE BCEA	
WRITTEN PARTICULARS OF EMPLOYMENT	**YES / NO**
Full name and address of employer	Yes
Name and occupation of employee	Yes
Brief description of the work	Yes
Place of work	Yes
Date on which employment began	Yes
Ordinary hours of work and days of work	Yes
Employee's salary	Yes
The rate of pay for overtime work	As provided in BCEA
Other cash payments	N/A
Any payment in kind	Yes
Frequency of remuneration	Yes
Deductions to be made	Yes
Leave to which employee is entitled	Yes
Period of notice required to terminate	Yes
Description of any council or sectoral determination	N/A
Any period of employment with a previous employer	N/A

Any other documents that form part of the contract	Yes
Where such documents are reasonably accessible	Yes

Letter of demand to employer for reinstatement

A dispute must be referred to the Commission for Conciliation, Mediation and Arbitration within 30 days of the dismissal, so get the letter requesting reinstatement to the employer immediately.

EXAMPLE

11 January 20...

The Manager
Mario's Upholstering
131 Main Street
Upington

Dear Sir

RE: MR ANDRE PIETERSON – TERMINATION OF SERVICES

On Monday 5th January 20... we spoke on the telephone regarding the dismissal of Mr Pieterson by yourself on the 4th January 20... I have now discussed the matter further with Mr Pietersen and he has asked us to write to you as follows.

Mr Pieterson advises us that he was taken by surprise by the termination of his services. In our telephone conversation about Mr Pieterson you told me that he had not been dismissed. You said there was a need to reduce staff so Mr Pieterson had been retrenched by the company. If this is the case then it appears that you have not complied with all the guidelines and standards regarding retrenchment as laid down by the Labour Relations Act.

You have not complied with the requirements for retrenchment in the following ways:

a. *by not giving Mr Pieterson reasonable notice of the need for the proposed retrenchment before the decision to retrench was taken*
b. *by not consulting with the employees or their representatives on the proposed need to retrench employees*
c. *by not taking all reasonable steps to avoid the retrenchment*
d. *by not applying fair and reasonable criteria in selecting staff to retrench*
e. *by not giving Mr Pieterson reasonable notice of your intention to retrench, so as to enable him to make alternative plans for employment.*

If the dismissal of Mr Pieterson occurred for reasons other than reduction of staff, we should like to draw the following points to your attention. At no time during the course of Mr Pieterson's employment with your company was dissatisfaction expressed concerning his work or conduct in the workplace. In

addition, Mr Pieterson was given no warning of your intention to dismiss him and he was not given the opportunity to state his own case or defend himself in a hearing.

In light of the above, Mr Pieterson submits that there was no sound, substantive reason for his dismissal and the procedures used to dismiss him were unfair. Your actions in dismissing him therefore constitute an unfair dismissal in terms of the Labour Relations Act. In the circumstances, your dismissal of Mr Pieterson is of no legal effect and he still regards himself as being in your employ. Mr Pieterson hereby tenders his services to you.

We therefore request, on behalf of Mr Pieterson, that you reinstate him in his previous job on the same terms and conditions as applied prior to his dismissal. Should you fail to confirm this in writing within seven days from the date of receipt of this letter, an application will be made to the Commission for Conciliation, Mediation and Arbitration for conciliation, without further notice to you.

However we hope the above action will not be necessary and we look forward to hearing from you before this time.

Yours faithfully

.....
B. CAROLUS (ADVISOR)

Letter of demand to employer for notice and leave pay

This letter can be used as a model for any demand against an employer, for example, a claim for the right wages to be paid, and so on.

EXAMPLE

10 January 20...

Sew 'n Knit
15 Bell Arcade
Greytown

Dear Sir/Madam

RE: MR JAMES TYEKELO

We have been approached by Mr Tyekelo who was dismissed from his employment with you on 4 January. At the time of his dismissal he was earning R1000 *per week.*

Mr Tyekelo left your employment without being paid in lieu of notice and he was not paid out the pro-rata leave owing to him. He took leave last year in March. He wishes to claim the outstanding money which is calculated as follows:

- *One week's salary in lieu of notice:* R1000
- *Pro-rata leave pay (for 9 completed months service)* R1000 *x 3 weeks leave per annum as per contract* = R3000
- R3000 *(divided by 12 months)* = R250 *per month x 9 months worked* = R2250

Kindly forward the total amount of R2250 *being outstanding notice and leave pay to our office within 14 days of receipt of this letter failing which we shall refer the matter to the Department of* Employment and *Labour (or Bargaining Council if the employee is covered by a Bargaining Council Agreement) for investigation.*

Yours faithfully

.....
B. CAROLUS (ADVISOR)

Letter to Department of Employment and Labour about a notice and leave pay claim

This letter can be used as a model for the referral of any complaint for investigation to the Department of Employment and Labour or to a Bargaining Council.

EXAMPLE

22 January 20...

The Labour Inspector Department of Employment and *Labour*
Durban

Dear Sir/Madam

RE: JAMES TYEKELO / SEW 'N KNIT

We have been approached by Mr Tyekelo, who was dismissed from his employment with Sew 'n Knit of 15 Bell Arcade, Greytown on 4 January 20….. He started working for Sew 'n Knit on 20 February 2005 and was paid a salary of R1 000 *per week at the time of his dismissal.*

According to Mr Tyekelo he was dismissed because he was late for duty on 28 December. He advises us that the reason he was late was because of a taxi boycott in the area where he lives and he had to wait for a bus to arrive to take him to work. It is clear that such circumstances are beyond the control of Mr Tyekelo who has no history of lateness.

Mr Tyekelo was dismissed without being given notice or paid in lieu of notice and he was not paid out the pro-rata leave owing to him. He last took leave in March. We do not believe that the circumstances justified summarily dismissing Mr Tyekelo.

He wishes to claim the outstanding money which is calculated as follows:

- *One week's salary in lieu of notice:* R1 000
- *Pro-rata leave pay (for 9 completed months service)* R1 000 *x 3 weeks leave per annum as per contract =* R3 000
- R3 000 *(divided by 12 months) = R250 per month x 9 months worked* R2 250

Please investigate Mr Tyekelo's claim for a total of R2 250 *and advise us of the outcome of your investigations.*

Yours faithfully

.....
B. CAROLUS (ADVISOR)

Letter of appeal against the refusal to pay UIF

Send this notice of appeal to the Regional Appeals Committee at the provincial office of the Department of Employment and Labour with a covering letter from the employee or advice office employee. Remember to fill in the details specific to your own case.

EXAMPLE

UIF APPEAL

1. *The appellant*: TAFENI JONGUMZI
2. *Appellant's address*: c/o Claremont Advice Office PO Box 51, Claremont 4051
3. *Identity number*: 3602125134189
4. *Name and address of employer*: Claremont Municipality, PO Box 1711, Claremont 4051
5. *Date of application for benefits*: 31 August 20…
6. *Address where application made*: Department of Employment and Labour (Claremont)
7. *Date when I heard of Claims Officer's decision:* 18 October 20….
8. *Claims Officer's decision: Benefits refused because I was not in employment for 13 weeks in the last year, and not unemployed due to illness for more than 2 weeks.*
9. *Reasons for appeal: I was employed at the Municipality from 11 November 2008 until 30 April 20… Application for benefits was made on 31 August 20…*

   Therefore I was in employment for more than 13 weeks in the year before applying for benefits. I was also already unemployed for more than two weeks due to illness when I applied for benefits.

   I am therefore entitled to UIF benefits.

.....
TAFENI JONGUMZI

Letter to UIF because benefits have not been paid

This letter can be used as a model for any complaint about benefits not being paid, including illness benefits, maternity benefits, and so on.

EXAMPLE

3 July 20…..

The Claims officer Department of Labour
Cape Town

Dear Sir / Madam

RE: MR JACK NAUDÉ – ID NO: 510707 0098 006

Mr Naudé registered for unemployment benefits on 16 April 20…

He stopped signing the register on 15 May 20…. as he was away in the Eastern Cape looking for alternative employment. We enclose for your reference two letters of refusal of employment. A month later he signed the register again. During the period he was not signing, he was still unemployed and available for work.

He has been paid unemployment benefits for the period that he signed. However no payments have been made to him for the period that he did not sign the register.

Kindly investigate the reasons why he has not been paid any further benefits. Please advise us what action Mr Naudé could take to be paid out his full benefits.

Yours faithfully

.....
P. ZUMA (ADVISOR)

Letter to Compensation Commissioner asking whether the accident was reported

EXAMPLE

25 March 20....

The Compensation Commissioner
PO Box 955
PRETORIA 0001

Dear Sir/Madam

ENQUIRY RE ACCIDENT REPORT

Name of employee: NTSHAKALA NGESI

Identity number: 400713 5086 084

Date of injury: 14 JANUARY 20...

Employer: GRANSTEEL CONSTRUCTION (PTY) LTD 61 MINES ROAD, RANDBURG

Mr Ngesi has approached us for assistance with his claim for Compensation.

Mr Ngesi was off duty from 14 January to 30 January 20... as a result of an injury sustained on duty and has not yet received compensation for this period.

Kindly advise us whether Mr Ngesi's accident was reported in terms of the Compensation Act. If it was reported, please give us the claim number. We enclose a completed FORM WCL3 in case this is needed. I look forward to hearing from you.

Yours faithfully

.....
R. GEORGE (ADVISOR)

Letter to Compensation Commissioner asking for reasons for the delay in paying

EXAMPLE

25 March 20...

The Compensation Commissioner Po Box 955
Pretoria 0001

Dear Sir / Madam

RE: DELAY IN PAYING COMPENSATION

Name of employee: MARY PIETERSE
Identity number: 751108 0098 004
Date of accident: 13 DECEMBER 20...
Claim number: 98/836172

The above-mentioned accident was reported to the Compensation Commissioner in January 20....

To date Ms Pieterse has not received any compensation for the time that she was off work.

Kindly advise us of the reasons for the delay and when she can expect to receive compensation.

Yours faithfully

.....
R. GEORGE (ADVISOR)

How to write a complaint to the Pension Funds Adjudicator

This is an example produced by the Pension Funds Adjudicator to show you how to write a complaint to them which includes all the information they need.

You can copy the way the complaint is written. But change everything that is in italics to put your own case details in instead. If there is something in the example which does not apply to your case, leave it out.

The person whose case you are dealing with is the complainant. The pension fund or the employer are the respondents. So the complaint is against the respondents.

Send a copy of the complaint to the respondents at the same time that you send it to the Pension Funds Adjudicator, so that the respondents have the same documents as the Pension Funds Adjudicator does.

REMEMBER

With your complaint to the PENSION FUNDS ADJUDICATOR *include:*

- *Copies of the letter to the pension fund/employer and their reply*
- *Proof that the complaint was first sent to the pension fund, for example, a registered letter slip or fax slip*
- *Any other papers, including letters, about the complaint*
- *The rules of the pension fund, if available*

Remember to send A COPY *of the complaint to the* RESPONDANTS, *so that they have the same documents as the Pension Funds Adjudicator.*

In the complaint between:

HENRIETTA SMITH (**Complainant)**

and:

CAPE FRIENDLY PENSION FUND (**First respondent)**

and

METAL SHOES (PTY) LTD (**Second respondent** [the employer – only if necessary]

COMPLAINT IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT 24 OF 1956

1. I am the complainant. My name is Henrietta Smith. I am an adult female, of 16 Wally Street, Kenilworth, Cape Town, and my telephone number is 021–761 3296.
2. The first respondent is the Cape Friendly Pension Fund, whose address is PO Box 2462, Observatory, Cape Town. The Principal Officer of the pension fund is Mr James Beckett. The telephone of the pension fund is 021–430 4214 and fax number is 021–430 4240.
3. The second respondent is Metal Shoes (Pty) Ltd, a company with its head office at 420 Voortrekker Road, Maitland, Cape Town. The telephone number of the second respondent is 021–053 6180 and the fax number is 021–053 6181.
4. I have sent a written complaint to the pension fund/employer in terms of Section 30A(1) of the Act on 22 February 20... I enclose a copy of that complaint marked 'A'.
5. The first respondent wrote back on 25 February 20... to say they would look into the matter. I enclose a copy of their reply marked 'B'. I received no further information nor reply from the first respondent.

As the respondent has not replied to the complaint within 30 days, the Pension Funds Adjudicator now has jurisdiction to deal with this matter.

PARTICULARS OF THE COMPLAINT

Under this heading you should explain what the complaint is about.

THE BACKGROUND

First give the history of your work with that employer and membership of the pension fund. Write down all the background.

EXAMPLES

I started work for the second respondent on 4 January 1974 as a messenger. I retired on 30 September 2014.

All the time I worked for the second respondent, I was a member of the first respondent, a defined benefit fund. I made regular contributions for my pension.

Or you might say:

I purchased an annuity with the Golden Retirement Annuity Fund, administered by Ace

Insurance Company, on 17 July 1979, and I contributed R150 monthly to this. At the date of retirement, I decided to get a 1/3 cash lump sum. I took the rest of my retirement benefit as a monthly pension.

EXPLAIN THE PROBLEM

The law says you can complain about:

- how the pension fund is run
- how the money is invested
- the rules of the pension fund

You must tell the Pension Funds Adjudicator if you think:

- the pension fund did something it was not allowed to do
- you lost money because of something the pension fund did
- you disagree with the pension fund about something that happened or about the rules
- the employer did not carry out its pension fund duties

Write what happened and also why you think the pension fund did something it was not supposed to do, why you think the pension fund caused you to lose money, what you disagree with the pension fund about, or why you think the employer did not carry out its duties.

EXAMPLES

These are some examples of things you may want to complain about. Maybe you think tha

- *The monthly pension was not calculated correctly*
- *You did not get an increase in the pension that you were supposed to get*
- *The pension fund left out some things when they worked out your benefits*
- *The employer took off money from the pension for a staff loan you had*
- *The pension fund discriminated against you: this means that they were not fair because they gave benefits to others that you did not get*
- *When the pension fund closed down or changed to a defined contribution pension fund it used the surplus unfairly*
- *You did not get a fair amount of money when you left the pension fund*
- *The board of the pension fund did not keep to its promises*
- *The pension fund used the rules in a way you disagree with*
- *The pension fund was unfair in deciding about early retirement or disability*

- *The pension fund gave death benefits unfairly*
- *The pension fund did not give you proper information so you made a bad decision*

Give as many details as possible about the case, and tell the Pension Funds Adjudicator exactly what happened from beginning to end. Remember the Pension Funds Adjudicator has never heard of your case before, and they know absolutely nothing about you or this complaint.

EXAMPLES

It doesn't help to write:

"I phoned Ace Insurance and they told me they had decided I did not qualify."

This does not help because it does not say who you spoke to at Ace, when you phoned Ace, who at Ace had decided and it does not really explain what was decided.

It would be better to say it like this:

"on Wednesday 4 February 20..., I phoned Ms Carelse, the Fund Manager at Ace Insurance. She told me that the board of trustees had met on 30 January 20.... They decided to refuse my application for early retirement made in terms of Rule 9.2 of the rules of the fund, because I did not qualify."

It doesn't help to write:

"In terms of the rules I am entitled to a gratuity of R100 000."

This does not say which rule, nor how you arrived at the figure you claim your client is entitled to.

It would be better to say:

"Rule 6.2 provides that on retrenchment an employee is entitled to her own contributions plus 20% of the employer's contribution plus 10% per annum interest. My own contributions totalled R..., and 20% of the employer's total contribution amounts to R.... So with interest I am entitled to R100 000. Instead on 6 February 20... I received a cheque for only R86 000 from the fund. A copy of the fund's statement is attached, marked 'C'."

When you have given the facts, you must set out your argument about why you think the fund was wrong. Say why you think you are right.

RELIEF

Don't forget to say what you think would help or solve the problem. This is called relief. Write down what you want the Pension Funds Adjudicator to do. The law says the Adjudicator can make any order about this complaint which a court can make.

So for example you could ask the Adjudicator to order the pension fund or employer to:

- Give you urgent or interim relief
- Give you information which you need
- Pay your contributions for a time
- Pay a certain pension amount
- Give some of the surplus to the provident fund
- Give you compensation money if the fund was wrong
- Change a decision of the fund trustees if it was not fair
- Pay costs
- Obey any law

Or ask the Adjudicator for:

- An order that says what your rights are if they are not clear
- An interdict to stop the fund from doing something

END THE COMPLAINT

Signed at Cape Town on this [date] day of [month] [year]

Complainant: .....

Address:.....

Tel. no: .....

Fax no: .....

Email: .....

LRA Form 7.11 Referring a dispute to the CCMA for resolution

LRA FORM 7.11

Section 135

REFERRING A DISPUTE TO THE CCMA FOR CONCILIATION

LABOUR RELATIONS ACT, 1995

This form assists a person or organisation to refer a dispute to the CCMA for conciliation. The CCMA will appoint a commissioner who must attempt to resolve the dispute through conciliation within 30 days. You can download the form off the CCMA website: **www.ccma.org.za** (click on ***Referral forms***)

NOTE: If you are covered by a bargaining council, a statutory council or an accredited agency you may have to take the dispute to that council or agency. Some councils and agencies are required by law to deal with certain disputes and parties must then refer disputes there, rather than to the CCMA. You may also need to deal with the dispute in terms of a private procedure if one applies.

An employer, employee, union, or employers' organisation may fill in this form. It should then go to the CCMA office in your province.

PROVINCIAL OFFICES OF THE CCMA:

CCMA EASTERN CAPE – PORT ELIZABETH
Registrar • Private Bag X22500 • Port Elizabeth 6000
Tel: (041) 505-4300 Fax: (041) 586-4585

CCMA EASTERN CAPE – EAST LONDON
Registrar • Private Bag X9068 • East London 5200
Tel: (043) 743-0826 Fax: (043) 743-0810

CCMA FREE STATE
Registrar • Private Bag X20705 • Bloemfontein 9300
Tel: (051) 505-4400 Fax: (051) 448-4468/9

CCMA GAUTENG – JOHANNESBURG
Registrar • Private Bag X096 • Marshalltown 2107
Tel: (011) 688-2200 Fax: (011) 688-2201/2/3

CCMA GAUTENG – PRETORIA
Registrar • Private Bag X176 • Pretoria 0001
Tel: (012) 392-9700 Fax: (012) 392-9701/2

CCMA KWAZULA-NATAL – DURBAN
Registrar • Private Bag X54363 • Durban 4000
Tel: (031) 362-2300 Fax: (031) 368-7387

CCMA KWAZULA-NATAL – PIETERMARITZBURG
Registrar • PO Box 72 • Pietermaritzburg 3200
Tel: (033) 345-9249 Fax: (033) 345-9790

CCMA KWAZULA-NATAL – RICHARDS BAY
Registrar • Private Bag 1026 • Richards Bay 3900
Tel: (035) 789-0357 Fax: (035) 789-1748

CCMA MPUMALANGA
Registrar • Private Bag X7290 • Witbank 1035
Tel: (013) 656-2800 Fax: (013) 656-2885

CCMA NORTH WEST
Registrar • Private Bag X5004 • Klerksdorp 2571
Tel: (018) 464-0700 Fax: (018) 462-4126

CCMA NORTHERN CAPE
Registrar • Private Bag X6100 • Kimberley 8300
Tel: (053) 831-6780 Fax: (053) 831-5948

CCMA LIMPOPO
Registrar • Private Bag X9512 • Polokwane 0700
Tel: (015) 297-5010 Fax: (015) 297-1649

CCMA WESTERN CAPE
Registrar • Private Bag X9167 • Cape Town 8000
Tel: (021) 460-0111 Fax: (021) 465-7193

Referring a dispute to the CCMA for conciliation

1. DETAILS OF PARTY REFERRING THE DISPUTE

Tick the box ☑

As the referring party are you:

☐ an employee ☐ a union official or representative

☐ an employer ☐ an employers' organisation's official or representative

If you are an employee fill in (a) below and if you are a union official or representative, an employer or an employers' organisation's official or representative fill in (b)

a) **If the referring party is an employee**

Name .....

Address .....

.....

Tel: ..... Fax: .....

If a union or employers' organisation is helping you with the dispute, give their details too. ➤

Alternative contact details of employee (for example, a relative or a friend):

Name .....

Address .....

.....

Tel: ..... Fax: .....

If more than one party is referring the dispute, write their details on a separate page and staple it to this form. ➤

b) **If the referring party is an employer, an employers' organisation or union**

Your contact details:

Name .....

Address .....

.....

Tel: ..... Fax: .....

Contact person .....

2. DETAILS OF OTHER PARTY (THE OPPOSITE PARTY)

Tick the box ☑

The other party is:

☐ an employee ☐ a union official or representative

☐ an employer ☐ an employers' organisation's official or representative

If more than one other party is referring the dispute, write their details on a separate page and staple it to this form. ➤

Name .....

Address .....

.....

Tel: ..... Fax: .....

Name of person dealing with the matter and other party's reference number (if known):

.....

3. NATURE OF THE DISPUTE

Describe the issues involved. The list on page 4 should help you. Your description will assist the CCMA in dealing with the matter. It is not meant to bind you. ➤

a) **The dispute is about:**

.....

.....

.....

.....

.....

.....

.....

CCMA Ref No:

.....

.....
.....
.....
.....
.....
.....
.....

Look at the list of disputes and their corresponding sections on page 6. If you are unsure which is the appropriate section, you may leave 3b blank.

b) The dispute relates to section ..... of the Labour Relations Act, 1995.

4. SPECIAL FEATURES (IF ANY)

I/we would like to bring the following special features of this dispute to the attention of the Commission:

.....
.....
.....
.....
.....

Special features might be the urgency of a matter, the large number of people involved, important legal or labour issues, etc.

Delete the box below if inapplicable:

Dispute about unilateral change to terms and conditions of employment [s 64(4)]

I/we require that the employer party not implement unilaterally the proposed changes that led to this dispute for 30 days, or that it restore the terms and conditions of employment that applied before the change.

Signed:..... (party referring the dispute)

5. DATE OF DISPUTE

The dispute arose on .....
Give the date, or approximate date

Give a description of the industry, service or public sector concerned (eg. the metal industry, tourist services, provincial hospital services, etc). This will help the CCMA choose a Commissioner with experience in the particular sector or area.

6. SECTOR AND AREA

The dispute exists in the following sector:

.....
.....
.....
.....

and in the following area:

Where did the dispute arise? Unually this will be the address of the workplace

.....
.....
.....
.....

7. RESULTS OF CONCILIATION

The outcome I/we would like:

Describe the outcome or result you would like from this conciliation. You are not bound by the proposals you make here.

.....
.....
.....
.....

Referring a dispute to the CCMA for conciliation

Proof that a copy of this form has been sent could be:

- *a copy of a registered slip from the Post Office*
- *a copy of a signed receipt if hand-delivered*
- *a signed statement confirming service by the person delivering the form*
- *a copy of a fax confirmation slip*

8. INFORMING THE OTHER PARTY

A copy of this form has been sent to the other party to the dispute.
Proof of this is attached to this form.

Signed at ..... on.....

.....
Party referring the dispute

CONCILIATION REFERRALS SECTION LIST	
LRA SECTION	**NATURE OF DISPUTE**
9.1	Freedom of association and general protections
16.6	Disclosure of information
21.4	Collective agreement on organisational rights
21.11	Withdrawal of organisational rights
22.1	Interpretation or application of organisational rights
24.2	Interpretation or application of collective agreement
24.6	Interpretation or application of agency or closed shop agreement
26.11	Non-admission as party to closed shop
45.1	Interpretation or application of ministerial determination
61.10	Interpretation or application of lapsed collective agreement
63.1	Interpretation or application of collective bargaining provisions
64.1 & 134	Any matter of mutual interest
64.2 & 134	Refusal to bargain
64.4	Unilateral change to terms and conditions of employment
69.8	Picketing
74.1	Disputes in essential services
86.4[b]	Joint decision-making (workplace forum)
89.3	Disclosure of information (workplace forum)
94.1	Interpretation or application of workplace forum provisions
191.1	Unfair dismissal
196.6	Severance pay
Sch 7, item 3.1	Unfair labour practices

For example, the contact details of a union or an employers' organisation which is helping or representing you.

Please indicate which number in this form your comments refer to.

ADDITIONAL INFORMATION

.....
.....
.....
.....
.....
.....
.....

Compensation Form WCL3

COMPENSATION FORM WCL3

Eisnommer/Claim number . . . . . .

KENNISGEWING VAN ONGEVAL EN EIS OM VERGOEDING
NOTICE OF ACCIDENT AND CLAIM FOR COMPENSATION
WET OP VERGOEDING VIR BEROEPSBESERINGS EN-SIEKTES, 1993 (WET No. 130 VAN 1993)
COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT No. 130 OF 1993)
(Voorheen Ongevallewet, 1941) (Previously Workmen's Compensation Act, 1941)
[Artikel 38(1) – Reëls, vorms, en besonderhede van die Vergoedingskommissaris – Aanhangsel 14]
[Section 38 (1) and section 43 (1) – Commissioner's rules, forms and particulars – Annexure 14]

Hierdie vorm moet deur of namens beseerde werknemer/afhanklike ingevul en aan die Vergoedingskommissaris, Posbus 955, Pretoria 0001 gestuur word. / This form must be completed by or on behalf of the injured employee/dependants and sent to the Compensation Commissioner, PO Box 955, Pretoria 0001.

(DRUKSKRIF/BLOCK LETTERS)

1. WERKNEMER – EMPLOYEE:

Van/Surname. . . . . .

Voornaam/First names . . . . . .

Identiteitsnommer/Identity number. . . . . .Personeelnommer/Personnel Number. . . . . .

Woonadres/Residential address. . . . . .

. . . . . Poskode/Postal Code. . . . . .

Geboortedatum / Date of birth . . . . . Geslag / Sex. . . . . Getroud of ongetroud / Married or Single . . . . . .

Geroep/Occupation . . . . . .

2. WERKGEWER – EMPLOYER:

(i) Naam van werkgewer in wie se diens die ongeval plaasgevind het / Name of employer in who's service the accident occured . . . . . .

(ii) Adres/ Address. . . . . .

. . . . . Poskode/Postal Code. . . . . .

3. ONGEVAL – ACCIDENT:

(i) Wanneer en waar het die ongeval plaasgevind? / When and where did the accident occur? . . . . . Datum / Date . . . . . Tyd / Time . . . . . Plek / Place. . . . . .

(ii) Wat het die werknemer op daardie tydslip gedoen en hoe het die ongeval plaasgevind?/What was the employee doing at the time and how did the accident occur? . . . . . .

(iii) Gee 'n volledige beskrywing van die aard en omvang van die besering/Describe in detail the nature and extent of the injury . . . . . .

(iv) Het iemand die ongeval sien gebeur? Indien ja, meld: / Did anybody see the accident happen? If so, specify: Naam/Name . . . . . Adres/Address . . . . . .

4. WERKNEMER SE VERDIENSTE TEN TYDE VAN DIE ONGEVAL – THE EMPLOYEE'S EARNINGS AT THE TIME OF THE ACCIDENT

	Per week R	Per maand/ month R
Bruto kontantverdienste (insluitende gemiddelde oortyd en/of kommissiebetalings van gereelde aard)/Gross cash earnings (including average overtime and/or commission of a regular nature)	. . . . .	. . . . .
Toelaes van gereelde aard/Allowance of a regular nature	. . . . .	. . . . .
(a) Bonusse (bv. 13de tjek)/Bonuses (e.g. 13th cheque).	. . . . .	. . . . .
(b) Ander (spesifiseer)/Other (specify)	. . . . .	. . . . .
. . . . .		
Kontantwaarde van huisvesting/Cash value of quarters	. . . . .	. . . . .
Kontantwaarde van voedsel/Cash value of food	. . . . .	. . . . .

5. (a) As die ongeval die DOOD van die werknemer ten gevolge gehad het, moet onderstaande inligting betreffende sy afhanklikes, ten behoewe van wie die eis ingestel word, verstrek word/If the accident resulted in the DEATH of the employee, the following information relating to his dependants, on whose behalf the claim is made, should be given:

Volle naam Full name	Adres Address	Datum van geboorte Date of birth	Verwantskap met werknemer Relationship with employee

(b) In die geval van alle ANDER ongevalle, moet onderstaande inligting betreffende die naasbestaandes van die werknemer verstrek word./In the case of all OTHER accidents, the following information should be furnished in regard to next of kin of the employee.

Volle naam Full name	Adres Address	Verwantskap Relationship

6. Vergoeding ingevolge die Wet op Vergoeding vir Beroepsbeserings en -siektes, 1993 (voorheen Ongevallewet, 1941), word hierby geëis ten opsigte van die ongeval wat hierin beskryf is./Compensation in terms of Compensation for Occupational Injuries and Diseases Act, 1993 (previously Workmen's Compensation Act, 1941), is hereby claimed in respect of the accident described above.

Ek bevestig dat volgens my wete die inligting in hierdie vorm vervat korrek is,
I certify that the information in this form is to the best of my knowledge correct

DATUM/DATE: . . . . . .

. . . . . .
Handtekening van werknemer of persoon wat namens hom/haar optree
Signature of employee or person acting on his/her behalf

Checklists

Checklist for a labour problem

- Full name and address of the employee and if possible a telephone number.
- Full name, address and telephone number of the employer.
- Was there any written employment contract?
- The employee's wage at the time of the complaint.
- How long has the employee been working there?
- What work was the employee doing?
- What are the details of the employee's complaint?
- If the problem relates to a dismissal:When did the dismissal take place?Was the employee given notice of the dismissal or paid in lieu of notice?Does the employee want to return to their if the dismissal was unfair?

- When did the dismissal take place?
- Was the employee given notice of the dismissal or paid in lieu of notice?
- Does the employee want to return to their if the dismissal was unfair?
- Does the employee know whether the employer's company was a member of a Bargaining Council?
- Is the employee a member of a union? If so, get the union's name, address and telephone number.

Checklist to prepare for arbitration

Here is a checklist to help an employee prepare for an arbitration:

- Does the employee understand what arbitration means and what it entails?
- Have the employee and the employer agreed on the issue which the arbitrator will be asked to decide?
- Has the employee made copies of all necessary documents for the arbitrator to use at the hearing?
- Will the employee need the services of an interpreter? If so, have they made the necessary arrangements to get someone?
- Has the employee arranged for all witnesses to be present at the hearing?

Oral evidence from witnesses is often the best way of proving a case.

Checklist to prepare a claim for reinstatement

- Full name and address of the employee and if possible a telephone number.
- Full name and address of the employer.
- The employee's length of service.
- Employee's wage at the time of the dismissal.
- Was there any written employment contract?
- Was there any established disciplinary code/procedure?
- What was the nature of the employee's job and of the employer's business in general?
- Did the employee receive notice in writing?
- Get details of the employee's marriage, family situation, and dependants (ages of children, whether studying, working or unemployed).
- Is the employee a member of a union? If so, get the union's name, address and telephone number.
- Does the employee know whether the employer's company was a member of a Bargaining Council?

- What are the employee's prospects of finding another job?
- Does the employee have any other information or documents that might be relevant to the case?

Checklist for problems about UIF

- Name, address and identity number of the employee
- Was the employee a contributor to the UIF?
- Is the employee out of work, or without work because of being pregnant or illness or has the employee died and the dependants are claiming UIF death benefits?
- Was the employee registered by the employer with the Fund?
- Is the employee permanently resident in South Africa?
- Has the employee registered for benefits?
- Was the employee told that the benefits are used up?
- Is the employee still unemployed or sick?
- Have more than 12 months passed since the employee's contract was terminated?

Checklist for compensation problems

- What is the name of the employee?
- What is the address of the employee: at work and at home?
- What is the age of the employee?
- What is the name of the employee's employer at the time of the accident?
- What is the address of the employer?
- What work was the employee doing at the time of the accident?
- What was the date of the accident?
- Has the employee received any correspondence (letters or forms) from the compensation office?
- Give details of the accident.
- What is the name of the employee's doctor?
- What injuries did the employee suffer in the accident?
- How long was the employee off work as a result of the accident?
- Is the injury permanent or temporary?
- Can the employee still do some work or not, for example, light duties?
- Is the employee still having medical treatment or is the medical treatment finished?

Social grants

Introduction

South Africa's Constitution guarantees the right of all citizens to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. Section 27 of Chapter 2 of the Bill of Rights states that " (1) Everyone has the right to have access to (a) health care services, including reproductive health care, (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. (2) The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights."

Social assistance grants are one way in which the government gives people access to social security which is a right guaranteed in the Constitution. Everyone pays taxes to the government through working (income tax) and buying things (VAT). Some of this money is used to pay social grants to people who cannot support themselves and/or their families. The South African Social Security Agency (SASSA) administers social assistance grants on behalf of the Department of Social Development.

Underpinning the whole welfare delivery system are the Batho Pele Principles (People First). This is a government programme to improve delivery in the public service and requires that eight service delivery principles be implemented by all public servants.

The **Batho Pele Principles** are as follows:

1. Courtesy: don't accept insensitive treatment
2. Access: one and all should get their fair share
3. Service standards: insist that our promises are kept
4. Consultation: you can tell us what you want from us
5. Value for money: your money should be employed wisely
6. Redress: your complaints must spark positive action
7. Openness and transparency: administration must be an open book
8. Information: you are entitled to full particulars

Laws that apply to social welfare

The main laws that concern social welfare are as follows:

- The Constitution
- The Social Assistance Act (No. 13 of 2004)
- The Social Security Agency Act (No. 9 of 2004)
- The Children's Act (No. 38 of 2005)
- The Children's Amendment Act (No. 41 of 2007)
- The Promotion of Administrative Justice Act (No. 3 of 2000)

Other Acts that concern social welfare include:

- Refugees Act (No. 130 of 1998)
- Maintenance Act (No. 99 of 1998)

THE CONSTITUTION

The Constitution guarantees the right of all citizens to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. ***(See pg 44: Section 27: Right of access to health care, food, water and social security)***

THE SOCIAL ASSISTANCE ACT

The Social Assistance Act provides a national legislative framework for the provision of different types of social grants and crisis intervention in the form of social relief of distress, the delivery of social assistance grants by a national Agency (SASSA), as well as the establishment of an Independent Tribunal for Social Assistance Appeals (ITSAA) and the Inspectorate for Social Security. The functions of the Inspectorate are to:

- Conduct investigations to ensure the integrity of the social assistance frameworks and systems
- Carry out internal financial audits and audits of SASSA to ensure that it is sticking to laws and policies
- Investigate fraud, corruption and mismanagement within SASSA
- Establish a complaints mechanism
- Fight against the abuse of social assistance.

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY ACT

The *South African Social Security Agency Act* makes provision for the effective management, administration and payment of social assistance and services through

the establishment of the South African Social Security Agency (SASSA). Payment is either electronic (EFT) or manual. Some people use cash paypoints or collect their money from Post Office branches. They are now required to use SASSA Gold Cards or Postbank cards where these cards are accepted. SASSA contracts Postbank to administer the payment of social grants.

SASSA is responsible for the administration of social assistance grants. In addition to its main function of administering grants, it must also:

- Provide assistance to all grant applicants to help them understand and exercise their rights to social security
- Pay beneficiaries what they are entitled to receive
- Provide information about grants to beneficiaries and potential beneficiaries
- Investigate any irregularities relating to grants
- Provide assistance with foreign grants if there is an agreement with other countries to do so

THE RELATIONSHIP BETWEEN SASSA AND THE INSPECTORATE

SASSA is the agent that is responsible for implementing social assistance policy, in other words, for the process and delivery of social assistance. The Inspectorate is a watchdog of the whole social assistance system and SASSA. The functions of the Inspectorate are to:

- Conduct investigations to ensure the integrity of the social assistance frameworks and systems
- Carry out internal financial audits and audits of SASSA to ensure it is sticking to laws and policies
- Investigate fraud, corruption and mismanagement within SASSA
- Establish a complaints mechanism
- Fight against the abuse of social assistance

THE RELATIONSHIP BETWEEN SASSA AND THE INDEPENDENT TRIBUNAL FOR SOCIAL ASSISTANCE APPEALS (ITSAA)

In terms of the *Social Assistance Act*, the minister has to consider written appeals that will go to the Independent Tribunal for Social Assistance Appeals (ITSAA). Section 18 includes reconsideration of a decision by SASSA. The function of SASSA with respect to appeals is to:

- Reconsider its own decision before the applicant or beneficiary lodges an appeal with the minister or tribunal
- Make a decision to confirm, vary or set aside its own decision

The functions of the appeals tribunal are to:

- Receive the lodging of an appeal
- Hear appeals for all social grant types
- Make a decision whether to confirm, vary or set aside the decision made by SASSA and whether to award the grant temporarily or permanently
- Communicate the outcome of the appeal to the applicant and SASSA

THE RELATIONSHIP BETWEEN SASSA AND CASH PAYMENT CONTRACTORS

Payment is either electronic (EFT) or manual. Some people use cash paypoints or collect their money from Post Office branches. They are now required to use SASSA Gold Cards or Postbank cards where these cards are accepted. However, the payment of grants in cash is being phased out. SASSA contracts Postbank to administer the payment of social grants.

Section 26a of the *Social Assistance Act* makes provision for one deduction of not more than 10% of the value of the social grant for funeral cover only. Unrecognised and unlawful deductions must be reported to SASSA offices to be stopped.

Types of social grants

In terms of the *Social Assistance Act*, social assistance is provided in the form of the following types of grants:

- Social grants for adults who are 18 years and older
    - Older Person's Grant
    - Disability Grant
    - Care Dependency Grant
    - War Veteran's Grant
    - Grant-in-Aid
- Children's social support (a child is someone who is younger than 18 years)
    - Foster Care Grant
    - Child Support Grant
- Special Grant
    - Social Relief of Distress Grant
    - COVID-19 Special Social Relief of Distress Grant (R370 grant)

Social grants for adults who are 18 years and older

There are four different state social grants for adults:

1. Older Person's Grant
2. Disability Grant
3. War Veteran's Grant
4. Grant-in-Aid.

Social grants are available to South African citizens and permanent residents. In addition, refugees can access disability grants.

Who can apply for a grant?

GENERAL CRITERIA FOR APPLYING FOR A SOCIAL ASSISTANCE GRANT

> Social grants are available to South African citizens and permanent residents. Non-citizens of South Africa, for example, refugees, people with work permits, and children born in South Africa of non-citizens may also receive South African social grants.
>
> Payment of social grants is made on condition that there is an agreement between South Africa and the country of origin of the non-citizen. ***(See pg 68: What does South African citizenship mean? See pg 76: Legal entry and staying in South Africa)***

How much money can you get (for social grants for adults over 18 years)?

The amount you get depends on your income and assets. The amount also changes each year with the annual government budget.

See the Chart below for the grant amounts that will be paid per month from 1 April 2025.

TYPE OF GRANT	AMOUNT: 1 APRIL 2025
Older Person's (60 – 74 yrs)	R2315 per month
Older Person's (75 yrs and over)	R2335 per month
War Veteran's	R2335 per month
Disability	R2315 per month
Grant-in-Aid	R560 per month

OLDER PERSON'S GRANT (OPG)

To apply for an Older Person's Grant, the applicant must:

- Be a South African citizen or a permanent resident
- Be resident in South Africa at the time of application
- Be 60 years or older
- If married, the spouse must comply with the means test
- Have a valid identity document or produce an alternative identification

A person cannot apply for an Older Person's Grant if:

1. They are living or being taken care of by any of the following institutions, which are wholly funded by the state:
    - a prison
    - an old age home and state treatment centre
    - a psychiatric hospital
    - a drug rehabilitation centre

    A person can still apply if they are in an institution which is partially funded by the state - however the grant would be reduced to 25%.
2. If the applicant is receiving another adult social grant, unless it is a Grant-in-Aid. ***(See pg 475: Grant-in-Aid)***

Applicants for an Older Person's Grant must have proof of the following before applying:

- A South African bar-coded identity document (to prove identity, citizenship and age)
- If single, an affidavit stating this fact
- Marriage certificate if the person is married
- Divorce papers if the person has been divorced
- Death certificate, if the husband or wife died
- If they are employed, a wage certificate
- If they are unemployed, any UIF record of registration, discharge certificate from the previous employer
- If they have a private pension, proof of the pension
- If they have a bank account, bring a bank statement of three consecutive months
- Proof of any other income and assets

DISABILITY GRANT

A disability grant is a social grant intended to provide for the basic needs of adults (people who are over 18 years old) who are unfit to work due to a mental or physical disability. The applicant should not have refused to do work that they are capable of doing and should not have refused treatment. The disability must be confirmed by a valid medical report of a medical officer stating whether the disability is temporary or permanent.

PROOF OF DISABILITY

When an application is made for a disability grant, the SASSA officer will give the person a medical form to be completed by either a medical officer or an assessment panel. The medical person must write on the form what kind of disability it is and how long they think it will last.

The assessment by an assessment panel will take place if there is no doctor available. The panel will consist of medical people such as nurses, psychologists and social workers, as well as community leaders such as chief magistrates or priests.

The SASSA officer sends the doctor's certificate in with the application form. The medical officers in SASSA look at the medical certificate or assessment and see if they agree that you are disabled. If they do not agree, they turn the application down.

A person can apply for a *temporary* disability grant, where it is believed the disability will last between six months and a year, OR a permanent disability grant, where it is believed the disability will last for more than a year.

The medical certificate for a grant may not be older than 3 months at the date of application.

In order to apply for a Disability Grant, the applicant must:

- Be a South African citizen, or a permanent resident or refugee
- Be resident in South Africa at the time of the application
- Be between the ages of 18 years and 60 years
- Be unfit and unable to work because of the nature of your disability
- If married, your spouse must comply with the means test
- Have a valid identity document or produce an alternative identification

A person can still apply if you are in an institution which is partially funded by the state and may then receive a partial grant.

A person cannot apply for a Disability Grant if that person is living or being taken care of by any of the following institutions, which are wholly funded by the state:

- A prison
- An old age home and state treatment centre
- A psychiatric hospital
- A drug rehabilitation centre

A person can also not apply for a Disability Grant if:

- They have refused to undergo medical treatment
- They are receiving another grant unless it is a Grant-in-Aid. ***(See pg 475: Grant-in-Aid)***

Applicants for a Disability Grant must have proof of the following before applying for a grant:

- A South African bar-coded identity document (to prove identity, citizenship and age)
- If you are under 60 years bring a medical assessment or report stating that you are disabled and cannot work
- If you are single, an affidavit stating this fact
- Marriage certificate: if you are married
- Divorce papers if you are divorced
- An affidavit if your spouse has deserted you for more than 3 consecutive months
- Death certificate: if your husband or wife died
- If you are employed, a wage certificate

- If you are unemployed, any UIF record of registration, discharge certificate from your previous employer and affidavit made at a police station to state you are unemployed
- If you have a private pension, proof of the pension
- If you have a bank account, bring a bank statement for three consecutive months
- Proof of any other income and assets
- If your partner died within the last 5 years, a copy of the will and the first and final liquidation and distribution accounts

WAR VETERAN'S GRANT

To apply for a War Veteran's Grant, the applicant must:

- Be a South African citizen or a permanent resident
- Be resident in South Africa at the time of application
- Be 60 years and over or disabled
- Have fought in the Second World War (1939-1945), or the Korean War (1950-1953)
- Not receive any other social grant
- Not being cared for in a wholly funded state institution
- If married, your spouse must comply with the means test

Applicants for a War Veteran's Grant must have proof of the following before applying for a grant:

- South African identity document (to prove identity, citizenship and age)
- Proof of 'official war' service (discharge certificate or medals)
- If the applicant is under 60 years old, they need to bring a medical assessment or report stating that they are disabled and cannot work
- If single, an affidavit stating this fact
- Marriage certificate if the person is married
- Divorce papers if they are divorced
- An affidavit if the spouse has deserted the applicant for more than 3 consecutive months
- Death certificate, if their husband or wife died
- If the person is employed, a wage certificate
- If the person is unemployed, any UIF record of registration, discharge certificate from your previous employer and affidavit made at a police station to state you are unemployed
- If they have a private pension, proof of the pension
- If they have a bank account, bring a bank statement of three consecutive months

- Proof of any other income and assets

GRANT-IN-AID

The Grant-in-Aid is a social grant intended to provide for the basic needs of adults who are unable to care for themselves and are certified by a medical officer to be in need of full-time care from someone else. The Grant-in-Aid is provided as an additional grant to adults who are already receiving an Older Person's Grant, a Disability Grant or a War Veteran's Grant. The Grant-in-Aid is not paid out on its own – it must be in addition to a main social grant. Please note this grant is paid out to the person receiving the main grant and not to their assistant. In addition, note that there is no means test for the Grant-in-Aid. ***(See pg 510: Problem 8: Person receiving an Older Person's grant needs full-time care)***

To apply for a Grant-in-Aid, you must:

- Be a South African citizen or a permanent resident
- Be a South African citizen, or a permanent resident, or a refugee in respect of the Disability Grant
- Be resident in South Africa at the time of application
- Be receiving an adult social grant
- Require full-time care by another person due to a physical or mental disability.
- Not be cared for in a wholly funded state institution

What do you need to apply?

- A South African bar-coded identity document to prove identity, citizenship and age
- A medical report or medical assessment report (less than 3 months old)
- If single, an affidavit stating this fact
- A marriage certificate, if you are married
- Divorce papers if you are divorced
- A death certificate, if your husband or wife died
- If you are employed, a wage certificate
- If you are unemployed, any UIF record of registration, discharge certificate from your previous employer
- If you have a private pension, proof of the pension
- If you have a bank account, bring a bank statement of three consecutive months
- Proof of any other income and assets

NOTE

You can also apply for a Grant-in-Aid at the same time as you apply for an Older Person's Grant, Disability Grant or War Veteran's Grant if you cannot look after yourself and need full-time care.

The means test for adult social assistance grants

Anyone applying for a social grant must qualify through a means test. This is a way of measuring a person's income and assets. If the person applies for a grant, SASSA will evaluate their income and assets. If the income and/or assets are higher than the thresholds set by government, then they will not qualify for a social grant. The means test depends on their own income and assets if they are not married and on the income and assets of the applicant and their spouse if married. It makes no difference if the applicant is married in community of property or out of community of property. If the applicant's spouse already receives a social grant, their grant is NOT counted as income in the application.

A Foster Child Grant is the only social grant that is NOT subject to a means test.

The means test differs for the different grants. For example, the Older Person's Grant, Disability Grant and War Veteran's Grant are paid on a sliding scale. This means the more private income the applicant has, the smaller the percentage of government grant they will qualify for. Other grants, such as the Special COVID-19 Social Relief of Distress Grant (the Special SRD R370 Grant), are a fixed amount and not paid on a sliding scale provided the person is not earning above the applicable means test.

INCOME & ASSETS THRESHOLD

The means test will consider the following 'assets' which will determine whether a person qualifies for a grant:

- Value of a property or land owned by the applicant or their spouse (except for the property they live in) (properties or land that have an outstanding bond registered over it are deemed to have 0 value)
- Cash in the bank (and their spouse's bank account)
- Investments (such as shares or unit trust funds) owned by the person or their spouse
- Retirement fund (if the person has retired from the fund)

The income and assets thresholds for the means test as of April 2024 are as follows:

Older Person's Grant: People aged 60 and older who earn less than R101 640 (if single) and R203 280 (if married and combined) per year, whose assets do not exceed R1 438 800 (single) and R2 877 600 (married).

War Veterans Grant: Men and women who fought in World War II or the Korean War who earn less than R101 640 (single) and R203 280 (married) a year, whose assets do not exceed R1 438 800 (single) and R2 877 600 (married).

Disability Grant: People with permanent or temporary disabilities earning less than R101 640 (single) and R203 280 (married) a year, whose assets do not exceed R1 438 800 (single) and R2 877 600 (married).

Grant-in-Aid: An applicant for this grant must earn less than R101 640 per year (single) and R203 280 per year (married), and the assets must not be more than R1 438 800 (single) and R2 877 600 (married).

For up-to-date information on the asset and income thresholds for the means test, check the:

- South African Social Security Agency (SASSA) website: www.sassa.gov.za
- Black Sash website: www.blacksash.org.za
- Black Sash Helpline: 072-663-3739.

WHAT COUNTS AS INCOME?

Income means money you get from somewhere else. This can be:

- Renting out a room in your house for a fee
- Leasing out any other property for a fee
- From a private pension fund
- Earning money for work that you do
- Profits you make from farming or from any business
- Compensation, for instance, from UIF, Road Accident Fund or Compensation for Occupational Injuries and Diseases Fund (COIDA)
- Financial support received from relatives such as dependent children
- Maintenance received as an ex-spouse or for a child

NOTE

A husband and wife can claim separate grants. If either of the spouses already gets a grant, then that grant must not be counted as income when the other spouse applies for a grant.

WHAT CAN BE DEDUCTED WHEN CALCULATING INCOME?

You are allowed to deduct the following:

- Contributions to a pension fund or retirement annuity
- Income tax that you pay
- Payments made to a medical aid
- Payments made to the Unemployment Insurance Fund

Who cannot get a grant?

Even if you are old enough, disabled, or a war veteran, you may still not get a grant. A grant can be refused if you:

- Already get another social grant (except in the case of a Grant-in-Aid, which is only given to a person if they are already receiving either an Older Person's Grant, Disability Grant or War Veteran's Grant)
- Are a mineworker who receives money in terms of the *Occupational Diseases in Mines and Works Act*
- Get money for permanent disablement from the Compensation Fund (COIDA)
- Are kept and cared for in a wholly funded state institution (like a state-run nursing home, a hospital or a prison), although you may be entitled to a part if you are in a private institution which has a contract with the state
- Do not pass the means test

Military Veterans Pension

The *Military Veterans Act (No. 18 of 2011)* and the *Regulations Regarding the Military Veterans Pension Benefit* (2023) make provision for pension benefits to be paid to military veterans and dependents who qualify.

A military veteran is any person who is a citizen of South Africa and:

- Was involved in any of the military organisations which were involved on all sides of the liberation wars in South Africa from 1960 to 1994
- Served in the Union Defence Force before 1961
- Became a member of the SANDF after 1994

The person should be listed in the Department of Defence and Military Veterans National Military Veterans database. Any dependents, widows, and widowers must be living in South Africa.

A person who qualifies for a Military Veteran Pension will receive a monthly pension based on the Old Age Pension amount.

When a Military Veteran dies, their dependents may receive up to 50% of the pension benefit provided they don't receive any other form of State pension above the 50% threshold from the Military Veteran pension benefit.

A person can apply for a Military Veterans Pension Benefit using the prescribed form of the Department of Defence and Military Veterans (Form MVP01_2022) available on the department website. The application must include the following documents:

- Certified copy of ID
- Certified copy of the ID of the spouse
- A recognised marriage certificate
- Certified copies of the unabridged birth certificates of the dependents of the person who is applying
- Signed bank entity form with applicant's account numbers, stamped by the bank

The application must be submitted to the Government Pensions Administration Agency (GPAA) either by hand, registered post or electronically. The GPAA must give the applicant an acknowledgement of receipt of the application within 90 days.

If the application is approved, the GPAA must inform the Military Veteran in writing or electronically.

If an application is rejected, the GPAA must inform the person of the reasons for this and their right to lodge an appeal.

The applicant must appeal within 90 days of the date of the decision to refuse the application. The Appeal Board will consider the appeal based on the information provided in the original application and can either confirm or set aside the decision of the GPAA. The Board must finalise the appeal within 90 days from the date when the appeal was made.

Social grants for children below the age of 18 years

The *Children's Act (No. 38 of 2005, commencement date 1 July 2007)* and the *Children's Amendment Act (No. 41 of 2007, commencement date 1 April 2010)* bring South African child care and protection laws in line with the Bill of Rights and international law. The purpose of both Acts is to give effect to children's rights to:

- Family care, parental care or appropriate alternative care
- Social services
- Be protected from abuse

There are three different state social grants for children below the age of 18 years:

1. Child Support Grant
2. Foster Care Grant
3. Care Dependency Grant

How much money can you get (for social grants for children below 18 years)?

The amount you get depends on your income. The amount also changes each year with the annual government budget. See below for the chart on the grant amounts that will be paid per month from 1 April 2025.

TYPE OF GRANT	AMOUNT 1 APRIL 2025
Child support (CSG)	R560 per month A single person should not earn more than R63 600 per year (R5 300 per month) to qualify for the CSG; A married person's joint income with their spouse should not be more than R127 200 per year (R10 600 per month) to qualify for the CSG
Child Support Grant Top-Up	No amount referred to in the 2025/2026 budget
Foster Care	R1250 per month There is no means test for a foster child grant.
Care Dependency	R2315 per month A single parent/PGC should not earn more than R261 600 per year (R21 800 per month) to qualify for the CDG A parent/PGC with joint income with their spouse should not be more than R523 200 per year (R43 600 per month) to qualify for the CDG

Maintenance and social grants

Both parents have to support the child. If the parent of a child is still alive and has money, and their whereabouts are known, the primary caregiver can get maintenance from the parent. If the parent refuses to pay, this can be taken to the Maintenance Court at the Magistrate's Court. The maintenance officers will help the applicant to get money from the parent who is not providing support. ***(See pg 548: The duty to support children; See pg 570: Problem 4: Getting maintenance through the Maintenance Court)***

But if the parents have no money to support the child then the primary caregiver can apply for a Child Support Grant. A primary caregiver is any person who takes responsibility for the daily needs of the child and who may or may not be related to the child.

Child Support Grant (CSG)

The Child Support Grant is intended to provide for the basic needs of South African children whose parents or primary caregivers are not able to provide sufficient support due to unemployment or poverty. They may apply for the CSG if they qualify as per the means test.

The amount of the grant from 1 April 2025 is R560 per child who qualifies per month (for every child who qualifies). SASSA introduced the top-up CSG to assist relatives or primary caregivers to provide for an orphan's basic needs. There is no mention of a top-up amount for 2025/2026.

For up-to-date information on grant amounts, check the following website: www.wqwwq.gobv.za or www.blacksash.org.za.

It does not matter whether you are the parent of the child or not, whether the parents of the child are living together, whether they are married or not married, whether either of the parents is in prison or not, or whether the husband or wife receives another state grant.

WHO CAN APPLY FOR A CSG?

A primary caregiver can apply for the Child Support Grant on behalf of a child or children in their care. A primary caregiver can be a parent, grandparent, or anyone who is mainly responsible for looking after and providing for the basic needs of the child. A primary caregiver must be older than 16 years old and does not need to be the family of the child.

The grant will be paid for all qualifying biological or legally adopted children. In the case of non-biological children and those who are not legally adopted, the grant will be paid for a maximum of six children.

The grant is paid to the primary caregiver. In all cases, the grant follows the child. This means that if someone else becomes the primary caregiver, then the grant goes to that person.

The primary caregiver is responsible for ensuring that the child is fed, clothed, immunised, given access to health-care and for using the money to benefit the child. SASSA must be allowed to have access to the child at all reasonable times.

The child's ability to get the grant will depend on the financial situation of the primary caregiver and their spouse. If the primary caregiver is a single parent, they should first try to get money from the child's other parent through applying for a maintenance order.

The person who applies must:

- Be the primary caregiver of the child
- Be over the age of 16 years
- Be living with the child in South Africa at the time of the application for the grant
- Be a South African citizen or a permanent resident
- Pass the means test

A primary caregiver cannot apply for a grant if:

- They are being paid to look after a child
- Someone else is already getting a grant for the child
- They represent an institution which takes care of the child
- They do not qualify in terms of the means test

WHAT IS THE MEANS TEST TO QUALIFY FOR A CHILD SUPPORT GRANT?

In order to qualify for a Child Support Grant, the primary caregiver must pass a means test to see if the child is eligible for the grant. The asset threshold test is the same for all other grants, but the income threshold differs. ***(See pg 476: The means test for adult social assistance grants)***

INCOME THRESHOLD

A single person should not earn more than R63 600 per year or R5 300 per month. A married couple's joint income should not be more than R127 200 per year or R10 600 per month

HOW CAN A PRIMARY CAREGIVER APPLY FOR A CHILD SUPPORT GRANT?

The process for applying for the Child Support Grant is the same as for all other grants. ***(See pg 496: Applying for a social grant)***

The following documents are required for the application:

- Primary caregiver's South African identity document
- Child's identity document or birth certificate
- Proof that the child has been immunised
- Proof of any maintenance received from a parent of the child or proof of efforts made to obtain maintenance from a parent
- Proof of your and your spouse's earnings; if you are working, the employer must fill in a special form for an employer's report
- If married, a marriage certificate
- If divorced, the court order giving details of custody of the child

- If the primary caregiver is not the parent of the child, a letter or affidavit from the parent of the child giving the person permission to take care of the child
- A death certificate if one or both parents are dead, or if the father or mother is missing, proof of this, like a missing person's report from the police and sworn statements from you and another family member
- A school report is not a requirement for application for a CSG or for ongoing receipt of a grant

All copies of documents must be certified. This means they must be signed and stamped by a police officer or any other commissioner of oaths.

The applicant will be given a copy of the application or a dated receipt signed by the SASSA officer. This provides proof of the application.

If the application is not approved, a letter will be sent to give reasons for the rejection. There is a right of appeal against this decision. ***(See pg 501: Appeals process)***

PAYMENT OF A CHILD SUPPORT GRANT

There is supposed to be a waiting period of only up to 3 months before the primary caregiver receives payment. The first payment of the grant should include all the money from the date of application. Payment can be made in the way that suits you:

- Cash payment on specific days at a paypoint
- Electronic payment into a bank account.

Foster Care Grant

A Foster Care Grant is a grant intended to provide for the basic needs of foster children who have been placed in the care of foster parents by a Children's Court. The Foster Care Grant is paid to foster parents for children between the ages of 0 and 18 years. An extension order for foster care can be given until the age of 21 years if the child is still at school. ***(See pg 560: Foster care)***

Usually, a grant is for 2 years, but a social worker can extend the grant depending on the circumstances, subject to a review by a social worker or a magistrate through a Children's Court.

A foster parent is responsible for ensuring that the child is fed, clothed, healthy, and attending school and that the foster grant is used to benefit the child. SASSA officers must always be allowed to have access to the child. ***(See pg 481: How much money can you get)***

WHO CAN APPLY FOR A FOSTER CARE GRANT?

Any adult or caregiver who is taking care of a child who qualifies – and has no common law duty to maintain that child – can apply for this grant. To apply for a Foster Care Grant, the foster parent and the foster child must:

- Be a resident in South Africa at the time of making the application (but they do not have to be South African citizens)
- Be in possession of a court order that makes the foster care status legal
- Qualify in terms of the means test for a Foster Care Grant
- A child from any country that finds themselves in need of care and protection in South Africa, can be fostered. This will include a child who is undocumented or a child who is a refugee.
- A foreign national who is a refugee can qualify to be a foster parent

WHAT IS THE MEANS TEST TO QUALIFY FOR A FOSTER CARE GRANT?

There is no means test to qualify for a Foster Care Grant.

HOW TO APPLY FOR A FOSTER CARE GRANT

The process for applying for a Foster Care Grant is the same as for all other grants. ***(See pg 496: Applying for a Social grant)***

The following documents are required for the application:

- The foster parent's bar-coded identity document (ID)
- The foster child's RSA or non-RSA identity document or birth certificate
- The court order indicating foster care status
- If there is no birth certificate, check with SASSA what alternative document will be accepted

The situation of the child who is placed in need of care is reviewed from time to time. A social work review may take into account whether the foster child:

- Remains in the care of the parents
- Is living in adequate housing
- Is fed and given clothes to wear
- Receives necessary medical and dental care
- Goes to school regularly

WHEN DOES THE FOSTER CARE GRANT STOP OR LAPSE?

A Foster Care Grant will stop:

- If the foster child or both foster parents pass away
- If the child is no longer in the custody of the foster parent

- When the child turns 18, the grant will stop in the last month of that year. If the child is still attending school over the age of 18, the foster placement can be extended until age 21
- When the court order expires
- When the child leaves school at school-leaving age

The beneficiaries must inform SASSA of any changes in the foster parent/s' or foster child/ren's circumstances.

If a child is severely disabled, the foster parent can get a Care Dependency Grant as well as a Foster Care Grant.

NOTE

The Children's Amendment Act deals with foster care. ***(See pg 543: The Children's Act and Children's Amendment Act)***

Care Dependency Grant (CDG)

The Care Dependency Grant is a social grant intended to provide support to parents, primary caregivers, or foster parents of any child with severe mental and/or physical disabilities up to 18 years, requiring full-time home care.

Even though the child may make use of professional support services, the child should not be cared for in an institution but at home to qualify. The child's disability must be assessed by a medical doctor appointed by SASSA.

The person receiving the grant is responsible for ensuring that the child is fed, clothed, receives care and stimulation as well as access to health services. ***(See pg 481: How much money can you get)***

WHO CAN APPLY FOR A CARE DEPENDENCY GRANT?

In order to apply for a Care Dependency Grant, the parents, primary caregiver, or foster parents and the child must be:

- South African citizens, permanent residents or refugees
- Resident in South Africa at the time of application
- In possession of a medical/assessment report confirming disability
- Qualify in terms of the means test for a Care Dependency Grant

A child with severe disabilities cannot get a Care Dependency Grant if:

- The child is being cared for on a 24-hour basis for more than 6 months in an institution that is wholly funded by government, for example, a psychiatric hospital or special care centre

WHAT IS THE MEANS TEST TO QUALIFY FOR A CARE DEPENDENCY GRANT?

Only the income threshold of the caregivers of the child who is care dependent is assessed. There is no asset threshold test. The applicant, spouse and child must meet the means test (except for foster parents where a different means test applies) ***(See pg 485: What is the means test to qualify for a Foster Care Grant?)***.

Therefore, receiving the Care Dependency Grant depends on the income of the entire family.

A person can qualify for the CDG if:

The parent/s or primary caregiver earns less than R261 600 per year or R21 800 per month (if single), or R523 200 per year or R43 600 per month (if married). These are the thresholds from 1 April 2024.

HOW TO APPLY FOR A CARE DEPENDENCY GRANT

The process of applying for a Care Dependency Grant is the same as for all other grants. ***(See pg 496: Applying for a social grant)***

The following documents are required for the application:

- Barcoded identity document of the parent/s, primary caregiver, or foster parents
- Child/ren's birth certificate with identity number
- A medical report for the child, which must say what the child is able to do - this is known as a functional assessment
- If you are the foster parent of the child, the court order making you the foster parent
- Proof of your marital status, such as a marriage certificate, divorce papers, the death certificate of your spouse or a sworn statement (affidavit) if you have never married
- Proof of income and if you receive the care dependency grant, the primary caregiver must ensure that the child:
    - Is tested at the age of 6 years to see whether they need special schooling
    - Receives appropriate education according to the level of disability
    - Remains in their care

- Is living in adequate housing
- Is fed and given clothes to wear
- Receives necessary medical and dental care
- Is not in a wholly funded state-run institution

WHEN DOES THE CARE DEPENDENCY GRANT STOP OR LAPSE?

The Care Dependency Grant will be stopped in any of the following situations:

- If the parents, caregivers or foster parents die
- If the child dies
- If the child is admitted into a wholly funded state institution when the child turns 18 years old (after this, the child can apply for a disability grant)

The grant will be reviewed from time to time to check for changes in the child's circumstances.

The amount you get depends on your income. The amount also changes each year with the annual government budget so the amounts included in this manual should be checked every year. The amount of the grant from 1st April 2025 is R2315 per month for every child who qualifies.

Social relief of distress grant

A Social Relief of Distress Grant is a temporary form of support - in voucher, cash or food - for people who are in crisis and in need of immediate help to survive. The amount of temporary relief will usually be equivalent to the amount of a grant that the person would qualify for, and it will only be given for a maximum of three months.

You can apply for an extension of the relief for another three months, but it will only be given in exceptional cases. A social worker or officer referred by SASSA will be sent to check your situation and write a report to qualify for further extension. Because this is supposed to be for immediate relief, the application should not take long to process.

(See pg 491: COVID-19 Special Social Relief of Distress Grant (R370 Grant))

Who can apply for the Social Relief of Distress Grant?

Relief can be granted to anyone:

- If they have applied for a grant and the grant is not yet ready (this relief will be deducted from their grant once they get it)
- Who has appealed against the suspension of their grant
- Who is too sick to work for less than 6 months (if a person is sick for more than six months, they can apply for a disability grant)
- Where the person in the family who earns the money (the breadwinner) has just died, gone to prison or gone to a treatment centre or hospital
- Who doesn't receive maintenance from a parent or spouse if this is required by law and there is proof that efforts have been made to get maintenance
- Who has experienced a disaster, such as a house burning down or being flooded; however they will not receive relief if the whole area has been affected by the disaster and other emergency funds are made available for the area
- If they or their household will experience undue hardship if the social relief of distress grant is refused

A person cannot get relief if:

- They are receiving assistance from another organisation
- They are receiving another grant, for example, a Child Support Grant.

Applying for the Social Relief of Distress Grant

The process for applying for Social Relief of Distress is the same as for all other grants.

WHAT DO YOU NEED IN ORDER TO APPLY FOR RELIEF?

You will need the following documents to apply for relief:

- A valid bar-coded South African identity document or any other alternative proof of identity of the applicant, spouse or their children
- Proof of minimal resources (in other words, that you are in a crisis situation)
- Proof of marital status
- Proof of admission of spouse to prison, treatment centre or hospital or proof that you are awaiting trial
- Discharge certificate of prison, treatment centre or hospital
- Proof of temporary medical disability
- Proof from the magistrate's court that you are not receiving any maintenance
- Proof of insufficient means by way of a declaration
- Any other alternative proof may be accepted ***(See pg 517: Model letter: Application for Social Relief of Distress Grant)***

WHAT IS THE VALUE OF THE SOCIAL RELIEF OF DISTRESS GRANT

The value of the Social Relief of Distress Grant must be equal to, in the case of:

- **A single person:** an amount not more than the maximum amount payable per month in respect of an older person's grant
- **A married person:** where both spouses live together, an amount not more than the amount payable per month for each adult
- **A child:** an amount not more than the maximum of the type of child support grant applied for

If you are not eligible for a grant, the amount would be at the discretion of SASSA, but it should not be less than the amount of the Child Support Grant.

HOW IS THE SOCIAL RELIEF OF DISTRESS GRANT PAID OUT?

When your application is approved, you will be issued a voucher or a food parcel.

It will take less than 30 working days for your application to be processed and checked and either approved or refused. If it is refused, you will get a letter explaining why it has been refused and how you can appeal.

TRANSPORT RELIEF

There is also a special form of relief for transport money. This relief is given once only and must be recommended by the social worker for people who:

- Have been told by their doctor or clinic that they need special medical treatment, but they cannot afford the transport to get to the place where they will be treated
- Have been promised a job but do not have enough money to pay for transport to reach the place of employment

What do you need in order to apply for relief?

- A document from the doctor that explains the treatment needed and where it is available
- A letter from a prospective employer confirming the date and place of employment to substantiate the application

COVID-19 Special Social Relief of Distress Grant (R370 GRANT)

WHAT IS THE SPECIAL SOCIAL RELIEF OF DISTRESS (SRD) R370 GRANT?

The COVID-19 special social relief of distress grant (Special SRD R370 grant) was introduced by the government as an emergency grant in response to the COVID-19 pandemic to support people who were not receiving any other form of income or social grant.

The Special SRD R370 grant provides a monthly payment of R370 to people who have insufficient means and meet certain criteria. The Special SRD R370 grant has been extended to 31 March 2026.

WHO CAN APPLY FOR THE SPECIAL SRD R370 GRANT?

These are the requirements to qualify for the Special SRD R370 grant:

- **Citizenship:** Must be a South African citizen, permanent resident or refugee registered with the Department of Home Affairs
- **Age:** Must be between the ages of 18 and 60 years
- **Income:** Must not earn more than R620 per month.
- **Unemployment:** Must be unemployed and not receive any other form of income or social grants or money from the UIF.

SASSA will conduct a means test to assess a person's financial situation, including their household, to determine if they qualify for the R370 SRD grant.

WHAT IS THE MEANS TEST FOR THE SPECIAL SRD R370 GRANT?

Applicants must not earn more than R620 per month.

WHAT INFORMATION DO YOU NEED WHEN APPLYING FOR A SPECIAL SRD R370 GRANT?

When applying for a Special SRD R370 grant, applicants will have to read, agree to and sign two forms:

- The declaration form
- The consent form

SASSA needs these forms to verify and validate the information provided in the application. Go to the SASSA website for links to these documents: https://srd.sassa.gov.za/

The following information is required for the application:

- ID number or special permit if the applicant is not a South African citizen
- Full name and surname (as stated in the ID)
- Phone number (SASSA will use this number to contact the applicant regarding their status)
- Physical address

HOW TO SUBMIT AN APPLICATION FOR A SPECIAL SRD R370 GRANT

Applicants must apply for the Special SRD R370 grant through the specified channels set up by SASSA. Follow these steps:

Step 1: Choose an application method:

- *Apply via WhatsApp*
    - Send a message to: 082-046-8553
    - Provide personal details
    - You will receive a Reference number, an OTP and a link to click
    - Click on the link, fill in the OTP and verify the account
    - Fill in your surname and ID number
    - Confirm the personal details that were provided via the WhatsApp chat
- *Apply via the SRD website*
    - Go to the SRD Website: https://srd.sassa.gov.za/
    - Click on the correct block for either South African ID holders or Asylum Seekers and Special Permit Holders
    - You will receive a 6-digit OTP via SMS
    - Insert the OTP number on the SRD website and click 'verify pin'
- *Apply via the SASSA Chatbot*
    - Go to the SASSA website
    - Click on the Special SRD R370 Grant assistance chatbox (orange box on the side of the screen)
    - Fill in your ID number and mobile number
    - On the chat, choose the option to apply for the SRD R370 grant
    - Click on the SRD website link provided by the SASSA Chatbot
    - Follow the SRD Website steps

Step 2: Agree to the terms and conditions

Read and agree to the clauses on the Declaration and the Consent forms.

Read and agree to the clauses on the You and your Special COVID-19 SRD Grant document.

Step 3: Provide your personal details

Provide the following information:

- ID number
- Full name and surname
- Gender
- Physical address
- Contact information (mobile number, email address)

Step 4: Choose the payment option

New applicants with a personal bank account must provide banking details, including:

- Bank name
- Account number
- Branch name
- Account type

If you don't have a bank account, you can select *Cash Send* as the payment option.

Step 5: Receive an SMS

You will receive an SMS notifying you of your banking details. After receiving this SMS, the Special SRD R370 Grant application is active.

Step 6: SASSA Verification and validation

SASSA verifies your personal information, like your ID number and name, against the Department of Home Affairs database. It matches your ID number against approved databases such as UIF, SARS, NSFAS, etc. Your application is either approved or declined with reasons.

REASONS FOR REJECTING A SPECIAL SRD R370 GRANT APPLICATION

- You have been employed and have made contributions to income tax
- Your personal details and contact details in your application do not match the ones from the Department of Home Affairs
- You are receiving another social grant other than a child grant
- You are registered for a National Student Fund Aid Scheme (NSFAS) bursary
- You qualify for UIF benefits OR contribute to UIF OR are currently receiving a UIF benefit
- You are employed in a government institution
- You do not meet the age requirements or are above the age of 60. If you are over the age of 60, you may qualify for the Old Age Grant
- You are registered as deceased on the Department of Home Affairs database

If you have been rejected for one of these reasons, you will not be eligible for a Special SRD R370 grant from SASSA. However, if you submit an appeal and SASSA finds that you do qualify for a grant, you will be paid from the month that you submitted your application. ***(See pg 495: How to submit an appeal for a Special SRD R370 grant).***

CHECKING YOUR APPLICATION STATUS FOR THE SPECIAL SRD R370 GRANT

You can check your application status online by completing the following steps:

- Visit the SASSA SRD website: https://www.sassa-status.co.za/
- You will be asked to fill in your ID number and cell number that you used when you submitted your application
- Check the progress of your grant

You should check your status regularly so that if your application has been rejected, you can appeal this decision as soon as possible.

If your SASSA SRD application has been rejected, you can appeal the decision.

HOW IS THE SPECIAL SRD R370 GRANT PAID OUT?

Bank account

Once you submit your application and choose this as your payment method, you will have to include your bank account details as part of your application. You will then be able to withdraw your R370 at any ATM as soon as it has been paid. SASSA will verify your bank details when you apply. This is because SASSA has to ensure you do not exceed the income threshold for the grant relief. If a person has more than R620 in their bank account, their application for the relief grant will be rejected. You need to submit your own banking details, as an SRD R370 grant cannot be paid into a bank account that does not belong to the applicant.

CashSend Services

If you don't have a bank account, you can also receive your grant through CashSend services. Beneficiaries use their ID numbers and phone numbers to access their grant money. You must have a cell phone with a registered cell phone number and proof of identification. The cell phone number must be registered to your name, as this is how SASSA verifies that the grant money is going to the correct beneficiary.

Shoprite Group Checkers, Pick n Pay and Boxer Stores

You can also access your SRD R370 grant by visiting a Checkers, Boxer or Pick n Pay store. You will not be able to collect your grants at BP Pick n Pay

Express, Pick n Pay Clothing and Pick n Pay liquor stores. You can also get your grant payments at any of the Shoprite Group supermarkets, including Checkers, USave, OK and Shoprite stores.

WHEN IS A SPECIAL SRD R370 GRANT PAID OUT?

There is no set R370 grant payment date so beneficiaries are paid out for the months that they qualify. SRD grants are not paid out on days when other SASSA grant payments are made.

HOW TO SUBMIT AN APPEAL FOR A SPECIAL SRD R370 GRANT

If you think SASSA has unfairly or incorrectly rejected your application, you can submit an appeal. You must do this within **90 days** of your application being rejected.

Follow these steps for the Special R370 SRD grant appeal process:

1. Visit the SASSA appeals website: https://srd.sassa.gov.za/appeals/appeal
2. Click on the green bar that says, 'Click here to lodge an appeal or check appeal status'.
3. Enter your ID number.
4. Enter your cell number.
5. Click 'send pin' and wait for the SMS which will contain the verification pin.
6. Enter the pin into the bar and click 'submit'.
7. Select the month you are submitting an appeal for.
8. Select the drop-down arrow and choose the reason for your appeal.
9. Click the submit button.

TRACKING YOUR APPEAL STATUS FOR THE SPECIAL SRD R370 GRANT

If you want to track your appeal status, follow these steps:

- Go to the SASSA appeals website: https://srd.sassa.gov.za/appeals/appeal
- Enter your ID number
- Enter your cell phone number
- Track your appeal

Or you can call the SASSA Call Centre on their toll-free number which is 0800 601 011. If you've already submitted an appeal, you should not submit another appeal or contact the SASSA office. You will be informed of the outcome of your appeal through confirmation via SMS.

Applying for a social grant

Where can you apply?

You can apply at the nearest SASSA local or counter service point of a district office in your area. You can also apply online. Go to the SASSA online services website: https://services.sassa.gov.za/portal/r/sassa/sassa/home

Follow the steps to apply for a grant. You will need to register a new account to start the application.

When can you apply?

If you are applying in person at a SASSA office, you can apply from Monday to Friday, but some counter service points are only open for grants on certain days of the week or month, or sometimes only once in two months. Check with your local counter service point for opening times.

What can you use for proof of identity?

PROOF OF IDENTITY, SOUTH AFRICAN CITIZENSHIP AND AGE

ADULTS

- A South African 13-digit bar-coded identity book (ID) or
- A temporary South African identity document from the Department of Home Affairs
- As a refugee, they should have a refugee identity document OR a refugee status permit together with proof of having applied for an identity document from the Department of Home Affairs
- Where adults act on behalf of others in applying for or receiving a grant (i.e. are 'procurators'), they need identity documents of any country, or a passport, or a driver's licence
- Proof of marital status (e.g. marriage certificate or divorce order if divorced, or copy of spouses' death certificate and their will)
- Proof of residence
- Proof of income or dividends (if applicable)
- Proof of assets, including the municipal value of your property (if applicable)
- Proof of private pension (if applicable)

- 3 months bank statements
- UIF 'blue book' or discharge certificate from the previous employer (if previously employed)

CHILDREN

- As a South African citizen, they should have a birth certificate with a 13-digit identity number, which was issued free of charge immediately after the registration of their birth at any Home Affairs service point
- As a South African citizen over 16 years old, they should have a South African 13-digit barcoded identity document
- As a permanent resident, they should have a birth certificate OR a South African 13-digit barcoded identity document if they are over 16
- As a 'documented' or 'undocumented' foreign national child, they should have a birth certificate, identity document or passport from their country of origin. Where they do not have these, their biological or foster parent or primary caregiver should make an affidavit and apply for a birth certificate at the Department of Home Affairs (obtaining a receipt of the application when they do so)

ALTERNATIVE IDENTIFICATION DOCUMENTS

Some South Africans and foreign nationals have experienced problems in getting their identity documents from the Department of Home Affairs. As this remains a challenge, it is important to know what alternative identity documents can be used to apply for and receive social assistance.

In 2005, the Alliance for Children's Entitlement to Social Security (ACESS) – in which the Black Sash participates along with other civil society organisations - took the Minister of Social Development to court. The purpose was to insist that the government implement the 2005 Regulations, which allowed children to use alternative identification where they did not have any, particularly where the Department of Home Affairs had not yet issued their documents. This became known as the 'Paper Chase Case'. ACESS won the case, but the government appealed. Finally, in March 2008, the court instructed the government to allow alternative identification to be used by adults and children. Five months later, in August 2008, new regulations were published which included the option of using alternative identification documentation.

SASSA offices have since then been implementing these regulations, and the Department of Social Development has monitored implementation to ensure the court order is complied with.

Section 11(1) of the 2008 Regulations of the Social Assistance Act of 2004 says that SASSA may accept alternative proof of identification where the person currently has no valid proof (an identity document or a birth certificate).

Alternative proof could include:

- A sworn statement (an affidavit) on a form provided by SASSA and, where available
- Proof of having applied for formal identity documentation from Home Affairs

These could also be supported by:

- A sworn statement by a reputable person (like a councillor, traditional leader, social worker, priest, or school principal) who verifies that they know the person and/or
- Other documents like baptismal certificates, school reports, clinic cards, etc.

Ideally, alternative identification should only be used as a temporary measure. While it has not been regulated, SASSA requires that grant beneficiaries apply to the Department of Home Affairs within three months for their proper documents. Once the person provides proof of having applied for their documents, the grant will continue to be paid until the beneficiary receives their identity documents and returns to the SASSA office to update their records. However, if they do not apply for these documents and do not return to SASSA to confirm that this has been done within the three month period, payment of their grant may be suspended. ***(See pg 70: South Africa's citizenship law)***

PROOF OF DISABILITY

When an application is made for a disability grant, the SASSA officer will give the person a medical form to be completed by either a medical officer or an assessment panel. The medical person must write on the form what disability you have and how long they think it will last.

The assessment by an assessment panel will take place if there is no doctor available. The panel will consist of medical people such as nurses, psychologists and social workers, as well as community leaders such as chief magistrates or priests.

The SASSA officer sends the doctor's certificate with the application form. The medical officers in SASSA look at the medical certificate or assessment

and see if they agree that you are disabled. If they do not agree, they turn the application down.

How do you apply for a grant?

There are three stages in the process of applying for a grant:

1. **APPLICATION PROCESS:** Filling in the application forms, taking fingerprints, interviewing with a SASSA officer or completing the online application (2 hours)
2. **NOTIFICATION PROCESS:** Letter of approval or rejection (less than 3 months/ 30 working days after application)
3. **APPEALS PROCESS:** Appeals of the decision (within 90 days of receiving a letter of rejection)

STAGE 1: APPLICATION PROCESS

There are two ways to apply for a SASSA grant: in person at a SASSA office or online via the SASSA services website.

APPLYING FOR A SASSA GRANT IN PERSON

The application for the social assistance grants is free and should not take longer than 2 hours. This must be done at a SASSA office.

You must take all your proof to the nearest SASSA District office or counter service point. Some of the forms that you are required to complete will be given to you and you will need to have these correctly filled in.

You will first have to fill in an application form in the presence of a SASSA officer. After this, there will be an interview, fingerprints will be taken, and then you must present information to prove your means (income and assets) to see if you qualify under the means test. The documents will be verified by another SASSA officer. All information that you provide during the application process will need to be signed by you as being true and correct. When the application is made, you should say how you would like the money to be paid. ***(See pg 502: Getting paid)***

In addition, if you are applying for a Disability Grant, the following steps will be taken:

- The SASSA officer will send you to a state medical doctor – or a doctor contracted by SASSA – for a medical examination to assess your disability. You should show all medical records, even old records from another doctor or hospital, to the doctor.

- You must take the doctor's certificate or assessment panel's report back to the SASSA officer.

Please check the correct procedure with your SASSA office. In some cases, when the application process is completed, you will get a receipt and a copy of the completed application form. This receipt is the only proof of application that you have and should, therefore, be kept safe. Check that the following is on the receipt: date of application, official stamp, name of applicant, and name of SASSA officer. However, in other places, SASSA will collect the form, and it will not be given to you. Please note that the medical assessment is free of charge for the applicant.

APPLYING FOR A SASSA GRANT ONLINE

If you are applying for an Older Persons Grant, Disability Grant, Child Support Grant, Care Dependency Grant, Foster Child Grant, or Grant-In-Aid, go to the SASSA services website to complete the online application: https://services.sassa.gov.za/portal/r/sassa/sassa/how-to

This is a summary of the steps to follow:

1. Connect to the SASSA services website on any device that has internet connectivity: https://services.sassa.gov.za
2. Register as a user to apply on the SASSA services website with your details by following the on-screen instructions.
3. Log in to the SASSA services website using your newly created username and password to start an application.
4. Click on Apply for a Grant and then specify the Grant Type you want to apply for, i.e. Older Person's Grant, Child Support Grant or Foster Child Grant.
5. Complete the grant application form by supplying the necessary information.
6. Print a SASSA-generated affidavit and have it commissioned by the nearest Commissioner of Oath. Also, print, sign and submit the Bank Payment Form with the affidavit.
7. Upload certified supporting documents in PDF format as indicated by the application form. The website will indicate the documents that you need to submit.
8. Submit your application, and you will receive a confirmation of your submission with a reference number via e-mail or SMS. Use this reference number for any enquiries.

This is the end of the process, and SASSA will process the application and let you know of the outcome.

STAGE 2: NOTIFICATION PROCESS

It will take about thirty working days for your application to be processed and checked and either approved or refused.

If your application is approved, it must be dated and in the language that you prefer.

If the application is approved, you should start getting payments within 3 months. Payments will be backdated to the day you applied for the grant. If you have not received payment within 3 months, you can find out what has happened to the application and when you can expect payment by contacting the following number: SASSA toll-free helpline on 0800 601 011.

If the application is rejected, the rejection must be made in writing in the language that you prefer, and it must advise you on your right to appeal and the process to follow.

STAGE 3: APPEALS PROCESS

If the application is rejected, you should get a letter from SASSA giving reasons why you were turned down. If you want to appeal against this decision, you must first use the internal SASSA appeal mechanism, which means you must submit a written 'Application for Reconsideration' to SASSA.

If SASSA does not change its decision, you must submit your appeal to the Independent Tribunal for Social Assistance Appeals. You must send them the following documents:

- Proof of your application
- Previous or current medical reports (if it is a disability grant application)
- Proof of your income and assets
- The SASSA rejection letter

If this fails, a letter of appeal can be written to the Minister of Social Development explaining why you do not agree with the decision. This appeal must be sent (lodged) within 90 days of receiving the letter of rejection. The Minister reviews the appeal and may decide to overturn the decision of rejection or may agree with the first assessment.

CAN ANOTHER PERSON MAKE THE APPLICATION ON BEHALF OF AN APPLICANT?

If the application cannot be made by the caregiver or beneficiary because they are too old or sick, a friend or family member can bring a letter from them and a

doctor's note saying why the primary caregiver cannot visit the office themselves. A home visit may then be arranged. The Agency can also appoint a Procurator for this person. ***(See pg 502: Can another person fetch an applicant's grant?)***

Getting paid

METHODS OF PAYMENT

When you apply for a grant, you need to say how you would like the money to be paid. You can receive your grant by the following methods:

- Cash payment on specific days at a paypoint, which includes Pick n Pay, Checkers, Shoprite, Boxer and USave Stores
- Electronic payment into a personal bank account
- Any bank ATM using your SASSA gold card

If you want to have the money paid into a bank account, you must provide the details of your bank account when you make the application. If you want to change the method and place of payment of the grant you can make an application to the local service office. ***(See pg 508: Problem 2: Not having a bank account)***

If you cannot collect the grant yourself, you may nominate a procurator to collect it on your behalf. ***(See pg 502: Can another person fetch an applicant's grant?)***

WHEN CAN YOU GET THE GRANT MONEY?

Your first payment can be bigger than the regular monthly payment because the first payment is counted from the date of your application. So if you waited four months after applying, you should get four month's money in your first payment. ***(See pg 509: Problem 4: Long delay in getting grant; See pg 511: Problem 12: Applying for back-pay)***

HOW DO YOU GET YOUR GRANT MONEY?

When you go to collect your grant you must take a valid identity document with you. When you receive the money, count it to check that it is right and then sign or thumbprint for receipt of the money. This is proof that you have received the money. You must not sign or give your thumbprint before you get the money.

If something is wrong with the money, you must not sign. You must complain immediately to the person who makes the payouts.

CAN ANOTHER PERSON FETCH AN APPLICANT'S GRANT?

If a grant applicant is too old, sick or disabled and cannot get to the SASSA office to fetch their grant, they can sign a paper called a power of attorney to say that another person, called a procurator, can fetch the grant. The SASSA office has a special power of attorney form that specifies what details to fill in to appoint a procurator. The procurator who will collect the grant on behalf of the sick or disabled person must take the form to the grant applicant. The applicant must sign or put their thumbprint on the power of attorney in front of a Commissioner of Oaths (for example, a lawyer, church minister, police officer, bank or post office official). The procurator must do the same.

If the applicant is too old, sick or disabled to go to a Commissioner of Oaths to sign the power of attorney, they must ask at least two people (who know the applicant well) to make an affidavit. This is a sworn statement that says the applicant is still alive, but they cannot collect their own grant because of sickness or disability. They must sign the affidavits in front of a Commissioner of Oaths.

It is also possible to request a SASSA officer to do a home visit to enable the applicant to complete and sign the Power of Attorney form in front of the official.

The SASSA officer must approve an applicant's request to let someone else fetch the grant. The SASSA officer can regularly ask to see the applicant or to see some proof that they are still alive. The grant can be stopped if proof is not given that the applicant is still alive. However, the SASSA officer must send a notice to the applicant or give the notice to the person who collects the grant before the month when the SASSA officer wants new proof. When the procurator goes to collect the grant money, they must produce a valid identity document and an affidavit to prove that they have been authorised to do this. A welfare organisation can also be appointed to collect grants on behalf of beneficiaries, for instance an old age home.

CAN ANYONE CLAIM ACCESS TO A BENEFICIARY'S GRANT MONEY?

All your grant money must be paid to you in full. Deductions can only be made from your grant money if the law believes it is in your best interests. The only lawful deduction which can be made is for a funeral policy, if you have agreed to have this deducted from the grant.

No deductions can be made for moneylenders and creditors, who may also not enter the premises or be within 100 metres of where grants are paid. Moneylenders and creditors may also not hold your ID book or card, and you may not cede your grant to another person.

When does the grant stop or lapse?

A grant can be stopped for many legal reasons.

OLDER PERSON'S AND WAR VETERAN'S GRANT

This grant stops:

- The last day of the month when the beneficiary dies
- If you do not provide proof that you are alive when asked -about once a year, your pension will be reviewed to check that you are still alive
- If it is not collected for 3 consecutive months -you can apply to have the grant payments start again, but if it is more than 90 days later, you must apply for a new grant
- If you are admitted to a wholly funded government institution, for example, a jail or government hospital
- If you are absent from the country without notice for a continuous period that is longer than 90 days
- If your income and/or assets improve so much that you no longer qualify for the grant in terms of the means test

If you die, the person who holds the receipt for funeral expenses can claim your pension up to the end of the month in which you die, providing that pension was not already paid during that month. They can use this money to help with the funeral and other expenses. After the person claims, this money takes about 3 months to come.

DISABILITY GRANT

This grant stops for all the same reasons as the Older Person's Grant, plus:

- A temporary Disability Grant will not continue for more than six months or a year, depending on how long it was originally awarded; after this, it will lapse, and you will have to reapply
- If it is a permanent Disability Grant, you will have to undergo another medical assessment after 5 years of the date of the application. But SASSA can ask permanent disability grant holders to provide proof every year that they are still alive
- If a refugee receives a disability grant, if their refugee status lapses, then the disability grant will no longer be awarded

The law also says the SASSA officer can review the disability grant:

- Every year where, there is documentary proof that your financial circumstances have or may change, or
- More regularly, where there is documentary proof that your medical circumstances may change

A Disability Grant will be converted to an Older Person's Grant when a beneficiary turns 60 years old.

GRANT-IN-AID

This grant stops for all the same reasons as the above, and if the main grant is withdrawn.

WHAT HAPPENS WHEN A GRANT IS WRONGLY STOPPED?

There are times when a grant is wrongly stopped. If this happens, you should send a letter to the same office where you made the application. The letter should give:

- All details of the application
- Date of last payment
- Details of payments missed
- Any reasons you know of why the correct payments were not made
- Request for the money

Keep a copy of the letter and proof that the letter was sent, for example, a registered mail slip.

STOPPING A GRANT ON GROUNDS OF FRAUD

A grant will be stopped if it is found that you provided information to SASSA that is known to be untrue to get the grant in the first place. It will also be stopped if it is discovered that you failed to inform SASSA of changes in your circumstances (for example, you start earning a big salary or you are no longer disabled), which would disqualify you from receiving the grant. Providing misleading information constitutes fraud, and SASSA can claim any money that has been overpaid back from you. SASSA will send 90 days written notice of their intention to investigate.

The beneficiary can respond to provide the necessary information within a further 90 days. If they do not do so, or if it is not acceptable to SASSA, then the beneficiary will be given 90 days' notice of SASSA's intention to suspend the grant. No notice of a suspension needs to be given if the grant was approved based on fraudulent information or was approved in error.

SASSA Fraud Hotline is Tel: 0800 601011 or Fax: 0800611011

Private welfare and service organisations

There are thousands of private welfare and service organisations in South Africa. Just a few of the bigger organisations that have branches all over the country are mentioned here. It is useful to have up-to-date lists of the local organisations in your area. ***(See pg 1074: Resources)***

Child Welfare South Africa

Child Welfare South Africa (CWSA) is an umbrella body representing 151 child welfare affiliates. Collectively, they reach about 2 million children, their families, and caregivers. Their mission is to promote, protect, and enhance the safety, well-being and health development of children.

Family and Marriage Society of South Africa (FAMSA)

This is a non-profit organisation that helps to build and maintain good relationships in the family, in marriage and in the community. They offer a variety of services, including counselling (advice) and education to individuals, groups and organisations about family relationships. These are some of their activities:

- Pre-marital (before marriage) counselling
- Marriage counselling for couples and individuals
- Family counselling for parents and children
- Divorce counselling and mediation (negotiating between husband and wife)
- After-divorce counselling and after-divorce support groups
- Community education through talks, workshops and groups
- Training of professional groups in marriage counselling skills ***(See pg 1077: Resources)***

National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO)

NICRO is a national crime prevention non-profit organisation working towards a safer South Africa. It has offices in all the provinces in South Africa. NICRO runs a number of projects and programmes to support their aims. These are:

- Diversion for youth offenders – this aims to divert youth away from the criminal justice system and into constructive programmes

- Community victim support project – assisting victims of crimes
- Offender reintegration programme – this aims to help current and past offenders and their families to reintegrate into society
- Economic opportunities project – to help people start their own business View their website: www.nicro.org.za

Problems

There are many problems that people have when they apply for grants. There are also problems that people have relating to the payment of grants or lapsing of grants. This section provides a list of some of the problems and some things you can do about them.

The *Promotion of Administrative Justice Act* (No 3 of 2000) (also called the PAJA) is an important Act that says everybody has a right to administrative justice that is lawful, reasonable and procedurally fair.

All government departments and their officials and private people who exercise public powers or perform public functions have to comply with the PAJA.

'Procedural fairness' means:

- An administrator should not make a decision that affects someone without first hearing what they have to say
- An administrator must be seen by everyone to be making a decision fairly and impartially (without any bias) and not because they have a private or personal interest in the matter.

An administrative action is a decision that affects the rights of:

- Individual people, for example, a decision to refuse an application for a child grant
- The general public – for example, a decision to change the age for being eligible for a child grant

There are different procedures that an administrator has to follow in each of these cases and different actions that can be taken if an official doesn't follow the requirements and procedures of the PAJA. ***(See pg 47: Section 33: Just Administrative Action)***

The PAJA has important implications for people applying for grants. You can use this Act to help people in different situations where they have problems being paid their grants.

1. Application for grant turned down

"*My application for a grant was turned down. But I am sure that I do qualify for a grant.*'"

If the application is rejected, you should get a letter from SASSA giving reasons why you were turned down. You must first use the internal SASSA appeal mechanism, which means you must submit a written 'Application for Reconsideration' to SASSA.

If SASSA does not change its decision, you must submit your appeal to the Independent Tribunal for Social Assistance Appeals. You must send them the following documents:

- Proof of your application
- Previous or current medical reports (if it is a disability grant application)
- Proof of your income and assets
- The SASSA rejection letter.

If this fails, a letter of appeal can be written to the Minister of Social Development explaining why you do not agree with the decision. This appeal must be sent (lodged) within 90 days of receiving the letter of rejection.

The letter must explain when and where your application was turned down, why it was turned down, and why you don't agree with the decision. In other words, you must give reasons why you think you qualify for a grant. You must state that this is your appeal. Other requirements include:

- The appeal must be in writing
- The appeal must be sent to the Minister of Social Development
- The appeal must be sent within 90 days of receiving the letter of rejection (notification); if the time limit has passed, you will have to reapply for a grant, and then when it is turned down, you can appeal within 90 days. ***(See pg 501 Stage 3: Appeals Process)***

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2. Not having a bank account

"*The SASSA official told me I must have a bank account before I apply for a grant. They said I must come back in 2 or 3 months. But then I will lose 2 or 3 months' grant money.*"

This is wrong. A grant beneficiary does not need a bank account. The SASSA officer cannot stop you from applying for a grant because you do not have a bank account.

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3. Bribery and social grants

"*My headman says I must pay him for helping me to apply for my grant.*"

"*The SASSA official says I must pay him for helping me to apply for my grant.*"This is wrong. All applications for grants are free. There is no payment required for any grant application. Nobody needs to be paid at all. If any of these people ask you for money, you can lodge a complaint with SASSA or report them to the police.

---

4. Long delay in getting grant

"*I applied for my grant four months ago, and I have still not heard anything.*"

If you do not hear anything after three months, you must go to the payout point or check your bank account to see if your money is there.

If your money is not there, you must take action. You can go to the SASSA officer and ask when the money will come and why it is taking so long.

You can write to the SASSA office at the provincial administration in your province, or you can write to the Director General or Minister of Social Development. In your letter, you must ask for written reasons why your application has not been processed. Getting written reasons is your legal right. Always give your ID number (your grant number is often just your ID number.) You can get the help of a paralegal, but do not make another application.

While you are waiting and you cannot survive, you should be able to get some money or food for the months that you are waiting from the office where you applied. This is called a Social Relief of Distress Grant. It will be deducted from your grant once you get it. Take your ID book and your receipt of the application with you to the office when you go to ask for relief. ***(See pg 488: Social Relief of Distress grant)***

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5. Moving from one place to another

"*Must I apply for a new grant if I move from one place to another*?"

If a person moves from one place to another, the grant can be moved. The beneficiary must, however, inform the SASSA officer about the move. There is a special form to sign to transfer your grant. The SASSA officer must arrange to have the grant paid in the new place. There should not be a delay.

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6. Applicant wants to apply for a Disability Grant and Child Support Grant but does not have the correct documents

Ravi wants to apply for a Disability Grant and Child Support Grant for his children. Unfortunately, he does not have an identity document, and none of his children have birth certificates, although he has applied for these. On this basis he was refused grants by SASSA.

SASSA should have told Ravi that he was entitled to receive a Social Relief of Distress Grant while he was waiting for his documents to be processed. ***(See pg 488: Social Relief of Distress Grant)***

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7. Shops refuse to honour vouchers given as a Social Relief of Distress Grant

Futhi has applied for a Social Relief of Distress Grant. During the assessment the SASSA official decided that she could receive vouchers for food as well as water and electricity. She was told she could use the vouchers to buy food at approved shops in her area. When Futhi went to buy food from one of the shops, she was told that they won't accept the voucher because the Department takes too long to pay them out for the vouchers.

What should she do?

Futhi should immediately report this shop to SASSA and they will have to take steps to ensure that her vouchers are accepted by all accredited service providers. ***(See pg 488: Social Relief of Distress Grant)***

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8. Person receiving an Older Person's Grant needs full-time care

John receives an Older Person's Grant. He is, however, very sickly and cannot look after himself. He needs a person who can care for him on a full-time basis.

John can apply for a Grant-in-Aid, which he can get in addition to his Older Person's Grant. ***(See pg 475: Grant-in-Aid)***

9. Getting a new power of attorney or procurator

"*I gave my daughter power of attorney to fetch my grant. She has not given me the full grant amount for the last two months. I want to change procurators, what do I do.*"

The beneficiary must write a letter to SASSA explaining that they want to stop the current procurator and the effective date. If the beneficiary is unable to read or write, then SASSA can obtain a sworn statement to this effect. The procurator whose power of attorney has been stopped has ten days to transfer any outstanding money to the beneficiary. A new application for appointing a procurator will need to be made. Generally SASSA would review the power of attorney from time to time when they review the older person's grant. ***(See pg 502: Can another person fetch an applicant's grant?)***

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10. Grant stops when not collected

"*I could not collect my money last month because I was sick. When I went this month, the SASSA officer said my grant had stopped because no one collected it last time.*"

This is incorrect. A grant only stops if it is not collected for 3 consecutive months. If the SASSA office fails to pay you what is owed, you must lodge a complaint to the head of the Regional SASSA office in your province.

---

11. SASSA pay point runs out of money

"*Last month, the SASSA officials said the paypoints couldn't pay out our grants. Many of us did not get paid our grants.*"

All applicants who are affected by this should go together to the Regional SASSA office and complain. If you are not satisfied you must write to the Minister of Social Development and report the complaint.

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12. Applying for back pay

"*I only got my first payment 6 months after I applied. They only paid me two month's grant money.*"

You are supposed to get back pay from the date of your application. This is why it is important to get a receipt of the application when you apply for a grant. Then, you have

proof of the date you applied. If you have this receipt, you can write to the Regional SASSA office and ask for the four months back pay.

---

13. SASSA officers are rude to grant applicants

"The SASSA officers are always very rude to us when we need to find out about our grant applications. They do not help us or tell us the right information."

The law requires SASSA officers to treat people with dignity and provide them with correct information. The Batho Pele Principles also require that eight service delivery principles be implemented by all public servants. If you are not satisfied, you should lodge a complaint with the district or regional SASSA office. If you are still not satisfied you can write to the Minister of Social Development. ***(See pg 466: Introduction)***

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14. Foster Care Grant is terminated because social worker does not extend the foster child court order

Namhla cares for a child whose mother is deceased. The social worker assisted her with getting a foster child court order for the child for 2 years. After this, Namhla applied for and received a Foster Care Grant. Two years later, the grant was terminated because the Social Worker did not extend the foster child order in terms of the *Children's Act*.

What can Namhla do?

According to a recent court case, SASSA is required to pay all foster child orders even though they have lapsed, and the Department of Social Development is required in terms of the court ruling to deal administratively with the matter. Therefore, Namhla can still receive the foster care grant while the social worker and the DSD deal with her grant and the foster child order.

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15. Grant beneficiary's circumstances change and she does not report this to SASSA

Vicky receives a Disability Grant as she is unable to work. After she has been receiving the grant for a number of years, Vicky gets married. Her spouse is earning well above the income threshold of the means test. Vicky continues to receive her grant and fails to tell the SASSA office of her change in circumstances.

If the circumstances of a grant beneficiary change, they must report this to a SASSA official. Failure to do this may mean that a beneficiary is guilty of fraud.

In terms of the law, if SASSA has paid more money to a grant beneficiary than they should have received, the beneficiary will have to repay the amount that was overpaid. In addition to having to repay the money, the person who has received the money will be guilty of committing an act of fraud, which is a criminal offence.

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16. Grandmother is being paid to take care of a child

Marie is taking care of her granddaughter while her son is working in another town. He sends his mother an amount of R1000 every month for the care of his daughter. Marie cannot manage with this money, so she goes to SASSA to apply for a Child Support Grant (CSG). The SASSA official refuses to take the application as Marie is already being paid to care for the child.

The SASSA official is wrong. The grandmother is the primary caregiver, and if she qualifies in terms of the means test, she should be able to access the CSG. As Marie receives R1000, which is under the maximum allowed in terms of the means test, she will still qualify for the CSG.

Model letters

Letter of appeal to SASSA

Remember: As an applicant or beneficiary, your client should lodge an appeal to the following institutions in the following order.

1. The Social Security Agency for South Africa
2. Independent Tribunal for Social Assistance Appeals (ITSAA) on behalf of The Minister of Social Development (If your client is not satisfied with the outcome of SASSA, they may appeal to the Minister within 90 days)

EXAMPLE LETTER

[Fill in your address]

Telephone:
Date:

Our Ref:

The Social Security Agency for South Africa
(*Fill in address*)
.....
.....

Dear Madam / Sir

Re: (NAME) .....

IDENTITY NUMBER.....lodging an appeal in terms of Section 18(1) of the Social Assistance Act 13 of 2004.

(*put in the client's name, identity number*)

In our capacity as (paralegal caseworkers) we confirm that we are assisting the above mentioned client to lodge an appeal in terms of Section 18 of the Social Assistance Act 13 of 2004.

Ms/Mr [name] has nominated our offices to follow up and receive all correspondence relating to this appeal.

Kindly take note that Ms/Mr [name] lodged all relevant documentation during the application procedure with SASSA. We herewith ask for an investigation into the appeal and the furnishing of reasons for the decision to reject the application to Ms/Mr [name]. We further ask for an appeal hearing date within 30 days of your office receiving this appeal.

Ms/Mr [name] believes that the service centre officer of SASSA or the appeal division in SASSA did not apply their–mind to the records presented and therefore bases this appeal on the following;

.....
.....

(*In this section the client must explain the reasons why* they *believe they are entitled to the grant, what records they have to support their case*)

We trust this appeal application is in order and await the date of the appeal.

Yours faithfully,

.....
(*put your name and capacity, and sign*)

Letter to the Regional SASSA office

This is a letter explaining that the Power of Attorney has been renewed, and asking for all grant payments that were kept back to be paid to the client.

EXAMPLE LETTER

[Fill in your address]
Telephone: [ ]
[Date]
Our Ref:{ }

The District Pensions Officer
[Fill in their address]

Dear Madam / Sir
Re:
NAME.....
IDENTITY NUMBER.....
GRANT NUMBER.....
NAME OF POWER OF ATTORNEY HOLDER.....

(put in the client's name, identity number and grant number, and the name of the person who has power of attorney to collect the grant for the client)

We have been approached for assistance by the abovementioned pensioner/disabled person who was in receipt of an Old Age Pension/Disability Grant/War Veteran's Pension until payments were stopped on. (put in the date)

We understand that payments were stopped because our client Mr/Ms ..... (put in the client's name) failed to renew the Power of Attorney as required.

The Power of Attorney has now been renewed and accordingly there is now no reason not to coneinu with grant payments.

In the circumstances, would you ensure that on the next payout date the grant is paid as normal together with the sum of R....(put in the amount of back grant that is owed) being arrears since the date of last payment.

We regret that should the matter not be settled as set out above, we shall have no alternative but to take legal action.

Yours faithfully

.....
(put your name and capacity, and sign)

Application for Social Relief of Distress Grant

EXAMPLE LETTER

[Fill in your address]
Telephone: [ ]
[Date}
Our Ref:{ }

The SASSA
[Fill in their address]

Dear Madam / Sir

Re:
NAME.....

IDENTITY NUMBER.....

We write to you on behalf of our client referred to above. They need temporary material assistance.

Our client is currently: (*select only what is relevant and delete the rest BEFORE printing*)

- Awaiting permanent aid
- Medically unfit to undertake remunerative work. This has been the case for a period less than 6 months
- Entitled to maintenance from a person obliged to pay maintenance
- A member of a household of which the breadwinner is deceased and insufficient means are available
- A member of a household of which the breadwinner has been admitted to an institution for less than 6 months
- Affected by a disaster or emergency, although the area of the community in which they live has not yet been declared as a disaster area
- Not receiving assistance from any other organisation
- Appealing the suspension of their grant
- Not a member of a household that is already receiving social assistance
- Entitled to relief in terms of the regulations that state a person may be granted relief in exceptional circumstances.

It would be appreciated if you could assist our client in the application for this alleviation grant by ensuring that their application gets processed speedily. They are in serious need of social assistance and this would ensure that their difficult circumstances are not prolonged.

Should you decide not to grant our client a Social Relief of Distress Grant, kindly provide written reasons for such refusal.

We look forward to your cooperation.

Yours faithfully

.....
(put your name and capacity, and sign) Paralegal Caseworker

Checklists

General questions about social grant applications

- Name and address
- What income and assets does the person have?
- Will the person pass the means test?
- What kind of grant does the person qualify for?
- Is the person disqualified by any special regulation?

Social grants for adults 18 years and older

- Have you already applied for a state grant?
- When were you born? (How old are you?)
- Are you working or earning any money? If so, how much? (SeeThe means test for adult social assistance grants)
- Do you have an identity document, reference book, passport, travel document, birth certificate, baptismal certificate or marriage certificate?
- If disabled, do you have a doctor? What is your doctor's name? Do you have a medical form stating your disability?
- Do you get another grant from somewhere else? ***(See pg 478: Who cannot get a grant?)***

Child Support Grant

- Is the father (or mother) of the child alive?
- Do you know where they live?
- What are the ages of your children?

If the person received a grant payment in the past but payment stopped

- When was payment last claimed?
- Was failure to claim the grant due to circumstances beyond the person's control?
- Has the person been admitted to a state institution?
- Has the person received a review card?
- Call SASSA tollfree hotline: 0800 601 011

FAMILY LAW

Introduction

Most people are members of a family – by birth, marriage, adoption, foster care or living together. Family law is about matters like marriage, husbands and wives, parental rights and responsibilities, care and protection of children, foster care and adoption, divorce, and death.

Traditionally, the idea of a family was of a working father, a mother working in the home and dependant children. But it is not so common to find this kind of family anymore. For example, many married women go out to work, and in some families, especially in rural areas, the children also work to support the family, illegitimate children (children born out of marriage) and divorces mean that there are many 'single-parent families' and gay and lesbian couples can now legally form a civil union. It is hard to say what a typical South African family is.

The Constitution and Bill of Rights guarantee non-discrimination and equality regardless of factors such as race, sex, gender, sexual preference, marriage and religion. This means that different types of families and marriages must be treated equally.

Marriage

Draft Marriage Bill (2023)

South Africa's law on marriage is fragmented and there are different laws that deal with different forms of marriage, such as the Marriage Act, the Civil Union Act, and the Recognition of Customary Marriages Act. The Draft Marriage Bill will consolidate all laws relating to marriage into one piece of legislation and recognise all types of intimate partnerships regardless of gender, sexual orientation, or religious, cultural and other beliefs. All South Africans and residents in the country of all sexual orientations, as well as religious and cultural beliefs, will be allowed to have legal unions in line with constitutional principles. The Bill outlines measures to prevent unions such as child and forced marriages and those done in the absence of the other party.

Civil marriages

Marriage is a contract between a man and a woman entered into in terms of the *Marriage Act 25 of 1961*. According to this contract, they agree to live together as husband and wife. Like other contracts, a marriage contract has rights and duties for each partner.

South African law recognises civil marriages, civil unions and customary marriages. Marriages, according to Muslim or Hindu rites, are not 'legal' marriages but enjoy limited recognition in certain circumstances. For a civil marriage, certain rules have to be obeyed in order for the marriage to be valid. For example:

- Both parties must agree to marry each other
- If you are already married civilly, you cannot enter into another civil marriage again until your first spouse dies or until the first marriage ends in divorce. While you are civilly married and you marry someone else civilly, you are guilty of the crime of bigamy
- You cannot marry and/or have sex with close relatives, e.g. a grandfather cannot marry his granddaughter. If you do, you are guilty of incest
- Boys under 18 and girls under 15 cannot marry unless they have permission from their parents and the Minister of Home Affairs
- Minors (persons under the age of 18 years, as the Children's Act defines a child as a person under 18 years) also need their parent's permission to marry
- A marriage officer must conduct the civil marriage ceremony to make it legally valid

Civil unions

In November 2006, following a long line of court cases recognising certain rights and responsibilities in same-sex partnerships, the *Civil Union Act 17 of 2006* came into effect. This law provides for the legal recognition of marriages and civil partnerships, collectively referred to as civil unions, between two persons regardless of their sexual orientation or gender identity.

The *Civil Union Act* is in line with the Constitutional Court judgement in the case of *Lesbian and Gay Equality Project and Eighteen others v Minister of Home Affairs and others*, which found that the common law definition of marriage in the *Marriage Act* was inconsistent with the Constitution and was invalid to the extent that it did not allow same-sex couples to enjoy the same status, benefits and responsibilities given to heterosexual couples.

REQUIREMENTS FOR REGISTERING A CIVIL UNION

The *Civil Union Act* specifies the following requirements for registering a civil union.

- Anyone who is 18 years or older may enter into a civil union (in terms of the *Civil Union Act*) and can choose to register it as a marriage or civil partnership. When it has been registered a certificate will be issued with the details of the union.
- A person may only be a spouse or partner in one marriage or civil partnership.
- A person who enters into a civil union is not allowed to also enter into a marriage under the *Marriage Act* or the *Recognition of Customary Marriages Act 120 of 1998*. In the same way, a person who is already married under the *Marriage Act* or the *Recognition of Customary Marriages Act* may not register a civil union in terms of the *Civil Union Act*.
- If a person wants to enter a civil union and they have previously been married under either the *Marriage Act*, *Recognition of Customary Marriages Act*, or registered as a spouse in terms of the *Civil Union Act*, the person must present a certified copy of the divorce order or death certificate of the former spouse or partner as proof that the previous marriage or civil union is no longer valid.
- A civil union may only be registered by two civil union partners who would, apart from the fact that they are the same sex, not be prohibited by law from marrying each other under the *Marriage Act* or *Recognition of Customary Marriages Act*.
- A valid South African identity document is necessary for the registration of a civil union.
- All the legal and material benefits and responsibilities that flow from marriages entered under the *Marriage Act* will also apply to marriages or civil partnerships registered in terms of the *Civil Union Act*.
- Any civil marriage officer, for example, a Magistrate, selected government officials and/or special justice of the peace, recognised by the *Marriage Act* are automatically entitled to conduct marriages and civil partnerships under the *Civil Union Act*. A minister of religion and the religious organisation must first get authorisation from the Minister of Home Affairs to register a civil union. ***(See pg 568: Problem 2: Entering into a civil union)***

African customary marriages

When Africans marry, they can choose to marry by African customary law (traditional customs) OR by the ordinary civil law of the land. An African customary marriage takes place without a civil marriage officer. The families agree on the *lobola* or bride price. The ceremony takes place after the man's family has paid all or part of the *lobola*.

The *Recognition of Customary Marriages Act 120 of 1998*, which came into effect on 15 November 2000, gives full legal recognition to customary marriages. If you got married before the Act came into effect, your marriage would still have legal recognition and protection if it complies with the customary law and was still in existence after the implementation of the Act. If your spouse died or you got divorced before the Act came into force, your marriage is not protected by this Act.

DOES THE LAW DISTINGUISH BETWEEN CUSTOMARY MARRIAGES ENTERED INTO BEFORE AND AFTER THE IMPLEMENTATION OF THE ACT?

Yes, there are different legal implications. Women married before the implementation of the Act fall under the customary law prevailing at the date when the marriage took place. However, in the Gumede case *[Gumede (Born Shange)] v President of the RSA and others [2008] JOL 22879 (CC)*, which challenged the failure of the legislature to make the provisions of the *Recognition of Customary Marriages Act* retrospective, the court ruled that this differentiation was unfairly discriminatory. The practical result was that all marriages entered into before the Act came into force, which were still regarded as being out of community of property, were now regarded as being in community of property.

As a result of this case, the law does not distinguish between monogamous customary marriages before and after the implementation of the Act with regard to being in community of property.

The *Recognition of Customary Marriages Act* states the following:

Equal status and capacity: The wife in a customary marriage is no longer regarded as a minor. She has equal status and capacity to her husband. This means she can buy and sell assets, enter into contracts and take a case to court.

Validity: Both partners in a customary marriage must consent to the marriage, and they must be 18 years or older. If a person under the age of 18 wants to enter into a customary marriage, they must first get permission from the Minister of Home Affairs.

Registration: The marriage must be registered with a registration officer at the Department of Home Affairs. The main purpose of registering the marriage is to provide proof that a customary marriage exists, which will help the parties if any dispute arises about the validity of the marriage. Failure to register a customary marriage does not affect the validity of the marriage.

Property and assets: All marriages concluded after the Act and monogamous marriages concluded before the Act, according to African custom (as a result of the Gumede case), will automatically be in community of property unless the parties draw up an ante-nuptial contract. Polygamous unions concluded before the Act are governed by customary law. Partners in a customary marriage can apply to the High Court to change the property system of their marriage. If the husband wants to enter into another customary marriage, the husband, existing wife/wives, and the future wife must enter into a contract to develop a new property system and ask the High Court or Regional Magistrates Court (Family Court) to approve the contract. The court will try to look after the interests of all the parties by deciding what the assets are worth and making sure that the existing wife and children get a fair deal. All marriages formed after the Act will automatically be in community of property unless the parties draw up an ante-nuptial contract.

Inheritance: The *Recognition of Customary Marriages Act* does not change the law on inheritance, but a new law that deals with this was passed in 2009 called the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*. This legislation does away with the rule of primogeniture (the rule that the oldest male relative inherits all) that was challenged in the case of *Bhe and others v The Magistrate, Khayelitsha and others* 2005(1) SA 580 (CC). In this case, the Constitutional Court held that the customary law rule of primogeniture is unconstitutional and that the estates of all black people who die without leaving a will should be dealt with as set out in the *Intestate Succession Act*.

Custody of children: The court can decide who will have custody of children born into a customary marriage and what maintenance should be paid. The decision will be based on what is best for the children. A customary union is still recognised for these cases:

- The partners can claim support money from each other if they are divorced
- A wife can claim inheritance rights if her husband dies
- A wife can claim benefits under a pension scheme if her husband dies

- A wife can claim compensation under the *Compensation for Occupational Injuries and Diseases* Act if her husband dies in an accident at work.

MAY A WOMAN WHO IS MARRIED BEFORE THE IMPLEMENTATION OF THE ACT, HAVE HER CUSTOMARY MARRIAGE GOVERNED BY THE PROVISION OF THE ACT?

Yes, the Act makes provision for these women to change the legal consequences of their marriage in order to create equal status and capacity for both the husband and the wife. The parties must apply to court stating good reasons for the change and show that no third person will be prejudiced.

DOES THE ACT MAKE PROVISION FOR POLYGAMOUS MARRIAGES?

The Act does allow a man to enter into multiple marriages. However, this has to be done under the provisions of the Act. The Act states that if a man wishes to enter into a polygamous marriage, he has to apply to the court for permission. In his application, he must set out the property systems for all of his wives. All interested parties must be represented in the application, particularly the existing and future wives. The court must consider the circumstances to ensure that the contract fairly divides the existing marital property. The court has the power to accept, add a condition or refuse to accept a contract. This provision is intended to protect all wives, children and family members.

Muslim and Hindu marriages

MUSLIM MARRIAGES

Muslim marriages are now legally recognised by South African law. Up until 2022, they were not legally recognised. This changed after a Constitutional Court decision in *Women's Legal Centre Trust v President of the Republic of South Africa and others* (2022), which ruled that Muslim marriages must be legally recognised and that certain sections of the *Divorce Act of 1979* and *Marriage Act of 1961* are unconstitutional.

The Court judgement noted that various human rights, such as the right to equality, dignity and access to courts for women in Muslim marriages, were infringed. It noted that the rights of children born from Muslim marriages were also infringed. The Court held that:

- The common law definition of marriage was invalid, where it excludes Muslim marriages.
- Specific sections of the Marriage Act and the Divorce Act were not consistent with the Constitution because:
    - Both these Acts did not recognise Muslim marriages, which have not been registered as civil marriages, as valid marriages in South Africa
    - The Divorce Act fails to provide for the redistribution of assets when a Muslim marriage is dissolved
    - The Divorce Act fails to provide for mechanisms to protect the welfare of minor or dependent children from Muslim marriages when a Muslim marriage is dissolved
    - The Divorce Act fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time when it is dissolved.

The Constitutional Court judgement gave Parliament time (up to June 2024) to amend these Acts according to its ruling. The judgement specifically said Parliament must make laws that recognise Muslim marriages as valid marriages and regulate the consequences of such marriages.

As a result of this Court judgement, the *Divorce Amendment Act (No. 1 of 2024)* has been passed, and it provides recognition and protection of Muslim marriages in South Africa. It integrates specific provisions for Muslim marriages into the existing *Divorce Act* and addresses critical legal issues that were previously lacking for Muslim marriages. ***(See pg 535: Ending a Muslim marriage)***

The *Draft Marriage Bill (2023)* aims to consolidate all laws relating to marriage into one piece of legislation and recognise all types of intimate partnerships regardless of gender, sexual orientation, or religious, cultural and other beliefs. All South Africans and residents in the country of all sexual orientations, as well as religious and cultural beliefs, will be allowed to have legal unions in line with constitutional principles. This includes Muslim and Hindu marriages. The Bill outlines measures to prevent unions such as child and forced marriages and those done in the absence of the other party.

COURT DECISIONS DEALING WITH RECOGNITION OF MUSLIM MARRIAGES

In the case of *Amod v Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319 (SCA)*, a surviving spouse from a Muslim marriage was given the right to claim damages for loss of support from the Fund when her husband died in a motor accident.

In the case of *Daniels v Campbell N.o. and others* 2004 (5) SA 331 (CC), the plaintiff was given the right to claim maintenance and inherit from the estate of her deceased husband to whom she had been married by Muslim law, in terms of the *Maintenance of Surviving Spouses Act*.

In the case of *Khan v Khan TPD case no: 82705/03/A 2705/2003 (not yet reported)*, a Muslim woman who was party to a polygamous Muslim marriage was given the right to claim maintenance from her spouse in terms of the *Maintenance Act*.

In the case of *Mahomed v Mahomed (2008 ECP)*, and in *Hoosain v Dangor (2009 CPD)*, the courts recognised the right to claim interim maintenance while waiting for the outcome of the main action which asked the court that Muslim marriages be governed by the *Divorce Act*.

The courts have recognised the right of a spouse married according to Muslim rites to inherit from her deceased husband's intestate estate.

In the case of *Hassam v Jacobs N.O. and others [2008]*, where the Applicant was the wife of the deceased in a polygamous marriage, the court allowed both wives to inherit a child's share of the estate.

HINDU MARRIAGES

Traditional Hindu marriages are not recognised by civil law. But if spouses go through a civil marriage ceremony either in terms of the *Marriage Act* or the *Civil Union Act* or are married by a Hindu priest who is a marriage officer, the law will recognize their marriage. The husband then cannot marry any other woman by civil law.

The *Draft Marriage Bill (2023)* aims to consolidate all laws relating to marriage into one piece of legislation and recognise all types of intimate partnerships regardless of gender, sexual orientation, or religious, cultural and other beliefs. All South Africans and residents in the country of all sexual orientations, as well as religious and cultural beliefs, will be allowed to have legal unions in line with constitutional principles. This includes Muslim and Hindu marriages. The Bill outlines measures to prevent unions such as child and forced marriages and those done in the absence of the other party.

COURT DECISIONS DEALING WITH THE RECOGNITION OF HINDU MARRIAGES

In the *Prag matter (Wynberg court ref.31008MAI000680)* the maintenance court recognised the duty to maintain where the parties were married according to Hindu rites.

In the Govender matter (*Govender v Ragavayah No and others (Women's Legal Centre Trust as amicus curiae) [2008] joL 22653 (D)*), a wife was entitled to inherit from her deceased's husband's intestate estate to whom she was married according to Hindu rites.

The rules of civil marriage

Marriages create certain rights and duties for the husband and wife. In all marriages, couples have a legal duty to **support** each other. This means that they must look after any children, the home and provide the family with food and clothing, medical care and other 'household necessities'. Either or both partners work to earn money.

All civil marriages are automatically in **community of property** unless the parties sign an **ante-nuptial contract** before the marriage (except African marriages before 1998, which were automatically out of community of property, unless the partners clearly chose to marry in community of property).

MARRIAGES IN COMMUNITY OF PROPERTY

This is the automatic system of marriage. In other words, if you get married without signing any contract, you will automatically be married in community of property.

'In community of property' means that everything the couple own, and their debts from before their marriage, are put together in a joint estate. Everything they earn or buy and any debts incurred after their marriage are also part of this **joint estate**.

There is **joint administration** of the things the couple owns. This means the husband and wife share in controlling their joint property. To protect each spouse, the other partner's written permission is necessary for big things like buying or selling a house, signing credit agreements, withdrawing money from accounts in the other spouse's name and so on.

If they get divorced, the joint estate gets divided in half. One half belongs to the wife, the other to the husband. Any debts are also shared. The court does have the discretion to order that one spouse will not get their half share that they will be entitled to by granting an order of forfeiture of benefits or redistribution of the assets if, taking into account various factors, it believes it would be unfair for everything to be split equally.

In terms of the *Matrimonial Property Act (No 88 of 1984)*, the marital power of a husband over his wife was scrapped. Now a woman married in community of property:

- Has equal rights to administer the joint estate
- Can enter into contracts without her husband's permission
- Can sue or be sued in her own name

Both men and women must now say what their marital status is when they fill in forms.

MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH AN ANTE-NUPTIAL CONTRACT

Before they marry, two people can make an agreement called an **ante-nuptial contract**. Usually, this agreement excludes (or cuts out) community of property. This means the husband and wife each own and control their own things – they have **separate estates**.

Under the *Matrimonial Property Act of 1984*, the **accrual system** automatically applies to their marriage, UNLESS they agree in their ante-nuptial contract that they do not want the accrual system.

'Accrual' means increase. The accrual system recognises that during a marriage, the husband and wife keep on adding to their joint property. For example, They may add to their property by both working and bringing money into the marriage. Or one spouse may add indirectly by staying home and looking after the home and children so that they do not need to employ someone to do that. The accrual system allows both partners to benefit from the growth of either of their properties during the marriage.

While the marriage lasts, the husband controls his own separate estate, and the wife controls hers. But if they divorce or when one spouse dies, any increase in the value of both estates gets shared equally by the partners. If the couple chooses not to have the accrual system, in their divorce, the partners keep their own things and are responsible for their own debts.

This is how the accrual system works:

- Certain things are excluded from the accrual system, such as inheritances and gifts.
- At the beginning of the marriage the property of each spouse is valued.
- During the marriage, each spouse controls and adds to their own property.
- When the marriage ends through death or divorce, the value of each spouse's property before the marriage gets compared with the value at the end of the marriage. This shows the increase in each spouse's property. (Inflation is taken into account.)

- Take the smaller increase in value away from the larger increase in value. Divide this amount in half. The spouse with the smaller increase in value has a claim against the other spouse for half of this difference so that they end up with the same accrual.

EXAMPLE OF ACCRUAL SYSTEM

Husband	***Wife***	
R30 000	R4 0000	(*Value at end of marriage*)
R10 000	R2 000	(*Value at beginning of marriage*)
R20 000	R2 000	(*Increase*)

In this example, the husband's estate has grown by R18 000 more than the wife's estate during the marriage (i.e. R20 000 – R2 000). She has a claim against him for half of this difference i.e. R9 000 so that they each end up with an accrual of R11 000.

CIVIL MARRIAGES OF AFRICANS BEFORE 1988

Africans married by civil marriage ceremonies before 2 December 1988 were automatically married out of community of property with no accrual and the husband had marital power in terms of the *Black Administration Act (38 of 1927)*. So, each partner kept their separate property and each partner owned any property they got during the marriage. But the husband had the marital power, so he managed both his property and his wife's property.

In 1988, the *Marriage and Matrimonial Property Amendment Act (No. 3 of 1988)* changed the laws for civil marriages of Africans and made them the same as any other civil marriage. This meant that marital power was scrapped, the automatic marriage is in community of property unless couples sign an ante-nuptial contract, and out of community of property marriages have the accrual system unless couples choose not to have it.

Since 1998, the *Recognition of Customary Marriages Act (No. 120 of 1998)* has recognised all African customary unions as legal marriages. All new marriages formed after the Act will automatically be in community of property unless the parties draw up an ante-nuptial contract. In terms of this Act, the husband has no marital power. ***(See pg 525: African customary marriages)***

CHANGING THE WAY YOU WERE MARRIED

Even though the laws may have changed since you were married, your marriage is still governed by the way you were married and the rules of marriage for that kind of marriage at that time (except that marital power is automatically scrapped).

Married people can apply to the High Court and ask the court to change their marriage from being in community of property to one out of community of property, or the other way around. Both husband and wife must apply together, they must prove that no other party will be disadvantaged, notice of the change has been given to all their creditors, and they must give the court good reasons for wanting to change the way they were married.

Divorce

Divorce can affect the spouses and their children for the rest of their lives. Before getting a divorce, the husband and wife should try to get help from social welfare agencies or marriage counsellors. ***(See pg 1080: Resources: Family and Marriage Society of South Africa (FAMSA); See pg 564: Problem 1: Getting a divorce)***

Divorce in a civil marriage

A divorce legally ends a marriage. Once a divorce is granted, each partner may legally marry someone else. ***(See pg 536: Family Court)***

There are only two grounds for divorce:

1. The 'irretrievable breakdown' of the marriage, or
2. The mental illness or continuous unconsciousness of one partner

IRRETRIEVABLE BREAKDOWN

This means the couple can no longer live together as man and wife. Both partners or one partner must prove to the court that the marriage broke down so badly that there is no reasonable chance of getting back together.

These are examples of the kind of evidence the court will accept as proof of irretrievable breakdown:

- The couple has not lived together like husband and wife for a period of time

- One partner had sexual intercourse with somebody else, and because of this, the other partner finds it impossible to continue living together as husband and wife
- One partner is in prison after being declared a 'habitual criminal'. (This means they keep committing crimes and because of this, was sentenced to 10–15 years in prison.)
- One partner deserted the other
- One partner abused the other, for example, the husband keeps assaulting the wife
- One partner is an alcoholic or a drug addict
- The partners no longer love each other – they may be too different, or they married when they were too young
- One of the partners finds it impossible to live together as husband and wife for any other reason

MENTAL ILLNESS OR UNCONSCIOUSNESS

The person wanting the divorce must show the court that the other spouse was admitted to or detained in a mental institution. The person must also show that the spouse has been in the institution for at least two years and that the doctors do not think they can be cured.

A person can also get a divorce if the other spouse is permanently unconscious. The spouse must have been unconscious for at least 6 months, and the doctor must see no hope of recovery.

Ending an African customary marriage

Customary marriages can only end if there is a court order. The same grounds for divorce that apply for civil marriages now apply to customary marriages. In other words, if the court agrees that there has been an 'irretrievable breakdown' of the marriage, then it will agree to dissolve the marriage. The spouses are free to settle on any terms they choose, but the court will make an order regarding the custody and guardianship of any minor children and may make an order for maintenance to be paid, taking into account any arrangement that may have been made in terms of customary law.

CUSTOMARY PRACTICES

Lobolo plays an important role in Customary law. Lobolo is a negotiated sum of money that the groom pays to the bride's family. This payment is done in good faith and is an indication that the groom will be able to provide a good life for the bride and that the bride will be a good wife to the groom.

If the customary marriage ends, the husband may, on certain grounds, claim the return of part or all of his lobolo from the wife's family. As there are many African traditions in South Africa, the grounds for the return of lobolo might vary from tradition to tradition.

Possible grounds on which the husband can claim lobolo:

- If the wife absconds for no reason
- If the wife cannot have children
- If the wife neglects her household duties and neglects the children

Possible grounds on which a husband cannot claim the return of lobolo:

- If the husband publicly rejects his wife for no reason
- If the husband and husband's family accuse the wife of witchcraft
- If the husband abuses the wife
- If the husband abandons the wife

When the parties apply to the court for a divorce, and there is a dispute regarding the return of lobolo, the parties can ask the court to assist, or the parties can approach the Community courts and courts of Chiefs and Headmen. It is likely that a claim for the return of lobolo, without approaching the court for divorce first, would be subject to challenge on a number of grounds, the most important being that the court would not have jurisdiction to grant an order that is equivalent to dissolving a marriage.

Ending a Muslim or Hindu marriage

ENDING A MUSLIM MARRIAGE

The *Divorce Amendment Act (No. 1 of 2024)* provides for the recognition and protection of Muslim marriages in South Africa. It integrates specific provisions for Muslim marriages into the *Divorce Act* and addresses issues that were lacking for Muslim marriages. Key changes introduced by the *Divorce Amendment Act* and their implications for Muslim couples include:

- **Definition of Muslim marriages:** A Muslim marriage can now be ended by a court order, just like any other marriage. This gives Muslim couples access to the same legal procedures and protections when they are ending their marriage.
- **Maintenance and care of children:** The Act gives courts the power to make orders regarding the maintenance, care, guardianship or contact with children from Muslim marriages. Courts can now make fair and just decisions

about child custody, care and support, allowing Muslim parents to seek legal support when needed.

- **Redistribution of Assets:** The Act allows for the redistribution of assets if a Muslim marriage is dissolved. The courts can order assets to be transferred between the parties, taking into account their direct or indirect contributions to the maintenance or increase of the estate during the marriage. This supports a fair division of marital assets.
- **Forfeiture of patrimonial benefits:** Courts can order a party in a Muslim marriage to forfeit or lose their benefits if this is just and equitable. The courts will consider the duration of the marriage, the circumstances that led to its breakdown, and any misconduct by either party when making the decision.

The *Divorce Amendment Act* applies to all existing Muslim marriages or Muslim marriages that are in the process of being terminated.

ENDING A HINDU MARRIAGE

If a man and woman were married by a priest in the Hindu religion, but they did not also have a civil marriage, the law says they were not lawfully married. So, they don't need to use the court if they want to get divorced. The current law does not protect Hindu women and children born into such marriages if they dissolve.

The Family Court

The Family Court combines issues of maintenance, Children's Court matters, guardianship, parental rights and responsibilities relating to custody and care, and domestic violence. ***(See pg 547: Custody, guardianship and support of the children)***

All Regional Courts are now Family Courts. One of the purposes of the Regional Court is to make it easier and cheaper for people to get a divorce. In the Regional Court people can choose not to have an attorney or advocate to represent them. The procedures used in the Regional Court are simple and cheap (if no lawyers are used). ***(See pg 564: Problem 1: Getting a divorce)***

A divorce can be finalised in a month if the parties have signed a settlement agreement at the outset, this is called a Consent Paper. However, if there are children, the Family Advocate who is appointed to look specifically at the needs of children in family matters, may become involved to make sure that the arrangements for the children are satisfactory.

If there are any disputes about the children or if they have any concerns about the arrangements proposed for the children in the summons, the divorce will take a bit longer

to finalise. It will also take longer if it is defended. ***(See pg 1077: Resources for Divorce Court Centres)***

Arrangements made at the time of divorce

When a couple gets divorced, they have to make a number of arrangements. The most important arrangements the couple must make are:

- Custody (now called care) of the children
- Access (now called contact with) to the children
- Maintenance of the children
- Maintenance for one partner, usually the wife
- Dividing up the family property

Care and maintenance of children are the most important things to arrange. A court will not let a couple get divorced until it is sure that there are satisfactory arrangements for the children.

CARE OF THE CHILDREN

This means the primary person taking care of the children. The law says that children must always have an adult to look after them. The court always takes into account the best interests of the children, not just the interests or wishes of the parents. So if the parents cannot agree on who should have care of the children, then the court looks to see which parent can best look after the children. The courts will ask the Family Advocate to hold an enquiry to see what would be in the best interests of the children who are under 18.

THE FAMILY ADVOCATE

The Family Advocate can look at guardianship and parenting agreements, which make provision for care and contact and other parental rights and responsibilities.

There is a Family Advocate's office in each division of the High Court. They assist the parties to come to an agreement that will be in the best interests of the child. If the parents are unable to agree they evaluate the case and make a recommendation based on the best interest of the child. The Family Advocate will then produce a report for the court. The Family Advocate's recommendations are not binding unless it is approved by the court. The Family Advocate cannot act for either of the parties, and they cannot be subpoenaed to court to be a witness for either party.

STEP-BY-STEP GUIDE TO USING THE FAMILY ADVOCATE

1. Either of the parties or the court can apply to the Family Advocate to hold an inquiry. So, for example, if the husband sues for divorce and asks for care of the children but the wife also wants custody, then either of them can complete an 'Annexure B' form, which asks the Family Advocate to enquire into the problem. You can get an 'Annexure B' form from the Registrar of the High Court, an attorney, Legal Aid or the Family Advocate's office.
2. The Family Advocate will interview the parties either together or separately, where necessary, to find out their personal circumstances and background details.
3. The Family Advocate also interviews the child with the assistance of the Family Counsellor to get the child's views on the matter. The aim is to protect the child from testifying in a potentially harsh court environment.
4. The Family Advocate helps the parties reach an agreeable solution through mediation.
5. If the parties reach an agreement, the Family Advocate will then help them draft a parenting plan or responsibilities and rights agreement, which can be registered with the Office of the Family Advocate or made an order of court.
6. If the parties cannot reach an agreement, the Family Advocate will then compile a report for the court and make a recommendation based on the enquiry that was conducted.

The Family Advocate does not charge the parent for holding the enquiry.

Divorces can take a long time. If one of the parties wants care of the children (for example, if the children are being threatened) while the divorce is happening, the party can make an application for interim care. This means asking the court for full-time care of the children until the divorce is settled. If the party is really worried that the children are suffering or if there is a threat that one of the parties is going to kidnap the children, the other party can make an urgent application for care and that any contact be supervised.

After the divorce, if the parent who doesn't have care of the children tries to take the children, the parent with care can ask the court for an interdict. This is an order for the parent to return the children.

In African customary marriages, the court also decides which parent should have custody and guardianship on divorce, based on the best interests of the children. The *Children's Act* and the *Maintenance Act* make provision for equal rights and duties of parents of children of religious marriages in terms of which the fact that the marriage is not legally recognised is not an issue. ***(See pg 547: Custody, guardianship and support of children)***

CONTACT WITH THE CHILDREN

The court usually gives the parent who does not have the children in their care a right to contact (this used to be called the right of 'reasonable access') with the children. The law aims to maximise the amount of contact children have with both parents. This is where the parents share time with the children without impacting their routine, which is in their interest. This usually means that the children spend at least every second weekend and every second long and short school holiday with the parent who does not have care of the children.

However, this arrangement may not be appropriate for very young children and depends on the circumstances. If the order does not specify how often and for how long the access should take place, then a parental plan must be drawn up. A parental plan is an agreement that specifies when a parent can have access to the child. The Family Advocate can assist the parents in drawing up a parental plan.

If the parent asking for care does not think the other parent should have unrestricted contact with the children, they can ask the court that contact be supervised or restricted. The parent with custody of the children must give good reasons why access should be restricted, for example, that the parent abuses the children or has a serious drinking problem and will not look after the children. That parent's access would then have to be supervised by the mother or another adult person.

Also, if one parent has contact rights, this does not mean that he has the right to see the children in the other parent's home. ***(See pg 547: Custody, guardianship and support of children)***

MAINTENANCE OF THE CHILDREN

Although maintenance for the children is paid to the parent who has care of the children, maintenance is a right that the children have, not the parent. Both parents have a duty to support their children, including illegitimate children (according to civil law). There is no longer a distinction made with children regarded as illegitimate.

When the court gives one of the parents custody, it usually also makes an order for the other parent to pay maintenance.

If a party does not pay maintenance for the children, even though the court has ordered this, then the other party can go to the Maintenance Court to have the order enforced. A maintenance order is an order of the court and so it is a criminal offence to break the order by not paying. ***(See pg 547: Custody, guardianship and support of children; See pg 572: Problem 5: Maintenance is not paid)***

MAINTENANCE FOR THE WIFE

Maintenance is often just called 'support'. In a marriage, both partners have a duty to support each other and any children. It is usually the woman who takes care of the home and children more than the man. So, the wife often cannot earn as much as the husband. Then the husband has a duty to support the wife and children with money to buy the things they need.

If they get divorced, the wife can claim maintenance for **herself** from the husband, at least until she finds a decent job. The court considers a number of factors to establish whether she can get spousal maintenance, like the duration of the marriage, whether she worked during the marriage, her age, what type of work she did/does, etc. She must always claim this money **at the time of the divorce.**

The wife and the husband can agree on what amount he will pay her. If they cannot agree, she should tell the court what amount she wants. If the court agrees that the wife should get maintenance, then the court will order the man to pay a specific amount. The woman can always ask the court to increase the amount later if her needs change.

If the wife earns more than the husband, he can apply for maintenance from her at the time of the divorce.

Although religious marriages are not legally recognised, the courts have acknowledged the duty to maintain, a spouse can claim for maintenance from her deceased's spouse's estate, claim interim maintenance pending divorce and maintenance during marriage where they were married according to religious rites.

DIVIDING UP THE FAMILY PROPERTY

This happens in different ways depending on how the marriage took place. ***(See pg 522: Marriage)***

If the couple were married in community of property:

The joint estate is divided into two equal parts, which includes both assets and liabilities (debts). One half belongs to the husband and the other to the wife. If they cannot agree on how to share the property, the court must decide.

Non-Africans married before 1 November 1984 out of community of property:

Each partner keeps their own property. They also take any property that the ante-nuptial contract says they must get. The court can give the wife a share of the husband's property if she helped financially to bring up the children or supported the husband in other ways.

Africans married before 2 December 1988 out of community without an ante-nuptial contract:

Each partner keeps their own property. The court can give the wife a share of the husband's property if she helped bring up the children or supported the husband in other ways.

Non-Africans married after 1 November 1984, and Africans married after 2 December 1988 out of community of property with an ante-nuptial contract which KEEPS IN the accrual system:

Each partner keeps their own property which they brought into the marriage. Any increase during the marriage in the value of either partner's property is shared equally between them.

Non-Africans married after 1 November 1984, and Africans married after 2 December 1988 out of community of property with an ante-nuptial contract which EXCLUDES the accrual system:

Each partner keeps their own property. They also take any property that the ante-nuptial contract says they must get. The court has no discretion to order that one spouse shares the property of the other spouse.

HOUSING

A big problem for women is that they might lose their houses when they divorce. There are some things women can do to make sure that they and their children have a place to stay.

BOUGHT HOUSES

When a couple buys a house it is a good idea to have the house put in both names. If married in community of property, the house has to be registered in both names. In a divorce situation, it is important that the person who has care of the children is given the sole right to stay in the house until the children are grown up and that, at that stage, it be sold and the profits

divided between the two parties. Alternatively, the person who is the primary carer of the children keeps the house instead of sharing in some other assets such as a pension fund interest. If the parent with only contact rights keeps the house, then the other parent (who has care) should ask to be paid out half the value of the house. Alternatively, the house can be sold and profits shared in half.

In the case of *Solarie v City of Cape Town, Cape High Court number 26186/09*, Ms Solarie challenged the former housing policy of the City of Cape Town to register houses in the name of the husband only when spouses married according to Muslim rites applied for housing as a couple. She argued that this position clearly discriminates against women on the basis of gender and religion. The Court held that the policy was inconsistent with the Constitution, as it unfairly discriminated against women and limited women's ownership of property and constitutional right to access to land. The policy created additional criteria for women to become property owners, made them vulnerable to eviction, and did not protect their right to security of tenure. The Judge also found that the agreement, which gave the ex-husband the sole right to ownership of the property, was contrary to the values enshrined in the Constitution and, therefore, could not be enforced.

RENTED HOUSES

If you are renting a house and you get divorced, you can ask your landlord to put the house in your name. The landlord will want to make sure that you have enough money to pay the rent, for example, that you have a job. If you are renting from a local council, it is a good idea to get the house put into your name.

Care and protection of children

This section deals with the laws that apply to child care and protection.

Laws that apply to child care and protection

- Age of Majority Act (No. 57 of 1972)
- Child Care Act (No. 74 of 1983)

- Children's Status Act (No. 82 of 1987)
- Guardianship Act (No. 192 of 1993)

However, over the past years, it has become clear that these laws are not sufficiently able to protect and support children. As a result of a long process of consultation, the *Children's Act* (No. 38 of 2005) and the *Children's Amendment Act* were passed.

The Children's Act and Children's Amendment Act

On 1 April 2010, the *Children's Act 38 of 2005* (*as amended by the Children's Amendment Act 41 of 2007*) and the Regulations came into full force. The purpose of this Act is to:

- Give effect to certain rights of children as contained in the constitution
- Set out principles relating to the care and protection of children
- Define parental responsibilities and rights; to make further provision regarding Children's courts
- Provide for partial care of children
- Provide for early childhood development
- Provide for the issuing of contribution orders
- Provide for prevention and early intervention
- Provide for children in alternative care Provide for foster care
- Provide for child and youth care centres and drop-in centres
- Make new provision for the adoption of children
- Provide for inter-country adoption
- Give effect to the Hague Convention on inter-country adoption
- Prohibit child abduction and to give effect to the Hague Convention on International Child Abduction
- Provide for surrogate motherhood, and
- Create certain new offences relating to children and to provide for matters connected therewith

In summary, the Act makes, inter alia, provision for the following:

- The Act sets out principles relating to the care and protection of children and defines parental responsibilities and rights. The best interests of the child are a key consideration in determining disputes with regard to parental responsibilities and rights.
- The Act also contains provisions on the parental responsibilities and rights of unmarried fathers relating to access to the custody of their children. The Act aims to give unmarried fathers the same rights to parental responsibility that biological mothers have. For example: unmarried fathers who are living with the mother of

their child at the time of the birth of the baby have the same rights as the biological mother. Additionally, if the father is not residing with the mother at the time of the baby's birth, he can apply for his rights by giving consent to be identified as the child's father.

- The Act makes provision for children's courts, adoption, child abduction and surrogate motherhood.
- The Act determines that a child becomes a major on reaching the age of 18 and allows children over the age of 12 access to HIV testing and contraceptives.
- The Act now allows for what is known as open adoption so the adoptive family and the biological family can enter into an agreement which caters for the rights of the child and the biological family to know each other.
- The Act also deals with child trafficking, virginity testing and circumcision.
- The Act enables children to approach the court independently of a parent or guardian.
- The Act makes provision for the development of a National Child Protection Register. This register lists the names of people who are unsuitable to work with children as well as all reports of abuse or deliberate neglect of a child made to the Director-General in terms of this Act and all convictions of all persons on charges involving the abuse or deliberate neglect of a child.

Summary of the Children's Act

The chapters in the Children's Act are as follows:

- **Chapter 1:** Interpretation, objects, application and implementation of the Act.
- **Chapter 2:** General principles underlying the Bill and the best interest of the child; it provides for children's rights and deals with issues such as child participation, harmful social, cultural and religious practices, access to children's courts and the age of majority.
- **Chapter 3:** Parental responsibilities and rights and court orders linked to parental responsibilities and rights; this chapter also provides for the rights of fathers, presumption of paternity, parenting plans and the rights of children conceived by artificial fertilisation.
- **Chapter 4:** The functioning, powers and jurisdiction of children's courts and proceedings before the children's courts.
- **Chapters 5, 6, 11, 13 and 14:** Partial care, the definition of early childhood development and early childhood development services, children in alternative care, child and youth care centres and shelters and drop-in centres.

- **Chapters 7, 9 and 10:** Protection of children, the National Child Protection Register and the identification of children in need of care and protection and contribution orders.
- **Chapter 8:** Provides for prevention and early intervention as a first layer of services provided to children and families in need of assistance.
- **Chapter 12:** Foster care and care by family members.
- **Chapters 15 and 16:** Adoption and adoption between countries.
- **Chapter 17:** Gives effect to the Hague Convention on the Civil Aspects of International Child Abduction.
- **Chapter 18:** Gives effect to the UN Protocol to Prevent Trafficking in Persons.
- **Chapter 19:** Surrogate motherhood.
- **Chapter 20:** Enforcement of the Act through powers of inspection and the creation of offences.
- **Chapters 21 and 22:** General administrative issues and other matters

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Overview of important sections of the Children's Act

All spheres of government and their departments must work together to deliver services

The Act requires all spheres of government and their departments to work together in an integrated and coordinated way to deliver services to children. This means there is a duty for national, provincial and local governments to work together to ensure that services are provided to children.

The Act brings together all laws relating to children in South Africa and does away with the need for each province to pass its own legislation on children's issues. It should, therefore, streamline provincial governance. This Act does not, however, have any direct implications for local government.

RIGHTS OF CHILDREN WITH DISABILITY OR CHRONIC ILLNESS

Special care must be taken of a child with a disability or chronic illness by:

- Providing the child with parental care, family care or special care
- Making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have (for a disabled child)
- Providing the child and the child's caregiver with the necessary support services
- Providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.

BEST INTERESTS OF THE CHILD

The principle of the best interests of the child must always be considered when making decisions about children. Some of the factors that should be taken into account include:

- The nature of the personal relationship between the child and the parents or caregiver
- The attitude of the parents towards the child
- The capacity of the parents or care-giver to provide for the needs of the child, including emotional and intellectual needs
- The possible effect on the child of any change in the child's circumstances, including being separated from both or either of the parents, any brother or sister or other child, or any other care-giver or person, where the child has been living with the person
- The practical difficulty and expense of a child having contact with the parents regularly
- The need for the child to remain in the care of their parent, family and extended family; and to keep a connection with the family, extended family, culture or tradition
- The child's age, maturity, stage of development, gender and background
- The child's physical and emotional security
- Any disability that a child may have
- Any chronic illness that a child suffers from
- The need for a child to be brought up in a stable family environment and, where this is not possible, in an environment that is as close as possible to a caring family environment
- The need to protect the child from any physical or psychological harm that may be caused by exposing the child to maltreatment, abuse, neglect, exploitation, degradation, violence, or any other harmful behaviour
- Any family violence involving the child or a family member of the child.

RIGHT OF PARTICIPATION

All children have a right to participate in decisions that affect them.

AGE OF MAJORITY

The age of majority is 18 years.

PROTECTIVE MEASURES RELATING TO THE HEALTH OF CHILDREN

Children over the age of 12 years can consent to HIV testing without involving their parents. Children over the age of 12 years can ask for contraceptives without the consent of their parents or care-giver.

Custody, guardianship and support of children

Parents have custody and guardianship of their children, and a legal duty to support them.

Custody or care

Custody or care means:

- Providing a home for the children
- Feeding and supporting the children
- Looking after the day-to-day needs of the children
- Educating the children

When parents are married and live together, they share the custody/care of the children. When they separate or divorce, the court usually gives custody to one parent, either the father or the mother. Often, the mother gets custody, and the mother and father have joint guardianship of the children.

Guardianship

In terms of the *Children's Act*, a person who acts as a guardian must:

- Administer and safeguard the child's property and property interests
- Assist or represent the child in administrative, contractual and other legal matters
- Give or refuse any consent required by law in respect of the child, including:
    - Consent to the child's marriage
    - Consent to the child's adoption
    - Consent to the child's departure or removal from South Africa
    - Consent to the child's application for a passport; and
    - Consent to the sale of any immovable property of the child

The parents are usually joint guardians and are called the 'natural guardians'. A natural guardian has a duty to support their children. If for some reason the natural guardian cannot carry out their duties, the court appoints a 'legal guardian' for the children.

NOTE

The Guardianship Act (No. 192 of 1993) is repealed by the Children's Act.

The duty to support children

Both parents have a legal duty to support their children. Where children are not given reasonable care, then the court may remove the child from the parent's care in terms of childcare provisions.

The duty of parents to support their children ends when the children become independent, for example, when they marry or when they become self-supporting.

If the children are not living with the mother or the father, the person who is looking after them can apply for maintenance from the parents. For example, if a child is living with the grandparents, the grandparents can apply to get maintenance from the father and the mother of the child. ***(See pg 570: Problem 4: Getting maintenance through the Maintenance Court)***

STATE CHILD SUPPORT GRANTS

Apply to the Department of Social Development (the SASSA offices) for these grants. The parents will have to go through a means test to qualify for Child Support or Care Dependency Grants.

- **Child Support Grant:** Any parent or whoever is looking after a child can apply for financial help if they cannot afford to support the child. You can apply for this grant for any child who is 0-17 years old.
- **Foster Care Grant:** This is for children who are placed in the care of foster parents by the Children's Court because they are considered to be children at risk. The foster parent is not the biological parent of the child.
- **Care Dependency Grant:** You can apply for this if you support a child who is severely disabled and needs special care. ***(See pg 482: Child Support Grant; See pg 484: Foster Care Grant; See pg 486: Care Dependency Grant)***

Parental responsibilities and rights

When people become parents they have legal responsibilities and rights in respect of their children. Parents must give their children enough support to live at the same standard of

living as the parents. This duty continues until the children are self-supporting. This support includes food, clothing, housing, medical and dental expenses, and education. Children are minors until they reach the age of 18.

GENERAL PARENTAL RESPONSIBILITIES AND RIGHTS

The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to:

- Care for the child
- Maintain contact with the child
- Act as guardian of the child
- Contribute to the maintenance of the child

PARENTAL RESPONSIBILITIES AND RIGHTS OF MOTHERS

The biological mother (in other words, the person who gave birth to the child) of a child, whether married or unmarried, has full parental responsibilities and rights with respect to the child.

PARENTAL RESPONSIBILITIES AND RIGHTS OF MARRIED FATHERS

The biological father (in other words, the physical father) of a child has full parental responsibilities and rights with respect to the child if:

- He is married to the child's mother, or
- He was married to the child's mother at the time when the child was conceived (in other words, when the mother fell pregnant) or at the time of the child's birth; or any time between these events.

PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS

Unmarried fathers have full parental responsibilities and rights with respect to the child:

- If, at the time of the child's birth, he is living with the mother in a permanent relationship
- Even if he is not living with the mother or has never lived with her, he:
    - Is identified as the child's father or pays damages in terms of customary law
    - Contributes or has tried to contribute to the child's upbringing for a reasonable period
    - Contributes or has tried to contribute towards the child's maintenance for a reasonable period.

However, this does not affect the duty of a father to contribute towards the maintenance of the child.

If there is a dispute between the unmarried father and the mother of a child regarding any of these conditions, the matter must be referred for mediation to a family advocate, social worker, social service professional or any other qualified person.

Any party to the mediation can ask a court to review the outcome of the mediation.

This section applies regardless of whether the child was born before or after the Act was passed.

The *Natural Fathers of Children Born out of Wedlock Act (No. 86 of 1997)*, which gave unmarried fathers the right to go to court to ask for access, custody or guardianship of their children, has been repealed by the *Children's Act*. The Act no longer makes a distinction between illegitimate and legitimate children.

PARENTAL RESPONSIBILITIES AND RIGHTS AGREEMENTS

The mother of a child or any other person who has parental responsibilities and rights in respect of a child can enter into an agreement with:

- The biological father of a child who, for some reason, does not have parental responsibilities and rights with respect to the child, or
- Any other person who has an interest in the care, well-being and development of the child.

A parental responsibilities and rights agreement must be registered with the family advocate or made an order of the High Court, a divorce court in a divorce matter or the children's court.

Before registering a parental responsibilities and rights agreement or making it an order of court, the family advocate or the court must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

Children of African customary unions

If a couple was married by African customary law, but they did not also have a civil marriage, the law says the children are legitimate. The natural father has rights over his children and a duty to support them. The *Children's Act* gives parental responsibilities and rights to all fathers if certain specified conditions are present, whether they are married or not.

Children of Muslim or Hindu marriages

If a couple was married by religious rites only (i.e. by an Imam in the Muslim religion, or a priest in the Hindu religion), they used to be considered to be illegitimate. However, under the *Children's Act*, it removed the status of calling children illegitimate. Both parents have a legal duty to support them. In terms of the *Children's Act*, whether fathers are regarded in law as married or unmarried, they automatically have parental responsibilities and rights if certain specified conditions are present. ***(See pg 548: Parental responsibilities and rights; See pg 549: Parental responsibilities and rights of unmarried fathers)***

Adoption of children

NOTE

The Children's Act deals with adoption as well as inter-country adoptions. The sections in the Act on adoption came into force on 1 April 2010.

Adoption is a legal way for an adult single person or a married couple to become the legal parents of a child. The Constitutional Court has decided in *Du Toit and Another v Minister of Welfare and Others* 2003 (2) SA 198 (CC) that the *Child Care Act* was unconstitutional in not providing for partners in same-sex life partnerships to adopt children jointly.

Adoption usually takes a long time. Parties must apply to the Children's Court for an order of adoption under the *Child Care Act*.

A child who is adopted must be under 18. A child can be adopted:

- Jointly by a husband and wife
- By a widow or widower or an unmarried or divorced person
- By a person who married the natural parent of the child
- By the natural father of a child born out of wedlock
- By a couple in a same-sex life partnership
- By the foster parent of the child

CONSENT TO ADOPTION

Proper consent (permission) is needed to make an adoption order legal. Consent is written permission that is given to people wanting to adopt a child. Consent can be

given by the parents, the guardian of the child or the child. A child older than 10 years can consent to their own adoption.

LAWS ON ADOPTION

Adoption laws in South Africa are outlined by the *Child Care Act of 1983*, which requires social workers and adoption agencies to 'give due consideration' to language, religion and culture when matching prospective parents with children. A child who is to be adopted must be under the age of 18 years and must be legally free to be adopted. This means that the biological parents of the child must either consent to the adoption or have had their parental rights terminated by a court. In some cases, a child may be placed for adoption by a children's home or other institution.

CONSENT TO ADOPT

A child whose parents are both dead is available for adoption. Where the parents are alive, they must both consent to the adoption.

CHILD BORN OUT OF MARRIAGE

In the case of the child born out of marriage, consent must be given by both the mother and the natural (birth) father, provided that he has acknowledged himself in writing to be the father of the child and has made his identity known on the child's birth certificate. Where only one parent has given consent, the commissioner will issue a notice to be served on the natural father within 14 days, informing them of the consent that has been given, and giving them the opportunity to also give or withhold consent.

The Children's Court does not need to issue a notice of an intended adoption of a child born out of marriage if the commissioner is satisfied that the natural father:

- Deserted the child and/or no one knows where he is
- Did not acknowledge that he was the father of the child or has failed without good reason to carry out his parental duties with regard to the child
- Was in an incestuous relationship with the mother of the child, and the child was conceived as a result of this
- Was convicted of the crime of rape or assault of the mother
- Was, after an inquiry by the Children's Court following an allegation by the mother of the child, found on a balance of probabilities, to have raped or assaulted the mother

WHO CAN ADOPT A CHILD?

- A married couple can jointly adopt a child
- Partners in a life partnership (including same-sex partners) can jointly adopt a child
- A person who has married the natural parent of a child can adopt the child (adoption of a step-child)
- A single person (a widow or widower or an unmarried or divorced person) can adopt a child as a single person if they get the consent of the Minister

WHEN IS CONSENT NOT REQUIRED?

Consent is not required when:

- The parents of the child have died, and no guardian has been appointed for the child.
- The parent:
    - Is not competent to give consent as a result of mental illness
    - Has deserted the child and it is not known where the child is
    - Has physically, emotionally or sexually assaulted, ill-treated or abused the child or allowed assaults or ill-treatment
    - Has caused or assisted in the seduction, abduction or sexual exploitation of the child, or has caused or helped the child to commit immoral acts
    - Withholds consent unreasonably
    - Of a child born out of marriage has failed to acknowledge himself as the father of the child or, for no good reason, did not fulfil parental duties about the child
    - Is the father of a child who was born out of marriage and was conceived in an incestuous relationship with the child's mother
    - Is the father of a child who was born out of marriage, and was convicted of the crime of rape or assault of the mother of the child
    - After an enquiry by the Children's Court following an allegation by the mother of the child, found (on a balance of probabilities) to have raped or assaulted the mother of the child: provided that such a finding does not constitute a conviction for the crime of rape or assault
    - Of a child who was born out of marriage has failed to respond within 14 days

NOTE

A parent of the child who has consented to the child's adoption has the right to withdraw consent within 60 days of giving the consent.

CASE STUDY

FRASIER VS CHILDREN'S COURT, PRETORIA NORTH

Lawrie Frasier had a child with his partner. They were not married. By the time the baby was born, the couple had separated. The mother of the child arranged for the child to be adopted by people that the father did not know and without getting his consent to the adoption. She also didn't ask him whether he wanted to look after the child.

Mr Frasier claimed he had rights as the father of the child even though they weren't married. But the Child Care Act said a mother didn't need to get permission from the father of an illegitimate child. If they had been married, then she would have to get his consent. As a result of this case going to the Constitutional Court. the Child Care Act was changed and the Natural Fathers of Children Born out of Wedlock Act was passed. **(See pg 549: *Parental responsibilities and rights of unmarried fathers*)**

The law regards an adopted child exactly **as if** they are the legitimate natural child of the **adoptive** parents. So there are the same rights and duties, for example the duty of support. All rights and duties between the child and its **natural** parents end.

Illegal adoption, for example, paying to adopt a child, is a criminal offence. **(*See pg* 568: *Problem 3: Adopting a child*)**

THE ADOPTION PROCESS

The adoption process consists of an assessment by a social worker, a police clearance, and a court application. This will usually need the support of an adoption lawyer.

Child abuse and neglect

The Constitution guarantees that everyone has the right to be free from all forms of violence in the home. The government and the police have a duty to protect children and implement measures that will prevent abuse of children in the home. For example, the police have established *Family Violence, Child Protection and Sexual Offences Units* (FCS), which investigate physical and sexual abuse of children and child neglect. They are specially trained to deal sensitively with children.

Laws protecting abused and neglected children

There are laws that provide specific protection for children who are abused. The most important Acts that deal with the protection of children who are or have been abused or neglected are the *Children's Act* and the *Children's Amendment Act*. There are wide-ranging provisions that include the provision of child protection services and keeping a National Child Protection Register. The Acts also make provision for children who are in need of care and protection. ***(See pg 544: Summary of the Children's Act)***

The main laws that aim to protect abused and neglected children are as follows:

- The *Children's Act* says that it is a criminal offence:
    - If a parent, guardian, or other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person abuses or deliberately neglects the child, or abandons the child.
    - If a person who is supposed to maintain a child doesn't provide the child with clothes, lodging and medical care.
    - The *Domestic Violence Act* defines the different forms of domestic violence against adults and children and says how a child (or other people on behalf of the child) can get a Protection Order against the abuser. ***(See pg 592: Domestic Violence Act (No. 116 of 1998))***
- The *Criminal Law (Sexual Offences and related matters Amendment Act (No. 32 of 1996)* gives a new definition of rape and includes a sexual offences register.
- The *Films and Publications Act (1996)* protects children from exploitation in child pornography and by being shown pornographic material.

- Criminal law allows a child who was abused to lay a charge against the abuser, for example, of assault, rape and assault with intent to do grievous bodily harm. **(See pg 203: *Criminal charges*)**
- The *Basic Conditions of Employment Act* makes it illegal to employ a child under the age of 15 years.

Reporting child abuse

Many children don't report the abuse they are experiencing. There are many different reasons for this. But the law says that people must report child abuse, and it is a criminal offence not to report in these circumstances. This law is in terms of the *Children's Act*.

The *Children's Act* says any doctor, nurse, teacher or person managing a children's home or place of care must report any suspicion of child abuse in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

Stopping child abuse using the Domestic Violence Act

The *Domestic Violence Act* covers domestic violence, sexual abuse, economic abuse and emotional and psychological abuse. This Act covers people who have or had a domestic relationship - for example, children, partners, ex-partners, parents, etc.

The *Children's Act* says any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care must report child abuse immediately to the police or a designated child protection organisation. It is an offence not to report child abuse. **(See pg 592: *The Domestic Violence Act*)**

The following people can apply for a Protection Order under the *Domestic Violence Act* to stop someone from abusing a child:

- Family members
- Parents of a child or people responsible for a child
- A child under the age of 18, without the help of a parent or guardian

- Any person, including a health service provider, police officer, social worker, teacher, neighbour, friend, relative, or minister, who has a material interest (not just being a busybody) in a child's wellbeing

The *Domestic Violence Act* says if a person has a material interest in the wellbeing of a child and believes that the child (under 18 years) is being abused, they don't have to wait for the child to give consent to apply for a Protection Order, they can bring the application for the Protection Order themselves. It is enough if the person believes that the child is being abused. ***(See pg 605: Problem 3: Getting a Protection Order)***

Child sexual abuse

If a child has been raped or otherwise sexually assaulted, the criminal law can be used to lay a charge against the person who assaulted the child. During the criminal trial, it is sometimes difficult to prove 'beyond a reasonable doubt' that a child was sexually abused in order to convict the accused. If it is clear that the child needs protection, the case goes to a Children's Court enquiry to decide the best way of protecting the child. But the Children's Court may not try or convict a person in respect of a criminal charge and thus cannot prosecute the child abuser. ***(See pg 583: Rape, incest and indecent assault; See pg 601: Problem 1: Reporting rape or assault and going to court)***

If the person who sexually abused the child, lives or recently lived with the child, is a member of the child's family by blood or adoption or is or was a partner/spouse of the child's parent, you can use the *Domestic Violence Act* to protect the child. ***(See pg 605: Problem 3: Getting a Protection Order)***

THE SEXUAL OFFENCES ACT

The *Criminal Law (Sexual Offences and Related Matters) Act (No. 32 of 2007)* – also referred to as the *Sexual Offences Act* - defines a number of sexual offences in relation to children. Some of the most important provisions are as follows:

- Sexual exploitation of children (under the age of 18 years). The Act says that the following actions are offences in terms of sexual exploitation:
    - If a person uses a child to engage in sexual activities for money, even if the child consents to this
    - If a person offers the sexual services of a child to another person, with or without the consent of the child, for money or any kind of reward
    - If a person (who is a primary caregiver) allows another person to commit a sexual act with a child, even if the child consents;
    - If a person allows another person to commit a sexual act with a child, with or without the child's consent and is paid for this

- Displaying child pornography
    - If a person displays child pornography or pornography to a child, with or without the consent of the child, they are guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.
- Using children for child pornography
    - If a person uses a child, with or without the child's consent, for the purposes of creating, making or producing any image, publication, depiction or description of child pornography or assists in any manner in this regard is guilty of an offence of using a child for child pornography.
- Committing a sexual act with a child between 12 and 16 years
    - The age of consent to sex or sexual activity is 16 years
    - Children under the age of 12 are unable to consent to any sexual acts
    - Committing a sexual act with a child under the age of 12 years is statutory rape or sexual assault, even if the partner is a minor.
    - A person (over 18 years) committing a sexual act with a child that is 12 years or older but under the age of 16 is statutory rape, even with the child's consent. This amounts to a sexual offence, and the adult will face statutory rape charges.

The *Sexual Offences Act* (2007) and the *Sexual Offences Amendment Act* (2015) provide the following approach to consensual, underage sex between adolescents:

In terms of the *Sexual Offences Act*, consensual sex or sexual activity with children between the ages of 12 and 16 years was a crime and had to be reported to the police. This was challenged in court in the *Teddy Bear* case, which held that it was unconstitutional and caused more harm than good for children of these ages.

The Constitutional Court held that adolescents have a right to engage in healthy sexual behaviour, and that criminalising consensual sex or sexual activity between adolescents of 12 and 16 years violated their rights to privacy, bodily integrity and dignity. In response to this, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015* was passed. The amendments to the *Sexual Offences Act* mean that it is no longer a criminal offence for adolescents to engage in consensual sex with other adolescents if they are 12 years or older and under the age of 16 years. It will also not be a criminal offence if one adolescent is between the ages of 12 and 16 and the other is 16 or 17, provided there is not more than a 2-year gap between the two people. For example, a 13-year-old and a 15-year-old can legally have sex if it is agreed to by both partners and not forced in any way. However, if

anyone older than 16 years has sexual contact with someone younger than 16 years and the age gap is bigger than 2 years, they are committing statutory rape.

INCEST

The law says that people who may not get married to each other because they have a blood relationship or an adoptive relationship with one another also may not engage in acts of sexual penetration with each other. If they do, then they are guilty of the crime of incest.

The rules about incest are mostly the same as for rape. But the people involved are usually an adult and a child in the same family where the adult forces the child to have sex. According to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2021*, incest includes the act of sexual penetration or sexual violation where one of the parties is a child, and the action of the adult was so bad that even if there was mutual consent, the adult would be guilty of incest.

Removing children from abuse or neglect

The *Children's Act* is designed to look after the interests of children and protect them if their parents abuse or neglect them. The Act says police or a designated social worker can take abused or neglected children away from their homes to a 'place of safety' without a court order in certain circumstances. The Children's Court will hold an enquiry to decide whether the parents or guardians are fit to have custody of the child. The court says they are unfit if they:

- Are so mentally ill that they cannot provide for the child
- Assaulted or ill-treated the child or allowed someone else to assault or ill-treat the child
- Let the child commit crimes or be seduced, kidnapped, or used as a prostitute
- Do not support the child by providing maintenance
- Neglect the child or let someone else neglect the child
- Cannot control the child, for example, to make sure they go to school regularly
- Abandoned the child
- Do not seem to have any means of support

If the court finds that the child has **no** parent or guardian, or an **unfit** parent or guardian, then the court can say the child must go to a foster home or a children's home. Or the court can say the child must go back to their parents, and the parents must follow any conditions the court gives them, or they will lose the child. ***(See pg 195: Children's Courts)***

Foster care

The *Children's Act* deals with foster care. In terms of the *Children's Act*, a child is placed in foster care when the Children's Court makes an order that it is in the child's best interests of the child to be placed in foster care or when the provincial head of social development in the relevant province by order in writing transfers a child to foster care.

The foster parents' rights and responsibilities with regard to the child are set out in the Court Order made by the Children's Court or in a foster care plan made between the parents/guardian of the child and the foster parents. But the natural parents can visit their child at reasonable times, unless the court says they may not.

Foster parents have a duty to give the child food, clothing and education and generally promote the child's wellbeing.

Foster parents have the right to discipline the child. But they cannot deal with the child's property, consent to the child's marriage, consent to adoption, consent to the removal of the child from the country or consent to the application for a passport of the child unless they are entitled to act as guardian of the child and in such a case they must consider the views and wishes of the child, bearing in mind the child's age, maturity and stage of development. Foster parents can apply to the Department of Social Development for a state Foster Care Grant. ***(See pg 484: Foster Care Grant)***

Abortion

When may a woman have an abortion?

The *Choice on Termination of Pregnancy Act* says a woman can get a termination of her pregnancy:

- **In the first 12 weeks of pregnancy**
    - If she asks for one during this period
- **From week 13 up to and including week 20**, if a doctor, after consulting with the pregnant woman, thinks that:
    - The continued pregnancy would seriously affect the social or economic circumstances of the woman
    - The continued pregnancy would pose a risk of injury to the woman's bodily health or her mental health

    - There is a serious risk that the foetus would suffer from severe mental or physical abnormalities
    - The woman is pregnant from rape or incest
- **After the 20th week,** if a doctor, after consultation with another doctor or a registered midwife, thinks that:
    - The woman's life is in danger
    - The foetus would be severely malformed
    - There is a risk of injury to the foetus

Consent to an abortion

The termination of pregnancy can only take place once the woman has given her informed consent. No consent other than that of the pregnant woman is necessary for the termination of pregnancy unless she is so mentally ill that she doesn't understand what abortion is about or what happens as a result of an abortion, or she is continuously unconscious and therefore cannot give consent.

In the case of a pregnant minor (a person under the age of 18 years), a medical practitioner or a registered midwife must advise the minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated. However, if the minor chooses not to consult them, she is still allowed to have the abortion in terms of the Act.

A woman is entitled to counselling before and after the abortion. The counsellor may not force her, nor tell her whether or not she should have the abortion. ***(See pg 38: Bill of Rights, Section 12)***

Who may perform an abortion?

- In the first 12 weeks of pregnancy:
    - A registered midwife who has completed the prescribed training course
    - A doctor
- From week 13 to the end of the pregnancy:
    - Only a doctor

Government hospitals should provide facilities to carry this out.

Death

When a person dies, the family must report the death to the Registrar of Births and Deaths at the Department of Home Affairs. They must do this as soon as they can practically do so.

As soon as the Registrar is satisfied that everything is in order, they will give the family a burial order. This is a certificate that says the dead person can be buried. Usually, a burial cannot take place without a burial order.

The family must also report the death to the Master of the High Court within 14 days if the person who died left any property or left a will.

When people die, their belongings and property are given to people called their **heirs**. These are usually members of their family. The way this is done depends on whether or not the dead person left a **will**. A will is a document setting out how someone wants to share their property after death.

The property a dead person leaves is called an **estate**.

Dying without a will

When a person dies without leaving a will, the law says the person died **intestate**. The law of **intestate succession** is followed in dividing up their property.

If a married person dies intestate, their property is shared equally by the other spouse and their children, except that the spouse will get at least R250 000, so if the estate has less value than this, the children won't get anything.

There are complicated rules for deciding who gets the property if the dead person leaves no spouse or children. You should ask an attorney for advice on this. If the dead person leaves no blood relatives at all, the property will go to the government.

If a couple are married according to African customary law, the same intestate rules set out above will apply. They will follow the same intestate rules set out above.

DOMESTIC PARTNERSHIPS ('VAT EN SIT')

> There is a common misunderstanding that the law recognizes common-law marriages. Many people who have lived together for a period of time believe that they are entitled to a portion of what their partner owns. This is not true. It does not matter how long the parties have lived together there is no automatic legal protection for people who live together. If the people who live together are not

married to each other, the partners cannot inherit property from one another without a will. No valid marriage means no legal protection.

Domestic partners can apply to the court to have a universal partnership declared. This is not easy because the person seeking a universal partnership must prove to the court the contributions that they made to the deceased person's estate. A will is the best way for people in domestic partnerships to protect themselves.

Children born in domestic partnerships can claim maintenance from both parents.

Dying with a will

People need to make a will. In a will, people can say what they want to happen to their property after they die.

Any person over 16 can make a will, as long as they know and understand what they are doing. In a will, you can leave your property to anyone you wish – wives, husbands, children, relatives, friends or strangers. When you decide how to divide up your property, you must decide who will do this for you when you die. The person you choose is called an executor. If you don't choose an executor, the Master of the High Court will name someone executor, usually a member of your family.

You must make a will in writing. You can choose any two people older than 14 years as witnesses, but they must not be people that you left anything to in the will. You must initial the will on every page and, at the end, in the presence of the witnesses, sign in full. The witnesses must also initial on every page and sign in full at the end. ***(See pg 575: Example of a simple will)***

Winding up a dead person's estate

A member of the dead person's family or a close friend must report the death to the Master of the High Court within 14 days if the deceased person had any property or left a will. If they do not do this, it is a criminal offence. They must get a form called a **Death Notice** from the Master's office and fill it in. Anyone who has a copy of the will must also send it to the Master of the High Court.

The dead person's husband or wife, or nearest relative or close friend must also send an **inventory form** to the Master within 14 days of the death. This is a list of all the property that belonged to the dead person.

All this property is called the **estate**. The estate has assets and liabilities. Assets are all the things the person owns. Liabilities are the person's debts.

The dead person's estate does not go straight to the heirs. It first goes to the executor.

The executor must draw up an account, adding up all the person's assets. Then, the executor subtracts all the debts from this amount. The executor must pay any income tax the dead person owed and also pay the 'death duties' tax on the estate. The executor sends the account to the heirs and to the Master of the High Court. When the Master is satisfied and the debts are all paid, the rest of the property goes to the heirs.

If things are complicated, for example, if the estate cannot pay all the debts, the executor should consult an attorney to help.

If the dead person's property is worth less than R250 000, the Master may say an executor is not necessary and appoint a representative and issue a letter of authorisation to confirm their appointment. The Master then gives directions as to how the estate is to be dealt with and usually gives the dead person's husband or wife permission to keep all the dead person's property unless they leave a will giving it to someone else.

Problems

1. Getting a divorce

My husband and I want to divorce. Where do we start? How can we get help with attorneys, legal fees and so on? What steps must we follow to get a divorce?

WHAT DOES THE LAW SAY?

Divorce cases are heard in the High Court and in regional divisions of the Magistrate's Court. These are also called Family Courts. The regional courts hear divorce matters on certain days of the week. A divorce can be simple and cheap in a Family Court. This means that people wanting to get a divorce do not have to go to the cities to use the High Court to get a divorce. You can choose whether to do your divorce in the Family Court or the High Court.

WHAT CAN YOU DO?

Even when there is serious marriage trouble, the couple can sometimes avoid a complete breakdown. Before going to an attorney or the court for a divorce, the married couple could speak to a social worker or marriage guidance counsellor to see if they can solve their problems. Divorce is a last resort.

The Family Advocate helps the Regional Court or High Court with divorce cases where there are minor children involved.

The Family Advocate works together with family counsellors in divorce and similar cases. Their main role is to work out what will be the best arrangement for children when the parents want a divorce. The Family Advocate is important because it allows the two sides to meet together with an independent person to sort out differences in the arrangements for the children. If the case goes to court, then the Family Advocate will represent the best interests of the children in the trial. A divorce can be defended or undefended.

- A **defended** divorce means that one partner wants a divorce and brings the case to court, but the other partner does not want the divorce OR does not agree on how the property should be shared, or about the maintenance and custody arrangements. The other partner wishes to argue in court about these things. This is called defending the divorce action.
- An **undefended** divorce means the other partner agrees to the divorce AND agrees to the arrangements suggested by the divorcing partner. If a divorce is undefended, the cheapest and quickest way to get a divorce is to use the Regional Court. ***(See pg 536: The Family Court)***

If you cannot afford a divorce attorney, you can get legal aid if you qualify according to the means test. ***(See pg 257: Applying for legal aid; See pg 576: Model letter: Request for social worker's report to assist with application for legal aid)***

A wife who wants to divorce her husband but does not have enough money to pay for an attorney can ask her attorney to claim some money towards her legal costs from her husband. If she needs support for herself and the children, she can ask her attorney to claim maintenance from her husband. A woman can also claim maintenance at the Maintenance Court from a husband who deserted her and the children. She can do this without consulting an attorney. ***(See pg 537: Arrangements made at the time of the divorce)***

If the divorce is undefended and there are no complications, you can cut out legal expenses and do the divorce yourself. To do this, you should check with the Registrar of the High Court or Regional Court.

STEPS IN A DIVORCE ACTION

1. **CONSULTATION WITH AN ATTORNEY**
   The spouse (husband or wife) who wants the divorce takes their marriage certificate and goes to see a lawyer. The spouse explains why they want to get divorced. The attorney gives advice on whether there are proper legal grounds for divorce. You can also go to one of the volunteers at the Regional Family Court, and they will assist you in filling out the forms.

2. **SUMMONS**
   The attorney or divorcing spouse draws up a summons against the other spouse. This is a document which tells the other spouse about their right to defend the divorce. The Registrar of the Court issues (stamps) the summons.

3. **PARTICULARS OF CLAIM**
   The summons is attached to the Particulars of Claim. This document sets out the reasons for the breakdown in the marriage. It also sets out what the divorcing spouse claims, for example, custody of the children.

4. **NOTICE OF INTENTION TO DEFEND**
   The other spouse usually has 10 days to file (send to court) a Notice of Intention to Defend. If they do not do this within 10 days, the court sets a date for an undefended court hearing. If they do file the Notice within 10 days, then the spouses must send in their Pleadings. Pleadings are legal documents in which the husband and wife try to work out exactly what their claims and defences are.

5. **CONSENT PAPER**
   If the other spouse does not file a Notice of Intention to Defend or if the parties reach a settlement where they agree on what should happen to the property, children and maintenance, they can write their agreement down in a Consent Paper. Then, only the spouse seeking the divorce action has to go to the court hearing. Even if the divorce is defended at first, the parties can reach a settlement at any stage. They also write this down in a Consent Paper. Both the husband and wife sign the Consent Paper. When the divorce is granted, the magistrate makes the agreements in the Consent Paper an order of court. This means that if either person breaks the agreement on purpose, the court can send him or her to jail for contempt of court. Regardless of what the parties put in the consent paper, the court will make sure it is in the best interests of the children and ask for the recommendation of the Family Advocate.

6. THE COURT HEARING (TRIAL)

In an **undefended** case, only the spouse who seeks the divorce must attend the court hearing. The divorce only takes a few minutes.

If the case is **defended**, both spouses must attend the court. If the spouse bringing the action proves their case, the court will grant a Divorce Order and also an order about the marriage property, care and contact in relation to the children, and maintenance.

The court sends a copy of the Divorce Order to each spouse. At the Family Courts, the Divorce Order must be collected.

USING THE REGIONAL COURT

A person using the Regional Court does not need to have an attorney. A person wanting a divorce can go to the court and ask for assistance. An assistant will help complete the necessary forms. A summons will be issued and then served on the spouse.

The divorce will take longer to settle if:

- The other spouse chooses to defend the matter
- There are children, and this usually involves a Family Advocate.

If a couple doesn't have children, a divorce can be finalised in about two weeks if either of the parties does not contest it. They must both fill in a notice of non-defence. This only gets signed by the defendant when the summons is served on them. A date for the court appearance is then set. If one spouse refuses to sign the notice of non-defence when it is served with the summons but does not defend the matter, it can take about five weeks to finalise. However, certain courts are so busy that people sometimes wait longer than 6 months for a date for an undefended divorce. If the couple has children, the Family Advocate will be involved to ensure that the children's interests are seen to.

The costs of using the Regional Court are very low. Contact the Regional Court that is closest to you for information on up-to-date costs and procedures and times when they are open for divorce matters. ***(See pg 536: The Family Court)***

2. Entering into a civil union

Riana and Charlene, both South Africans, have a lesbian relationship and want to get married. Riana is 21 years, and Charlene is 25 years old. Riana has been married before but is now officially divorced.

WHAT DOES THE LAW SAY?

Riana and Charlene are not legally allowed to marry each other in terms of the *Marriage Act*. The *Civil Union Act*, however, allows them to enter into a civil union, which can be either a marriage or civil partnership. If they do this, they will get a certificate that indicates that they have either entered into a marriage or a civil partnership, depending on their choice. This registration certificate shows that the civil union has been registered under the *Civil Union Act* and is not a marriage certificate under the *Marriage Act*. The certificate will serve as legal proof that the two partners are married or have become civil partners.

Riana and Charlene will be able to register a civil union because (a) they are both over the age of 18 years, (b) while Riana was previously married, she is divorced and has divorce documents to prove this, and (c) both women are South African citizens.

WHAT CAN THEY DO?

Riana and Charlene can get married or enter into a civil partnership in terms of the Civil Unions Act at any public office, including the Department of Home Affairs and magistrate's court in their area, in any private dwelling, including their own home, or any other place that is used for marriages or civil partnerships.

They will need to supply the following documents:

- Identity documents (or an affidavit if an ID or passport is not available to confirm their identity
- Application forms specific to the *Civil Union Act* which can be obtained from the Department of Home Affairs in their area
- Riana's divorce documents

Finally, they will need to have two witnesses to the ceremony.

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3. Adopting a child

"My husband and I wish to adopt a child. What must we do to find a child to adopt? What are all the steps to follow before we can bring a baby home?"

WHAT DOES THE LAW SAY?

(See pg 551: Adoption of children, which briefly sets out the law about adoption)

WHAT CAN YOU DO?

There are many different places you can approach to adopt a child, for example, the Child Welfare Society in your area or voluntary or charitable adoption agencies.

STEPS IN AN ADOPTION

- Make an application for adoption at one or more adoption agencies.
- Social workers from the agency check that you are suitable people to be adoptive parents.
- If the agency finds a child, you must apply to the Children's Court in the district in which the child lives.
- The court holds a formal court hearing, which is not open to the public.
- The Commissioner of Child Welfare sits in the court. You must satisfy the Commissioner that you have a good reputation and are fit to have custody of the child. You must also show that you can support and educate the child.
- The social workers from the agency also make a report to the Commissioner, saying if they think you are suitable parents. The Commissioner **can** consider the religion, culture and race of the child's natural parents and its adoptive parents. BUT the Child Care Act **does not** say the Commissioner **must** match these matters. The welfare of the child is most important.
- The Commissioner must see a consent form signed by the natural parents. Usually your names as the adoptive parents are filled in on the consent form. But you can have a 'secret adoption'. This means the adoptive parents and the natural parents agree that the natural parents will not know the names of the adoptive parents.
- If the Commissioner is satisfied with everything, they give an **order of adoption**. This can happen months after you first apply to adopt a child.

CANCELLING AN ADOPTION

The natural parents, adoptive parents or the Minister responsible can apply to the Children's Court for a Rescission (an order cancelling the adoption) within two years of the date of the adoption if:

- The adoption is not in the interests of the child

- The child was mentally ill at the time of the adoption, and the adoptive parents did not know this
- There was some fraud or mistake that persuaded the adoptive parents to adopt the child
- The natural parents did not give proper consent

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4. Getting maintenance through the Maintenance Court

"I have two children of four and seven years. How can I get the father of the children to pay me support money for them?"

WHAT DOES THE LAW SAY?

Both parents have a legal duty to support their children, including children from unmarried fathers. This duty of support ends when the children become independent, for example, when they marry or when they become self-supporting. One parent can apply to the Maintenance Court for the other parent to pay support for their children. Once there is a court order instructing a parent to pay child support, it is a criminal offence not to pay. The parents have to pay in proportion to their income. ***(See pg 548: The duty to support)***

For children up to the age of 17, you can also apply to the Department of Social Development (represented by the South African Social Security Agency (SASSA) for a Child Support Grant if they comply with the means test. ***(See pg 482: Child Support grant)***

There are special Maintenance Courts at every Magistrate's Court. Maintenance clerks working in these courts help people who want to apply for maintenance and also deal with applications to get more or to pay less maintenance.

WHAT CAN YOU DO?

Check when applications can be made at the Maintenance Court, as some Maintenance Offices are only open on certain days of the week. These are the steps you must follow:

- Go to the Maintenance Office at the Maintenance Court in your area. Take with you:
    - The name and address of the father, as well as details of where he works
    - Photographs of the father (if available) so that the court can identify him
    - If you were married and are now divorced, a copy of the divorce order

    - Proof of your income (like a wage slip)
    - Your papers, receipts and accounts, showing all the things you must pay every month. ***(Se pg 578: Monthly expenses)***
- The maintenance officer sends a letter, called a **summons**, to the father, asking him to come to the maintenance office on a certain date.
- On the date, you and the father must go to the office. You must try to agree on how much the father must pay for his children.
- The maintenance officer will work out with you all the things you must pay for every month, how much money you earn and how much money the father earns. Then you can see how much you need from the father.
- It is important to get the court to make an order to do a paternity test if the father denies that he is the father.
- If you **agree** on how much the father must pay for his children, the maintenance officer will get both of you to sign a paper called an **order of cour**t. This states how much, when and where it must be paid.
- If you **do not agree,** then the officer will say your case must go to the **Maintenance Court** on a certain date. The court will warn both parties verbally of the date that they must appear in court.
- If the father does not come to court on the date that he was supposed to, and he has been properly informed, you can ask that a default order be made in his absence. Often, the court issues a warrant for his arrest instead of giving a default order, but it is better for you to get a default order. Otherwise, there is more delay in getting the maintenance.

If the father seems to have disappeared, then the court can order any person who knows where he is to come to the court and tell them where he is. It is the responsibility of the state to trace the father. However, this is very difficult, and it is a better idea to claim maintenance from the grandparents (this sometimes brings the father out of hiding!).

- At the maintenance enquiry in the court, the magistrate listens to both parties and finds out how much their income and expenses are every month. ***(See: Monthly expenses)***
- The magistrate then decides how much the father must pay for his children. The magistrate makes this amount pg 578t an order of court in writing. It is called a **maintenance order.** Then, the father must pay that amount every week or month to the maintenance office or into the mother's bank account.
- The court can also order a stop (debit) order to be put on the person's account without their consent or make an order that the employer deducts the money from an employee's salary.

- If the father is out of work, he will not have to pay maintenance straight away. The magistrate will tell him that he has a certain time, say three months, to look for work. He will be given a form to be signed by employers he has approached if they do not give him a job. The enquiry will then be postponed to a future date. Once he has got work, an enquiry will be held, and the magistrate will make an order. But if the father stays out of work a long time, and doesn't look hard to find work, the magistrate might send him to jail for not paying support. If the father stays out of work a long time, you can try claiming maintenance from the grandparents as they have a duty of support towards their grandchildren if the parents can't support the children.

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5. Maintenance is not paid

"I got a maintenance order against the father of my children. But he still doesn't pay support."

WHAT DOES THE LAW SAY?

- Go to the maintenance office and complain. It is important to make a formal complaint every time when the father doesn't pay.
- If the father is employed and fails to pay his maintenance, the mother must ask the court to make an order to get the maintenance deducted from the father's wage by the employer. This is called a garnishee order. The consent of the father is not required for a garnishee order, and the employer has a duty to obey the court order.
- If the father does not pay, he will be in **contempt of court,** which is a criminal offence. The police will give him a paper telling him he must come to court where he must explain why he did not pay the money. If he doesn't have a good reason, the court usually tells him that he must pay all the maintenance he owes, or he will go to jail.
- If maintenance is not paid, you can ask the court to issue a warrant of execution. This means the court orders the property of the father to be attached and sold to cover the cost of the maintenance. Complainants sometimes have to pay a fee towards the costs of the sheriff. This cost varies, but it can be recovered from the maintenance debtor in the end.

SOME MORE POINTS ABOUT MAINTENANCE

You can ask the maintenance court to make the maintenance amount **higher** even if the father is behind in his payments. You must show good reasons for needing more money. You can ask the court to make an order that the maintenance goes up automatically every year either by a set percentage, for example, 10% or by the official inflation rate. This means you won't have to go

back to court regularly just to keep up with the rising cost of living. There may still be other reasons to apply for an increase, for example, you lost your job, the father got a much better job or a child had unexpectedly high medical expenses.

The father can also ask the maintenance court to make the maintenance money **lower**. He must show the court that since the court order was made, he earns less money. Or he can show that the mother or children can now support themselves.

You **do not need an attorney** to get maintenance through the maintenance courts. So it does not cost you anything. But some people **want an attorney to help** them when they go to court. You can do this, but then **you have to pay the attorney.**

Legal aid will not help you get maintenance because you do not need an attorney.

Other points about maintenance are:

- If a man pays maintenance directly to the mother of his children, he should get a receipt from her to prove this
- A mother is also entitled to get back payments of maintenance and medical expenses during her pregnancy and during or after the birth of her child
- You are entitled to charge interest on any back payments of maintenance
- To prevent wasting time and travelling, you can telephone the maintenance office and ask whether your maintenance was paid or not

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6. Making a will

"I want to make a will, leaving small sums of money to my friend and to Child Welfare, and the rest of my estate to my wife. Should I consult an attorney? What should I say in my will?"

WHAT DOES THE LAW SAY?

Remember the will **must be in writing,** and it must be signed on each page by yo,u the testator (the person making the will), and by **two witnesses** who are not named in the will, all present at the same time. ***(See pg 563: Dying with a will)***

WHAT CAN YOU DO?

Making a will is very important. Unclear language in a will can cause problems. And if the legal requirements are not met, the Master of the High Court can ignore your will.

So it is best to consult an attorney or a bank if you want to make a will, or you can buy a will form from a stationery shop. A good attorney can draft a will that includes ways of saving tax when dividing up your estate. A bank may draw up your will without charging, if you are a client of the bank.

Your will can be simple, like the example below, or it can have detailed instructions. For example, it can say what must happen to everything you own and what must happen at the funeral. It can name someone to be the guardian of your young children.

If you want to leave something special to someone, for example, a sum of money to a charity or a book or watch to a friend, you can write this in your will. This is called a **legacy**. The rest of your estate, after legacies and debts are all paid out, goes to your **heir** or **heirs.**

You can write your will in handwriting as long as it is clear and neat. You can change it at any time. You and your witnesses must sign any changes you make. If there are big changes, it is best to make a new will. ***(See pg 575: Example of a simple will)***

EXAMPLE OF A SIMPLE WILL

LAST WILL AND TESTAMENT OF ROWAN DANIELS

of 42 Blouboom Drive, Blikkiesfontein, Gqeberha

I hereby cancel all previous wills made by me.

I appoint as Executor of my estate, my brother PETER DANIELS, of 12 Marais Street, Aurora, Gqeberha.

I bequeath the following legacies: to my friend, JOSEPH WITBOOI, R2,000 (two thousand Rand) and my books on motor mechanics. to Animal Welfare (W.o. 2345) the sum of R2,000 (two thousand Rand)

The rest of my estate I leave to my wife, SORAYA DANIELS (nee FREDERICKS), to whom I am married out of community of property by ante-nuptial contract. If she does not survive me, I leave the rest of my estate to our daughter, ELSIE DANIELS.

Should my wife die before me, or at the same time, and should our daughter at that time still be a minor, I appoint my brother, the said PETER DANIELS, to be her guardian.

SIGNED by Rowan Daniels, the testator of this will, in the presence of the undersigned witnesses who signed in presence of the testator and each other, all being present at the same time at Gqeberha this 5th day of August 20.....

.....
ROWAN DANIELS
Testator

As witnesses:

1. .....

2. .....

Model letter: Request for social worker's report to assist with application for legal aid

REQUEST FOR SOCIAL WORKER'S REPORT TO ASSIST WITH APPLICATION FOR LEGAL AID

Benoni Advice Centre
[Address and Telephone]
[Date]

The Social Worker
Child Welfare
[Address]

Dear Madam / Sir

SOCIAL WORKERS REPORT: MELANEY ROBERTS

We have been approached by the above person, who wishes to make an application for a divorce.

Ms Roberts intends to apply to the Legal Aid Board for financial assistance in obtaining this divorce and, therefore, requires a social worker's report.

We accordingly request that you interview Ms Roberts and draw up a social worker's report for her to submit with her application.

Yours faithfully,

.....
C QEGU
Advisor

Checklists

Marriage

- Were you married in a church or magistrate's office?
- Or were you married according to customary law?
- Did you sign an ante-nuptial contract with your partner before you got married?
- What was the date of your marriage?

Divorce

- Do you want to separate from your partner, or do you want to divorce your partner?
- What are your reasons for wanting a divorce?
- Do you have any children with your partner?
- Does your partner agree to the divorce?
- Can you afford to pay for an attorney to deal with your divorce?
- Do you want to apply for legal aid to pay for an attorney? ***(See pg 257: Applying for legal aid)***
- Has your husband treated you or your children cruelly or violently while you were married?
- If the children are being maltreated, have you reported the case to Child Welfare or the police?
- Does the father pay any maintenance for the children?
- What are the respective contributions of the parties, and do you want to apply for forfeiture of benefits or redistribution of assets?

Maintenance

- When were you married?
- Are you living together or apart?
- How many children do you have?
- Where does the father of the children live, and where does he work?
- Have you applied for maintenance to the maintenance court?
- Have you worked out what your living expenses are (SeeMonthly Expenses)

Child abuse and neglect

- Has the problem of abuse been referred to the nearest Child Welfare Society, a social worker or the police?
- Have you applied for a Protection Order under the Domestic Violence Act?

Monthly expenses

How to draw up a list of expenses when you apply for maintenance

When you are getting ready to go for maintenance from the father of your child or children, you should make a list of what you spend every month. On the next page is an example of a monthly expenses list as it should be set out for the court enquiry. (The explanation parts in italics are there to help you see what goes onto the list and why.)

This is a maintenance claim by Ruby Brown to get money from Jack Mhlope, the father of her daughter Thandi, who is 11 years old. Ruby has 3 other children who are not Jack's children, and her mother lives with them. Go through the example on the next page on how to ddraft an application for maintenance.

EXAMPLE: APPLICATION FOR MAINTENANCE: CASE NUMBER 276/2025		
Ruby must show how much she spends on Thandi every month. The Maintenance Court will only make Jack, Thandi's father, pay half of Thandi's expenses. So Ruby must exclude the expenses of her other children and her mother in her claim.		
	GENERAL What it costs Ruby for everyone	**THANDI**
RENT (R3 600 divided by 6 = R600 per person) 6 people live in the house (Ruby, mother, Thandi and 3 other brothers and sisters). A share for each of them is R700	R3 600	R600
ELECTRICITY/WATER Electricity account is usually R480 (R480 divided by 6 = R80 per person for 6 people)	R 480	R 80
FOOD Meat: R1 548 per month Bread and milk: R900 per month Vegetables, Groceries etc: R2000 per month *6 people live in the house. A share for each of them is R741.*	R 4448	R 741
SCHOOL Fees: R20 per term x 4 terms x 4 children = R320 per year Stationery and text books: R100 per term x 4 terms = R400 per year School dresses: R98 x 6 = R588 per year Shirts: 8 x R66 = R528 per year Trousers: 5 pairs x R84 = R420 per year Shoes: R118 a pair x 8 pairs = R944 per year Jerseys: R90 x 6 = R540 per year Socks etc: R130 per year Total: R3 870 per year *Ruby adds up how much she spends on all the children at school for the year. Remember there are 4 children but only Thandi is Jack's daughter. Then she divides by 12 to make that into a monthly amount.* *Then she divides that amount by 4 to get the total for each child per month and allocates a portion to Thandi in the expenses.*	R 322.50	R 80.62
CLOTHES Ruby: Truworths account R100 Children: Jet account R240 Children: Edgars account R180 All: Layby General Clothing Store R70 *Remember with this one that when Ruby works out what she spends on Thandi's clothes, she doesn't put in her own Truworths account.* *And where she spends only on the children, she must divide the total by the number of children she has (4) and for the lay-bys she divides it by all of them in the house (6).*	R 590.00	R 116.68
INTERESTS / HOBBIES Karate: Thandi, Robert, Kholeka R40 per month each	R 120.00	R 40.00

FURNITURE Elle Furniture Store: fridge R130 per month *6 people live in the house. A share for each of them is R21.66.*	R 130.00	R 21.66
MEDICAL All: R100 (generally 1 hospital visit per month each) Thandi: doctor once a month at R50 a visit Chemist account for all: R160 per month *Thandi has asthma and so she costs more in doctors and medicine every month. So R120 of the R160 chemist account every month is for Thandi.* *If Ruby was on medical aid and she paid, say, R200 per month for it, and it helped Ruby and her 4 children, then Jack should be made to pay for Thandi's share of the medical aid (R200 divided by 5 = R40).*	R 310.00	R 170.00
TRANSPORT Bus fares for school for 2 children: R500 per month *Train fares for Thandi + Ruby + one other child monthly tickets R600 per month*	R1 100	R 600
TOTAL EXPENDITURE PER MONTH	**R 11 100.50**	**R 2 449.96**
TOTAL EXPENSES FOR THANDI		**R 2 449.96**
TOTAL CLAIMED FROM JACK FOR MAINTENANCE OF THANDI		**R1224.98**
This will depend on what Jack earns and what his monthly expenses are. But Ruby should ask for at least half of what Thandi costs. *And if she knows that Jack earns a lot more than she does, Ruby should ask for more from Jack.* *Don't forget to put on your list any OTHER ACCOUNTS, EXPENSES or LOANS you might have.* Model prepared by Pat Anderson.		

Gender-based Violence

Introduction

This chapter looks at the law regarding sexual and domestic violence, including reporting sexual offences and how to get a Protection Order. Despite the National Strategic Plan adopted by the country in 2020 to address gender-based violence and femicide, the number of reported cases continues to rise. Between April 2022 and March 2023, there were 53 498 sexual offences reported to the SAPS, with rape accounting for 42 780 of these cases. It is very important for communities to understand the legal processes available to deal with GBV situations.

Rape, incest and sexual assault

The Sexual Offences Act

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act (No 32 of 2007)* – usually referred to as the *Sexual Offences Act* - has changed the definition of rape and various other offences linked to sexual violence. The objectives of the Act are to give victims of sexual offences the maximum and least traumatising protection that the law can provide and to introduce measures which will allow the state to give full effect to the provisions of this Act. The Act aims to do this by:

- Bringing together all matters and/or offences relating to sexual offences in a single Act
- Making all forms of sexual abuse or exploitation a criminal offence
- Replacing some common law sexual offences, such as incest, with new offences that will apply to both men and women
- Protecting complainants of sexual offences and their families from secondary victimisation
- Promoting the spirit of Batho Pele ('the people first') in respect of service delivery in the criminal justice system dealing with sexual offences
- Providing certain services to victims of sexual offences, including affording victims of sexual offences the right to receive Post Exposure Prophylaxis in certain circumstances
- Establishing a National Register for Sex Offenders

Rape

The *Sexual Offences Act* changed the definition of rape so that it now includes penetration of the mouth, anus and genital organs of one person with the genital organs of another person, penetration of the anus and genital organs of one person with any other body part of another person, or any object including any part of the body of an animal, or penetration of the mouth with the genital organs of an animal. In other words, if a man puts his penis into the mouth or anus of another person, male or female, without their consent, this will constitute rape under the law. This means men and boys may now file complaints of rape with the police. Under the old Act, rape was defined only as vaginal penetration and excluded anal and oral penetration. Perpetrators accused of anal or oral penetration were charged with indecent assault, seen as a lesser offence than rape.

The main issue that needs to be determined in a rape trial is whether the person gave their consent. If the person said 'yes' to sex, then the court will find that it was not rape. So, the prosecutor has to prove to the court that the person said 'no'. Often it is the complainant's word against the perpetrator's word because no one else saw the crime.

In terms of the *Criminal Law Amendment Act*, a minimum sentence of life imprisonment is prescribed in the following situations:

- The offender injured the victim, and grievous bodily harm was inflicted
- More than one man was raping (multiple offenders)
- The victim was raped several times by the same man (multiple rapes)
- The offender has more than two prior convictions for rape
- The offender has knowledge of their positive HIV/AIDS status
- The victim is under 16 years old, physically disabled or mentally ill

NOTE

Minimum sentences in terms of the Act are not mandatory, but the court will have to show that substantial and compelling circumstances existed, which is why the minimum sentence was not applied.

Rape carries a minimum sentence of 10, 15 and 20 years for first, second and subsequent offenders, as per the Criminal Law Amendment Act. ***(See page 601: Problem 1: Reporting rape or assault and going to court; See pg 605:: Problem 3: Getting a Protection Order)***

WHEN DOES A PERSON CONSENT TO A SEXUAL ACT?

A person consents to a sexual act when they willingly and without force or pressure engage in a sexual act with another person. A person can indicate that they do not want to engage in a sexual act verbally, through body language or in another way that tells the other person that they do not want to engage in the sexual act.

A person has not consented to a sexual act if:

- They agreed to a sexual act with somebody because they were afraid of what the other person would do if they did not agree to the sexual act. For example, the person threatens to hurt or harm children or kill the person if they do not engage in the sexual act
- They agreed to a sexual act but did not know that they were agreeing to a sexual act. For example, Mary agrees to allow a medical doctor to touch her breasts and vagina, not knowing that he doesn't need to touch her to find out whether she has a heart problem
- They are under the influence of drugs or alcohol
- They were unconscious or sleeping

WHO CAN CONSENT TO A SEXUAL ACT?

- Children under the age of 12 are unable to consent to any sexual acts. Committing a sexual act with a child under the age of 12 years amounts to rape or sexual assault, even if the partner is a minor. For example, if Nomphelo is 10 years of age and Sipho, who is older than 18 years, engages in a sexual act with her, he has committed a sexual offence.
    - Committing a sexual act with a child of 12 years of age or between the age of 12 and 16 years, **with the child's consent**, amounts to the offence of 'statutory rape' if the partner is older than 18 years. For example, if Grace is 14 years of age and agrees to have sex with Vuyo, who is older than 18 years, Vuyo has committed a sexual offence. The *Sexual Offences Act* (2007) and the *Sexual Offences Amendment Act* (2015) have provided for a change in the approach to **consensual, underage sex between adolescents** as follows:
        - Previously, in terms of the *Sexual Offences Act* (2007), consensual sex or sexual activity with children between the ages of 12 and 16 years was a crime and had to be reported to the police. This was challenged in court in the *Teddy Bear case*, which held that it was unconstitutional and caused more harm than good for children of these ages
        - The Constitutional Court held that adolescents have a right to engage in healthy sexual behaviour and that criminalising consensual sex or sexual

activity between adolescents of 12 and 16 years violated their rights to privacy, bodily integrity and dignity
    - In response to this, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015* was passed. These Amendments to the Act mean that it is no longer a criminal offence for adolescents to engage in consensual sex with other adolescents if they are 12 years or older and under the age of 16 years. It will also not be a criminal offence if one adolescent is between the ages of 12 and 16 and the other is 16 or 17, provided there is not more than a 2-year gap between the two people. For example, a 13-year-old and a 15-year-old can legally have sex if it is agreed to by both partners and not forced in any way. However, if anyone older than 16 years has sexual contact with someone younger than 16 years and the age gap is bigger than 2 years, they are committing statutory rape
- Committing a sexual act with a child of 12 years of age or between 12 and 16 years of age **without the child's consent** amounts to rape or sexual assault. For example, if Tania is 13 years of age and Benjamin forces her to have sex with him, Benjamin has committed a sexual offence
- Non-penetrative sexual acts (sexual violation) of a child of 12 years of age or between 12 and 16 years of age **with the consent of the child** amounts to the offence of having committed an act of consensual sexual violation of a child if the partner is older than 18 years. For example, if Anne is 15 years of age and agrees to John, who is older than 18 years, touching her genital organs, John has committed a sexual offence
- The sexual violation of a child of 12 years of age or between the age of 12 and 16 years **without the consent of the child** amounts to rape or sexual assault. For example, if Farieda is 13 years of age and Abdul, who is older than 18 years, forcefully fondles her breasts, Abdul has committed a sexual offence
- Children who are 16 years of age and older can consent to sexual acts. For example, if Zinzi is 16 years of age and agrees to have sex with Shadrack, who is 32 years of age, no sexual offence has been committed. Therefore, any person who is 16 years of age or older can consent to a sexual act

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Incest

The law says that people may not get married to each other because they have a blood relationship or an adoptive relationship.

In terms of the *Sexual Offences Act* and the *Sexual Offences Amendment Act*, people who have a blood or adoptive relationship may not engage in acts of sexual penetration with

each other or sexual violation. Sexual violation refers to an act where one of the parties is a child, and the action of the adult was so bad (reprehensible) that even if there was mutual consent, the adult would be guilty of the crime of incest.

The rules about incest are generally the same as the rules for rape, except with incest, the law states that mutual consent is not a defence, whereas consent can be used as a defence in rape. The definition of incest has also been extended to include sexual violations where one of the parties who is violated is a child. In cases of adult/child incest, only the adult is charged with the crime. Like rape, there must be sexual penetration as defined in the *Sexual Offences Act*. ***(See pg 583: Rape, incest and sexual assault).***

Sexual assault

The *Sexual Offences Act* repealed the common law definition of 'Indecent Assault' and replaced it with 'Sexual Assault'. Sexual assault is when a person unlawfully and intentionally sexually violates another person without their consent. This includes, amongst other things, direct or indirect contact of the genital organs (for example, through clothing), the anus or, in the case of a female, the breasts, the mouth of one person with the genital organs, anus or breasts of another person or masturbation of one person by another person – but it does not include the act of sexual penetration. ***(See pg 601: Problem 1: Reporting rape or assault and going to court)***

Sexual violence and HIV testing

A victim of sexual violence can apply to court for an order to have the person who committed the sexual violence have an HIV test and for the results of the test to be given to the victim. This application can also be brought by any person who has an interest in the victim's well-being or the investigating officer investigating the case. The application must be brought within 90 days after the act of sexual violence was committed.

If the person is successful with the application, the investigating officer must take the person who committed the act of sexual violence for an HIV test. The HIV test results must then be given to the victim in writing. The HIV test results are private and confidential and should not be disclosed to others.

PROBLEMS WITH COMPULSORY HIV TESTING

> The provision for HIV testing was introduced to protect victims of sexual violence. There are, however, some problems with this. If the person who committed an act of sexual violence was tested for HIV during the window period, their body would not

indicate that they had contracted HIV yet. This means that the test results can indicate that they are HIV negative even though they are HIV positive. The negative result could, therefore, be false. The false test results can lead to the victim believing that they did not contract HIV and, therefore do not need to practice safe sex or use antiretrovirals. The window period can last for up to 4 to 6 weeks.

POST-EXPOSURE PROPHYLAXIS (PEP)

PEP is an antiretroviral treatment that is used to prevent a person from contracting HIV after having possibly been exposed to the virus.

PEP is, however, not effective in all instances. It must be taken within 72 hours after contracting the virus and can have better results if taken 48 hours after possible contraction of the virus.

It is very important to ask for the PEP as soon as possible but within 72 hours of the sexual assault or rape.

WHAT DOES THE LAW ALLOW IN TERMS OF PEP?

A victim is entitled to:

- Receive PEP free of charge at a designated public health establishment
- Free medical advice on PEP before using it
- The list with the names, addresses and contact details of designated public health establishments providing PEP

If the victim (or a person who has an interest in the victim's well-being) laid a charge with the police regarding a sexual offence or reported the sexual offence to a designated public health establishment within 72 hours after the sexual offence took place, the police member, medical practitioner or nurse to whom the sexual offence was reported must inform the victim of:

- The importance of getting PEP within 72 hours of having been exposed to HIV
- The fact that a victim can obtain PEP free of charge from a designated public health establishment

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Reporting sexual offences

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* (also known as the *Sexual Offences Amendment Act* (SOAA) was introduced to protect victims, especially women, children and people living with mental disabilities who have been raped or who have experienced sexual crimes. The Act requires that support services be provided

to victims of sexual abuse to reduce and remove secondary trauma in the criminal justice system.

The *Sexual Offences Amendment Act* protects any person who has experienced the following sexual crimes:

- **Rape:** where a person has sexual penetration with a victim without their consent; it is also a crime where a person forces another person to rape a victim (this is called compelled rape)
- **Sexual assault:** where a person sexually abuses a victim by, for example, touching their genital organs or causing them to touch their genital organs. It is also a crime for a person to force another person to sexually violate a victim (this is called compelled sexual assault)
- **Compelled self-sexual assault:** when a person forces the victim to masturbate or engage in any form of self-sexual arousal or stimulation
- **Flashing:** where a person shows their private parts to a victim without their consent
- **Sexual exploitation (child prostitution):** where a child or person who is mentally disabled is forced to engage in sexual services with or without their consent and is paid to do this
- **Sexual grooming:** making a child or person who is mentally disabled sexually ready to commit sexual acts
- **Child pornography:** where a child is used to make pornographic material for payment or a reward with or without the consent of the child

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Steps to follow when reporting sexual offences (crimes)

Anyone can be a victim of sexual crimes regardless of their gender.

FOLLOW THESE STEPS IF YOU ARE A VICTIM OF A SEXUAL OFFENCE:

Step 1: Go to the nearest Police station or a Thuthuzela Care Centre (TCC) to report the matter

Do not take a bath or change your clothes after a sexual crime. Your body and clothes will be used as important DNA evidence. A TCC is a one-stop victim-support service centre located at the hospital/clinic to facilitate the speedy collection of evidence in a victim-friendly environment. You can ask a friend or family member to go with you.

Step 2: Make a statement

At the police station/TCC, you will be taken to a private victim-friendly room where the police officer will take your statement. You will need to provide details of people who

witnessed the crime or have information concerning your case. Read your statement before signing it. The police will issue a case number, which must be kept safe.

Step 3: Go for a medical examination
Immediately go for a medical examination at the nearest hospital/clinic. The findings of the medical examination will be included in the police docket as evidence.

If the sex offender did not use a condom or any protection, you are entitled to receive Post-Exposure Prophylaxis (PEP) for HIV infection within 72 hours after the sexual offence. The PEP services are available at the public health centres managed by the Department of Health.

You may also be referred for trauma counselling to a local social worker for free.

Step 4: Police investigation
The police will investigate the case and may arrest the suspect.

Step 5: Work with the police and prosecutor
The district court prosecutor may consult with you to find out if there is enough evidence to prosecute the accused person. The prosecutor is your lawyer, so they need to be informed of all the details.

The law allows the accused to apply for bail. You will be told by the investigating officer when your application will come to court. If you feel you will be in danger if the accused is given bail, you need to tell the prosecutor about this. The prosecutor may use this information to oppose the bail application.

When the police investigation is completed, the case will be handed to the Sexual Offences Court for trial.

Step 6: On the date of trial, go to the Sexual Offences Court
Arrive on time and bring along friends and family who can support you.

If the regional court prosecutor is satisfied that there is enough evidence to prosecute the accused, the date of trial will be set for the case. You will be informed of this date by the investigator or prosecutor.

Step 7: Appearing in court
If you are a child, a mentally disabled person or a traumatised adult victim, you may testify in a private testifying room using closed-circuit TV.

Step 8: The verdict is given by the magistrate
If the accused is convicted, the magistrate will give them a sentence that is set by the law.

If the accused was convicted of a sexual crime involving a child or mentally disabled person, the court will order that the particulars of the accused be entered in the National Register for Sex Offenders to prevent them from repeating the same offence.

SEXUAL OFFENCES COURTS

Since April 2022, 116 Regional Courts have been upgraded to Sexual Offences Courts to deal with cases of sexual offences.

The Sexual Offences Courts aim 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 sexual offences cases
- Improve the conviction rate in sexual offence cases

The *Sexual Offences Amendment Act* requires all criminal justice officials (police, prosecutors, magistrates and court clerks) to deal with all reported sexual crimes without discriminating against victims because of race, nationality, sex, age, sexual orientation or any other reason.

Sexual Offences Courts are required to provide these services to support 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 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 counselling**
- **Private testifying room** and closed court services
- **Witness fee services:** this covers return travelling costs and food while in court

Domestic violence

Most victims of domestic violence are women and children. Domestic violence happens when a person gets hurt physically or is abused mentally or emotionally by someone who has a domestic relationship with them. It can include a partner, an ex-partner, a parent, a child, a caregiver, etc.

One out of every six women is battered by her husband or boyfriend. But domestic violence is still not talked about openly. It is generally believed that what goes on in a person's home is their own private affair, and people, including the authorities, should not intervene. This leads to a lot of abuse in the home going unpunished. It also makes it hard for battered women and children to look for help.

There are, however, options available to battered women and a number of organisations that can assist you if you are in such a situation. Getting a Protection Order under the *Domestic Violence Act* is one of the most important steps that a person who has been abused can take to stop the violence. ***(See pg 604: Problem 2: Using the law against domestic violence; See pg 605: Problem 3: Getting a Protection Order)***

The Domestic Violence Act (No. 116 of 1998)

The *Domestic Violence Act (No 116 of 1998)*, the 'old' *Domestic Violence Act*, recognised that domestic violence is a serious crime against society and aimed to give greater protection to people in domestic relationships who have been abused. The 'new' *Domestic Violence Act (No 14 of 2021)* has amended the previous Act by introducing new definitions like coercive and controlling behaviour and broadening existing definitions to include, for example, spiritual abuse and elder abuse. Another change is that victims of domestic violence can now apply for a protection order electronically without having to go to court. So an application for a protection order can either be lodged with the clerk of the court, or can be submitted by sending the application to an email address of the Magistrate's Court that will hear the case. This will help people who need urgent protection and can't get to a court.

The 'new' Act also states that exposing a child to domestic violence constitutes an act of domestic violence. This provision protects children when perpetrators intentionally make them witness or experience acts of domestic violence.

The *Domestic Violence Act* includes people who are married according to any law, custom or religion, living together whether they are of the same or of the opposite sex, dating or ex-partners. Also included are parents and children, people sharing homes, or caregivers to children or older people.

The Act says:

- A person can be charged and convicted of marital rape whether the parties are married according to civil, customary or religious law
- When police arrive at a scene of domestic violence, they must inform victims that they have a right to ask for police assistance to protect themselves and their children. Police are allowed to seize firearms and other weapons

- Victims can ask the police to help them find a place of safety and for help to move them there
- Police have to explain to victims how to get a Protection Order. The order is issued by a court and will specify conditions that the abuser must stick to. The court will also issue a warrant for the arrest of the abuser if they break any of the conditions
- The Act gives police the right to arrest an abuser at the scene of an incident of domestic violence without a warrant of arrest if the police reasonably suspect that the abuser has committed an offence involving physical violence
- A person who is subject to domestic violence can also ask for emergency money relief

DOMESTIC VIOLENCE

The Act says domestic violence includes:

- Physical abuse
- Sexual abuse
- Emotional, verbal and psychological abuse
- Economic abuse
- Intimidation
- Harassment
- Spiritual abuse
- Damage to property
- Elder abuse
- Coercive behaviour
- Controlling behaviour
- Exposing or subjecting children to any domestic violence behaviours
- Entering a person's home without consent where people do not share the same home, workplace or place of study, without consent, where they don't share the same workplace or study place
- Any other controlling or abusive behaviour that harms or may cause harm to a person

LEGAL REMEDIES IN DOMESTIC VIOLENCE CASES INCLUDE:

- Laying a criminal charge, for example, assault, against the abuser ***(See pg 206: Laying a criminal charge against another person)***
- Getting a Protection Order against the abuser under the *Domestic Violence Act*, including, if necessary, getting an order to have the abuser's gun removed if the abuser has used a gun to threaten the victim and/or an order that the abuser be evicted from the common home. ***(See pg 604: Problem 2: Using the law against domestic violence; See pg 605: Problem 3: Getting a Protection Order)***

- Making a civil claim against the abuser to claim compensation money for pain and suffering and any medical costs

PHYSICAL ABUSE

Physical abuse is defined as any act or threatened act of physical violence towards someone or to a child. In the case of physical abuse of children, it includes any form of deliberate harm or ill-treatment of a child and includes assault, sexual abuse, bullying by another child, a labour practice that exploits a child, or exposing or subjecting them to any behaviour that could harm the child psychologically or emotionally.

SEXUAL ABUSE

The *Domestic Violence Act* says sexual abuse is 'any conduct that abuses, humiliates, degrades, or otherwise violates the sexual integrity of the complainant'. Sexual abuse can, among other things, be the following:

- Forcing sex on a person (rape)
- Sexually assaulting them in other ways
- Sodomy
- Touching someone in a way that makes them uncomfortable
- Forcing oral sex on a person
- Incest (where a child's parent/brother/sister sexually abuses them)

Legal remedies in sexual abuse cases include:

- Laying a criminal charge against the abuser, for example, for rape or sexual assault ***(See pg 206: Steps in laying a criminal charge against another person)***
- Getting a Protection Order against the abuser under the *Domestic Violence Act* ***(See pg 605: Problem 3: Getting a Protection Order)***
- Making a civil claim to claim compensation for pain and suffering ***(See pg 236: Civil claims)***

ECONOMIC ABUSE

Economic abuse is when the abuser doesn't pay a woman maintenance out of spite towards her, withholds money to control her or takes her salary away from her.

Legal remedies in economic abuse cases include:

- Getting a protection order under the *Domestic Violence Act* for emergency monetary relief, which can include:
    - Compensation for loss of earnings
    - Medical and dental expenses
    - New accommodation expenses

    - Household or family necessities ***(See pg 605: Problem 3: Getting a Protection Order)***
- Claiming for maintenance under the *Maintenance Act*. ***(See pg 570: Problem 4: Getting maintenance through the Maintenance Court).***

The Maintenance Court process can take some time, so if money is needed urgently, it is best to apply for a Protection Order for emergency monetary relief. You must still claim maintenance in the Maintenance Court as well, because the Protection Order will only give emergency monetary relief for a temporary time because maintenance is supposed to be dealt with by the Maintenance Court. When the Maintenance Court makes an order, this will replace the part of the Protection Order that gives emergency monetary relief.

EMOTIONAL, VERBAL AND PSYCHOLOGICAL ABUSE

The *Domestic Violence Act* says emotional, verbal and psychological abuse is '*a pattern of degrading or humiliating conduct towards a complainant*' including:

- Repeated insults, ridicule or name-calling
- Repeated threats to cause emotional pain
- Repeated exhibition of obsessive possessiveness or jealousy, which is a serious invasion of a person's privacy, liberty, integrity or security
- Creating fear

LEGAL REMEDIES IN EMOTIONAL AND PSYCHOLOGICAL ABUSE CASES INCLUDE:

- Laying a criminal charge against the abuser, for example, for kidnapping, abduction, crimen injuria ***(See pg 206: Laying a criminal charge against another person)***
- Making a civil claim for compensation for pain and suffering ***(See pg 236: Civil claims)***

ELDER ABUSE

Elder abuse refers to the abuse of an older person, which is a punishable offence. The new *Domestic Violence Act* (2021) has extended protection from domestic violence to older people as well.

SPIRITUAL ABUSE

Spiritual abuse is now a category of abuse in terms of the *Domestic Violence Act* (2021). It is defined as:

- Ridiculing or insulting the complainant's religious or spiritual beliefs
- Preventing the complainant from practising their religious or spiritual beliefs

- Utilising the complainant's religious or spiritual beliefs to control, manipulate or shame them, including using religious texts or beliefs as a reason to justify abusive behaviour

ENTERING A VICTIM'S WORKPLACE OR RESIDENCE WITHOUT CONSENT

It is an act of abuse (which can be included in a Protection Order application) if a person enters a victim's workplace or home without their consent.

HARASSMENT

Harassment means behaving in a way that makes a person afraid they will be harmed. It includes stalking (where someone follows you around or hangs around your home), repeatedly making unwelcome telephone calls, or sending unwelcome emails, packages, texts, photos or videos.

SEXUAL HARASSMENT

Sexual harassment means sexual attention from a person in a domestic relationship with the complainant who knows or ought to know that the attention is unwelcome. It includes the promise of a reward for complying with the request linked to sexual behaviour or a threat of harm for refusing to comply with a request linked to sexual behaviour.

COERCIVE AND CONTROLLING BEHAVIOUR

Coercive behaviour is abusive conduct using intimidation or pressure to make a person behave in a certain way against their will and where they believe they will be harmed. Controlling behaviour is forcing a person to be dependent on another person by:

- Isolating them from sources of support
- Exploiting their resources for their own gain
- Depriving them of the support needed to resist or escape
- Regulating their behaviour

REPORTING DOMESTIC ABUSE

It is compulsory for an adult who knows, believes or suspects that an act of domestic violence has been committed against a child, a person with a disability or an older person to report this to a social worker or a member of SAPS. If they fail to do this, they will be guilty of a criminal offence.

The report must be made on **FORM 3** available from the Department of Justice website: https://www.justice.gov.za/forms/form_dva.htm.

The report must give reasons why the person reporting the matter believes domestic violence is taking place.

It is also compulsory for a functionary, who could be a medical practitioner, social worker, an official employed at public health establishments, health care personnel, educator or caregiver, who has a belief or suspicion on reasonable grounds, that a child, or a person with a disability or an older person, may be a victim of domestic violence, to immediately report this to a social worker or a member of the SAPS. They must complete **FORM 2: Report and Risk Assessment** available on the Department of Justice website: https://www.justice.gov.za/forms/form_dva.htm

DUTY OF THE POLICE TO ASSIST AND INFORM PEOPLE OF RIGHTS IN DOMESTIC VIOLENCE CASES

When a person reports a case of domestic violence to the police, the police must:

- Assist the person who is laying the complaint, including getting them medical treatment and finding shelter
- Hand **FORM 1** (available from the Department of Justice website: https://www.justice.gov.za/forms/form_dva.htm) to the complainant, which contains a list of their rights and the responsibilities of the police in domestic violence cases
- Explain to the complainant or to the person acting on their behalf that the SAPS will assist, that they have a right to make a criminal complaint and to apply for a Protection Order even if no criminal complaint has been made, and the right to apply for a Domestic Violence Safety Monitoring Notice
- Inform the complainant of the option of applying for a Protection Order and for a Domestic Violence Safety Monitoring Notice online and how the online portal can be accessed
- Read and explain the notice to the complainant if they can't read it, and advise them to go to the clerk of the court for more information and help

DOMESTIC VIOLENCE SAFETY MONITORING NOTICE

A person (the victim) who shares any type of residence, like a house or flat, with someone (the abuser) who has committed an act of domestic violence against them can apply to the court to issue a Domestic Violence Safety Monitoring Notice. This can be done at the same time as an application for a Protection Order or even where a Protection Order is in force.

The purpose of the Safety Monitoring Notice is to provide a victim with added protection if they live with someone who is a threat to their safety. The Safety Monitoring Notice orders the station commander at the local police station to appoint a police officer to:

- Contact the complainant at regular intervals electronically to find out if they are safe
- Visit the joint residence where the victim and the abuser live at regular intervals to check on the complainant

The application can be made by going to the court or electronically by submitting the application to an email address at the Magistrate's Court, where the case will be heard. The email address list is available on the Department of Justice website: https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf.

The application must be done using **FORM 9,** available from the Department of Justice website: https://www.justice.gov.za/forms/form_dva.htm and must include any supporting affidavits of people who know about the domestic violence and who will support the application.

When the clerk of the court has issued the Safety Monitoring Notice, it will be sent to the complainant and to the local SAPS station commander, who must assign a police officer to serve the notice on the perpetrator within 24 hours. The police officer must contact the complainant immediately after serving the Notice on the perpetrator. If the Notice couldn't be served, they must ask the complainant for details on where to find the perpetrator. The police officer must submit a return of service or non-service (if they couldn't find the complainant) to the clerk of the court by hand or electronically within 12 hours of serving the Notice on the perpetrator.

PROTECTION ORDER

Under the *Domestic Violence Act*, a person can get a Protection Order to stop another person from abusing them or for the abuser to leave the home.

The advantages of this process under the Act are:

- You do not need an attorney to help you apply for this kind of court order, so the process is practical and cheap
- It is much quicker because you do not have to use the normal court procedure
- The abuser is not charged with any crime but just ordered to stop the abusive behaviour. Many women or children may be reluctant to go so far as to lay a charge against a family member, which could land the person in jail. The abuser only gets into trouble with the law if they disobey the Protection Order.

WHAT IS A PROTECTION ORDER?

A Protection Order is an order from the court telling an abuser to stop abusing someone. You can get a Protection Order against anyone who is abusing you and who is in some form of *domestic* relationship with you, for example, a parent or guardian, a husband or wife, or a romantic partner. You cannot get a Protection Order against your employer or neighbour.

The Protection Order can also order:

- The police to take away any dangerous weapons from the abuser
- A police officer to go with the abused person to collect their things
- The abuser to move out of the home
- The abuser not to prevent the complainant from entering the common home
- The abuser to continue paying the rent or bond to provide housing for the complainant
- The abuser to pay money to help the person survive or for medical costs

Police may arrest an abuser who has disobeyed a Protection Order, using the warrant of arrest given at the same time that the Protection Order is given by the court, if the person that has been abused is in 'imminent harm'. This is a problem because the courts have not said what 'imminent harm' is, and often, the police are reluctant to arrest. They prefer to give the abuser a notice to come to court.

WHO CAN APPLY FOR A PROTECTION ORDER?

Anyone in any of these relationships can apply for a Protection Order:

- A husband and wife married according to civil, customary or religious law
- Gay or lesbian couple
- People living together who aren't married
- People who are engaged
- People who are dating
- People who share the same home (housemates, boarding schools, university residences, and so on)
- Family members of the abused
- Parents of a child or people responsible for a child
- A child under the age of 21, without the help of a parent or guardian
- Any person, including a health service provider, police officer, social worker, teacher, neighbour, friend, relative, or minister, who has a material interest (not just being a busybody) in a victim's well-being,

provided that the victim consents. They must complete **FORM 7**: Consent for another person to apply for a Protection Order on behalf of a victim, which is available on the Department of Justice website: https://www.justice.gov.za/forms/form_dva.htm. No consent from the victim is needed if the victim is a child, mentally retarded, unconscious or for other good reason isn't able to consent.

The *Domestic Violence Act* says if a person believes a child is being abused, they don't have to get the child's permission before getting a Protection Order. It is enough to believe that the child is being abused.

WHERE CAN YOU GET A PROTECTION ORDER?

A person can get a Protection Order from a Magistrate's Court or High Court. This court must be close to where the abused person lives or works, where the abuser lives or works or where the abuse took place. The Act says a person can get a Protection Order from a Magistrate's Court at any time of day or night.

You can also make the application for a Protection Order electronically. Instead of going to court, you can submit an application to the email address of the Magistrate's Court, where you would make the application. You must complete **FORM 6** for the application which is available on the Department of Justice website: https://www.justice.gov.za/forms/form_dva.htm, and submit it to the correct email address.

The list of email addresses is available on the Department of Justice website: https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf.

Doing an electronic application makes it easier to apply for urgent protection without having to go to court itself.

COSTS OF GETTING A PROTECTION ORDER

It is not necessary to get an attorney to get a Protection Order. Getting a Protection Order in court is free – the person only has to pay for the Protection Order to be served on the abuser. If they do not have money to pay for the order to be served, then the Act says the court must help with this. ***(See pg 605: Problem 3: Getting a Protection Order)***

Problems

This section deals with the following problems:

- Problem 1: Reporting rape or assault and going to court
- Problem 2: Using the law against domestic violence
- Problem 3: Getting a Protection Order

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1. Reporting rape or assault and going to court

I was raped, and I want to report the rape. How do I do this? What will happen to me when I go to the police? And what will happen in the court case?

WHAT DOES THE LAW SAY?

If you make a complaint to the police, the police must investigate the matter. They must arrest the accused and may arrange identity parades for you to point out the criminal. They must collect evidence that will help the court to properly try the person accused of the crime. They must get statements from any witnesses (people who saw the crime). incest and sexual assault) Other rights that you have when reporting a rape are the right to:

- Call the police and have them come to you
- Have a friend or a family member with you to support you
- Give your statement in privacy
- Give your statement to a female officer (if you are female) if there is one available

WHAT CAN YOU DO?

- **Go to the charge office** at the nearest police station and make a complaint. You can go to any police station. If you report it at a police station that does not cover the area where the assault took place, it will be referred to the appropriate station for investigation. You should try to go within 48 hours of the attack. If you leave it longer, you may have to explain why it took you so long to go to the police. It is advisable to report it to the police or a health facility within 72 hours, and then you can access PEP treatment against a possible HIV infection.
- **Make a statement to the police.** The detective will take a statement from you. You have the right to make the statement in your own language or have

it translated. Because you are making a complaint, you will be called a complainant. You must then swear that you are speaking the truth and sign your statement. If you forget something and think about it later, you can add it to your statement.

- **Ask for a copy of your statement** and the police reference number before you leave the charge office. You have the right to get a copy. The police reference number is called an OB number (Occurrence Book Number) or a VB–nommer (Voorvalleboeknommer).
- **Get a medical report**. If you have any injuries, 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 a district surgeon (a government doctor) to get this form filled in. This form must go back to the police station where you laid the charge. If you go to a district surgeon, they will send it back for you.
- After you make your statement to the police, they must **open a case docket** and investigate a criminal charge against the person who sexually assaulted you. Then there will be a CR (Criminal Register) or MR (Misdaadregister) number.
- **Check on the progress of your case** a week or two later to see what is happening. **Ask for the name of the investigating officer** so you can speak to them when you contact the charge office.

Sometimes nothing happens because the police investigation is stopped or the National Prosecutions Authority decides not to charge the person who raped or assaulted you. You can ask the investigating officer for reasons. If you are not satisfied, you can ask your lawyer to make the authorities take your case more seriously.

- **Identity parade.** You may have to identify the person who assaulted you by pointing out the person in an identity parade.
- **Evidence.** The police must gather as much evidence as possible to show that the story you have told is the truth, for example, the clothes that you were wearing when the attack happened, etc. They may be needed in the court case.
- **Medical evidence.** The police also need the medical report and samples taken by the doctor. Do not wash yourself after the attack until you have seen the district surgeon or your doctor. Also, do not drink any alcohol or take any other drugs, such as strong painkillers or tranquillisers. You have a right to ask the doctor what they are doing and why. You should also ask the doctor to treat you in case you may be pregnant from the rape. The doctor is not legally obligated to treat you for pregnancy, sexually transmitted diseases or

HIV/AIDS. You may need to see another doctor to be treated for these problems or any other injuries.

- **The court case** ***(See pg 210: Summary of steps in a criminal court case)***
    - If the man who raped you is charged, you must give evidence in court. You will be cross-examined by the accused or their attorney
    - The state prosecutor will present the case against the accused. You will be called as a **state witness** to say what happened to you. Tell the court about the effects the sexual assault has had on you
    - The prosecutor must prove the charge against the accused **beyond a reasonable doubt**. This means there should be no doubt in the magistrate's mind that the man is guilty. The magistrate might decide that the prosecutor has not proved the case well enough and then find the attacker 'not guilty'. This does not always mean that the accused did not do it. It just means there was not enough evidence to prove the case.
    - Even if the magistrate or judge finds the attacker guilty, the **sentence might be light** – a fine or only a short time in jail. You have no say over what sentence the accused gets.
    - If the accused is found guilty, ask the prosecutor if you can submit a Victim Impact Statement or testify how the rape or sexual violation affected you and your life.
    - You can ask for certain damages in terms of the *Criminal Procedure Act*. If you do, then you may not be able to bring a claim for civil damages against the perpetrator.

BRINGING A CIVIL CLAIM FOR RAPE

A person who has been raped can also bring a civil case against the person who has raped and/or sexually assaulted them. ***(See: pg 236 Civil claims)***

EXAMPLE

In a civil claim, a young girl sued the man who had been raping her for many years for damages in a civil case. The civil claim was made after the man was found guilty of rape in a criminal court. The man was sued for depriving the young girl of freedom of movement and for raping and/or sexually assaulting her. Because of this, she suffered shock, pain, discomfort, mental anguish and humiliation. The damages claimed were:

- *R30 000 general damages for pain and suffering, hurt feelings, anguish and stress*

- *R10 000 for wrongful deprivation of freedom of movement*
- *R10 000 general damages for shock, pain and suffering*
- *R20 000 for disablement in respect of enjoyment of the amenities of life*

You can also sue for child sexual abuse many years after it happened if you only became aware and truly understood the impact it had on your life later, for example, after seeing a counsellor.

If the state does not prosecute, you can conduct a private prosecution. The only problem is that this is expensive.

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2. Using the law against domestic violence

"*What are all the legal options I can try to stop my partner from using violence against me?*"

WHAT DOES THE LAW SAY?

Domestic violence is an assault and, therefore, a crime. If a court finds a person guilty of assault, they can get a fine or a prison sentence.

WHAT CAN YOU DO?

These are the legal options you can try:

- **Call the police** to stop your husband or boyfriend from hitting you. They will probably not take him away or arrest him.
- **Lay a charge of assault against** your partner. ***(See pg 601: Problem 1: Reporting rape or assault and going to court).*** You must be prepared to make a statement to the police and later to go to court. Many women are scared to do this because they fear that their partner will beat them up even more if they find out. Also, if the man is found guilty, the sentence is usually just a small fine.
- **Get a Protection Order.** This is an order from the court to your partner to stop them hitting you, to tell them to stay away from you or to have them removed from the home. ***(See pg 605: Problem 3: Getting a Protection order)***
- If you are married to the man who batters you, you may want to end the violent relationship. You may want to leave him and get a divorce. ***(See pg 564: Problem 1: Getting a divorce)***
- **Lay a charge of trespass.** You can do this if you own or rent a house and someone keeps coming onto your property without your permission. It is important that you have told the person before not to enter your property or your house. If he does not obey, you can tell the police he is trespassing.

3. Getting a Protection Order

This is the procedure for getting a Protection Order under the *Domestic Violence Act* to stop abuse or domestic violence.

WHAT DOES THE LAW SAY?

The *Domestic Violence Act* protects people (men, women and children) in abusive relationships. ***(See pg 556: Reporting child abuse; See pg 556: Stopping child abuse using the Domestic Violence Act; See pg 592: The Domestic Violence Act)***

WHAT MUST YOU DO?

You can apply for a Protection Order by going to the Magistrate's Court and making an application or by applying for it electronically by sending your application to the email address of the Magistrate's Court where the case will be heard. Download a list of email addresses for Domestic Violence Courts in all the provinces on the Department of Justice website: https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf.

To make an application, you need to complete **FORM 6: Application for Protection Order,** which you can find on the Department of Justice website: https://www.justice.gov.za/forms/form_dva.htm. If you want to submit it electronically, you can attach the application form to the email.

If you want to get a Protection Order, you will have to go to court on two separate days. The first time you go, the magistrate might give you an interim order if they believe there is a threat to your safety. If the magistrate gives you an interim order, they will set a return date when you have to go back to the court. The return date is the second time you have to go to court, and the abuser is also called to appear in court on this day. You do not need an attorney to get a Protection Order.

STEPS IN GETTING A PROTECTION ORDER

***Step 1*: APPLY FOR A PROTECTION ORDER**

You can apply for a Protection Order using ***FORM 6: Application for a Protection Order****, available on the Department of Justice website:* https://www.justice.gov.za/forms/form_dva.htm.

The completed form can be submitted either electronically or to an email address at the nearest Magistrate's Court (generally in the Family Court section) where your case will be heard. Use the link to the Department of Justice website for email addresses: https://www.justice.gov.za/forms/dva/20230417-DV-Court-Emails.pdf. *Or you can go to*

the Magistrate's Court to apply for a Protection Order. The clerk of the court must explain what your rights are and how to get a Protection Order. Take with you any documents like medical reports, photographs of the injuries, and supporting affidavits from family members, neighbours or children who know about the abuse.

***Step 2*: COURT ISSUES INTERIM PROTECTION ORDER**

The magistrate will listen to your story and read any affidavits that you have brought with you. If the magistrate believes there is enough evidence of abuse, they will give you an interim or temporary Protection Order. The magistrate will also give you a suspended warrant of arrest, which you can use to get the abuser arrested if he disobeys the order.

You can ask the magistrate:

- *For protection from domestic violence*
- *To have a firearm confiscated, if you explain how this has been used to threaten you*
- *For the abuser to have no contact with the children, if appropriate*
- *For the police to come with you to collect your belongings at your home*
- *Not to say where you have moved to, if you are leaving or have left home*
- *For the abuser to be evicted from the home*
- *For the abuser not to prevent you from entering the common home*
- *For emergency monetary relief, for example, for loss of earnings because you can't work, medical and dental expenses, accommodation expenses, money for food or clothes*

***Step 3*: PROTECTION ORDER SERVED ON ABUSER**

The Sheriff of the Court or the police will serve the Protection Order on the abuser. You can ask the court to phone you and tell you when the Protection Order has been served. The order is only effective from the time that it has been served on (delivered to) the abuser by the Sheriff or the police.

If you do not hear from the court that the Protection Order has been served within one week, then you should check with the clerk of the court whether it has been served or not. Sometimes, the Sheriff of the Court can't find the abuser.

The Protection Order tells the abuser that he must be at court on a return date written on the Protection Order. He must go to court to tell the magistrate why the Protection Order shouldn't be made final. The return date is usually a few weeks after serving the documents.

***Step 4*: GO BACK ON RETURN DAY COURT**

You must go to court on the return day written on the Protection Order. The abuser will also be there. You can ask the police to protect you if necessary. The court will decide whether to make the temporary order final or to set it aside. If the abuser doesn't come to court, then the court will probably make the order final.

***Step 5*: COURT ISSUES THE FINAL PROTECTION ORDER AND WARRANT**

Once the magistrate has heard all the evidence, they will issue a Protection Order. The magistrate also issues a warrant of arrest, to be used if the abuser disobeys the Protection Order. The Sheriff or police serve the final Protection Order on the abuser. You get a copy of the order signed by the court (certified copy), together with the warrant. The order lasts until you choose to cancel or change it.

IF THE ABUSER DOESN'T OBEY THE PROTECTION ORDER

If the abuser doesn't obey the Protection Order:

- You can go to any police officer with the warrant of arrest, which is attached to the Protection Order
- You tell the police how the abuser has broken the protection order
- The police will charge him with breaking the Protection Order
- The police must arrest the abuser if you are in danger (they can also do this without a warrant), or if they think you are not in immediate danger, they will warn him to appear in court

IF YOU LOSE YOUR WARRANT OF ARREST

If you lose your warrant of arrest and Protection Order, you can go back to the clerk of the court and get another copy.

WHAT HAPPENS TO THE ABUSER?

- If the abuser is arrested, he will be kept in jail until he goes to court within 48 hours
- Besides being charged with disobeying the Protection Order, he can be charged with any other criminal offence he has committed while abusing you, for example, if he assaulted you or pointed a firearm at you
- If he is found guilty in court, he will be fined or sent to jail

CHANGING THE PROTECTION ORDER

If you want to change the Protection Order, you can give written notice to the abuser and to the court to apply to change the order or to withdraw it completely. You must say why you want to change it or withdraw it.

Checklist

Rape and indecent assault

- Have you been to a doctor for a medical check-up?
- Do you know the name of the person who raped or assaulted you?
- Where does the person live (their address)?
- Have you laid a charge against the person at the police station?
- Have you reported the case to any welfare organisation, for example, Rape Crisis, church welfare organisation, or social work agency?

HIV/AIDS and TB

Introduction

HIV has become a pandemic of massive proportions, particularly in Southern Africa. While there is less prejudice about HIV nowadays, there are still many untrue stories about AIDS, which causes people who are living with the disease to live with fear, prejudice and discrimination. People must understand what HIV and AIDS are and how to prevent the disease from spreading, but it is also important that we look at ways of undoing the prejudice that has built up around the disease. South Africa is still experiencing the largest HIV and AIDS epidemic in the world.

TB is a serious public health issue in South Africa, with about 450 000 people developing the disease every year, and of these, 270 000 are also living with HIV which is a key factor in the TB epidemic. HIV sufferers have a higher risk of contracting TB and are therefore at greater risk.

What are HIV and AIDS?

HIV stands for the Human Immune Deficiency Virus. This virus attacks the immune system, which is the body's defence against disease. HIV can live in our bodies for years without us looking or feeling sick in any way. Most people with HIV feel healthy and can work and live healthy lives for many years. It is only when a person develops an AIDS-related illness that they become very ill.

AIDS is caused by HIV. AIDS stands for Acquired Immune Deficiency Syndrome. It is the name given to a group of serious illnesses that are caused by your body being unable to fight infections. People with HIV or AIDS are more likely to get some diseases and infections because their immune system cannot fight them off.

The different stages of HIV

Once you test positive for HIV and Aids, you should get treatment as soon as possible. With the right treatment, you can live a normal healthy life for a long time.

Without treatment, the disease follows four stages:

STAGE 1: PRIMARY HIV INFECTION: The early symptoms of HIV may include a sore throat, swollen glands, headache, muscle aches or similar flu-like symptoms, and afterward you will return to feeling completely well. This stage may last several years, during which the person might have no HIV-related illnesses

STAGE 2: THE ASYMPTOMATIC OR "SILENT" STAGE: If you have the primary HIV illness, you can feel very well for many years without showing any major symptoms. A person with HIV who lives a healthy lifestyle by eating healthy foods, taking exercise, food supplements and anti-retroviral therapy (ART), can remain in Stage 1 or 2 of the illness for many years, living a normal life. Where the person does not live healthily and/or fails to take anti-retroviral treatment (ARVs), they will begin to develop minor illnesses in Stage 2. Ear infections, frequent flu and skin problems are common at this stage.

STAGE 3: EARLY HIV SYMPTOMATIC DISEASE: Gradually, after many years, the person's immune system starts to break down, and the CD4 cell count drops lower and lower. (The strength of a person's immune system is calculated by their CD4 cell count). Some people will begin to show mild symptoms of HIV disease, for example, shingles, swollen lymph glands, occasional fevers, mild skin irritations and rashes, fungal skin and nail infections, mouth ulcers, chest infections and weight loss.

STAGE 4: MEDIUM-STAGE HIV SYMPTOMATIC DISEASE: This is the stage when the CD4 cell count gets very low, and people use ARVs to boost their immune systems. In stage four, the person has illnesses due to a very weak immune system. These may include PCP (Pneumocystis pneumonia), pneumonia, chronic diarrhoea, toxoplasmosis and meningitis. It is at this stage that a person is said to "have AIDS." A person is also said to "have AIDS" if their CD4 count (white blood cells) goes under 200.

How do you get HIV?

There are only three ways to get HIV/AIDS:

1. Unprotected sex (sex without a condom)
2. Contact between your blood and infected blood or body fluids
3. Mother-to-child transmission.

UNPROTECTED SEX

This is the most common way that people get HIV/AIDS. If you have sex with an HIV-positive person and there is direct contact between the penis and vagina or anus, you can easily get infected. The virus lives in the fluids inside the penis and

vagina and can easily enter your bloodstream. Using condoms properly is the only protection against this kind of infection.

You cannot get HIV from kissing someone on the lips, hugging, sharing food and drink or using the same bath or toilet as someone who is HIV-positive. Deep kissing or French kissing can pass on HIV if you have sores in your mouth.

CONTACT WITH INFECTED BLOOD

If you have an open wound and it is exposed to the blood of an HIV-positive person, you can be infected. This contact could be through using the same needles for drugs or unsafe instruments used for circumcision. It is possible to get HIV if you use the same razor blade or toothbrush as an HIV-positive person if there are any traces of blood on the implement. While you could easily contract HIV from a blood transfusion if the blood is contaminated, all blood in SA is tested for safety. Medical workers can get it from accidentally pricking themselves with needles they have used to inject HIV-positive people.

MOTHER-TO-CHILD TRANSMISSION

HIV-positive mothers can pass the infection to their babies. Without treatment, an estimated 25-45 % of HIV-positive mothers will transmit the virus to their infants. HIV may be transmitted during pregnancy, labour, delivery and breastfeeding. This happens because of the contact with blood. To reduce mother-to-child transmission during pregnancy, the HIV-positive mother should be initiated on treatment (ARVs) at 14 weeks, regardless of her CD4 count. This will ensure that the mother's CD4 count increases and the viral load drops. After birth, the baby is immediately administered with Nevirapine syrup. The mother continues to take treatment.

If the baby is taking Nevirapine syrup, the mother can practice exclusive breastfeeding. This reduces the chances of HIV transmission from mother to child. Exclusive breastfeeding means the feed cannot be mixed with other fluids or solids (even water) except for prescribed medicines.

Who is at most risk of contracting HIV?

Anyone can get HIV, but some people are more vulnerable because they do not have the power to negotiate the terms of sex or because of their risky sex lives.

The groups who are most vulnerable and have the highest infection rates are:

- Young women between 15 and 30 years old – some of the women in this age group are in unequal relationships where they cannot refuse unsafe sex or are exposed to sexual violence

- Sexually active men and women who have more than one partner. Although polygamy (having more than one wife) is a custom followed only by some men, many others have a wife and a girlfriend or casual sexual partners. They may get the virus from a casual partner and pass it on to their wife.
- Migrant and mine workers who are separated from their families for most of the year, and many of them have multiple partners
- Transport workers who travel a lot and have multiple partners, and many of them use the services of sex workers
- Sex workers who are exposed to many partners and are sometimes powerless to insist on safe sex
- Drug users who share needles – one HIV-positive person can infect a group of people who share the same needle unless it is sterilised in between usage. Many drug addicts also become sex workers to pay for their drugs.
- People who practice anal sex – the anus can easily be injured during sex because it has no natural lubrication (wetness), and the virus can be passed on unless a condom is used. Women who have anal sex, gay men and other men who have sex with men (for example, prisoners), are vulnerable to this form of transmission.)

Young women are the most vulnerable because they are often powerless to say no to unprotected sex with an HIV-positive partner. They have the highest infection rate of all in South Africa. They are also the most common victims of rape and sexual abuse. Young girls who are virgins are also at risk because of the myth that a person can be cured of HIV or AIDS by having sex with a virgin. This is completely untrue.

Women are more vulnerable to HIV infection than men. A woman's vagina has a larger surface area for HIV to enter. Some sexual practices are dangerous for women as they can increase the risk of getting HIV, e.g. dry sex, which can lead to vaginal tearing and can make it easier for the virus to enter the body. Rape, especially if it is violent, can also increase the risk of getting HIV, as the victim cannot make her rapist wear a condom.

Men and women who have other sexually transmitted diseases (such as syphilis or gonorrhoea) are also more vulnerable because they often have open sores on their private parts.

How do you treat HIV and AIDS?

You can find out whether you are HIV-positive by having a free blood test at any clinic, doctor, or hospital. The results will, and should, only be given to you. If you are positive, you should tell your sexual partner so that they can also be tested, and you should only practice safe sex by using a condom.

There is no cure for HIV, but there are many ways to help people living with HIV to strengthen their immune systems, for example:

- By treating people with anti-retroviral drugs
- By treating the opportunistic infections that are caused by HIV so that people can live longer, for example, by giving people antibiotics to fight diseases
- By following a healthy diet, exercising and living in a clean and healthy environment
- By providing counselling and emotional support to the person and their family

There are medications that can help to fight illnesses like pneumonia and stomach infections that easily kill people with AIDS. These infections are called opportunistic infections. Many of the medicines used to fight opportunistic infections are available at clinics and the government is working to get more affordable medicines to people who need them.

Anti-retroviral treatment (ART), when taken properly, can greatly reduce the level of HIV in the body, reduce susceptibility to HIV/AIDS illness, and extend the person's life – many years. ART prevents the virus from reproducing and helps prevent further damage to the body. Many people find that, after taking ART for a few months, the level of the virus in their blood is so low that it cannot be detected.

ART cannot, however, repair damage to organs and systems of the body that the virus has already made. Once a person goes on ART, they must accept that they will have to keep taking the medication for many years to come and probably for the rest of their lives.

PROPHYLACTIC ANTI-RETROVIRAL TREATMENT

If a person has been exposed to HIV-infected body fluids (for example, through being raped), then they should start with ART within 72 hours of possible post-exposure through rape or unprotected sex. This is called Post-exposure prophylaxis (PEP). PEP is a short-term anti-retroviral treatment that reduces the likelihood of HIV infection after exposure to HIV-infected blood or sexual contact with an HIV-positive person. The drug regimen for PEP consists of a combination of ARV medications that are taken for a period of four weeks. ***(See pg 587: Sexual violence and HIV testing)***

How do HIV and AIDS impact on individuals and society?

THE IMPACT ON PEOPLE LIVING WITH HIV/AIDS

HIV can be treated. But there is still a lot of ignorance and prejudice about HIV and AIDS, and it is often seen as a "death sentence". Most people are scared when they are first diagnosed. Some respond by feeling that their lives are over and become

very depressed. Many people cannot accept the diagnosis and deny that they are positive to their families and to themselves. Others react with anger and refuse to be responsible and practice safe sex. Many people feel ashamed of their HIV status and think that their partners and family will reject them or that their communities will isolate them if they are open about being HIV-positive.

It takes courage to face this disease, and a lot of support is needed to fight it. People with HIV/AIDS can live long and productive lives if they get emotional support, strengthen their immune systems, get proper medical treatment and take good care of their health.

Many HIV-positive people do not know it, although people are becoming more aware of the importance of voluntary counselling and testing (VCT). Many people only realise they are HIV-positive when they develop AIDS and get seriously ill.

THE IMPACT ON FAMILIES AND CHILDREN

The burden of care falls mostly on the families and children of those who are ill. Often, they have already lost a breadwinner, and the few resources they have left are not enough to provide care for the ill person and food for the family. Families also suffer the daily stress of looking after someone who is ill and, in some cases, facing death. Many children, especially older female children, have to leave school to look after ill parents.

Children who are orphaned are often deprived of parental care and financial support. Many orphans are living in child-headed families where no one is earning an income. Many of them leave school and have no hope of ever getting a decent education or job. These children who grow up without any support or guidance from adults may become our biggest problem in the future. They are more likely to become street children or turn to sex work or crime as a way of surviving.

Older female relatives, mostly grandmothers, are the most likely to take in orphans. Many of them survive on pensions and already live in dire poverty. When their children die, and they become responsible for grandchildren, they get a huge extra financial burden, and at the same time, they lose the financial support they may have received from their children. Although there are certain grants available for caregivers who are taking care of orphans, they may not be sufficient. (***See pg 463: Social grants***)

POVERTY, THE ECONOMY AND HIV/AIDS

People who carry the heaviest burden as a result of HIV and AIDS are the poor. AIDS increases poverty, and families are the first to feel the economic effects of having members of the family who have HIV and/or AIDS. Families lose income if the

breadwinner falls sick and is unable to continue working. Often, another family member stays at home to look after the sick person and further income is lost. Families also face increased costs, as they have to spend money on caring for the sick or on funeral expenses when the person dies.

Government spending is affected since more and more of the taxes are spent on health care and welfare. Our social welfare system may not be able to cope with the number of orphans who need grants.

In addition, very poor people usually cannot afford the basic requirements for a healthy lifestyle - such as healthy food, a clean environment and clean water. They also cannot afford the costs of accessing basic health care services such as transport to clinics or hospitals. It is difficult for poor people to cope with the effects of HIV and to take their medicine regularly.

Most of the people who are dying from AIDS-related illnesses are between the ages of 25 and 44 – an age when most people are workers and parents. This has serious consequences for our economy and the development of the country.

BREAKING THE SILENCE AROUND HIV/AIDS

Although HIV/AIDS has become very common, it is still surrounded by silence. People are ashamed to speak about being infected, and many see it as a scandal when it happens in their families. People living with HIV or AIDS are exposed to daily prejudice born out of ignorance and fear. Fear leads to discrimination and victimisation against those living with HIV or AIDS. Some people still believe that only a certain group of people will be infected with HIV, such as gay men, sex workers, people who engage in risky sexual behaviour, and injecting drug users. This causes stigmatisation and discrimination against HIV-positive people. People become reluctant to test or disclose their status out of fear.

There are myths around HIV/AIDS that lead to people seeing it as something that should be kept secret. Many people see those with HIV/AIDS as people who are somehow to blame because they are promiscuous or homosexual. HIV is seen by some people as a plague that you can catch just from being in the same space with someone who is HIV-positive. In some communities, people with HIV or AIDS have been ostracised. This underlines the importance of widespread community education efforts because the ignorance and prejudice around HIV/AIDS can be almost as destructive as the disease itself. In some countries, AIDS activists have adopted the slogan "Fight AIDS, not people with AIDS." ***(See pg 665: Running an HIV/AIDS and TB awareness campaign)***

There is a need to educate people to make responsible decisions that will prevent them from getting HIV. People should be encouraged to test and seek treatment if

they test positive. It is important to create awareness of HIV/AIDS in communities and encourage non-discriminatory practices for a more conducive environment that allows HIV-positive people to live more freely and openly.

HIV/AIDS and TB

What is TB?

Tuberculosis (TB) is an infectious disease caused by the bacteria known as Mycobacterium tuberculosis.

What is the association between TB and HIV?

TB and HIV form a lethal combination, each speeding the other's progress. It is essential to offer TB patients HIV testing with counselling. HIV weakens the immune system, increasing the susceptibility of an individual to TB infection and the progression of TB infection to disease. TB is a leading cause of death among people living with HIV. Early diagnosis and effective treatment of TB ensure a cure and stop transmission to others. Among HIV-infected patients, it is critical to diagnose and treat TB early.

How does TB spread?

Transmission occurs through the airborne spread of infectious droplets. When an infectious person coughs, sneezes, or spits, they propel TB bacteria into the air. Left untreated, a person with active TB can infect an average of 10 –15 people each year. People living with HIV are at a much greater risk of developing active TB once infected, which increases as the degree of immune suppression increases.

What factors affect TB transmission?

Businesses with a large migrant workforce, such as oil and gas companies, mining companies as well as health centres/hospitals, are workplace settings where there is an increased risk of TB. Transmission generally occurs indoors, where droplets can stay in the air for a long time due to poor ventilation.

TB is also more easily spread in crowded living, working or social conditions, such as in hostels, prisons, military barracks and shebeens.

What is the difference between TB infection and disease?

TB infection occurs when TB germs are breathed in and establish infection initially in the lungs. In most healthy individuals the immune system is able to keep the infection in check. This is referred to as latent TB infection.

TB occurs when conditions tip in favour of the TB germs because the immune system is weakened due to HIV infection, malnutrition, silicosis, cancer therapy or other chronic diseases such as diabetes, long-term steroid therapy, alcoholism, and physical and emotional stress. The TB bacteria then start replicating, causing increasing inflammation and tissue destruction until the person shows the signs and symptoms of TB.

What is drug-resistant TB?

Drug-resistant TB is when the bacteria that infected you are resistant to one or more anti-TB drugs. Drug resistance is possible in people getting TB for the first time (patients who have not received treatment with anti-TB drugs before), or they may have been infected with drug-resistant TB and not disclosed previous TB treatment. Drug resistance occurs much more commonly in patients with a history of previous treatment that was not completed properly.

How can TB be recognised?

If TB occurs following the initial infection, it is referred to as primary TB, which is common in children and HIV-positive individuals. Pulmonary TB (in the lungs) is the most common and contagious form of active TB. TB can occur in almost any other part of the body, including the lymph glands, lungs, joints, bones or intestines, and is called extra-pulmonary TB. In HIV-infected TB patients, TB often affects more than one organ, and pulmonary and extra-pulmonary TB commonly co-exist.

Why is early diagnosis important?

The systematic and early identification of adults with a persistent cough lasting two weeks or more (particularly among outpatients in health facilities) is important, as this reduces treatment delays and identifies infectious patients who are a risk to the community and others in their workplace. Early diagnosis and effective treatment reduce the chances of dying from TB and transmission of TB to others.

What are the symptoms of TB?

The most common symptom of pulmonary TB is a persistent cough for two weeks or more, where patients cough up bits of blood.

It may be accompanied by one or more of the following:

- Chest pain
- Loss of appetite and weight
- Tiredness
- Fever, particularly with a rise in temperature in the evening and night sweats
- Shortness of breath
- Coughing up blood may occur in complicated cases

Symptoms of extra-pulmonary (outside the lungs) TB depends on the organ involved. Chest pain from tuberculosis pleurisy, enlarged lymph nodes, and a sharp angular deformity of the spine are the most frequent signs.

How is TB treated?

The primary anti-TB medicines are Isoniazid (H), Rifampicin(R), Pyrazinamide (Z), Streptomycin (S) and Ethambutol (E). Apart from Streptomycin, the drugs are used in fixed-dose combination (FDC) tablets. Treatment regimens for new cases and retreatment exist for adult patients. Treatment is in two phases: an intensive phase (two or three months) and a continuation phase (four or six months). The initial intensive phase aims to kill the TB bacteria rapidly. The continuation phase of treatment aims to destroy any lingering bacteria that could trigger a relapse. Treatment in the intensive phase is directly observed by a treatment supporter.

HIV/AIDS and rights

The Bill of Rights has a list of fundamental rights of all people living in South Africa. In addition to the right of equality under the Equality Clause (Section 9 of the Bill of Rights), these rights are also extremely important. The Constitution includes many rights, but most important for people living with HIV and AIDS are the socio-economic rights such as the right to basic health care, education, social services, shelter, and so on. The government has a duty to provide as many of these services as it can afford.

WHAT RIGHTS MEAN FOR PEOPLE LIVING WITH HIV OR AIDS		
Section in the BILL OF RIGHTS	**RIGHT**	**WHAT IT MEANS FOR YOU IF YOU ARE LIVING WITH HIV OR AIDS**
10	**HUMAN DIGNITY** Everyone has inherent dignity and the right to have their dignity respected and protected	A person or institution, such as a hospital or company, may not insult or take away your self-respect by their words or actions.
12	**FREEDOM AND SECURITY OF PERSON** Includes the right to: ● Make decisions about reproduction ● Security and control over your body ● Not be subjected to medical or scientific experiments without your informed consent	You have the right to make your own decisions about medical treatment and pregnancy, e.g. you cannot be forced to have an HIV test. You may not be treated in a cruel or degrading way by any person or institution.
14	**PRIVACY** Everyone has the right to privacy	You have the right to keep the fact that you have HIV or AIDS to yourself. An employer or hospital cannot force you to tell them or force you to have an HIV test.
16	**FREEDOM OF EXPRESSION** Everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas.	Proper information can be made available in schools or prisons about how to prevent HIV.
18	**FREEDOM OF ASSOCIATION** Everyone has the right to freedom of association.	You can join any organisation you choose. You cannot be forcefully separated from other people.
21	**FREEDOM OF MOVEMENT AND RESIDENCE** Everyone has the right to: ● Move about freely ● Rnter, remain in or leave the country ● Reside anywhere in the country	You are free to move around the country. You cannot be forced to live in a separate place, away from the rest of society.

22	**FREEDOM OF TRADE, OCCUPATION AND PROFESSION** Every citizen has the right to choose their work freely.	You can choose what kind of work you want to do, e.g. you may not be told that you cannot be a teacher or a health care worker.
23	**LABOUR RELATIONS** Everyone has the right to fair labour practices.	You may not be unfairly discriminated against at work.
24	**ENVIRONMENT** Everyone has the right to an environment that is not harmful to their health or wellbeing.	This right may be important for people living in a state institution such as a prison or psychiatric hospital.
26	**HOUSING** Everyone has the right to have access to adequate housing. No one may be evicted from their home or have their home demolished without a court order.	You may not be refused a subsidy or loan to buy a house because you have HIV or AIDS. It is unlawful to evict you from your home because of your health.
27	**HEALTH CARE, FOOD, WATER AND SOCIAL SECURITY** No one may be refused emergency medical treatment. Everyone has the right to access: • Health care services, including reproductive care • Social security, including appropriate social assistance if they are unable to support themselves and their dependants	Hospitals or medical people cannot refuse to treat you. You have the right to a disability grant if you are too ill to support yourself or your family.
29	**EDUCATION** Everyone has the right to a basic education, including adult basic education.	You have the same right as anyone else to education. A school cannot refuse to educate you or your child because you have HIV or AIDS.
32	**ACCESS TO INFORMATION** Everyone has the right to see any information held by another person that they need in order to exercise or protect their rights.	If for example you feel your rights are being violated because of a company policy, you can demand to see the policy and may then challenge it in court. You have the same right with private institutions or the state, for example an organisation, or your medical records at a state hospital.
33	**JUST ADMINISTRATIVE ACTION** Everyone whose rights have been negatively affected by administrative action has the right to be given written reasons. This includes reasons for very long delays.	If you believe that you are being refused a social service (e.g. a house or education) for unjust reasons, you can demand to get the reasons in writing. You may then decide to challenge the decision.
35	**ARRESTED, DETAINED AND ACCUSED PEOPL**E Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with dignity.	Prisoners cannot be discriminated against or treated in an undignified way just because they have HIV or AIDS.

Acknowledgements: HIV/AIDS & The LAW: A Resource Manual, 2nd edition. The AIDS Law Project & The AIDS Legal Network

People also complain that information about their illness is not kept confidential. Healthcare workers also have rights, including the right to a safe working environment, while patients have rights to:

- Confidentiality
- Testing for HIV and informed consent
- Medical treatment

Confidentiality

Confidentiality means that doctors, nurses, psychologists, dentists and other healthcare workers have a moral and legal duty to keep all information about patients confidential. Any information about the patient's illness or treatment cannot be given to another person unless:

- The patient consents (agrees) to this
- The information is about the illness or treatment of a child – then health workers can tell others but only with the permission of the child's parent or guardian
- The patient is dead – then the doctor must get permission from the next-of-kin (the person's closest family)

EXAMPLE

THE McGEARY CASE

In the McGeary case, the Supreme Court of Appeal said that a doctor cannot tell other doctors about the HIV status of a patient without the patient's consent. Mr. McGeary applied for a life assurance policy. The insurance company told him to have an HIV test before they could approve his application. The doctor got the results of the test and told McGeary that he was HIV-positive. The next day, the doctor played golf with another doctor and a dentist. During the game, they discussed AIDS and McGeary's doctor told the other two that McGeary was HIV-positive. The news of McGeary's condition spread around the small community. McGeary began a civil claim to get compensation from his doctor for breaking his rights to confidentiality. The Court said the doctor had to pay

McGeary compensation for breaking his right to confidentiality. The Supreme Court of Appeal said that a doctor cannot tell other doctors about the HIV status of a patient without the patient's consent.

SOME RULES ABOUT CONFIDENTIALITY

Telling other health care workers: A health care worker must get a patient's permission before giving any of that patient's medical information to another health care worker.

Telling a patient's sexual partner: A healthcare worker may not tell the patient's sexual partner that the patient has HIV unless the partner appears to be at risk because the patient refuses to practice safer sex. The health care worker must counsel the patient on the need to tell their sexual partner and to practise safer sex. The health care worker must then warn the patient that if they do not tell their sexual partner or practise safer sex, then the health care worker will have to tell the partner about the person's HIV status.

Telling a court: A court can order a health care worker to give them confidential information.

CONFIDENTIALITY AND OPENNESS

HIV/AIDS is not an open issue mainly because people living with the disease fear the prejudice and discrimination they will suffer if they tell people about it. Communities need to be educated about HIV and AIDS and the supportive role they can play in the lives of people living with the disease. In this way, people may be encouraged to be open about their HIV status. Some people choose to be open about their HIV status to certain people, but this does not mean they lose their right to confidentiality with a doctor, nurse, health care worker, employer or friend. A person's personal right to privacy and confidentiality must always be respected.

WHAT CAN YOU DO IF A HEALTHCARE WORKER ABUSES YOUR RIGHT TO CONFIDENTIALITY?

You can complain to the Health Professions Council of South Africa (HPCSA). You can also make a civil claim for damages (compensation) against the healthcare worker, hospital or clinic, or any member of the public who has abused your rights. ***(See: pg 1078: Resources)***

HIV testing and informed consent

Everyone has the right to make their own decisions about their body, so no patient can be given medical treatment without their consent. Consenting to medical treatment has two parts to it: information (understanding) and permission (agreeing).

With an HIV test, you must know what the test is, why it is being done and what the result will mean for you before you agree to the blood sample being taken. This is called pre-test counselling. After the HIV test results have been received, you must be counselled again to help you understand and accept the effect that a negative or positive result will have on your life. This is called post-test counselling.

EXAMPLE

Thami is a caregiver in a children's home. The matron informs him that all staff in the hospital must have a Hepatitis B test. Thami agrees to this. But, the hospital does an HIV test, too, saying it saves time and money to do both tests at the same time. The matron tells Thami he is HIV-positive. Thami is furious because he only gave permission for the Hepatitis B test. The matron did not have a right to do the test. She should have discussed it with Thami first and obtained his consent.

SOME RULES ABOUT HIV TESTING AND CONSENT

Here are some rules to remember:

- You can give verbal or written consent to have an HIV test
- If you go to hospital, you cannot be tested for HIV without your consent

EXCEPTIONS TO THE RULE OF INFORMED CONSENT

These are the only exceptions to the rule that a person must give their consent to treatment or an operation:

- If a patient needs emergency treatment
- Testing done on blood donations
- Mentally ill patients - In this case, the mental hospital must get permission from one of the following people: the patient's husband or wife, parent, child (if the child is 21 or older), brother or sister

- HIV tests are routinely done on the blood of all pregnant women for health research, but the name of the woman is not attached to the blood sample, so no one knows whose blood it is

WHO CAN GIVE CONSENT?

A person who is directly affected must give consent. Only in exceptional circumstances can it be given by another person, e.g. on behalf of mentally ill patients. In the event that a person is unable to consent, consent can be given by a person who has a legal right to consent on behalf of another person, e.g. guardian or curator.

Adults who have a legal capacity (the ability to make legal decisions) and who are of "sound and sober mind" can give valid consent to medical treatment (consent recognised by law). Adults without legal capacity (e.g. people who are mentally ill or have a mental disability) cannot give consent without assistance. Couples must consent to treatment individually – one partner in a relationship cannot consent to treatment on behalf of the other partner.

Children over 12 years can also give their consent to medical treatment. When a child is too young to consent, either one of their parents or guardians must give consent. ***(See pg 643: Children and youth and HIV/AIDS)***

WHAT CAN YOU DO IF AN HIV TEST WAS DONE WITHOUT YOUR CONSENT?

If an HIV test was done without consent, your rights have been abused. You can complain to the Health Professions Council of South Africa (HPSCSA). You can also bring a civil claim for invasion of privacy and a criminal charge of assault against the health care worker or the person they were acting on behalf of.

CASE STUDY

HOFFMAN *v* SOUTH AFRICAN AIRWAYS (SAA)

Mr Hoffman applied for a job as a cabin attendant with South African Airways (SAA) and was asked by SAA to take an HIV test. He tested HIV-positive. SAA refused to give Mr Hoffman the job because, they said, part of his job involved travelling to different countries, and he would need to have a yellow fever vaccination. It is not advisable for someone with HIV to have these vaccinations. SAA said that this was an inherent requirement of the job in the airline and, therefore, they couldn't employ him. The Constitutional Court was asked to decide if SAA had gone against Hoffman's rights to equality, dignity and fair labour practices. The court decided that:

- *SAA had discriminated against Hoffman*
- *The discrimination was unfair and infringed on his dignity*

Being HIV-negative was not an inherent requirement of the job of being a cabin attendant; they should have taken greater steps to investigate how Hoffman's immune system could have dealt with travelling and the possibility of getting a strange disease.

The right to health care and medical treatment

Everyone has the right of access to health care services and medical treatment, including access to affordable medicines and proper medical care. The right to access to health care services includes the right to proper care from a health care worker, which means it is against the law for a health care worker to:

- Refuse to treat a person because they have HIV
- Treat people with HIV differently from other patients.

If a hospital or clinic refuses to treat someone living with HIV/AIDS, they can be reported to the Department of Health, the Public Protector, the South African Human Rights Commission or Legal Aid South Africa. The case can also be taken to the High Court, which can review and cancel the hospital's decision to refuse to provide treatment. ***(See pg 629: The right to health care and medical treatment)***

The right to health care includes the provision of medical treatment to people in need. The government has committed itself, as part of its strategic plan, to making anti-retroviral treatment available to all people who have reached a certain stage of their illness. A doctor must medically certify a person who wants to receive anti-retroviral treatment.

HIV/AIDS and TB in the workplace

Laws that give employees with HIV, AIDS and/or TB rights at work

Employers, supervisors or colleagues often discriminate against employees living with HIV, AIDS or TB. The following laws give people rights at work:

THE CONSTITUTION

The Constitution gives all employees the right to be treated fairly at work, including the right to fair labour practices and the right to equal treatment and non-discrimination.

THE LABOUR RELATIONS ACT (LRA)

The LRA covers all employees and employers and treats everyone the same. This means that domestic workers now have the same rights as factory workers.

The only employees who are not covered by the LRA are people working for the South African National Defence Force (SANDF) and the State Security Agency. But these employees are protected by the Constitution and therefore have the right to fair labour practices and equality. The LRA gives employees the right to be treated equally. It is an unfair labour practice to discriminate against an employee on any grounds, including race, gender, sex, colour, sexual orientation, age, disability and so on. Discrimination is 'automatically unfair' if it violates any of the basic rights of employees, such as discrimination on grounds of a person's disability. ***(See pg 361: Automatically unfair dismissals)***

CASE STUDY

GARY SHANE ALLPASS *v* MOOIKLOOF ESTATES (PTY) LTD (2011)

Mr Allpass was employed by Mooikloof Estates as a horse riding instructor and stable manager. At the time of his recruitment, he had been living with HIV for almost 20 years. Before being hired, Mr Allpass had an interview where he informed his employer that he was "in good health".

Shortly after he was hired, he — along with other employees — was asked to complete a form requiring him to disclose whether he was taking any "chronic medication."

Mr Allpass complied and disclosed that he was taking, among other things, daily medication to manage his HIV condition.

When his employer found out about his HIV-positive status, he immediately terminated his employment on the grounds that he had fraudulently misrepresented his condition and that he was, in fact, "severely ill".

The court decided that Mr Allpass had been discriminated against and unfairly dismissed due to his HIV status. The court also considered that the dismissal violated the equality rights.

THE EMPLOYMENT EQUITY ACT (EEA)

The EEA is more specific about the rights of people living with HIV or AIDS. The EEA explicitly prohibits unfair discrimination against people at work on grounds of their HIV status. The EEA also prohibits testing for HIV in the workplace unless this is authorised by the Labour Court. ***(See pg 345: Employment Equity Act)***

An employer cannot:

- Force a person who is applying for a job to have an HIV test
- Automatically make an HIV test part of a medical examination
- Force someone who is already working for them to have an HIV test

The EEA doesn't cover members of the South African National Defence Force or the State Security Agency. But members of these organisations can still take their cases to any court with jurisdiction including the High Courts.

THE OCCUPATIONAL HEALTH AND SAFETY ACT AND MINE HEALTH AND SAFETY ACT

Sometimes, an accident at work can cause a bleeding injury. If the injured person is HIV-positive and someone who tries to help the person also has an open wound, there is a small chance of the helper becoming infected if the wound comes into contact with the injured person's blood. The employer has a responsibility to make sure that the workplace is safe and that employees are not at risk of HIV infection at work. ***(See pg 346: Occupational Health and Safety Act)***

There are regulations issued by the Department of Employment and Labour which say:

- Employers must keep rubber gloves in the first aid box
- All staff must pg 3be trained so that they know what safety measures to take if an accident happens

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT (NO. 130 OF 1993) (COIDA)

COIDA gives employees the right to compensation if they are injured or become ill at work. If you get infected with HIV because of a workplace accident, you can claim for compensation. ***(See pg 394: Compensation Fund)***

THE MEDICAL SCHEMES ACT NO. 131 OF 1998 AND REGULATIONS: GOVERNMENT GAZETTE 20556, 20 OCTOBER 1999

Medical aid as a form of insurance is an important employee benefit in the workplace. In the past, the majority of medical schemes refused to cover illnesses that were linked to HIV infection.

The *Medical Schemes Amendment Act of 1998* prohibits discrimination on the grounds of 'state of health'. This covers a person living with HIV or AIDS. It means that the medical scheme cannot refuse to cover reasonable care that could prolong the health and lives of people living with HIV or AIDS. The *Medical Schemes Act* stops medical schemes from discriminating against people living with HIV or AIDS. It states that all schemes must offer a minimum level of benefits, decided by the government, to employees with HIV or AIDS. The minimum levels of benefits include:

- They must diagnose and treat all opportunistic infections for HIV or AIDS
- They must provide anti-retroviral treatment

General rules about HIV and AIDS that apply in the workplace

- An HIV-positive person does not have a duty to give this information to their employer because of their right to privacy
- If you tell your employer about your HIV status, the employer cannot tell anyone else without your consent. If the employer tells anyone else, this is violating your right to privacy, and it is possibly an unfair labour practice
- A doctor or health care worker who tells an employer about an employee's HIV status without their consent is acting against the law. This is a violation of the employee's right to confidentiality
- An employer cannot demand to know if the cause of an illness is HIV infection
- An employer cannot refuse to employ you because you have HIV
- An employer cannot dismiss you because you have HIV
- An employer cannot dismiss you because you have HIV, even if other employees refuse to work with you

- The *Promotion of Equality and Prevention of Unfair Discrimination* Act also protects an HIV-positive person from unfair discrimination in the workplace

CASE STUDY

SOUTH AFRICAN SECURITY FORCES UNION AND OTHERS *v* SURGEON GENERAL AND OTHERS

The AIDS Law Project (now SECTION27) represented the SA Security Forces Union (SASFU) and three individual people with HIV who were denied recruitment or promotion in the SANDF based on their HIV status. The old HIV testing policies of the SANDF were used to exclude all people with HIV from recruitment, promotion and foreign deployment.

The court declared that the blanket exclusion practised by the SANDF was unconstitutional. The case was important because it showed that there is no medical evidence to justify a blanket ban on all people with HIV.

Code of Good Practice on HIV/AIDS and Employment

The Department of Employment and Labour has published a *Code of Good Practice on Key aspects of HIV and Employment*. This Code gives employers and trade unions guidelines to ensure that HIV-positive people are not unfairly discriminated against in the workplace.

This includes provisions dealing with:

- Creating a non-discriminatory work environment
- HIV testing, confidentiality and disclosure
- Providing equitable employee benefits
- Dismissals
- Managing grievance procedures

The Code also provides guidelines for employers, employees and trade unions on how to manage HIV/AIDS in the workplace.

For a copy of the Code, go to the website: www.labour.gov.za; click on 'Resource Centre'; click on Codes of Good Practice'; click on 'Employment Equity', then on the specific Code of Good Practice.

What happens if you become too ill to work?

All employees have a right to sick leave, and an employer has no right to discriminate against or dismiss an employee who uses these rights. The *Basic Conditions of Employment Act* says an employee can have 6 weeks' paid sick leave over any 3-year cycle.

However, people with HIV could eventually start to become ill, and this will affect their capacity to perform their work. An employer is allowed to dismiss an employee on grounds of incapacity and poor work performance, even if the employee has not used all their sick leave. This means if an employee is unable to do their job properly because of their illness, then the employer will eventually be able to dismiss them.

The *Labour Relations Act* sets out clear procedures for employers and employees when dealing with dismissals for incapacity.

The Code on HIV states, “Where a worker has become too ill to perform their current work, an employer is obliged to explore alternatives, including reasonable accommodation and redeployment". It is unlawful for an employer to dismiss an employee simply because he/she suspects that the employee may have AIDS but cannot show any evidence of incapacity.

When can TB patients return to work?

Since patients with active TB may be sick and infectious, they may be advised not to work during the initial stages of treatment until they are no longer infectious. Most patients are no longer infectious after approximately two weeks of treatment. Such patients should continue treatment and can return to work; they are not a threat to other employees.

TB patients where multi-drug resistance is confirmed or strongly suspected should not be allowed to return to work until they have had tests that confirm that they do not have resistant TB. Adequate sick leave should be available to employees to allow them sufficient time to recover, especially those with drug-resistant TB, as they may require hospitalisation for a few months.

Can TB patients go on leave?

TB patients, particularly those with workplace DOT treatment, should be encouraged not to take annual leave during the intensive phase of treatment. Prior to going on leave, the patient should be re-counselled on the importance of continuing treatment while on leave.

The patient should be supplied with adequate treatment for days away and be encouraged to use an alternative treatment supporter while on leave. Employees with TB going on extended leave should be transferred to their nearest clinic.

How can TB be prevented in the workplace?

The three underlying principles of TB control are: find, treat/cure and prevent.

1. Prompt identification and diagnosis of TB
2. Regular and correct treatment and cure of TB
3. Prevention of TB

In addition to promptly identifying TB cases and ensuring they are treated and cured, TB can also be prevented by TB preventive therapy targeted to those who are at a high risk of developing TB, such as HIV-infected workers or those with silicosis, an occupational lung disease that results from silica dust exposure. Silica dust exposure may occur in mines, quarrying, sandblasting, tunnelling and smelting.

Infection control is essential to prevent transmission of TB in the workplace. The elements of a workplace infection control programme include:

- Developing an infection control plan following a risk assessment
- Implementing environmental controls, such as ensuring adequate ventilation by having outdoor waiting areas and windows that open or through simple architectural modifications to improve ventilation, cough hygiene for coughing patients and the use of ultraviolet-light air disinfection
- Identifying workers that may have TB as soon as possible and referring them for prompt diagnosis and treatment
- Collecting sputum samples in a safe manner. This is best achieved by collecting sputum samples outside but not in direct sunlight. If this is not possible, sputum should be collected in a well-ventilated room
- Relevant training for administrators and healthcare workers
- Offering HIV testing for those working in high-risk situations and alternative jobs for HIV-infected workers
- Ensuring the use of personal respirators (masks), particularly for those working with drug-resistant TB patients ***(See pg 365: Dismissal for incapacity)***

What can you do to protect your rights at work?

Employees can take disputes about dismissals or discrimination to a Bargaining Council or the Commission for Conciliation, Mediation and Arbitration (CCMA). The Bargaining Council or CCMA will try to settle the dispute by conciliation, mediation or arbitration. ***(See pg 370: Solving disputes under the Labour Relations Act)***

Cases about unfair discrimination and automatically unfair dismissal will be referred to the Labour Court. Employees can appeal against decisions of the Labour Court by going to the Labour Appeal Court. ***(See pg 628: Case Study: Hoffman vs South African Airways)***

Women and HIV/AIDs

The impact of the HIV pandemic has been far greater on women than men. There are many reasons for the vulnerability of women to HIV:

- **Physical reasons:** Women are more vulnerable to HIV infection than men. A woman's vagina has a larger surface area for HIV to enter. Some sexual practices are dangerous for women as they can increase the risk of getting HIV, e.g. dry sex, which can lead to vaginal tearing and can make it easier for the virus to enter the body. Rape, especially if it is violent, can also increase the risk of getting HIV because the victim cannot make the rapist wear a condom.
- **Social and economic reasons:** Because women are often financially dependent on their partners, it can be difficult for a woman to tell her partner to use a condom because she may be afraid that he might reject her and leave her with no financial support. The unequal position of women in society also means that it is often difficult for women to get access to good health care and information about how to prevent HIV.
- **Sexual reasons:** Many men do not believe that women have the right to make decisions about their bodies and when to have sex. This makes it difficult for women to be assertive (to make their own decisions) about sex and to demand that their partners have safer sex. Many women do not know that they have the right to refuse to have sex with their husbands. If a woman does not consent to sex with her husband, the husband can be charged with rape.

Rape and HIV infection

If a woman has been raped, she should ask for an HIV test. Even if the result is negative, she should go for another test after 3 months. If she tests positive, this may be proof that she became positive as a result of the rape. However, the rapist has to take an HIV test. The *Sexual Offences and Related Matters Amendment Act* allows a person accused of a sexual offence where there is a risk of HIV transmission to be tested without his permission and his HIV status to be disclosed to the victim.

A rape survivor can also make a civil claim against her rapist. If she can prove that she became HIV positive as a result of the rape, she can make a claim against the rapist for her medical expenses and for pain and suffering because of the rape. ***(See pg 601 Problem 1: Reporting rape or assault and going to court; See pg 587: Sexual violence and HIV testing)***

Termination of pregnancy (Abortion)

The *Choice of Termination of Pregnancy Act* gives women the right to have safe and legal terminations.

APPLYING FOR TERMINATION

To apply for an abortion, the woman should:

- Ask her doctor to refer her to a hospital or clinic where terminations take place
- Go to a non-profit clinic that assists women with advice and care on issues around pregnancy and reproduction
- Go to the hospital in her area that the government has set aside to do terminations (called 'designated hospitals')
- Go to the nearest doctor or nurse at the local primary health care clinic
- Consult a counsellor at a community centre
- Visit a social worker in her district

Sometimes, healthcare workers do not give women the right information because they think that it is wrong for a woman to terminate her pregnancy. At other times, healthcare workers have forced pregnant women living with HIV or AIDS to have a termination. This is against the law, as only a woman has the right to decide whether she wants to continue with her pregnancy or not. If this happens to you, you should make a complaint to the Commission on Gender Equality (CGE) or the Department of Health.

WHERE WILL THE TERMINATION TAKE PLACE?

The termination will take place at a hospital or clinic that has been authorised to do terminations by the health minister. Social workers, doctors, nurses and midwives will be able to advise a woman where the nearest facility is.

TERMINATION BY HIV-POSITIVE WOMEN

A woman living with HIV or AIDS may apply for a termination, as without treatment, there is a nearly 20% risk of infection to her child. It is possible that she may be able to have a termination even after the 20th week of pregnancy. A woman can only have a termination after the 20th week of her pregnancy if a doctor, after discussing it with another doctor or a registered midwife, believes that the pregnancy could be dangerous for the woman or could result in a deformed baby.

CONSENT FOR TERMINATION OF PREGNANCY

The *Choice on the Termination of Pregnancy Act* says that a woman doesn't need to ask her husband before she decides to end her pregnancy. Healthcare workers cannot refuse to do a termination because a woman has not told her husband.

TERMINATION FOR A GIRL UNDER THE AGE OF 18 YEARS

The law says that a young woman under 18 may apply for a termination without the knowledge or consent of her parents. Doctors and midwives should advise her to discuss this with her parents, but they cannot force her to do this. Healthcare workers cannot refuse to terminate her pregnancy if she does not want to discuss her decision with her parents.

Sterilisation

A woman with HIV cannot be sterilised unless she agrees to this. All women, including women with HIV, have the right to have children. If a woman with HIV chooses to get sterilised, the hospital must respect her decision. She does not have to discuss her decision with her husband or get his consent.

CONSENT TO STERILISATION

A woman of 18 years or older can consent on her own to sterilisation. As sterilisation is a medical operation, a girl under 18 must have the consent of her parents or legal guardians before a hospital will agree to the operation.

Commercial sex work

In South Africa, it is a crime to be a commercial sex worker. This is sometimes still referred to as 'prostitution'. It is also a crime to solicit (get customers). Although both men and women can be sex workers, it is usually women working on the streets who are most often prosecuted and who are most vulnerable to violence and abuse.

Commercial sex workers are vulnerable to HIV because:

- They are not always able to insist that their customers use condoms, and the sex is often violent
- Because sex work is illegal, it is difficult for sex workers to get information about HIV and safer sex practices
- Sex workers are often scared to say that they are sex workers and are not able to go to organisations where they could get help and information
- They are also not able to protect themselves from rape and abuse because they cannot report these crimes to the police

Customary practices and HIV/AIDS

For many people, customary law is the most important law in their lives, controlling areas of their lives like their marriages, their property, and their right to inherit.

But some customary laws discriminate and make people vulnerable to HIV and AIDS because, for instance, it traditionally gives women less power than men. Various customary practices have been linked to HIV and AIDS, e.g. ritual male circumcision, healing scarification and virginity testing.

Customary law is the written and unwritten rules which have developed from the customs and traditions of communities. They are laws that apply to certain cultures or ethnic groups. The ordinary courts use customary law. For customs and traditions to become law, they must be:

- Known to the community
- Followed by the community
- Enforceable (able to be carried out)

Three important ways that the Constitution and Bill of Rights have changed the way customary law is used:

1. Customary law must be in line with the principles in the Bill of Rights. The Bill of Rights protects the right to culture, but it also protects the right to equality and non-discrimination and the right to dignity
2. Identify cultural practices that deserve to be protected because they do not discriminate and those that should be done away with because they discriminate unfairly.
3. Customary law should not be used to discriminate

Mother-to-child transmission of HIV

Research has shown that giving anti-retroviral drugs to HIV-positive pregnant mothers before they give birth decreases the risk of passing HIV on to the baby.

The Constitutional Court has said that the national government must make it possible for all pregnant mothers to have access to drugs that will prevent mother-to-child transmission of HIV.

LGBTQI+ persons and HIV/AIDS

The gay, lesbian, bisexual, transgender, queer and intersex (LGBTQI+) communities have faced much of the blame, discrimination and prejudice linked with HIV/AIDS. A gay person with HIV or AIDS will, therefore, suffer a double burden of discrimination and negative attitudes towards them – because of having the disease and because of being gay. As a result of the general prejudice and discrimination against gay and lesbian people, important ways of educating people about HIV and AIDS are lost. For example, sexuality education in schools ignores or avoids discussion about lesbian or gay relationships.

Social prejudice: There is still a lot of social prejudice against lesbians and gay men from their families in the community, workplace, schools, churches, and public services.

The effects of double discrimination: LGBTI people often experience double discrimination:

- Discrimination because of their sexual orientation and
- discrimination because of HIV/AIDS

This discrimination can put them at more risk of getting infected with HIV and make prevention and care work much more difficult. It can also worsen the impact of HIV on their lives.

Reasons for greater risk and vulnerability:

- It is harder to do direct and open, safer sex education because many people still think that same-sex acts are immoral.
- Many men and women who have same-sex relationships believe their behaviour is illegal or socially unacceptable – as a result, many deny to themselves, to their close family and friends, and to the broader community that they love or have sex with people of the same sex.
- Many LGBTQI+ persons cannot, or are afraid to, use public services (like health care and welfare, sexuality education) that would help to reduce the risk of HIV infection or would help them to cope with HIV infection.

SEXUALITY EDUCATION AT SCHOOL

Sexuality education ignores, avoids or misrepresents same-sex practices or relationships. Most of the HIV/AIDS prevention materials aimed at school students and youth do not discuss same-sex relations. They are silent about the needs of young people who are not heterosexual, and often, young people cannot get access to any information about same-sex practices.

Most of the safer sex tools – like condoms – that are available in South Africa are not suitable for lesbian or gay safer sex. Lesbian safer sex tools like dental dams and rubber gloves are not distributed widely by the health department. Some of the condoms available in South Africa are not suitable for anal sex and do not come with lubricants such as KY jelly.

The Constitution prohibits unfair discrimination on the basis of sexual orientation. LGBTQI+ students and youth have a right to get suitable information, sexuality education or life skills training on how to protect themselves.

THE WORKPLACE

LGBTQI+ persons face a lot of discrimination at work, for example, in hiring, promotion and benefits. The *Labour Relations Act* specifically prohibits discrimination on the grounds of sexual orientation and marital status, in line with the Constitution.

MEDICAL AID ASSISTANCE

Lesbian and gay employees were often not allowed to register their same-sex partners on their medical aid schemes, and many companies still exclude

same-sex partners from their schemes. The *Medical Schemes Act* says it is against the law for medical aid schemes to refuse to register a same-sex partner.

CASE STUDY

LANGEMAAT *v* MINISTER OF SAFETY AND SECURITY (1998)

In Langemaat v Minister of Safety and Security (1998), *a lesbian who worked for the police wanted to add her partner to her medical aid as a dependant but was not allowed to because the medical aid scheme did not include same-sex partners as dependants. The High Court said that this was discrimination on the basis of sexual orientation.*

MEDICAL CARE

Doctors need to know the sexual orientation of their patients.But once doctors know this, they have to respect the privacy and confidentiality of the patient.

If a doctor or any health care worker discriminates against you because you are lesbian, gay, bisexual, transgender or intersex, they are breaching:

- Their duty to give the best care and treatment to patients
- Their constitutional duty to equal treatment of all patients
- The *National Health Act*, which prohibits discrimination on the basis of sexual orientation

Challenging unfair discrimination by a medical professional

If you do not receive adequate medical treatment or care because a healthcare worker is homophobic, you can:

- Make a civil or constitutional case against the hospital or clinic, or
- Complain to a professional body such as the Health Professions Council of South Africa (HPCSA)

MATERNITY LEAVE

The *Basic Condition of Employment Act* currently does not make provision for parental leave or maternity leave for gay couples.

CASE STUDY

A *v* STATE INFORMATION TECHNOLOGY AGENCY

In March 2015, a gay man challenged his employer's refusal to grant him four months' paid maternity leave on the grounds that he was not the child's biological 'mother'. The man married his partner in a civil union in 2010, and a year later, the couple entered into an agreement with a woman to carry a baby for them. However, the employer refused on the grounds that its policies and the Basic Conditions of Employment Act made provision for maternity leave only for female employees and was silent on leave for people who became parents through surrogacy.

The Labour Court ordered that the employer:

- *Recognise the status of parties to a civil union and prohibit discrimination against couples who have become parents by entering into a surrogacy agreement.*
- *Pay him for the two months' unpaid leave he took to care for his newborn baby.*

COMPASSIONATE LEAVE

The *Labour Relations Act* allows for compassionate leave. This is an equal right for people in same-sex relationships. Compassionate leave makes it possible for people to take leave when their partner or a close relative dies or is very ill.

If a company discriminates on the grounds of sexual orientation in giving compassionate leave, this is an unfair labour practice. You can challenge this at the Commission for Conciliation, Mediation and Arbitration (CCMA). ***(See pg 623: Chart: What rights mean for people living with HIV and AIDS)***

Children and youth and HIV/AIDs

HIV and AIDS can affect children in the following ways:

- Where they are infected from birth or from sexual abuse
- Where their parents have HIV or AIDS, and they have to live with the illness and loss

- Where they have to live with the illness and loss of friends, teachers, and other family members

Children who have HIV or whose parents are ill because of HIV or AIDS are often shunned and discriminated against by people in the community. Many suffer from neglect or are abandoned as babies. There are many examples of children being refused access to crèches, schools and bursaries. Orphans of parents who have died from AIDS are particularly vulnerable, and many survive in child-headed households. Many of them turn to crime, drugs, or the streets to survive.

Discrimination and abuses faced by children (relating to HIV/AIDS)

Children are often discriminated against and abused in the following ways:

- They are often tested for HIV without their consent or the consent of their parent or guardian
- Young boys and girls are denied access to adequate sexuality education and sexual health care services
- Children orphaned by AIDS struggle to find suitable caregivers
- Children living with HIV or AIDS are sometimes denied access to pre-schools

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How does the law protect children (relating to HIV/AIDS)?

Children are protected by various international, regional and local human rights documents. These are some of their major rights. ***(See pg 45: Section 28: Children's Rights)***

The Constitution of South Africa and the United Nations (UN) Convention on the Rights of the Child that South Africa signed and agreed to on 16 June 1995 protect the rights of children. The Constitution sets out the human rights of all people. Children also have these general rights, for example:

- The right to equality and non-discrimination
- The right to privacy and dignity

CHILDREN'S RIGHTS AND THE LAW

The Constitution also recognises that children need special protection. Section 28 of the Constitution sets out special rights just for children - these include:

- The right to appropriate care (if they are removed from their parents)
- The right to basic health care services
- The right to basic shelter

- The right to basic social services
- The right to be protected from abuse or bad treatment
- The right to be protected from child labour
- The right to a basic education (Section 29)

THE BEST INTERESTS OF THE CHILD

Whenever a person does something that concerns and affects a child, this must be done in the best interests of the child. The 'best interests of the child' is a very important standard that we must use to measure everything that is done for a child. Sometimes, it is difficult to decide what a child's best interests are, as you often have to weigh up different issues carefully.

If a child is identified as being in need of care by the law, then the Children's Court must hold an inquiry to decide how to protect the child.

Just because a child's parents or caregivers are living with HIV or AIDS does not mean that the child should be placed in alternative care. It depends on the circumstances.

CASE STUDY

A *MOTHER LIVING WITH HIV*

In 1999, a mother living with HIV turned to the AIDS Law Project (ALP, now called SECTION 27) for help. A social worker had removed her 3-year-old twin children on the grounds that she was a bad mother because she was living with HIV and wasn't looking after the children properly.

The ALP represented the mother in the Children's Court and showed that she was healthy, was earning money through informal work and that the children were well cared for.

The Department of Social Development made it clear that removing a child should be a last resort.

The case shows that when decisions are made about removing a child, discrimination and prejudice about HIV/AIDS should not be a deciding factor.

Dealing with HIV/AIDS in schools

The *South African Schools Act* says that schools must admit all learners and must not discriminate against any learner. Thus, a child cannot be excluded from school only because of their HIV status. This is the law for private and government schools. The

Constitution also says that everyone has the right to a basic education. If a child is stopped from going to school because of their HIV status, this can be challenged in court.

Parents do not have to tell the school authorities if their child has HIV, even if the school asks them to fill this in on the application form. Schools are also not allowed to test learners for HIV before they are admitted to the school or while they are at school. A learner cannot be tested for HIV without their consent (if over 12 years) and/or a parent's or guardian's consent (if younger than 12 years.)

With the increasing numbers of learners and teachers becoming infected with HIV and AIDS, all schools need to have an HIV/AIDS policy so that:

- The rights of all learners and teachers are respected
- Learners and teachers with HIV are managed in an appropriate way
- Further HIV infection is prevented
- A non-discriminatory and caring learning environment is created

THE NATIONAL POLICY

The *National Policy on HIV/AIDS for Learners and Educators in Public Schools* and *Students and Educators in Further Education and Training Institutions* (1999) sets out some important policy issues on children with HIV or AIDS in schools.

IMPORTANT PRINCIPLES

- Learners and students with HIV or AIDS should live as full a life as possible and should not be denied an opportunity to receive education that fits their ability
- No learner or educator can be forced to disclose their HIV status If anyone knows about the HIV status of a learner or educator, this information must be kept confidential
- No learner or educator may be asked to have an HIV test
- Learners and educators should not be discriminated against, for example, this means that no learner or educator can be refused to join or stay at a school because of their HIV status
- If a learner becomes incapacitated through illness, the school must take steps to arrange home study for the learner

RULES REGARDING TESTING AND CONFIDENTIALITY FOR CHILDREN

- Children who are 12 years or older can consent to medical treatment or a surgical operation on their own
- If the child is younger than 12 years, the child cannot consent to an HIV test without the consent of the parent or guardian. The test results must be given

to the parents or guardian unless the child is of sufficient maturity to understand the benefits, risks and social implications of such a test.

- If a child consents to an HIV test, they have the right for the information to be kept confidential, even from the child's parents
- A school does not have to be told about a child's HIV status
- A children's home or place of safety can be told of a child's HIV status if the child is under 12, and it is in the child's best interests for this information to be passed on. The information must be kept confidential by the staff of the home, and the child must not suffer any kind of discrimination because of it.

Confidentiality is a common law right and also protects children. The law does not say that a child's HIV status must be disclosed to a school. We recommend that parents or caregivers think carefully about what is in the child's best interests before deciding whether to disclose this information. ***(See pg 625: Confidentiality)***

Adoption, fostering and HIV/AIDS

ADOPTION

Adoption is when a couple or a single person agrees to permanently take care of a child who is not their own. The law then treats the child as the child of the new parent or parents. The adoptive parents (the new parents) become the child's legal guardians. ***(See pg 551: Adoption of Children)***

TESTING FOR HIV BEFORE ADOPTION

There is no legal requirement for prospective parents to be tested for HIV. However, some adoption agencies will not consider parents who are HIV positive and may demand that the applicants, child and birth mother be tested before they will proceed with an adoption. It is important to remember that HIV testing is not something that the law demands when it comes to adoption. The *Children's Act* does not say whether or not HIV testing should take place before an adoption. This means that different welfare organisations may have different HIV testing policies. It is worth noting that the practice of compulsory HIV testing of parents and children before an adoption violates the right to privacy. ***(See pg 551: Adoption of Children; See pg 568: Problem 3: Adopting a child)***

FOSTER CARE

Fostering is usually for a short period, so children are not tested for HIV before they are fostered. When a child's HIV status is known, and the child is under 12 years old, this may be told to the foster parents if it is in the child's best interests, for example, the child needs special medical care. Adoption agencies are not required by law to disclose the child's HIV status to the prospective parents. ***(See pg 560: Foster care; See pg 480: Social grants for children below the age of 18 years; See pg 914: Exemptions from school fees)***

INSTITUTIONAL CARE

The *Childrens Act* allows a police officer to remove a child from a parent or any other person if they believe that the child is in need of care (e.g. if the child is neglected) and to take the child to a place of safety. After this, the Children's Court will decide what is in the best interests of the child. Where no person can be found to take care of the child, the child may be sent to a children's home until he/she is placed with a family or reaches the age of 18 years.

CAN A CHILDREN'S HOME REFUSE TO ADMIT A CHILD WHO HAS HIV?

A children's home, place of safety, or any other institution (including schools and pre-schools) may not refuse to admit a child simply because of the child's HIV status. This is unfair discrimination.

CAN A CHILDREN'S HOME OR PLACE OF SAFETY HAVE INFORMATION ON CHILD'S HIV STATUS?

A children's home or place of safety does not have a right to have information on a child's HIV status. Sometimes, it may be in the best interests of the child if the caregiver knows the child's HIV status. Children who are 12 years or older can decide whom to tell about their HIV status.

Children's health rights and HIV/AIDS

The United Nations Convention on the Rights of the Child (CRC), which South Africa ratified in 1995, says the State has a duty to:

- Recognise the right of the child to the highest possible standard of health
- Take steps to lower infant and child mortality, ensure that all children receive necessary medical assistance and health care, and ensure suitable pre-natal and post-natal care for mothers.

CONFIDENTIALITY AND HIV TESTING

HIV TESTING 12 YEARS OR OLDER

If a child is 12 or older, the child has the same rights to confidentiality as an adult. This means that a child who consents to an HIV test has the right to keep their result private. Nobody is allowed to disclose (tell anyone) the HIV status of someone who is 12 or older without their consent.

HIV TESTING 12 YEARS OR YOUNGER

When a child is younger than 12, the child cannot consent to an HIV test. The consent of a parent or guardian is necessary. The parent or guardian has a right to decide whether to disclose the results of the test to the child. A lot depends on:

- Whether the child is old enough to understand the results
- What is in the child's best interests

If the child does not have parents or a guardian, the parents or guardian are not available, or they cannot be found in time, then consent to general medical treatment or operation (which is not risky to the child's life or health) can be given by one of these people:

- A person with parental power over the child (e.g. a teacher or relative)
- A person who has custody of the child (e.g. a foster parent or the head of a children's home)
- The social development minister

EMERGENCY MEDICAL TREATMENT

When there is an emergency where the child's life or health is in danger, there may not be time to consult the parents/guardian or the minister for consent. Then, the *Children's Act* says that one of these people can consent to the treatment or operation:

- The person with parental power or custody
- The medical superintendent of the hospital

REPRODUCTIVE HEALTH

Reproductive health is the health of your body's reproductive system – the parts of the body that are used for having sex and giving birth to babies.

The Constitution says that all children have a right to health. The right to health includes a right to reproductive health.

CONTRACEPTION

The *Children's Act* says that a child of 12 years or older can consent to medical treatment. This means that a 12-year-old girl can choose to take an oral contraceptive (the pill) to control her reproductive system.

TERMINATION OF PREGNANCY

The *Choice on Termination of Pregnancy Act 1996* governs the law about terminations of pregnancy – often referred to as 'abortions'. The Act says that when a girl wanting an abortion is under 18, the doctor or midwife must advise her to speak to her parents or other family members before having the abortion. But the girl does not need to follow this advice and she does not need their consent for the procedure.

An exception is that if the girl is severely mentally ill or has been unconscious for a long time, then the consent of a parent or legal guardian is required.

Prisoners and HIV/AIDS

In many cases, prisoners with HIV or AIDS and Tuberculosis (TB) continue to be strongly discriminated against. The *National Strategic Plan 2012 – 2016* in Section 3.1.2 states that the Department of Correctional Services (DCS) must ensure the provision of appropriate prevention and treatment services – including HIV, STI and TB screening, and prompt treatment of all inmates and correctional services staff – ensuring a continuum of care through proper referral.

Prisoners' rights and HIV/AIDS

THE CONSTITUTION

Prisoners are also protected by the Constitution:

- Section 27 protects the right to access to health care services
- Section 35(2)(e) provides that a detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment

THE CORRECTIONAL SERVICES ACT

- Section 12(1) – The DCS must provide adequate healthcare so that inmates can "lead a healthy life."
- Power to make (1) regulations (to the Minister) and (2) "orders" (to the National Commissioner).

CORRECTIONAL SERVICE REGULATIONS

Section 7 of the correctional services regulations states:

- 7(1) Primary healthcare must be available at least on a level as rendered by the state to the public
- 7(2) A dental practitioner must be available at every prison

Standing correctional orders on health promotion and disease prevention are:

- Each prison should have health education sessions at least once a week
- The topics must include HIV and reducing the risk of communicable diseases like TB
- External stakeholders such as the health department and civil society must be involved in these sessions
- The division head of nursing services must check that these sessions are diarized and displayed so that prisoners can know about them

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Some rights and rules about prisoners and HIV/AIDS

- It is against the law for a prisoner to be tested for HIV against their wishes or knowledge. A prisoner does not have to take an HIV test even if the prison authorities demand this. Informed consent must always be given for an HIV test. ***(See pg 627: HIV testing and informed consent)***
- It is against the law to force a person to make a confession or admission, for example, about their HIV status so that this can be used against them
- The courts cannot use evidence that was forced out of a prisoner in a way that goes against the person's rights
- Prisoners have the right to receive healthcare, including preventative measures, equivalent to the care available in South African communities. This means prisoners with HIV and TB should have access to the same kinds of treatment and care that are available to non-prisoners. ***(See pg 652: Case Study: Dudley Lee v The Minister of Correctional Services)***

- Prisoners have the right to confidentiality about their HIV status ***(See pg 625: Confidentiality)***
- Prisoners have the right to TB and STI screenings and treatment
- Policies and practices should be put in place to create a safer environment and diminish the risk of transmission of TB, HIV and sexually transmitted infections (STIs) to inmates
- It is against the law to segregate (separate) a prisoner with HIV, AIDS or TB from other prisoners. Segregation is only allowed if ordered by the medical practitioner on medical grounds (e.g. communicable diseases such as TB). The periods for segregation should not exceed 37 days.

CASE STUDY

DUDLEY LEE v THE MINISTER OF CORRECTIONAL SERVICES

This is a landmark case that highlights the state's responsibility for ensuring that the constitutional rights of detainees are maintained and safeguarded. Lee sued the state because he contracted TB in Pollsmoor's overcrowded, poorly ventilated cells. His case succeeded in the Cape High Court but was overturned by the Supreme Court of Appeal.

Lee appealed to the Constitutional Court, where he eventually won in December 2012.

The majority of the Court found that the Department of Correctional Services (DCS) negligently caused Dudley Lee to become infected with tuberculosis (TB) while it detained Lee in Pollsmoor prison from 1999 to 2004. The Court, therefore, held that the DCS should be liable to Lee.

The rights of accused people and HIV/AIDS

Accused people are people who have been charged with crimes but who have not yet been found guilty or not guilty. In terms of the *Sexual Offences and Related Matters Amendment Act*, the victim of a sexual violence crime can apply to court for an order to have the perpetrator have an HIV test if they do not know the HIV status of the perpetrator. The results of the test should only be given to the victim in writing and should not be disclosed to others. This application can also be brought by any person who has an interest in the victim's well-being or the investigating officer investigating the case. The application must be brought within 90 days after the act of sexual violence was committed. ***(See pg 587: Sexual violence and HIV testing)***

Bail and sentencing for rape accused with HIV/AIDS

All accused people have a right to apply for bail. However, where the crime is very serious, for example, rape, the law makes it more difficult to get bail particularly – where the accused knew that he was HIV-positive or had AIDS at the time of the rape. The minimum sentence for a person accused of rape who is HIV-positive is much higher than the minimum sentence for a person accused of rape who is not HIV-positive. ***(See pg 209: The Criminal Procedures Second Amendment Act (Bail law))***

Social support and medical care for people living with HIV/AIDS

If people are unable to support themselves and their dependants, they have the right to social assistance. People living with HIV can work and support themselves during the first phases of their illness. However, eventually, many people with HIV become sick and unable to look after themselves and will require palliative care. Social support includes the right to healthcare and medical treatment.

There are different types of social grants available to people living with HIV and AIDS or people caring for someone with HIV or Aids:

- Disability grants
- Grants-in-aid
- Foster care grants
- Care dependency grants

HIV or AIDS are also disabling conditions. People living with HIV or AIDS will qualify for social security and assistance such as nutrition, transport, rent, burial costs and school books where necessary. ***(See pg 470: Social grants for adults who are 18 years and older; See pg 480: Social grants for children below the age of 18 years)***

Disability grants for people with HIV/AIDS

A person who has HIV- or an AIDS-related illness will only get a disability grant if they become too sick to work. If that person is unemployed but still fit for work, they will not get a grant. The social development department will look at the medical report to make sure

that the disability will prevent the person from working for more than 6 months. Usually, a person will lose their grant if they become healthy enough to work. ***(See pg 472: Disability grant)***

Grant-in-aid for people with HIV/AIDS

A grant-in-aid is help in the form of nursing care. This grant is given to people who are too sick to take care of themselves at home. When a person applies for a grant-in-aid, they must bring the same forms to the SASSA office as they would for a disability grant. The applicant:

- Must receive a grant for older persons, a disability grant or a war veterans grant, and require full-time attendance by another person owing to their physical or mental disabilities
- Must not be cared for in an institution that receives a subsidy from the state for the care/housing of such beneficiary ***(See pg 475: Grant-in-Aid)***

Fast-tracking grants

The government has created a facility for 'fast-tracking' grants for people who are urgently in need of social support. The district office is responsible for processing disability grants and for deciding on the policy on 'fast-tracking'. These policies might differ from province to province. However, these are some of the standard rules about fast-tracking:

- Both disability grants and care-dependency grants, in respect of children, can be 'fast-tracked' for a person who is sick with AIDS. However, only if a person is in stage 4 of AIDS will they qualify to have the grant fast-tracked. ***(See pg 613: The different stages of HIV)***
- If a grant is to be fast-tracked it means it should take no more than five (5) working days to be processed. The procedure for applying to have a grant fast-tracked is as follows:
    - A prescribed medical form is issued AND stamped by the District Office of the provincial social services department. The person must take this form to a state doctor (not their own private doctor) to have it completed. The person either has to take the medical form back to the social services department or the doctor sends it. The grant should then be available within 5 days.

A care-dependency grant will only be paid if a child's physical condition stops them from going to school. The child must be in the full-time care of a caregiver at home.

Other forms of relief for people with HIV/AIDS

PALLIATIVE CARE

Palliative care tries to help people who suffer from illnesses that may cause death to have a better quality of life. It helps to prevent suffering and helps patients and families cope with pain and emotional and physical problems.

RIGHT TO PALLIATIVE CARE

Section 27 of the Constitution gives every person the right of access to health care services. The *National Health Act of South Africa* aims to promote the health of all people, and the *South African Patients' Rights Charter* states that "Everyone has the right of access to healthcare services that include provision for special needs in the case of ... patients in pain... palliative care that is affordable and effective in cases of incurable or terminal illness'."

In order to realise these rights, the government needs to put in place a policy on palliative care so that this can form part of the comprehensive healthcare system in both the formal and informal healthcare sectors.

Access to healthcare depends on access to doctors, nurses, dentists and pharmacists. In South Africa, as well as internationally, there are several different problems confronting human resources within health care services, including:

- Shortage of professional staff in rural areas and poor urban areas
- Many healthcare workers leaving the public health system and going to rich countries where payment and conditions are much better
- The impact that HIV is having on the capacity of the health system by greatly increasing the numbers of people in need of care

Organisations such as the Hospice Palliative Care Association of South Africa (HPCA) provide palliative care and support. It is difficult for these organisations to find adequate resources to meet the growing needs.

See www.apcc.org.za and click on 'Find a Hospice or Palliative Care Centre" to find hospices in your province.

OBSTACLES TO ACCESS TO PALLIATIVE CARE

While organisations such as HPCA continue to provide palliative care and support there are a number of obstacles standing in the way of people accessing their right to palliative care. These include:

- Lack of access to an appropriate place of care, for example, a hospice or a home-based care service
- Lack of integration of palliative care into government health programmes
- Lack of palliative care education and training for doctors and nurses resulting in professionals who are not able to deal with the clinical and emotional issues in caring for patients for whom cure is no longer an option
- A shortage of trained palliative care staff
- Legislation that only allows doctors to prescribe specific medication that can provide pain relief. This limits access to pain medication for many patients in need, as it is homecarers – not doctors – who are attending to patients in their homes. The South African Nursing Council (SANC) and civil society are working on regulations that will allow professional nurses to prescribe and administer medication in cases requiring pain management.
- Geographic challenges in rural areas where the infrastructure is bad, for example, poor road conditions and no public transport, make it difficult to reach people in need and to provide the appropriate medication
- Fear of the stigma attached to terminal illnesses means families often delay contacting an organisation such as HPCA to treat the sick person at home, or they prefer to treat the person on their own without support
- Language barriers between caregivers and patients
- Cultural barriers where some cultures believe that talking about death invites death, or not acknowledging their illness leads to a delay in accessing palliative care
- Religious beliefs where some people believe in the power of prayer and not medical care
- Women generally play the nurturing role, and men often distance themselves from caring for the very ill as they see this as a woman's task. This puts a burden on female members of the family and limits the responsibility of the male in the home in caring for ill members of a family.

- In child-headed households where the child replaces the parent, it places a big responsibility on the child if a member of the household is very ill, and this often leads to poor compliance with the medication and other logistical problems

Information for this section was taken from *Legal Aspects of Palliative Care*, developed by the Association of Palliative Care Centres (APCC). Download a copy of the Law Manual from www.apcc.org.za, and click on Resources/Law Manual.

MEDICAL COSTS

Public healthcare offers free access to anti-retroviral treatment nationwide. However, people living with HIV/AIDS may also want to use private health care, especially if they are on a private medical scheme. Private healthcare offers prescribed minimum benefits (PMBs). PMBs are a set of minimum benefits which, by law, must be provided to all medical aid scheme members and include the provisions of diagnosis, treatment and costs of ongoing treatment for a list of 27 chronic conditions including HIV/AIDS.

CHILD SUPPORT

Under the *Social Assistance Act*, the following grants are available for the support of children, including children living with HIV or whose parents are living with HIV or AIDS:

- Foster Care Grant ***(See pg 484: Foster Care Grant)***
- Child Support Grant ***(See pg 482: Child Support Grant)***
- Care Dependency Grant ***(See pg 486: Care Dependency Grant)***

Insurance and HIV/AIDS

Insurance is a contract (agreement) between an insurance company (e.g. Santam) and a person. It is meant to protect the person and their family from financial hardship in case something very serious like an accident or unexpected death happens.

The insured person pays a monthly premium, and the insurance company in turn promises to pay the insured or their dependents money to cover the loss when the event happens. Insurance policies may be especially important to families where there is only one breadwinner or where there are still young children.

The Association for Savings and Investment South Africa (ASISA) is the umbrella body of the insurance industry. ASISA represents the majority of South Africa's asset managers,

collective investment scheme management companies, linked investment service providers, multi-managers, and life insurance companies. It was formed in 2008, combining several key players in the saving and investments industry, including the Association of Collective Investments (ACI), the Investment Management Association of South Africa (IMASA), the Linked Investment Service Providers Association (LISPA) and the Life Offices' Association (LOA).

ASISA comprises voting and non-voting members. The following insurance companies are among its members:

- Liberty Group Ltd
- Hollard Life Assurance Company Ltd
- Old Mutual (South Africa) Ltd
- Discovery Holdings Ltd
- OUTsurance Life Insurance Company Ltd
- Lombard Life Ltd
- Clientèle Life Assurance Company Ltd
- Sanlam Ltd

There are 2 main types of insurance contracts:

- Indemnity insurance
- Non-indemnity insurance

People living with HIV or AIDS can also speak to their insurance company about what other financial planning options there are (besides a life insurance policy). For example, it may be better to consider an education policy to make sure that children are provided for.

INDEMNITY INSURANCE

Indemnity insurance is when the insurance company agrees to compensate you for a loss that you may suffer as a result of the event you have insured yourself against – for example, if you insure your house against fire and your house burns down, you will be compensated. When the contract is taken out, a maximum amount that the insurance company will pay out is agreed upon in the contract, and your monthly premiums are based on this maximum amount. But the actual amount that the insurance company will have to pay in the end is not known, and will depend on the value of your loss.

NON-INDEMNITY INSURANCE

Non-indemnity insurance is a type of insurance where the insured and insurer agree on the amount that the insurance company will pay if something happens to you – for example, life insurance or disability insurance. The higher the amount you want

you or your dependants to receive, the higher the premium that you will have to pay.

THE APPROACH OF MOST INSURANCE COMPANIES

Your decision to apply for life insurance or disability insurance is voluntary. Equally, the insurance company does not have a duty to accept your application. Before entering into an insurance contract, the company needs information from you to help assess the risk to the company of issuing a contract. This information also helps the company to decide what premiums to charge. Insurance companies check applicants for serious diseases (e.g. diabetes) or habits (e.g. smoking) that may affect their life expectancy (how long you are likely to live). This is done through questionnaires, medical examinations, urine, blood and other tests.

HIV TESTING PROTOCOL

The ASISA *HIV Best Practice Testing Guidelines (1 November 2021)* encourage the insurance industry to provide life cover for HIV-positive applicants. The purpose of the HIV Testing Best Practice Guideline is to ensure that the life industry follows the highest standards in all aspects of HIV screening of applicants for life insurance. This guideline applies to all HIV tests performed by ASISA members. It addresses issues such as identification, confidentiality, informed consent, pre-and post-test counselling transmission of test results and approval of test kits and laboratories.

THE RIGHT TO PROPER COUNSELLING

The ASISA Testing Guidelines state that an applicant has the right to give informed consent. The Guidelines say the insurer must cover:

- Costs of pre-test counselling
- One session of post-test counselling.

This means it is your right to ask the broker for proper counselling before and after the HIV test.

CHALLENGING VIOLATIONS OF YOUR RIGHTS

If you are asked to sign a consent form without pre-test counselling and informed consent, this violates your right to autonomy (to make decisions for yourself). If you do not receive pre-and post-test counselling, you can make a civil claim against the company.

APPLICANT'S DUTY TO DISCLOSE MATERIAL FACTS

When entering into an insurance contract it is important to fully disclose one's medical history in order for a claim not to be rejected.

CASE STUDY

SOUTHERN LIFE ASSOCIATION *v* JOHNSON (1993)

Mr Johnson applied for life and disability cover. When he applied, he was asked to say if he had had a blood test in the last 5 years. He did not disclose a blood test that was carried out on him to decide if he had a blood disorder. He was not aware that he suffered from the blood disorder. No symptoms had developed at the time of the application, and he believed that he was in good health.

Only later, when his health got worse, his doctor told him what the problem was. The insurance company decided not to pay him the disability cover.

The Supreme Court decided that Mr Johnson should have disclosed the fact that he had the blood test. The undisclosed fact was 'material', and thus, the company was allowed to refuse to make any payment under the insurance policy.

PROCEDURES FOLLOWED BY MOST INSURANCE COMPANIES

CONSENT FORM: You will be asked to fill in an application form. This form will probably include a consent form – the form that says you give your permission for an HIV test to take place.

DOCTOR DETAILS: You will also be asked to give details of your doctor (your family doctor or a doctor who you trust). The results of the HIV test will be sent to this doctor, so it is important that their details are correctly written down.

THE TEST: A doctor or laboratory chosen by the insurance company will do an HIV test. They will tell you where to go for the test.

TEST RESULT: The result of the HIV test is then usually sent to a doctor employed by the insurance company. This person is usually called the 'chief medical officer'. The chief medical officer will open a file for you. The file will include all medical information relevant to the application, including the results of the HIV test.

> ***Positive test result – life register:*** If a test result is positive, your insurance application may be rejected. If it is rejected, your name will be put in the code on the LOA's life register as someone who has been refused insurance. This means that if you apply for insurance at another company, they will also reject your application. 'In code' means that the information about your HIV status will not be able to be read by anyone, except those people who know

what the code is. This is done to stop unauthorised people from getting to know your status.

***Positive test result – telling your doctor*:** If the result is positive, your personal doctor will be told in writing. This doctor is expected to contact you to tell you the result. An insurance company will not tell you directly.

***Negative test result*:** If the results are negative and all the other conditions of the insurance company have been met, you will be told that your insurance application has been successful. Your doctor is not contacted if the results are negative.

HIV/AIDS strategic plan for South Africa

In 2003, the South African government approved a *Comprehensive National Plan on HIV/AIDS Care, Management and Treatment*. A new plan is developed every four years after the evaluation of the previous four-year plan.

The South African National Aids Council (SANAC)

The South African National AIDS Council (SANAC), is the main official body co-ordinating the government's HIV/AIDS programme.

It is chaired by the deputy president of South Africa and has members from government, civil society (NGOs), the private sector and trade unions. People living with HIV/AIDS and women's groups are also represented. SANAC is engaged in shaping, influencing and implementing policies and programme interventions.

ACKNOWLEDGEMENT

The contents of certain sections of this chapter were originally based on relevant chapters in the publication HIV/AIDS and the Law, published by the AIDS Law Project (now SECTION27) and Lawyers for Human Rights.

For more information, see www.section27.org.za

Problems

1. Keeping medical information confidential

Dr Vincent is a doctor at Langa Day Hospital. He has a patient called Themba, who is HIV-positive. Dr Vincent tells two other doctors about Themba's HIV status. Themba is very angry about this. He believes Dr Vincent should have kept his HIV status confidential. Themba wants to take action against the doctor.

WHAT DOES THE LAW SAY?

Doctors, nurses and other medical professionals have a legal and moral duty to keep information about a patient confidential. ***(See pg 625: Confidentiality)***

WHAT CAN YOU DO?

You can refer Themba to a lawyer who will make a civil claim on his behalf against the doctor. ***(See pg 237: Steps in a civil claim in a magistrate's court)***

You can also help Themba draw up an affidavit complaining about the doctor's conduct. Send the affidavit to the Health Professions Council of South Africa (HPCSA) (Go to the website: www.hpcsa.co.za). ***(See pg 974: Affidavits)***

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2. Entry to school refused because of HIV status

The principal of the local high school, Mrs Shabangu, refuses to admit a student, Melanie, to the school because Melanie is HIV-positive.

WHAT DOES THE LAW SAY?

It is an act of discrimination to keep a child out of a school because of HIV status, and every child has a right to education.

WHAT CAN YOU DO?

You can help Melanie and her parents by first setting up a meeting with the chairperson of the school governing board. If this doesn't help, you can write a letter of complaint to the South African Human Rights Commission about the school's actions. The SAHRC must investigate the complaint. ***(See pg 63: Problem 1: Taking a case to the South African Human Rights Commission; See pg 645: Dealing with HIV/AIDS in schools)***

3. Dismissing a worker who is HIV-positive

Susan is a machine operator in a factory. She tells her employer that she is HIV- positive. The employer tells Susan that she will have to leave her job because the other workers will complain if they find out, and he doesn't want any trouble in his factory.

WHAT DOES THE LAW SAY?

Everyone has the right to be treated equally and fairly at work. There can be no discrimination against a person because they are HIV-positive. The *Labour Relations Act* and the *Equality Act (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000)* protect people living with HIV or AIDS from being discriminated against in the workplace.

An employer cannot dismiss a person because they are HIV-positive, even if other employees refuse to work with this person. ***(See pg 630: Laws that give employees with HIV and AIDS or TB rights at work)***

WHAT CAN YOU DO?

You can help Susan fill in the correct form for her to refer her case to the Commission for Conciliation, Mediation and Arbitration (CCMA). ***(See pg 370: Solving disputes under the LRA)***

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4. Refusing to employ an HIV-positive person

Brian applies for a job with the South African Police Services (SAPS). On the application form, he fills in that he is HIV-positive. The SAPS refuses to employ him and gives him no reasons to explain their refusal.

WHAT DOES THE LAW SAY?

The SAPS must give Brian reasons why he didn't get the job. The *Labour Relations Act* and the *Equality Act* say an employer cannot refuse to employ a person because they have HIV. This is discriminating against the person. that give employees with HIV and AIDS or TB rights at work) ***(See pg 47: Section 33: Just Administrative Action)***

WHAT CAN YOU DO?

You can help Brian find out the reasons why he didn't get the job. If the SAPS refuses to give the reasons, Brian can complain to the Department of Safety and Security.

If the reasons do not seem valid, and Brian suspects that the real reason he didn't get the job is that he is HIV-positive, he can take up a case of an unfair labour

practice involving arbitrary discrimination against the SAPS. You can help Brian fill in the correct form to refer his case to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA will investigate the allegation of discrimination. ***(See pg 370: Solving disputes under the LRA)***

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5. Making a complaint about being refused medical care

Tina was in an accident and is a patient at the Lagunya Hospital. Tina agrees to an HIV test. The test is positive.

Tina's wounds need to be treated every day, but the nurse treating her finds out the results of the HIV test and refuses to treat her again. She also tells all the other nurses. They, too, refuse to touch Tina, and she is left in pain with blood-soaked bandages for many hours. When she recovers, she wants to take action against the hospital for the degrading way in which they treated her.

WHAT DOES THE LAW SAY?

Everyone has the right of access to health care services. It is against the law for a healthcare worker to refuse to treat a person because they have HIV or to treat people with HIV differently from other patients. ***(See pg 629: The right to health care and medical treatment)***

WHAT CAN YOU DO?

There are a number of ways to respond to this problem:

1. You can refer Tina to a lawyer to make a civil claim against the health workers or the hospital on behalf of the patient. A High Court can review and set aside the decision of a hospital to refuse to treat a patient. ***(See pg 238: Steps in a civil claim in a Magistrate's Court)***
2. You can help Tina draw up an affidavit explaining her complaint. Include the names of the health workers involved. Send the affidavit to the relevant medical council, which can discipline their members. This includes the South African Nursing Council (SANC) if the complaint is against a nurse, or the Health Professions Council of South Africa (HPCSA) if the complaint is against a doctor. ***(See 974: Affidavits; Go to the HPCSA website: https://www.hpcsa.co.za/complaints-investigation to lodge a complaint)***
3. You can also help Tina send a letter of complaint to the South African Human Rights Commission (SAHRC). ***(See pg 63: Problem 1: Taking a case to the South African Human Rights Commission)***

4. A letter of complaint can also be sent to the Public Protector ***(See pg 63: Making a complaint to the Public Protector)***

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6. Applying for a disability grant

Nobantu and Sipho are married with three young children below the age of 10. Both partners are HIV-positive. Sipho has lost his job because he became too ill to work. The doctor says that he could die within 6 months. Nobantu earns R4,800 per month doing part-time domestic work, but she has also become increasingly ill, and her employer has warned her on a number of occasions that she will have to find someone else to do the work.

WHAT DOES THE LAW SAY?

Both Sipho and Nobantu can apply for a disability grant. The social development minister has also notified the department and SASSA that applications from HIV-positive people for disability grants should be 'fast-tracked'. This means that these applications should be given priority and processed faster than any other grant applications. The parents can also apply for child support grants for the three children. ***(See pg 470: Social grants for adults who are 18 years and older; See pg 480: Social grants for children below the age of 18 years; See pg 482: Child support grant)***

WHAT CAN YOU DO?

You should find out from the provincial SASSA office that processes disability grants what the policy is on 'fast-tracking'. Then you should write a letter setting out the particular circumstances of Nobantu and Sipho and ask the provincial office to 'fast-track' their applications. You should also help them apply for child support grants for their three children (who all qualify for the grant because of their ages).

Community action

Running an HIV/AIDS and TB Awareness Campaign

These guidelines will help you to run an HIV/AIDS campaign in your community – when you are planning your campaign you must keep them in mind.

WHAT IS THE AIM OF THE CAMPAIGN?

The aim of the campaign says what you want to achieve at the end of the campaign. To think about your aim ask yourself this question: What do I want to achieve with this campaign? So, for example, your aim(s) for an HIV/AIDS campaign could be that you want to: Reduce the rate of HIV infection in my community and Ensure that people with HIV or AIDS and their families in my community are given care and support

HOW ARE YOU GOING TO ACHIEVE YOUR AIMS?

SETTING OBJECTIVES FOR THE CAMPAIGN

Objectives are more specific than aims; they help you to achieve your aims. You can ask yourself the question: What must we do to achieve our aims? Your objectives could be as follows:

To build openness and awareness around HIV/AIDS & TB

We will do this in the following ways:

- Wear a red ribbon
- Act as role models to show support for the campaign
- Organise AIDS awareness-raising events, for example, marches, cultural events, protests, prayer meetings, loudhailers, and information tables in public places
- Openly support people who are open about their HIV status and encourage people to be tested for HIV
- Print posters, pamphlets or use graffiti
- Encourage and support people living with aids to go public about their illness
- Encourage voluntary counselling and testing by organising testing drives and ask community leaders who are willing, to go public about their results
- Encourage leaders and other influential people who are HIV-positive to become role models for other people by being open about their status

To educate people about prevention, care and treatment:

We will try to get people to change their sexual behaviour in the following ways:

- Public meetings – invite people to speak on HIV/AIDS, particularly people who are HIV-positive and willing to speak in public about their illness

- Speeches – ask institutions like schools, churches, workplaces, etc if we can send a speaker to talk about HIV/AIDS and TB
- Workshops – present community education workshops
- Chat shows – ask to be invited to speak on chat shows of local radio stations
- Newspapers – write articles for newspapers on the prevention of aids, non-discrimination and care for people living with HIV and AIDS and TB or ask journalists to write them
- Plays and songs
- Distribution of pamphlets, booklets, etc.

To develop community care projects

We will try to help community members living with HIV/AIDS or infected with TB, their families and orphans in the following ways:

- Openly organise support and care for people living with HIV/AIDS and TB
- Start vegetable garden projects to help provide the right food to people who cannot afford it
- Make sure the local health services keep supplies of cheap medicines that can be used to fight common infections that harm people with HIV/AIDS or TB
- Organise support groups where people living with HIV or AIDS can meet and talk to each other
- Train volunteers in basic home care and counselling so that they can help with house visits and also provide training to home caregivers
- Work with the social services department or the Child Welfare Society to encourage people in the community to take care of orphan children, for example, by providing foster care

WHO ARE WE GOING TO TARGET?

The campaign should reach everyone in the community but we can also target specific sectors which are more vulnerable.

THE EDUCATION AND PREVENTION PART OF THE CAMPAIGN

- Sexually active youth, particularly young girls
- Migrant and transport workers
- Sex workers Women, particularly those in relationships with HIV-positive men
- Men who are HIV-positive
- Anyone infected with TB or caring for someone with TB

- Drug users
- LGBTQI+ persons
- Men who have sex with men (MSM)

THE AWARENESS AND OPENNESS PART OF THE CAMPAIGN

These groups are most likely able to influence people's attitudes:

- The local mayor
- Ward councillors
- Members of national and provincial parliaments
- Local leadership
- Religious leaders
- Traditional leaders
- Sports and cultural stars
- Popular business people
- Community organisation leaders
- Union leaders
- Teachers
- Community radio DJs and newspaper reporters

THE SUPPORT AND COMMUNITY CARE PART OF THE CAMPAIGN

People who need information, care and/or support:

- People who are HIV-positive
- People who are sick with AIDS and need home care
- Children whose parents are dying or have died of AIDS
- Anyone infected with TB or caring for someone with TB

People who can help provide information, care and/or support -

- Community structures and leaders
- Community welfare organisations
- Religious leaders
- Women's groups
- Local business
- Schools
- Individual volunteers for home care or foster care projects

You need to give the campaign an identity and decide what the main messages will be. For example, the Treatment Action Campaign encourages people to wear T-shirts with the slogan 'HIV-positive' or 'TB-Suspect' to help bring AIDS awareness to the public.

Land and Housing

Introduction

The Constitution of South Africa guarantees the right to have access to housing and land. It requires the government to pass laws and take necessary steps, within its available resources, to ensure that people have access to land, housing and security of tenure in their houses. Although it is not practical to ensure that everybody gets a house or land immediately, the government has to commit itself to making this happen over time. This is called a progressive right. The land and housing laws and policies are an important step in the process of creating access to housing and land for landless and homeless people. The policies make provision for financial assistance in the form of housing subsidies and grants. To address these issues, the government has stated its commitment to the following:

- The return of land or other compensation to communities who were forcibly removed during the years of apartheid
- The return of land which was taken over or 'bought' by the Apartheid government
- Support for agricultural development in rural areas
- Addressing the housing backlog in formal and informal settlements
- Finding ways for the poor to access affordable housing
- Building sustainable communities where the building of houses goes hand in hand with the construction of community facilities such as schools, hospitals, recreation centres and economic development

Land

What is the government's land policy?

The government has said that it is its policy and vision to address:

- The racially-based land dispossession of the past
- The need for a more equitable distribution of land ownership
- The need for a kind of land reform that will reduce poverty and create jobs
- Security of tenure for all
- A system of land management that will make land available for development but not harm the environment

To carry out this policy or vision, the government has implemented a land reform programme consisting of three elements:

1. *Land Restitution* to address cases where people lost land after 1913 because of forced removals; the cut-off date for applications for land restitution was December 1998.
2. *Land Redistribution* to give those most in need a chance to get land for housing and productive purposes. It caters for urban and rural areas and includes labour tenants, farm workers and people who want to start farming.
3. *Land Tenure* reform is a process of reviewing all the old land policies and laws in order to improve the tenure security of all South Africans.

Laws and court cases that apply to the land reform programme

The following are some of the important laws and court cases to do with land, tenure and housing.

INTERIM PROTECTION OF INFORMAL LAND RIGHTS ACT (NO. 31 of 1996) (IPILRA)

This Act aims to protect people with insecure tenure from losing their rights to land while land reform is being introduced. The provisions of the *Interim Protection of Informal Land Rights Act* have been extended by the government to 31 December 2024.

In *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (Dlamini and Land Access Movement of South Africa as Amici Curiae)* (2018) the Constitutional Court held that a mining company could not evict a community of people from their lands without their consent or without compensating them for their lands. The Court overruled an eviction order issued by a lower court to a mining company, giving it permission to evict 13 families from a farm in the North West Province where the company had mining rights. The Court upheld a provision in the Interim Protection of Informal Land Rights Act, a law that protects land rights, by saying that no person may be deprived of any informal right to land without their consent.

COMMUNAL LAND RIGHTS ACT (NO. 11 of 2004) (CLaRA) AND COMMUNAL LAND TENURE BILL (2017)

The CLaRA offered redress to people 'whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices'. CLaRA made provision for new land tenure forms for people living in old "homelands" and other communal land. However there was opposition to CLaRA from various stakeholders who said that CLaRA would undermine rural peoples' security of land tenure by giving

traditional councils wide-ranging powers, including control over the occupation, use and administration of communal land.

In May 2010, In the case of *Tongoane v National Minister of Agriculture and Land Affairs*, the Constitutional Court declared CLaRA unconstitutional. The Court found that there had not been enough consultation with communities and provincial legislatures before the Act was passed. The Court also had concerns that CLaRA did not take into account 'living customary law' practices in many communities and that rural voices were not heard.

In an attempt to create a law that could regulate communal land while providing security of tenure for those with historically insecure tenure, the government published the *Communal Land Tenure Bill (CLTB) of 2017*. The purpose of the CLTB is to provide for the transfer of communal land to communities and to convert insecure tenure into ownership and other forms that guarantee peoples' or communities' rights in land. The Bill has not been passed.

UPGRADING OF LAND TENURE RIGHTS ACT (ULTRA) (NO. 112 of 1991) & UPGRADING OF LAND TENURE RIGHTS AMENDMENT ACT (NO. 6 of 2021)

The *Upgrading of Land Tenure Rights Act* (ULTRA) aims to secure and officially recognise land rights held by people living on customary and informal land, and to transfer power over those rights to the land rights holders. The Act, which upgraded land tenure rights to ownership, only recognised men as the head of the family and as legal land owners. This particularly impacted black women who were unable to own property during apartheid. In *Rahube v Rahube (2018)*, the Constitutional Court upheld a lower court's finding that a key section in the *Upgrading of Land Tenure Rights Act* violates women's right to equality and to independently own property and is, therefore, unconstitutional. It was also held by the Constitutional Court that the Act was not applicable in the former apartheid homelands of Transkei, Bophuthatswana, Venda and Ciskei (formerly known as the TBVC states). For this reason, the *Upgrading of Land Tenure Rights Amendment Act (No. 6 of 2021)* was introduced.

This Act came into effect on 1 June 2024 and aims to:

- Provide for the conversion of land tenure rights to ownership
- Enable 'interested' people to object to this conversion to ownership
- Provide for the institution of inquiries to assist in the determination of land tenure rights
- Recognise conversions that took place in good faith in the past

COMMUNAL PROPERTY ASSOCIATIONS ACT (NO. 28 of 1996)

The *Communal Property Association* Act enables communities or groups to become a legal entity called a communal property association to acquire, hold and manage property on a basis agreed to by members of a community under a written constitution.

LAND REFORM (LABOUR TENANTS) ACT (NO. 3 of 1996)

This Act protects the rights of labour tenants and enables them to acquire permanent land to live and work on.

EXTENSION OF SECURITY OF TENURE ACT (NO. 62 of 1997) (ESTA)

This Act gives people who lived on someone else's land on or before 4 February 1997, with permission from the owner, a secure legal right to carry on living on and using that land. It specifies clearly what the landlord must do before they can evict a tenant. ***(See pg 683: Extension of Security of Tenure Act [ESTA])***

PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT (NO. 19 of 1998) (PIE)

This Act sets out how land can be orderly occupied. It explains when unlawful occupiers can be evicted and how to prohibit unlawful eviction. This Act repeals the *Prevention of Illegal Squatting Act of 1951.* An amendment has been proposed to PIE, and a draft has been published. This still has to be tabled in parliament.

THE TRANSFORMATION OF CERTAIN RURAL AREAS ACT (NO. 94 of 1998)

This Act aims to allow for the transfer of 1.7 million hectares of land to the communities consisting of 70 000 people in the former 'coloured reserves' in the Western Cape, Northern Cape, Eastern Cape and Free State. The *Transformation of Certain Rural Areas Act* states the processes to be followed for the creation of entities to hold the land in the commanages in trust for people living in specific rural areas. This process is managed by the Department of Land Reform and Rural Development and the Municipality responsible for the relevant area.

Municipal governments and their role in land, land tenure and evictions

An important general principle from court decisions concerns the role of municipal government in situations where an eviction will make poor people homeless and the need to make alternative accommodation available.

In the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others* in February 2008, the Constitutional Court found that

while the municipality may not necessarily be able to find suitable alternative accommodation for evictees of council property, it must make a good faith attempt to do so. The court stated in such cases that municipalities must at least "meaningfully engage" with the residents being evicted. Municipalities must, therefore, work closely with such residents, determine what their housing needs are, and make every attempt within their available resources to prevent the residents from becoming homeless.

In February 2010, the Constitutional Court also ruled that a municipal housing policy, which provided temporary accommodation only for those evicted from unsafe buildings owned by the municipality itself, was unconstitutional. This was because such a policy excluded tenants evicted from unsafe privately owned buildings from consideration for emergency accommodation. Municipal housing policy concerning temporary accommodation for tenants evicted from unsafe buildings must also therefore, cover tenants renting privately.

In December 2011, the Constitutional Court ruled that the City of Johannesburg was obliged to provide temporary emergency accommodation to the occupiers of a privately-owned building who were being lawfully evicted and who would consequently become homeless. The Court rejected the City's argument that the National Housing Code did not oblige the City to fund emergency accommodation and ruled the City's housing policy was inconsistent with the City's housing obligation. It was not reasonable, the Court said, for the City to provide temporary accommodation to people relocated by it from hazardous buildings and not to people who would be made homeless through a lawful eviction by a private owner. The Court rejected the City's claim that it did not have the necessary funds to provide accommodation for the occupiers, and ruled that the City had incorrectly budgeted based on the belief that it was not obliged to provide them with temporary emergency housing. The important precedent set in this case is that when very poor residents are lawfully evicted, through no fault of their own, and such eviction is likely to make them homeless, the government must intervene and at least provide them with temporary emergency accommodation. ***(See pg 690: Prevention of Illegal Eviction from and Unlawful Occupation of Land Act [PIE])***

Land restitution

All claims for land restitution had to be submitted to the Land Claims Commission before 31 December 1998. The *Restitution of Land Rights Amendment Act* gives the Minister of Land Reform and Rural Development extra powers to expropriate land for purposes of settling restitution claims.

Land redistribution and land grants

Land redistribution aims to give those most in need a chance to get land for housing and productive purposes. It caters for urban and rural areas and includes labour tenants, farm workers and people who want to start farming.

Land redistribution has been supported by a number of sub-programmes over the past 30 years. These include:

- Settlement Land Acquisition Grant (SLAG)
- Land Redistribution for Agricultural Development (LRAD) and
- Proactive Land Acquisition Strategy (PLAS)

The difference between these programmes is that the SLAG and LRAD land is transferred to the beneficiaries, while commonages and PLAS farms are transferred to the government. SLAG and commonages also involve bigger groups of individuals and is aligned to poverty alleviation, whereas LRAD and PLAS focus on more economic growth where fewer people benefit.

Redistribution has changed in the last few years from buying land to transferring it to beneficiary groups in the form of Community Property Associations (CPAs) or families to situations where the land is bought and transferred to black commercial farmers through LRAD or rented through PLAS for a lease period of 30 years.

Land redistribution has developed through the following programmes over the years:

- **SLAG** was implemented from 1995 to 2000, where land was provided to groups or families where the groups were funded to acquire land through a grant of R15 000, which was raised to R16 500 per family.
- **LRAD Phase 1** was implemented from 2001 to 2007, where groups or individuals were assisted to acquire land through a grant ranging from R15 000 as a minimum, which could be extended by a contribution of R5 000; or own labour, or in kind, up to R400 000 subsidy with the own contribution amounted to of R100 000.
- **LRAD Phase 2** was implemented from 2008 to 2010 with more emphasis on individual farmers than groups, acquiring bigger farms and phasing out the loan component.
- **PLAS** has been implemented from 2010 to the present, where the government buys land and then identifies beneficiaries who will lease the farm as individuals or as a company for a limited lease period ranging from three to 30 years.

SETTLEMENT LAND ACQUISITION GRANT (SLAG)

You can use this grant to buy land or get secure tenure to land you already occupy. You can also use the grant for improvements like housing, water supply, sanitation, internal roads and fencing. The SLAG is up to the value of R16 500 provided to a single household to buy land (or equity in a farm business) from a 'willing seller', or to pay for infrastructure, fixed and moveable assets. transaction costs, home improvements and enhancement of tenure rights. Households earning a combined maximum income of R3 500 per month could apply for the grant either as an individual household or as part of a group of households (where the average household income is not more than R3 500 per month). Additional criteria to qualify for the SLAG include being a South African citizen, and not receiving any benefits from the housing subsidy scheme or any other state-funded or assisted housing subsidy.

WHO CAN GET A SETTLEMENT LAND ACQUISITION GRANT (SLAG)?

To qualify for the grant, you have to be a South African citizen living in a household where your combined income is less than R3 500 per month per applicant/ household. A household means a single adult older than 18 with dependants, or two adults with or without dependants. Households can apply individually or in a group. When households apply as a group, the average household income for the group must be less than R3 500 per month. It is important to understand that you will not automatically get a grant if you qualify. The following people could qualify for the grant:

- Landless people, especially women who need to settle in rural or urban areas
- Farmworkers and their families who want to improve their settlement and land tenure conditions
- Labour tenants and their families who want to get secure title to land they are living on and to improve it or to get alternative land
- Residents who want to get secure title to the land they are living on
- Business people who want rural land for production, like farming or a shop
- People who get land through the land restitution programme
- People who lost land but are not covered by the *Restitution of Land Act*

SETTLEMENT PLANNING GRANT

The same people who qualify for a settlement grant also qualify for the Settlement Planning Grant. This grant is meant to assist poor communities in

employing planners and other professionals to help them plan their settlement. It can cover services like legal fees, land use planning, and infrastructure planning. The money gets paid in two instalments to the professional: once the project proposal is complete, and once the detailed settlement plan is done. This grant is worked out as a portion of the R16 000 that each household in the settlement is entitled to. The amount that is paid to the professionals is deducted from each household's R16 000.

HOW TO APPLY FOR A LAND ACQUISITION, SETTLEMENT, SETTLEMENT LAND ACQUISITION GRANT (SLAG) OR SETTLEMENT PLANNING GRANT

Contact your nearest office of the Department of Land Reform and Rural Development and fill in a registration of need form. When you apply as a group, you must elect a representative to make the application on your behalf.

LAND ACQUISITION GRANT FOR LOCAL AUTHORITIES

Many rural towns in South Africa have commonages. Long ago, this was used by town people who did not have land to graze their animals or grow crops.

People had to pay a small fee to the local authority to use the commonage. As this practice fell away, the local authorities started to lease out their commonages, mostly to rich farmers who often paid very little for the land. The Land Acquisition Grant is to help local authorities buy land to create a commonage, or to add to the existing commonage, so that the poorer residents in the town can use it for grazing animals or planting crops.

If there is a need in your community to use a commonage, you must go to your local authority or the provincial Department of Land Reform and Rural Development and discuss this option with them.

To qualify for this grant, your local authority must:

- Tell the Department of Land Reform and Rural Development how much they can contribute to buy the land
- Show the department their financial records
- Give a commitment that the land will be for the poorest residents to lease
- Give a list of all the people who will want to use the commonage
- Give a plan from the residents explaining how the land will be used

LAND REDISTRIBUTION FOR AGRICULTURAL DEVELOPMENT (LRAD)

LRAD is a land redistribution programme managed by the Department of Land Reform and Rural Development Department of Land Reform and Rural Development. Through the programme, qualifying beneficiaries may qualify for a grant to help them buy land for agricultural purposes. It is a non-refundable form of funding to help people buy land. A formula is used to determine how much an individual will get. This formula is based on how much money or inputs the applicant will contribute, referred to as 'total own contribution'. The grant will only work as a supplement to what the applicant already has and their own contribution. The money can be used to buy land or for land improvements, infrastructure, capital assets and short-term agricultural inputs.

HOW MUCH IS THE LRAD GRANT?

LRAD grants vary from a minimum of R20 000 for a minimum contribution of R5 000 (cash or labour), to a maximum of R400 000 for a minimum own contribution of R100 000. Between the minimum and maximum amounts, there is a scale of grant amounts, depending on the person's own contribution. Your 'own contribution' can be existing agricultural assets that are necessary for the farm. But you cannot use land that was accessed through an earlier grant, restitution, tenure security grant, donation, etc as a form of 'own contribution'.

WHO CAN APPLY FOR A LRAD GRANT?

Individuals or groups can apply. These are the guidelines. You should

- Be a member of a previously disadvantaged group (i.e. African, Coloured or Indian)
- Be 18 years or older
- Intend to use the land for agricultural purposes only
- Intend to farm on a full-time basis (except for safety-net projects)
- Neither be a civil servant or politician or hold any position within government structures
- Be prepared to participate in a training programme after land acquisition
- Be in a position to make your own contribution
- Be an individual or organised entity if applying as a group
- Have a bank account

PROACTIVE LAND ACQUISITION STRATEGY (PLAS)

PLAS is a land redistribution programme where the State buys land directly from the seller without first identifying a beneficiary and makes it available on a leasehold basis to selected beneficiaries.

The Department of Land Reform and Rural Development buys agricultural land directly rather than giving grants to enable beneficiaries to buy land for themselves. Once the state has bought the land, it is then allocated to approved beneficiaries as a lease for three to five years. After this, the person leasing the land may be given an option to buy the land. The Department selects the beneficiaries.

The PLAS programme aims to benefit households with limited or no land access, commercial smallholders with the potential to expand, and established black commercial farmers.

PLAS authorises provincial officials to negotiate purchases directly with willing landlords based on estimated land needs.

ACCESS TO LAND IF YOU DO NOT HAVE LAND

The purpose of the land redistribution programme is to provide people with land for housing in urban and rural areas as well as land for farming purposes. The government realises that poor people cannot buy land at normal prices. The government will assist them in buying land using the land grants - and in that way, speed up land reform. The government will make state land available and buy land from willing sellers on behalf of applicants. Expropriation, where the state forces the owner to sell, will only be a last resort.

Other land reform initiatives

COMPREHENSIVE AGRICULTURAL SUPPORT PROGRAMME

The Comprehensive Agricultural Support Programme (CASP) is a national governmental initiative which was established in 2003. The programme aims to support provincial departments of agriculture to create a favourable environment for Smallholder Farmers (SHF) and to expand the provision of support services for the development of agriculture. CASP has six pillars: information and knowledge management, technical and advisory assistance, and regulatory services; training and capacity building; marketing and business development; on-farm and off-farm infrastructure and production inputs.

WHO CAN APPLY FOR CASP FUNDING?

Agriculture-related projects that include vulnerable communities according to the following levels:

- Farmers
- Agricultural macro-system within the consumer environment
- Agri-Processing and value-adding projects
- Subsistence and household food producers
- Community projects

People wanting to apply for CASP funding should apply at the provincial office for agriculture. Applicants will need to declare previous government support.

Land tenure reform

When people talk about 'tenure', they mean the different ways in which you can own or occupy land or housing. When people use the term 'security of tenure', they mean that your right to stay where you are is secure. You cannot be thrown off or evicted easily.

DIFFERENT KINDS OF LAND TENURE IN SOUTH AFRICA

Private ownership: Private ownership means that a person or business owns the house or the land through having a registered title deed.

Communal ownership: This means people own land or property together as a community or as a group. This can be organised as a trust, Section 21 company, voluntary association or communal property association (CPA).

Renting: You can rent your house or land from its owner for a monthly fee.

LAWS THAT GIVE PEOPLE SECURITY OF TENURE

Tenure reform must give everybody the same amount of security wherever they stay. The following laws have been introduced to give people more security of tenure and prevent illegal evictions:

- *Extension of Security of Tenure Act* (ESTA)
- *Extension of Security of Tenure Amendment Act*
- *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE)

Extension of Security of Tenure Act (ESTA) (No. 62 of 1997) and the Extension of Security of Tenure Amendment Act (No. 2 of 2018)

The Extension of Security of Tenure Amendment Act (2018) came into force on 1 April 2024.

WHO IS COVERED BY ESTA?

ESTA covers people living in rural areas, on farms and undeveloped land. It also protects people living on land encircled by a township or land within a township marked for agricultural purposes. The Act specifically gives women occupiers the same rights as male occupiers. However, the Act does not cover:

- People who live in a proclaimed or recognised township
- Land invaders
- Labour tenants
- People using the land for mining or industrial purposes, for businesses or commercial farming
- People who earn more than R13 625 per month gross (before tax deductions)

WHAT DOES ESTA SAY?

ESTA says that if you have lived on someone else's land – with permission of the owner – on or before 4 February 1997, you have a secure legal right to live on the land. An owner cannot change or cancel these rights without your consent unless there is a good reason for doing so or until you have had a chance to answer any allegations made against you.

It sets out the steps you can follow to strengthen your land rights. You can apply for a state grant that can be used to secure tenure rights - either in the form of a development on the land where you are living or on another piece of land. **(*See pg 678: Settlement Land Acquisition Grant* (SLAG))**

ESTA says you have the right to receive visitors, have your family live with you, access to water, health and education services, and receive post and other forms of communication. The Act also gives people the right to visit and maintain family graves in rural and peri-urban areas. This right must be balanced with the owner's right to privacy. The owner or person in charge can set reasonable conditions on how this right is exercised.

The Act gives special rights to long-term occupiers. If you are older than 60 years, and you have lived on the land for 10 years, or if you become disabled while you were employed by the owner, you can stay on that land for the rest of your life. The rights of long-term occupiers can only be terminated if they intentionally harm or threaten anyone else occupying the land or deliberately damage property.

The Act protects you against unfair and arbitrary evictions and sets out how disputes over land rights can be resolved with mediation, arbitration or the courts.

RIGHTS AND DUTIES OF OCCUPIERS AND OWNERS UNDER ESTA

The Act spells out clearly what are the rights and duties of occupiers and owners.

Occupiers must respect the fundamental rights of the owner, prevent visitors from causing damage and comply with the important and fair terms of the agreement with the owner. This is very important. If occupiers do not fulfil the agreement, they can be evicted without the option of alternative land.

The Act says that occupiers may not harm or threaten other people on the land, damage property or help others to build shelters unlawfully on the land.

Occupiers are protected against unfair and arbitrary evictions. People who have the right to security of tenure have a right to legal representation or legal aid if they cannot reasonably afford the legal costs, and injustice would otherwise result.

Owners must respect the fundamental rights of occupiers, acknowledge the rights that this Act gives to occupiers and follow the provisions of the Act when they consider ending the rights of occupiers to stay on the land. The Act says owners or persons in charge have the right to:

- Set reasonable conditions regarding visits to occupiers' homes and family graves
- Terminate an occupier's right to stay on the land if this is just and fair
- Apply for an eviction order
- Make an urgent application for eviction in certain circumstances

EVICTIONS IN TERMS OF ESTA

The following actions are all forms of evictions:

- Where the contract of employment is terminated, and the person agrees to leave
- Taking away somebody's right to live on land
- Taking away somebody's right to use land
- Taking away somebody's access to water and electricity if they live on the land

- Threatening occupiers so that they leave
- Stopping them from coming back onto land if they left but planned to come back, for example, they went away for a family visit

The Act protects you against unfair and arbitrary evictions. An eviction may be fair and occupiers may be evicted from land if they do something seriously wrong or refuse to honour agreements with the owner, such as not paying rent if they agreed that they would pay.

In cases where the eviction is fair, a landlord must follow the requirements of the law in getting an occupier to leave the property, for example, by giving the required notice ***(See below: When is an eviction lawful?)***. However, if the occupier refuses to leave, the landlord must then get a court order to enforce the eviction. If the occupier disputes the eviction, then the reasons for this must be raised in court. The Act protects people who believe they have been unfairly evicted.

The *Extension of Security of Tenure Amendment Act* makes provision for occupiers and former occupiers to acquire suitable alternative accommodation. The Act mandates that a tenure grant would be paid to the provincial government or a municipality to enable it to facilitate, implement, undertake or contract with a third party for the provision of alternative accommodation for former occupiers.

WHEN IS AN EVICTION LAWFUL?

An eviction is lawful if the following requirements have been met:

- The occupier must get two months written notice that the owner intends to apply for an eviction order. An eviction will not be lawful if the correct notices have not been given. It is only lawful if there is an eviction order from a court
- The owner must send a copy of this notice letter to the local authority and the provincial office of the Department of Agriculture. This must be done in order to warn the municipality and the department that they might need to make arrangements for alternative accommodation for the occupiers and for mediation, where possible

The eviction must also be just and equitable. The court will look at the following questions to decide whether it is just and equitable:

- Was the original agreement between the occupier and the owner fair?
- How did the parties conduct themselves?
- How much is each party going to suffer if this eviction does or does not happen?
- Did the occupiers expect to stay on the land for a longer period?

- Was there a fair procedure to end the right to stay on the land? To decide if it was fair, the court will ask:
    - Are there valid grounds for ending the right?
    - Did the owner inform the occupiers of allegations against them in a way they could understand?
    - Did the occupiers have a chance to reply to the allegations?
    - Did the occupiers have enough time to reply?
    - If there is an enquiry, another occupier or person from an organisation that the occupier belongs to must be allowed to help the occupier state their case
    - If there is an enquiry, the owner must inform the occupier of their decision after the enquiry in writing
    - If the right to stay on the land is threatened, the owner has to remind the occupier that the occupier has the right to take the matter to court if they disagree about the outcome of the enquiry

WHAT THE COURT CAN DECIDE

The court may or may not grant an eviction order based on the following conditions:

- If the occupier has been on the land on or before 4 February 1997 and has done nothing wrong, the court will not grant an eviction order unless there is alternative accommodation available where the occupiers can enjoy the same quality of life.
- If the occupier has been on the land on or before 4 February 1997 and has done something seriously wrong, the court may grant an eviction order even if there is nowhere else to stay.
- Even if an occupier arrived after 4 February 1997, the owner must still end the right to stay lawfully and fairly, give written notice of two months, and get an eviction order before the occupier can be evicted. The court must also believe that the eviction was just and equitable, and the owner and the occupier have attempted mediation to settle the dispute or referred the dispute to arbitration and it could not be settled.

An eviction order given by a magistrate's court must go to the Land Claims Court for automatic review of the magistrate's decision. In other words, the eviction order issued by the Magistrate's court must be confirmed by the Land Claims Court before it can be enforced.

URGENT EVICTIONS

The court can give a provisional order for an urgent eviction when:

- There is a real and immediate danger that the occupier might harm someone or something
- There is nothing else that can be done to prevent this harm from happening
- The owner or any other person will suffer more if the eviction does not happen than the occupier will suffer if the eviction does take place

COMPENSATION IF YOU GET EVICTED

If the court grants an eviction order, the court must order the owner to compensate you for any improvements to the land or property, or for crops you planted which you have not harvested yet. If you were employed by the owner, you must get all your wages that are due to you.

WHEN CAN THE EVICTION ORDER BE CARRIED OUT?

The eviction can only take place once:

- Your compensation has been paid
- The court has set a date by which you must leave. If you do not leave by the due date, you can be removed.

WHO CAN REMOVE YOU?

Only the Sheriff of the Court or someone under their supervision can carry out an eviction. If at any time the owner or the person in charge forces you off the land, it is a criminal offence. They can be jailed or fined for this. You will be compensated for any losses, and have the right to return to the land on terms and conditions decided by the court.

Read through the example on the next page:

EXAMPLE

Frank was ordered to leave his house on a wine farm after he was fired from his job because of repeatedly being absent from work without a valid reason. The farmer gave Frank one month's notice to vacate his house. Frank hasn't been able to find a place to stay. The farmer says he will throw him out at the end of the month if he doesn't leave voluntarily.

WHAT ARE FRANK'S RIGHTS?

A *landlord/employer must take certain steps before evicting an occupier. Section 9(2) of ESTA says:*

a. A *person's right to stay in a house ends if they are fairly dismissed (in terms of the Labour Relations Act No. 66 of 1995), if they resign or are retrenched.* ***(See pg 360: Dismissals)***
b. *The land owner must give the occupier, the municipality and the provincial Department of Rural Development and Land Reform 2 months' notice of the intention to evict. In the case of family members of deceased employees (employees who have died), the notice period must be 12 months.*
c. *The land owner cannot evict a person without a court order. A court can order an eviction to be stopped, a person allowed back into the house and/or the payment of damages to the person.*
d. *The occupiers must be given a chance to defend themselves in court against the eviction.*
e. *Unless the occupiers have committed a serious offence, the landlord must find alternative, suitable accommodation before the eviction.*
f. *The court's decision to grant an eviction order must be based on just and fair reasons, taking into account, for example, how long the person has lived there, if there is alternative accommodation, whether the occupier complied with the duties, etc.*

In the first place, if Frank thinks his dismissal was unfair, he can challenge this in the CCMA ***(See pg 370: Solving disputes under the LRA)***. *While the case is being challenged in the CCMA, he has a right to remain in the house. However, if the CCMA upholds the dismissal, then Frank will have to leave the house so long as the farmer has followed the steps prescribed in ESTA. The farmer cannot evict Frank without a court order.*

Land Rights Management Board and Committees

The *ESTA Amendment Act* regulates the eviction of occupiers by enforcing alternative resolution mechanisms. The Act provides for the establishment and operation of a land rights management board and land rights management committees. The purpose of a Land Rights Committee is to identify, monitor and settle land rights disputes. They are also required to establish and maintain a database of occupiers, land rights disputes and evictions.

Possible repeal of ESTA and the Land Tenure Security Bill

In 2010, the government introduced the *Land Tenure Security Bill*, which was intended to replace both ESTA and the *Labour Reform (Labour Tenants) Act*. In doing so, the government acknowledged that ESTA had not been effective in preventing farm evictions.

The *Land Tenure Security Bill*, if enacted, would provide for the continued protection of the rights of people living and working on farms. It would provide a support framework for sustainable livelihoods for farm workers that would (amongst other things) address the need for sustained food production and state assistance in the settlement of alternative land. Importantly, the Bill would ensure that there is a clear legal distinction between the rights of farm dwellers as employees and their rights as occupants.

People who would be covered by the new law include those living and working on farms and those associated with them, as well as farm owners and their agents. The Bill addresses the rights of these stakeholders.

The *Land Tenure Security Bill* will also provide a framework for the following:

- The management of evictions
- Expropriation
- The management of resettlement units and agri-villages
- The establishment of a land rights management board
- Dispute resolution

In mid-2011, the Bill was sent back to the Department of Land Reform and Rural Development for reconsideration after stakeholders representing both farm owners and farm dwellers raised a range of concerns.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) (No. 19 of 1998)

The *Prevention of Illegal Eviction from and Unlawful Occupation of Land* Act (also called PIE) provides procedures for eviction of unlawful occupants and prohibits unlawful evictions. The main aim of the Act is to protect both occupiers and landlords. PIE is different from ESTA because it deals with unlawful occupiers of residential land, while ESTA deals with the eviction of lawful or previously lawful occupiers of rural or per-urban land.

An unlawful occupier is a person who occupies land without the express or tacit permission of the owner or the person in charge. Tacit permission is when the owner is aware of the occupant being on the land or premises but does nothing to stop this.

WHO IS COVERED BY PIE?

Anyone who is an unlawful occupier, including tenants who fail to pay their rentals and bonds, is covered by PIE. It excludes anyone who qualifies as an 'occupier' in terms of the *Extension of Security of Tenure Act*.

EVICTIONS IN TERMS OF PIE

WHEN IS AN EVICTION LAWFUL?

For an eviction to happen lawfully, certain procedures must be followed. If any one of them is left out, the eviction is unlawful. If an owner wants to have an unlawful occupier evicted, they must:

- Notify the occupier of their intention to go to court to get an eviction order.
- Apply to the court to have a written notice served on the occupier stating the owner's intention to evict the occupier. The court must serve the notice at least 14 days before the court hearing. The notice must also be served on the municipality that has jurisdiction in the area. The notice must contain the following:
    - A statement that proceedings are being instituted in the court in terms of PIE
    - The date and time of the court hearing
    - The grounds for the proposed eviction
    - That the occupier is entitled to appear before the court and defend the case
    - The occupier can apply for legal aid

- The unlawful occupier can go to the court hearing on the day it is set down and defend themselves if they believe the eviction is unfair

A person who wants to defend the court action should approach the Justice Centre at the Magistrate's court for assistance. An occupier threatened with eviction can apply for legal aid assistance and representation.

WHAT THE COURT CAN DECIDE

The court will only give an eviction order if it is proved that:

- The person who is applying to evict you is in fact the owner of the land
- You are an unlawful occupier
- The owner has reasonable grounds to ask for your eviction
- The local authority or any other owner of land in the area can make alternative land available for you

If the court is satisfied that all the requirements have been complied with, and that there is no valid defence that has been raised by the unlawful tenant, it will grant an order for eviction and provide:

- The date on which the unlawful occupier must leave the land, having regard to all relevant factors, including the period the unlawful occupier and their family have lived on the land;
- The date when the eviction order can be carried out if the unlawful occupier has not vacated the land on the given date.

The court can also make an order for buildings or structures that were occupied by the unlawful occupier on the land to be demolished and removed.

In addition to the legal requirements for an eviction to take place, the Constitutional Court has also set out best practices that are important to take into account before an eviction takes place. These practices were included in a series of judgements, including: *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*; *Occupiers of 51 Olivia Road, Berea and 197 Main Street, Johannesburg v City of Johannesburg*; *Abahlali Basemjondolo Movement SA v Premier of KwaZulu Natal and Others*; *and Occupiers of Erven 87 & 88 Berea v De Wet and Another*.

The best practices include:

- Evictions must be conducted in a humane manner

- The State must provide temporary alternative accommodation in certain instances, such as where those who are evicted are unable to secure their own accommodation
- Every property owner must engage meaningfully with people who are going to be evicted, individually and collectively, before starting the eviction process
- Eviction processes should not discriminate against an individual or group of people, such as migrants and non-nationals

EXAMPLE

In the case of South African Human Rights Commission v City of Cape Town 2021 2 SA 565 (WCC), questions and concerns relating to the government's responses to evictions during COVID-19 were raised. Even though the COVID-19 state of disaster no longer exists, questions continue to be raised about evictions. This case dealt with the City of Cape Town's use of the remedy of 'counter-spoliation' to evict families from several informal settlements and demolish shacks without getting a court order. 'Counter-spoliation' is a legal remedy that allows people to forcibly re-take possession of property unlawfully taken from them. The court found that the City's conduct was unlawful and unconstitutional.

The City of Cape Town disputed that the claimant in this case was an occupant of the structure and, for this reason, claimed they were entitled to summarily evict him and demolish his structure. However, the court found that once a person is present on land with the intent to construct a shack, and they demonstrate this intention by beginning to erect a structure, they are seen to be in 'possession' and the land owner must get a court order to remove them as required by PIE. This case demonstrates the need for any owner, person or body considering an eviction to ensure that all the correct legal processes are followed. This may include getting a court order and finding alternative accommodation for the occupiers.

URGENT EVICTIONS

The Act also allows for urgent eviction proceedings. This will be granted if the owner can show that:

- There is a real danger of substantial injury or damage to any person or property
- There is no other way to solve this situation
- The owner is going to suffer more if the occupier stays on the land than the occupier will suffer if they get evicted. In such a case, the owner can go to court and get a final order for the eviction

IF THE COURT GRANTS AN EVICTION ORDER

The eviction order will state a date by which you have to leave the land, and also the date on which the eviction will take place if you do not vacate the land. The court order may also make an order for your buildings to be demolished.

WHO CAN REMOVE YOU?

Only the Sheriff of the Court can carry out an eviction.

Dealing with land claims and other land reform disputes - the Land Claims Court

The Land Claims Court (LCC) specialises in dealing with disputes that arise out of laws that underpin South Africa's land reform programme. These are the *Restitution of Land Rights Act*, the *Land Reform (Labour Tenants) Act*, the *Extension of Security of Tenure Act* (ESTA) and the *Extension of Security of Tenure Amendment Act*. 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 conduct its proceedings in an informal way if this is appropriate. ***(See pg 725: Problem 4: Protecting labour tenants against losing land)***

Spatial Planning and Land Use Management Act (No 16 of 2013) (SPLUMA)

The *Spatial Planning and Land Use Management Act* (SPLUMA) came into operation in July 2015. SPLUMA provides a framework for South Africa's planning system, sets out principles for norms and standards and spatial development, and defines the role of each sphere of government.

SPLUMA defines the processes by which homes and businesses are built and expanded. It defines how and where suburbs should become more dense and what land uses should be permitted. It also provides guidelines for the growth of cities and makes provisions for dealing with undesirable or illegal land uses.

The Act defines a leading role for municipalities in local land matters and replaces regulations and laws that previously directed land development and land use. Under SPLUMA, municipalities must, following public consultation, prepare, adopt and implement

a Land Use Scheme (LUS). The Land Use Scheme must be consistent with, and give effect to, the municipal Spatial Development Framework (SDF). An SDF is a framework that guides the overall spatial distribution of land uses within a municipality to help bring about the municipality's development vision and goals. All land development applications must be determined within the context of the Land Use Scheme, which will be binding on all owners and users of land within the municipality.

Importantly, SPLUMA requires municipalities to establish a Municipal Planning Tribunal (MPT) to decide on applications for land use and development. People will have the right to appeal via the Municipal Manager against an MPT decision.

SPLUMA PROCESS FOR DEALING WITH LAND USE AND DEVELOPMENT APPLICATIONS

Application process: *The applicant submits an application to the Municipal Planning Registrar for assessment and approval.*

Decision-making process: *The assessment and initial decision is taken by the Municipal Planning Authorised Officer (MPAO) and the Municipal Planning Tribunal (MPT). A final decision will be taken and reasons must be given for the decision.*

Appeal process:

- *If a person's rights are affected by the Authorised Officer or Municipal Planning Tribunal's decision regarding a land use application, they can appeal to the Municipal Manager within 21 days of being notified of the decision (including someone with Intervener status).*

  An interested person is someone who may be reasonably expected to be affected by the outcome of the land development application where their income and/or their property rights could be influenced by the proposal.

- *The person who is appealing must give written notice and reasons for the appeal.*
- *The Municipal Manager must submit an appeal to the Appeal Authority within the prescribed time.*
- *The Appeal Authority holds the hearing - written or oral submissions can be made, which can also be electronic. Parties must be notified of the date, time and venue of the hearing.*
- *The Appeal Authority makes a decision - either confirming the original decision, varying it, or revoking (withdrawing) it.*

  The Appeal Authority must exercise its powers in an independent manner, free from governmental or any other outside interference or influence. No *person,*

including a municipality or organ of state, is allowed to interfere with the functioning of the Appeal Authority.

All parties are informed of the decision and the reasons.

Only when the appeal process is complete can the development continue if it has been approved.

INTERVENER STATUS

Anyone who has an interest in a land use and development application can petition the municipality to 'intervene' in a land use and development application that has been submitted to the Municipal Planning Tribunal or Authorised Officer. The intervention must relate to an existing application that has been considered by a Municipal Planning Tribunal or Appeal Authority. The person who is intervening must prove their 'interest' in the application, and the chairperson of the Municipal Planning Tribunal or Appeal authority has the right to decide if the person petitioning qualifies as an 'intervener'.

Housing

What is the government's housing policy?

In 1994 millions of people in South Africa stayed in informal houses, overcrowded backyard shacks or far from where they worked. The housing backlog and the slum living conditions it created were a central concern of the government.

Government developed a comprehensive housing plan referred to as *Breaking New Ground* which aims to promote and integrate society by developing sustainable human settlements and quality housing within a subsidy system for different income groups. It has the following targets:

1. Removal or improvement of all slums in South Africa as rapidly as possible.
2. Fast-tracking of the provision of formal housing within human settlements for the poorest of the poor and those people able to afford rent and or mortgages.
3. The creation of rental stock of housing for a rapidly growing, mobile (migrant) and urban population within the inner city and other locations close to employment opportunities.

4. To speed up development by removing administrative blockages and to aim to reduce the time for permission to be granted for building to 50% of the current time.
5. To educate and train housing consumers (owners and rental users) on their rights and responsibilities.

The *Breaking New Ground* plan includes the development of low-cost housing, a stronger emphasis on medium-density housing, affordable rental accommodation, the strengthening of partnerships with private housing developers, social infrastructure and facilities. The plan also aims to change existing spatial settlement patterns, driven by the need to build multicultural communities in a non-racial South Africa. The gradual replacement of informal settlements with adequate and secure housing in well-serviced communities is a critical aspect of the plan.

Laws passed to ensure access to quality housing

The following are some of the important laws and regulations to assist people with access to quality housing:

HOUSING ACT (NO. 107 OF 1997)

This Act makes provision for all the different levels of the state and various other bodies to assist those most in need of housing.

THE RENTAL HOUSING ACT (NO. 50 OF 1999)

This Act deals with the relationship between landlords and tenants, and it applies to all written or verbal lease agreements entered into on or after 1 August 2000. Important amendments were made to the *Rental Housing Act* in the *Rental Housing Amendment Act (No. 35 of 2016)*.

THE HOME LOAN AND MORTGAGE DISCLOSURE ACT (NO. 63 OF 2000)

This law ensures that banks lend money to all communities and do not refuse to give bonds to some communities while giving to others.

THE HOUSING CONSUMER PROTECTION MEASURES ACT (NO. 95 OF 1998)

This Act protects new homeowners from getting poorly built houses by ensuring that all builders are registered with the National Home Builders Registration Council, and all new houses are enrolled under the Defect Warranty Scheme. Builders must comply with certain building standards, and houses must be at least 30 square meters in size.

HOUSING AMENDMENT ACT (NO. 4 OF 2001)

This Act gives the housing minister the power to decide procurement policy on housing development so that, for example, local building materials or local labour can be used in a construction project. It also limits the sale of state-subsidised houses.

SOCIAL HOUSING ACT (NO. 16 OF 2008)

Increased access to rental accommodation in South Africa's cities is recognised as a priority, as many people cannot afford to buy property in urban areas. However, many of the people who need rented accommodation in the city cannot afford to pay high rentals but they also often belong to households whose incomes exceed the RDP housing subsidy limit. To assist people in this category, public subsidies are needed. This is the goal of the social housing programme.

The *Social Housing Act* aims to establish and promote a sustainable social housing environment, and it defines the functions of the national, provincial and local spheres of government with respect to social housing.

The *Social Housing Act* requires approved social housing projects to be delivered through accredited social housing institutions (SHI) that are regulated by the Social Housing Regulatory Authority. SHI are legal entities responsible for building and managing social housing.

INFORMAL SETTLEMENTS UPGRADING PARTNERSHIP GRANT (ISUPG)

The Informal Settlements Upgrading Partnership Grant (ISUPG) is a conditional grant that provides funding to municipalities for the upgrading of informal settlements. The funding aims to facilitate a programmatic, inclusive and municipality-wide approach to upgrading informal settlements and sets new conditions for provincial departments of human settlements and metropolitan municipalities that will receive this grant. Grants are available to municipalities and Provinces.

The housing subsidy

A housing subsidy is a grant which is used to assist households who qualify to build or buy a house, and does not have to be paid back. The subsidy money is not given directly to you. Instead, it is paid to the developer who builds the house, or to the seller of an existing house. The developer can be a private company, a local authority or a community organisation.

WHO CAN APPLY FOR A HOUSING SUBSIDY?

You can apply for a housing subsidy if you:

- Are a South African citizen over 18 years of age
- Are a single person with dependants (e.g. children you are responsible for) and have an income of less than R3 500 per month
- Are married or live with a long-term partner and have a combined income of less than R3 500 per month
- Have never received any other housing subsidy from the government
- Have never owned a property anywhere in South Africa
- You and your family will live on the property bought with the subsidy

It is very important to be aware of the following:

- You will only ever get one housing subsidy (except for a consolidation subsidy). If you decide to sell your RDP house, you will not qualify again for a subsidy for another RDP house
- The names of both partners go on the database. If you split up with your partner, you will not get another subsidy with your new partner

WHAT IS A HOUSEHOLD?

To apply for a subsidy, you have to be part of a household. The subsidy scheme recognises a household as:

- Couples who are married or who live together
- Single people with dependents (e.g. minor children, old or disabled people who rely on them for financial assistance)

Single people who live on their own do not qualify for a government housing subsidy, although they can still rent council houses.

APPLYING FOR A HOUSING SUBSIDY: GETTING YOUR NAME ON THE WAITING LIST

People often ask how they can put their names on the housing waiting list. Due to the big housing backlog, not everyone who wants to get a house can get one immediately. People who earn enough money to buy a house can go to the bank and take a loan and buy a house without the support of the government. But if you earn less than R3 500 per month and you qualify in all the other ways listed above, then you can apply to get government assistance to get a house.

Local government is responsible for the delivery of housing, and most local governments have housing departments. You can put your name on the waiting list at the housing department of the local council offices. Many municipalities have set up help desks to assist families with housing problems.

National government has also established a National Housing Needs Register (NHNR) which is a central database to register an application for housing. It gives households the opportunity to register their need for adequate shelter by providing information about their current living conditions, and household composition and to indicate the type of housing assistance they require from government.

CHECKING IF YOUR NAME IS LISTED ON THE HOUSING WAITING LIST

Some people complain that they have been on the housing waiting list for a long time, but they have not yet received a house. The problem with the waiting list is that there is more than one, and there are different systems for allocating houses. You might be listed on a Municipal Housing Demand Database or your province's Housing Needs Register. It might be best to take your proof of registration to the office where you applied and ask them where you are on the list.

The following are ways for people to check their status:

1. Log onto the Housing Subsidy Portal at https://www.hssonline.gov.za/ and enter your ID number.
2. Go to your municipal office. Take your copy of your C Form so they can check where you are on the waiting list.
3. SMS 44108 and type in your ID number.
4. Phone the toll-free housing number at 0800 146 873.
5. Email: info@dhs.gov.za and give them your ID number.

Any one of these should tell you what the situation is with your house. But it can take years before your house is allocated to you.

When your house is ready to be allocated, the municipality will inform you that you must come in and sign a Service Agreement, and you will then be given the keys to the house and the title deeds.

If the title deeds are not available when you get your house, do not stop checking when they will be ready because it is only the title deeds that make you the legal owner of your house.

Types of housing subsidies

There are different kinds of subsidies for people with different circumstances.

INDIVIDUAL SUBSIDY: BUYING A HOUSE AS AN INDIVIDUAL HOUSEHOLD

For households earning between R0-R3 500 per month

This subsidy is for low-income households wishing to buy residential property for the first time and may be used to purchase an existing house, including the land on which the house stands or finish an incomplete house. This subsidy can only be used once by a successful applicant.

HOW MUCH IS AN INDIVIDUAL SUBSIDY WORTH?

This depends on how much your gross (before deductions) monthly household income is. The subsidy is currently worth the following:

- If your household income is less than R3 500, you qualify for a subsidy up to R202 888.
- If your household income is less than R3 500 and you can prove that you are disabled or in permanent bad health, you qualify for a housing subsidy of up to R202 888, plus a set amount to pay for the cost of any extra features your house may need – for example, a ramp for wheelchair access.

The subsidy amounts are fixed and are increased in April of each year. You do not have to repay the subsidy as it is not a loan.

HOW MUCH WILL I HAVE TO PAY IN?

You will have to pay the difference between the subsidy and the cost of the house. For example, if you buy a house for R222 888 and receive a subsidy of R202 888, you will have to pay in R20 000, plus the bond registration and conveyancing attorney's costs. Transfer duty is not payable on properties below R1 100 000.

However, if you buy a house for R197 888 and receive a subsidy of R202 888 you will have R5 000 of the subsidy left over. You can use this to pay for at least part of the bond registration and attorney's costs. Remember that the money will not be paid out to you, but directly to the relevant parties.

HOW DO I APPLY FOR AN INDIVIDUAL HOUSING SUBSIDY?

There are two kinds of Individual Housing Subsidies, based on whether you can pay your contribution to the house out of your savings or if you need to borrow money to pay for it:

- **A Non-Credit-Linked Individual Subsidy:** This is what you get if you can pay your contribution in full, out of your pocket. To

apply for a Non-Credit-Linked Subsidy, you will need to fill out an application form at your local municipal housing office.

- **A Credit-Linked Individual Subsidy:** This is what you get if you cannot afford to pay your contribution, in full, out of your savings and need to do so using a loan from a bank or some other financial institution. You will need to be pre-approved for credit with an approved financial institution before you can apply for a Credit-Linked Subsidy at the Department of Local Government and Housing or at your local municipal housing office.

To apply for an individual subsidy, you will need to fill out an application form at your provincial Human Settlements Department or go to your local municipal housing office for assistance.

WHAT DOCUMENTS MUST I SUPPLY WHEN APPLYING FOR A SUBSIDY?

You will need to supply:

1. A copy of your and your partner or spouse's bar-coded South African IDs and the birth certificates of your financial dependants
2. Your marriage certificate if you are married, or your divorce papers if you are divorced and have financial dependants
3. A recent payslip as proof of income

If you are applying for a non-finance-linked subsidy, you will need to supply a certified copy of the signed agreement of sale for the property. Be sure to make the sale conditional to your receiving the housing subsidy.

If you are applying for a finance-linked subsidy, you will need to supply a certified copy of the signed agreement of sale for the property. Be sure to make the sale conditional upon your receiving a government housing subsidy as well as a home loan. You will need to provide proof that the home loan has been approved.

HOW IS THE INDIVIDUAL HOUSING SUBSIDY PAID OUT?

The subsidy is not paid out to you. It is paid directly to the financial institution from which you are receiving a home loan (in the case of a Credit-Linked Individual Subsidy) or the seller (in the case of a Non-Credit-Linked Individual Subsidy).

WILL I HAVE TO PAY ANYTHING BACK?

The housing subsidy is not a loan and you do not need to pay it back.

CONSOLIDATION SUBSIDY

This is for people who have already received assistance from the government and who live on a serviced site and want to build a better house. This money can only be used for building, as services have already been provided on the site, to upgrade or complete a non-subsidy house. The subsidy amount is R109 947.

What you need to qualify for a consolidation subsidy:

- Must be registered on the housing demand database at the nearest municipality
- Be a South African citizen or have a permanent residency permit
- Be 18 years or older
- Be married or living with a partner
- Be single or divorced and have proven financial dependants permanently living with you
- Have a monthly household income of R3 500 or less before deductions
- Must not be a current or previous property owner

INSTITUTIONAL SUBSIDY

This is for non-profit organisations like churches, local authorities or housing associations (also called 'social housing institutions') that want to provide rented accommodation to people from lower-income groups. It is called an institutional subsidy because it goes to the institution that can rent out the housing to different families. A family who lives in this type of rented accommodation does not jeopardise their chance to apply for their own subsidy at a later date. This is because the subsidy for rented housing is taken in the name of the organisation and not in the name of the individual. The homes developed through the institutional subsidy must remain in the ownership of the organisation for at least four years after they are built.

ENHANCED PEOPLE'S HOUSING PROCESS (EPHP)

The Enhanced People's Housing Process aims to support households who want to save money on their housing subsidies by building their own homes. The subsidies are available to communities or organised groups of households. This subsidy allows people to play an active role in building their own homes through an organised group. Applications should be submitted to the nearest municipality.

By using their own labour rather than paying someone else, these households can make their housing subsidy and personal contribution go further by building better quality and/or larger houses for less money. The Enhanced People's Housing Process can also include the following support:

- Access to land that can be serviced
- Training opportunities
- Technical assistance

SOCIAL HOUSING

Social housing aims to provide good quality, well-located and affordable rental accommodation to low-income and 'gap market' households. "Gap market' households are those who earn too much to qualify for other types of housing assistance, like RDP houses, but who earn too little to afford the commercial housing market.

Social housing is a rental or co-operative housing option for households that are earning between R1 850 - R22 000 per month and people in the 'gap market' (typically those earning between R6 000 - R10 000 per month). Social housing projects are developed, owned and managed by non-profit Social Housing Institutions (SHIs), which should be accredited by the Social Housing Regulatory Authority.

The law also allows for-profit private stakeholders called Other Development Agents (ODAs) to participate, as long as they make a 20% equity investment in the social housing project. In such cases, the social housing project would need to be monitored by the Regulator to ensure it is accredited and compliant, but the ODA itself does not require accreditation.

Social Housing projects are developed within areas that contribute to spatial, economic and social restructuring. Social housing is therefore built in restructuring zones, which are areas of major social and economic opportunity which are typically unaffordable to low-to-lower-middle income households. Government subsidies are provided to Social Housing Institutions to build new social housing projects.

Through this subsidised programme, people can gain access to a rental house or apartment. The household pays a reduced amount of rent, based on their income, to the Social Housing Institution. The rentals have to cover the running costs of the social housing project.

The SHIs don't decide these rental rates on their own. They must follow the regulator's guidelines for setting the rent.

Households may qualify for this subsidy if their income is between R1 850 per month and R22 000 per month. This amount aligns with the Financed-Linked Individual Subsidy Programme (FLISP).

HOW DO YOU QUALIFY FOR THIS SERVICE?

You will qualify for this subsidised programme if:

- You are a South African citizen or have a permanent residency permit
- You are 18 years or older
- You are married or living with a partner
- You are single or divorced and have proven financial dependants permanently living with you
- Your monthly income is between R1 850 - R22 000 before deductions

HOW TO APPLY FOR A SOCIAL HOUSING SUBSIDY?

Visit the nearest municipality to find out whether there are any Social Housing projects in a particular area and which Social Housing Institutions are operating in the area. The housing units are managed by Social Housing Institutions, and applications for units are made directly to the SHI.

RURAL SUBSIDY

This subsidy is available to people who don't have formal tenure rights to the land on which they live (government owns the land and tenure is granted in terms of traditional laws and customs). The rural subsidy is available only on a project basis and beneficiaries themselves may decide on how to use their subsidies. The subsidy may be used for building houses, providing services or a combination of both.

INTEGRATED RESIDENTIAL DEVELOPMENT PROGRAMME (IRDP)

The Integrated Residential Development Programme replaced the Project Linked Subsidy Programme. The IRDP provides for the planning and development of integrated housing projects. Projects can be planned and developed in phases.

- **Phase 1: Land, Services and Township Proclamation:** This phase includes planning, land acquisition, township establishment and the provision of serviced residential and other land use stands to ensure a sustainable integrated community.
- **Phase 2: Housing construction and individual ownership options:** This phase includes the construction of houses by contractors for people who qualify, and the sale of stands to non-qualifying beneficiaries and to commercial interests, etc.

ENHANCED EXPANDED DISCOUNT BENEFIT SCHEME (EEDBS)

This scheme promotes homeownership among tenants of publicly-owned rental housing (municipal and provincial). Purchasers can receive a discount on the selling price of the property. When this happens the property is transferred free of any further costs. Some municipalities have already transferred much of their housing stock to tenants who have utilised the Enhanced Expanded Discount Benefit Scheme.

COMMUNITY RESIDENTIAL UNITS (CRU) PROGRAMME

This programme provides funds for the re-development of government-owned housing stock (e.g., hostels, council flat buildings) for low-cost rental. CRU targets low-income persons and households earning below R3 500 per month who are not able to be accommodated in the formal private rental and social housing markets.

The funds through the CRU Programme will be utilised for the development of the following public rental housing assets:

- Old workers' hostels that are either government-owned (either by provinces or municipalities) or that have both a public and private ownership component
- Public housing stock that forms part of the enhanced extended discount benefit scheme but which cannot be transferred to individual ownership and has to be managed as rental accommodation by the public owner
- Publicly owned rental stock developed after 1994
- Existing dysfunctional, abandoned, and/or distressed buildings in inner cities or township areas that have been taken over by a municipality and funded through housing funds

EMERGENCY HOUSING ASSISTANCE

This programme applies to those experiencing emergencies of exceptional housing needs who are not in a position to address their housing emergency from their own resources or from other sources. Income qualifications are the same as those for other subsidy schemes.

To access funds under this programme, the municipality must first identify a need for emergency housing, and apply to the provincial department. Communities should approach their municipality for assistance under this programme when an emergency situation arises (e.g. a fire or flood). The amount of the grant will be determined by the provincial Human Settlements MEC based on the nature and extent of the emergency housing situation and a properly prepared project plan.

NOTE

People with disabilities (or who are in permanent bad health) may receive the higher housing subsidy for individual, project-linked or relocation assistance even if their household income is more than R1 500 but less than R3 500. They are also entitled to receive an amount higher than the usual subsidy amount to cover the cost of special structures to meet their needs (such as a wheelchair ramp for the mobility impaired)

FINANCE LINKED INDIVIDUAL SUBSIDY PROGRAMME (FLISP)

The Finance-linked Individual Subsidy Programme (FLISP) is a subsidy established by the government which aims to provide poor and low to middle-income households with access to adequate housing. The subsidy may be used to:

- Buy new or old residential property
- Buy a vacant serviced residential stand, linked to an NHBRC-registered homebuilder contract, or
- Build property on a self-owned serviced residential stand, through an NHBRC-registered homebuilder

Subsidies are provided depending on your income bracket and will be used to reduce your monthly home loan repayments. This will make your home loan more affordable. If you want to buy your own home for the first time and your household income is between R3 501 to R22 000 per month, you might be eligible for a FLISP subsidy.

The aim of FLISP is to reduce the initial home loan amount to make the monthly loan repayment affordable over the long term. FLISP can be used to purchase an existing house or to buy a vacant serviced residential stand which is linked to house building contracts.

Depending on your income, you could qualify for a subsidy of between R38 000 to R170 000. However, this amount will be subject to change. Examples of the subsidy amount:

- If your income is R3 501 the subsidy amount will be R169 265.
- If your income is R15 000 the subsidy amount will be R85 238.
- If your income is R22 000 (the limit for this subsidy), the subsidy amount is R38 911.

HOW DO YOU QUALIFY FOR A FLISP SUBSIDY

You qualify for this subsidy if:

- You earn between R3 501 and R22 000 per month

- You are a first-time home buyer or existing homeowner (you must apply within a certain time, and each Province has their time limit)
- You are a South African citizen
- You have not received a government housing subsidy before
- You are married or cohabiting
- You are single with financial dependants

Since 1 April 2022 first-time buyers can qualify for a FLISP subsidy even if they don't have a bank loan from a formal financial institution. You may qualify if you have financial assistance to buy a property in the form of:

- A pension/provident fund loan
- A cooperative or community-based savings scheme, i.e. stokvel,
- The Government Employees Housing Scheme
- Any other Employer-Assisted Housing Scheme
- An unsecured loan
- An Instalment Sale Agreement or Rent-to-own Agreement

Since April 2022, the attorney's transfer bond fees are also covered by a FLISP subsidy.

HOW TO APPLY FOR A FLISP SUBSIDY

If you have a bank loan or alternative financial assistance to buy a property, contact your municipality or the Department of Human Settlements to complete a FLISP application form.

The role of development workers in helping people to access housing subsidies

Development workers can help communities to build better-quality houses.

Some ways to do this include:

- Organising unemployed people, especially women, to form people's housing organisations and contacting non-governmental organisations that can help the community with a people's housing process
- Members can contribute their labour free of charge and help each other to build bigger and better houses
- Organising collective ways to buy building materials so that they are cheaper
- Setting up savings schemes so that banks can lend the community extra money to build better houses. This can be done by opening a group account at a bank. The

group will have to get a name and a constitution, and select a chairperson and treasurer

Organisations and development workers can also help with problems in housing projects. For example, there have been some instances where communities have reported corruption in housing projects, such as:

- Corrupt officials who take bribes to move people higher up the housing waiting list
- Corrupt developers who take the housing subsidy but do not complete building the houses or build houses that do not comply with building standards
- Community members who illegally occupy new houses before a development is completed so that the people for whom the houses were built cannot move in
- People who lie about their income and get subsidies to which they are not entitled

Here are some things you can do to assist in solving these problems:

- Use the housing hotline to report the matter to the Department of Human Settlements on their call centre line: 0800 146 873 or their Fraud and Corruption line: 0800 701 701.
- Report the matter to the MEC for housing or the mayor
- Monitor the construction of local housing projects and make sure that all contractors are registered with the National Home-Builders Registration Council and all new houses are enrolled under the Defect Warranty Scheme
- Make sure that all new houses built by developers are at least 30 square meters
- If houses have defects within the first year of construction, the construction company can claim from the Defect Warranty Scheme and fix these defects

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The role of local government and housing

The law requires all local authorities to have an Integrated Development Plan (IDP) showing how they plan to develop land and housing in their area. The plan must cater to all the development needs in the area, including housing. If homeless people are living in the area, it is the local authority's job to find land where they can be settled.

PROVIDING PUBLIC HOUSING

Local authorities are not given money from the central government to fund housing, but they can raise their own money to provide for land and housing. There is a duty on the government to provide people with rental housing in terms of the *Rental Housing Act*. Often, they own a lot of low-income houses, which many people still rent from them. The local authority is the landlord and decides who can get a house.

They will give preference to families of single people when a house becomes available. ***(See pg 726: Problem 5: Provision of land, housing and services for homeless people; See pg 167: Drawing up an Integrated Development Plan)***

According to the *Municipal Systems Act (No. 32 of 2000)*, every municipality has to draw up and pass a by-law on credit control and managing debts. This should include provisions for arrangements for people who are in arrears - particularly for people who are indigent (living in poverty). It should say what penalties there are for people who don't keep up on any of their payments, including the disconnection of services or the eviction of tenants or owners.

FACILITATING HOUSING DEVELOPMENT

Local authorities are often in an excellent position to facilitate new housing developments or to act in partnership with developers. In rural towns, they are often the only agents with the necessary experience and resources. ***(See pg 729: Problem 9: Falling behind on payments of rent, rates and services payments to the local council)***

Buying a house

Getting money is the first step in the process of buying a house. You need some savings because you have to pay a deposit of between 5% and 20% of the price of the house before any bank will lend you money. Also, if you qualify, you can get a housing subsidy. When you have paid your deposit and worked out what your subsidy will be (if any), you must borrow the rest of the money to buy the house. The money you borrow from a bank is called a mortgage bond or home loan.

Your monthly repayments go towards paying off:

- The lump sum of money you borrow
- The interest (the money that the bank charges you for lending you the lump sum)

Interest rates change over time. If the interest rate goes down this means your repayments will go down. If it goes up, your repayments will go up.

The time over which you pay back the loan is called the 'redemption period'. It is usually 20 years, but you can pay the money off quicker if you have spare cash.

Banks usually only lend money to people with stable jobs. Most banks insist that your bond repayment is not higher than 25% of your income or 30% of your joint income if you are

married. Banks will also only lend you money to buy a house made with brick or concrete walls, and zinc or asbestos roofing. ***(See pg 731: Problem 11: Falling behind on bond payments)***

The offer to purchase

Your offer to the seller to buy the house must be made in writing. Sometimes, the seller tries to put a 'voetstoets' clause into the offer before they will sign it. This means that you agree to buy the house exactly as it is, and you can never ask the seller to do repairs for anything. Before you allow a 'voetstoets' clause, you should make sure you are happy that there are no problems that you don't know about.

When both you and the seller sign the Offer to Purchase, it becomes a contract called the Deed of Sale. By law, the buyer and seller must then obey the contract.

If you buy a house under leasehold or Deed of Grant, you usually go to the offices of the Township Manager or the Home Ownership Division. If it is a new house, you fill in forms to apply for your leasehold or Deed of Grant. If it is not a new house, you go there to sign the transfer papers and pay the bond registration and transfer fees. Take your ID or reference book, marriage certificate and if you have one, your decree of divorce or spouse's death certificate with you.

Transfer

This is the change of ownership from the seller to you, the buyer. A special attorney, called a conveyancer, writes a document known as a Deed of Transfer. This document then goes to the Deeds Office for the area where the house is. Once the Registrar of Deeds signs the Deed of Transfer, it is called the title deed, and it proves that you are the legal owner of the property. You get a copy, and the Deeds Office keeps a copy. Before you buy the house, you should check that the seller is the real legal owner of the house. You can do this by checking the title deed at the Deeds Office.

Defects in a house

If a builder builds a new house for you, you have to sign a delivery note saying that you are happy that the house was completed according to the plan. The builder then gives you a

three-month guarantee. This means the builder is responsible for the first three months for fixing any problems with the way the house was built.

Sometimes, hidden problems only show after the first three months. For example, if the roof collapses after the first few years, it may be the builder's fault. This is known as a latent defect. ***(See pg 732: Problem 12: Problems with a house you bought)***

Renting a house

Tenants, landlords and leases

If you pay to rent a house, you are called a tenant or a lessee. The owner of the house is called the landlord or lessor. The tenant and landlord have an agreement, called a lease.

The lease can be for a fixed time, in which case the landlord does not have to give you notice to end the lease, and you must leave the house on the date when the lease ends, unless the lease is renewed by agreement with the landlord. The landlord cannot make you leave before the date when the lease ends, unless you break a condition of the lease, for example, if you do not pay rent on time.

The lease can also be for an indefinite time where there is no time limit on the lease. In this case, the landlord can only end the lease by giving you notice as prescribed in the lease agreement. If there is no lease agreement, then the notice given should be reasonable. If you think the notice was unreasonable, you can take the case to court where it will be decided whether the notice was reasonable or not. ***(See pg 728: Problem 8: Common problems in renting a house or flat)***

Where people rent their houses from the local authority or town council, then it is the local authority who will decide who can get a house.

The Rental Housing Act (No. 50 of 1999)

The *Rental Housing Act* controls the relationship between landlords and tenants in the private rental sector. This act protects tenants from landlords for example, if they charge very high rentals for bad accommodation. It also protects landlordsfrom tenants, for example, tenant committees that hold back rent money or try to take over the running of buildings. It provides for mechanisms to resolve disputes, for the establishment of Rental Housing Tribunals and a system for building positive relationships between landlords and

tenants. The Act applies to all written or verbal residential lease agreements entered into on or after 1 August 2000.

The *Rental Housing Amendment Act (No 43 of 2007)* was passed by parliament to address some administrative issues and implementation of the 1999 Act. One of the most important changes is the definition of "unfair practice." An unfair practice is any act or omission by either a landlord or tenant that goes against the Act.

The *Rental Housing Amendment Act (No 35 of 2014)* introduced various changes that impact the relationship between tenants and landlords. These are the key provisions:

- It requires residential lease agreements to be in writing
- It extends the nature of the offences
- It extends the power of the Rental Housing Tribunal
- It adds sections relating to securing deposits, the condition of the dwelling and the overall relationship between landlords and tenants
- It requires the Minister of Human Settlements to set up Housing Tribunals in all provinces.
- it requires municipalities to establish rental housing information offices to provide advice to tenants and landlords. However, there is no requirement for national or provincial government to make the necessary funds available for these offices.

WHAT ARE THE RIGHTS OF THE LANDLORD AND TENANT?

A landlord has the right to:

- Prompt and regular payment of rental
- Have a security deposit from the tenant, which may not be more than what is in the lease, and must be invested in an interest-bearing bank account
- Deduct from the tenant's deposit the reasonable cost of repairing damage to the dwelling but must then refund the balance of the deposit and interest to the tenant within 21 days after the lease has expired
- Recover debt after an order of court has been obtained
- Terminate a lease on grounds not deemed unfair and as specified in the lease Agreement
- Upon termination of a lease, receive the property back in a good state and Repossess the property after an order of court has been obtained
- Claim compensation for damages/improvements

A tenant has the right to:

- Not have their person, property or residence searched without a ruling by a court or tribunal
- Receive visitors

- Not have their possessions seized without an order of the court
- Privacy of communication
- Request written receipts from the landlord, which must include dates, address or description of the property, for which period payment has been made, whether the receipts are for payment of rental, arrear rental, deposit payment or otherwise
- Request written proof of interest accrued on the deposit paid

WHAT ARE THE DUTIES OF LANDLORDS AND TENANTS?

A landlord has a duty to:

- Ensure that the premises is in a safe and livable condition when rented out, which also means the building is structurally sound and physically safe for the tenant, the tenant's household members and visitors
- Provide basic maintenance of the premises, which includes repairs and upkeep to ensure the dwelling is in a habitable condition
- Provide a lease in writing. The Minister for Human Settlements must provide a pro-forma lease in all 11 official languages
- Allow the tenant to receive visitors
- Place the tenant's security deposit in a savings account which has the highest rate of interest for that financial institution
- Return the security deposit, plus all interest accrued, to the tenant minus any costs for reasonable repairs for damages caused by the tenant
- Provide proof to the tenant of any costs incurred through having a lease drawn up when passing on such costs to the tenant
- Not unreasonably withhold consent for a tenant to sub-let
- Arrange a joint inspection of the dwelling at the end of the lease at a time that is convenient for both parties. This must take place within three days before the lease expires to determine if there was any damage caused to the dwelling during the tenant's occupation. If the landlord fails to inspect the dwelling in the presence of the tenant, it is regarded as an acknowledgement by the landlord that the dwelling is in good and proper condition, and the owner will have no further claim against the tenant. If the tenant fails to respond to the landlord's request for an inspection, the landlord must, within seven days, inspect the dwelling to assess any damages or loss which occurred during the tenancy.

A tenant has a duty to:

- Pay the rent on time as specified by the lease
- Keep the dwelling/property clean and tidy

- Not use the premises for an improper purpose (for example, overcrowding, illegal activities and unregistered retail)
- At the end of the lease, return the property to the landlord in the same condition minus reasonable wear and tear
- Keep to the provisions of the lease as long as all the provisions are legal

RENTAL HOUSING TRIBUNALS

The *Rental Housing Act* provides for the establishment of Rental Housing Tribunals in all the provinces. The Act gives the tribunals the power to make rulings that are the same as the ruling of a magistrate's court. A tribunal can, for example, order a landlord to reduce the rent if a building is not being maintained properly. The service they provide is free.

The provincial Rental Housing Tribunals are required to resolve disputes between tenants and landlords in residential dwellings. These include privately owned houses, hostel rooms, informal dwellings, rooms, outbuildings, garages or similar structures that landlords may lease to tenants to live in.

The Unfair Practices Regulations prescribe what the rights and obligations are of landlords and tenants. These deal with:

- Changing of locks
- Deposits
- Damage to property
- Demolitions and conversions
- Eviction
- Forced entry and obstruction of entry
- House rules
- Intimidation
- Issuing of receipts
- Tenants' committees
- Municipal services
- Nuisances
- Maintenance
- Reconstruction and refurbishments

EXAMPLE

A tribunal can order a landlord to reduce the rent if a building is not being maintained properly.

OTHER TRIBUNAL POWERS

Spoliation orders: This prevents a landlord or tenant from taking the law into their own hands by seizing goods. A spoliation order restores the property to the owner while waiting for a full hearing on the matter.

Interdicts: These are orders that would prevent a landlord or tenant from continuing with a certain action or require either party to undertake a particular action. The complaining party alleges that such an action, or the lack of an action, is an Unfair Practice.

Attachment orders: A landlord would usually try to get an attachment order for the tenant's property once the Tribunal has determined that back rent owing to the landlord has not been paid and following an interdiction against the tenant.

Spoliation orders would generally be sought by the tenant against the Landlord. Interdicts, however, are likely to be sought by either a landlord or tenant in various situations where one party is alleging that the other is committing an unfair practice. Attachment orders would usually be sought by a landlord against a tenant.

EXAMPLES

***Spoliation order*:** A *landlord claims that a tenant owes them back-rent and removes a fridge that the tenant needs (which came with the house as part of the lease). The tenant can lodge a complaint with the Tribunal, which can now make a Spoliation order forcing the landlord to return the fridge.*

***Interdict(a)*:** A *tenant allows rubbish to gather around the property and does not respond to requests to remove it. The landlord can apply for an interdiction obliging the tenant to remove the rubbish and to keep the property clean in the future.*

***Interdict(b)*:** *The landlord makes frequent unwelcome visits to the rented house, and the tenant feels harassed. The tenant can approach the Tribunal for an interdiction against the landlord, obliging them to respect the tenant's privacy ("quiet enjoyment.")*

MAKING A COMPLAINT TO THE RENTAL HOUSING TRIBUNAL

Referring a complaint to the Rental Housing Tribunal is free. Follow these steps to make a complaint.

STEPS

1. Identify the complaint

Check if your complaint is valid. The following list of Tribunal Complaints will help you decide if your complaint qualifies to be submitted to the Rental Housing Tribunal.

- **Failure to refund deposit:** Your landlord has not returned your deposit after you've left the property.
- **Unlawful notice to vacate:** You received an unlawful notice to vacate from your landlord.
- **Exorbitant increase in rental:** Your landlord has increased the rent more than usual or by an unaffordably high amount.
- **Failure to accept your notice:** Your landlord doesn't accept that you have decided to leave after giving them your notice and wants you to stay and keep paying rent.
- **Municipal services not provided:** Your landlord has failed to provide municipal services (e.g. water, refuse and sewerage)
- **Municipal services not paid for by the landlord:** If the tenant has not paid for municipal services, your landlord can make a complaint against you.
- **Failure to do maintenance:** Your landlord is failing to do proper and required maintenance on your home
- **Unlawful eviction or lockout:** Your landlord has unlawfully evicted you or changed the locks so you can't get into the house
- **Unilateral changes to agreement:** Your landlord has made changes to the lease without your agreement or consent.
- **Unlawful entry:** Your landlord comes into your home without proper notice, or when you are not at home.
- **Unlawful seizure of possessions:** Your landlord takes your things from the property or takes things from the property that belong to them, but you have a right to use.
- **Failure to provide payment receipts:** Your landlord refuses to provide you with monthly statements or receipts for payment of rental after you have asked for them.
- **Failure to provide a copy of the lease:** Your landlord refuses to give you a copy of the lease.

- **Failure to provide a written lease:** If you have a verbal lease, your landlord has a duty to turn it into a written lease if you ask them.
- **Claim for lowering of rental:** If you think your current rental amount is too high and unfair you can ask for it to be reduced.

2. Complete the complaint forms

Make a complaint using the correct form available at the Rental Housing Tribunal in your province, or check if it is available online. Each province has its own specific methods, but in general, these are the steps to follow.

Submit two forms - the main complaint form as well as an annexure form. Both forms should be available on the provincial RHT websites. Mark the relevant complaints on the tick list and sign the forms.

You will also need the following:

- ID / Passport / Permit
- Your contact details (address and phone number)
- Your landlord's contact details
- Copies of the lease (if there is one)
- Supporting evidence (photos, payment receipts, etc.)

You should have three copies of these documents. Two are for the Tribunal, and one is for you to keep (this should be the original).

3. Submit your documents

Complaint forms and other supporting documents must be submitted in person to the Rental Housing Tribunal in your province.

When submitting the documents, make sure you do the following:

- Make 2 certified copies of all documents ('certified' copies have to be signed by a Commissioner of Oaths)
- Submit 2 copies of all documents to the Tribunal
- Record the date of submission on the original forms (the copy you keep)
- Record the name of the person who you submitted the documents to on the original forms
- Get written confirmation of your submission from the tribunal (like a letter or a date stamp on the submitted complaint form)
- Keep all original documents in a safe place

4. The Rental Housing Tribunal records your complaint

A case file will be opened with a reference number to track the complaint. About two weeks after submitting the complaint, you and the landlord should receive a letter from the Tribunal saying that the complaint has been received. If you don't hear from the Tribunal within two weeks, call them to follow up.

5. Tribunal investigates the complaint

The Tribunal will conduct a preliminary investigation to check whether the complaint qualifies as an unfair practice which means it relates to a dispute over which they have authority. An inspector may inspect the property and draw up a report if necessary.

6. Tribunal decides whether an unfair practice exists

After you submit the complaint, the tribunal has 30 days to make a decision whether the complaint qualifies as an unfair practice. If they don't think the complaint involves an unfair practice, they must send you a letter that gives reasons for their decision. If they think it qualifies as an unfair practice, they must try to resolve the dispute.

7. Resolving your dispute at the tribunal

A case officer is appointed to the case. They will contact you and the landlord. The case officer must first try and resolve the matter by calling you and the landlord to discuss and find a solution. If the matter isn't resolved, then the case officer will decide whether the dispute can be resolved through mediation. If mediation fails then the case moves to a Tribunal Hearing.

8. Attending mediation

The mediator will try to get the parties to agree to a solution. If they agree, then the agreement is binding and has the same power as a court order. If there is not agreement, then the next step is to have a hearing.

9. Attending a Tribunal Hearing

If mediation fails, then the case officer will provide a hearing date. The hearing will be held at the Tribunal office in your province. At the hearing, each party is asked to share the facts of their case. At least three Tribunal members will be present at the hearing. There is no need to have legal representation. After the hearing, the Tribunal makes a decision which is communicated to the parties a few days after the hearing. The ruling has the same power as a Magistrate's Court order. If you or the landlord want to challenge the decision, you can refer the case to the High Court to be reviewed.

10. High Court review

If you or the landlord are not happy with the decision of the Tribunal you can refer the matter to the High Court to be reviewed. You will need a lawyer to do this. ***(See pg 728: Problem 8: Common problems in renting a house or flat)***

WHO CAN LODGE A COMPLAINT?

Any tenant or landlord or group of tenants or landlords or interest group can lodge a complaint to the tribunal.

WHAT HAPPENS IF PARTIES DO NOT FOLLOW THE RULING OF THE TRIBUNAL?

A ruling by the Tribunal is like an order of a magistrate's court and must be enforced in the same way. People can be fined or sent to prison for up to two years if they:

- Fail to attend a hearing without good cause or refuse to be sworn in
- Refuse to produce any document or object in their possession
- Try to deceive the tribunal or make false statements
- Go against (contravene) any regulation or refuse to obey an order of the Tribunal

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Rental Housing Amendment Act (No. 35 of 2014)

The *Rental Housing Amendment Act* is the latest amendment to the *Rental Housing Act (No. 50 of 1999*. The Amendment Act introduces various changes that will impact the relationship between tenants and landlords. It also changes the term "Landlord" to the gender-neutral "Landowner".

It is important to note that even though the Act has been signed, the commencement date has not yet been announced, which means the provisions are not effective yet. It is important to be aware of the provisions in the Amendment Act because a landlord will be given six months from the commencement date to ensure that their lease agreements conform to the Amendment Act.

The main provisions of the Amendment Act are:

- Lease agreements between the landlord and the tenant must be in writing and legally enforceable
- All sections of the lease and any explanations and definitions it contains will need to be explained to the tenants and understood before the document is signed
- It is the landlord's responsibility to ensure that the rental property is in a habitable state, which is in line with the existing Rental Housing Act.
- The landlord will be responsible for maintaining the rental property and will have to ensure that it has access to basic services such as water and electricity
- Only the local authority will be permitted to cut off services to non-paying tenants

- No tenant may be prevented from entering the rental property or denied access to the rental property without a court order
- A joint inspection by the landlord and tenant has to be done at the commencement of the lease period, and if the landlord does not participate in this inspection, no part of the tenant's deposit for repairs or damages may be withheld when the tenant leaves
- A defect list will have to form part of the lease agreement as an annexure
- When the deposit is paid back to the tenant, the interest earned on that deposit must also be paid to the tenant within seven days of the expiration of the lease, subject to any deductions for damages

The Act creates new offences if you are a landlord that may result in imprisonment of the landlord or a fine. If you are a landlord and you:

- Do not provide your tenant with a written lease agreement
- Fail to repay your tenant's deposit and interest
- Cut the utilities to the dwelling, e.g. electricity
- Lock your tenant out of the premises
- Provide your tenant with an uninhabitable dwelling, or
- Fail to maintain the premises that you are leasing

then, you are guilty of an offence in terms of the *Rental Housing Amendment* Act.

Finally, the Act sets out landlord's rights, which include the right to:

- Prompt and regular payment of rental
- Recover unpaid rental, after obtaining a ruling by the tribunal or an order of a court
- Terminate the lease on grounds that do not constitute an unfair practice and are specified in the lease
- On termination of the lease for the tenant to vacate the dwelling and to receive the dwelling in a good state of repair, except for fair wear and tear

The Minister of Human Settlements is required to publish a simple lease agreement in all official South African languages and has a duty to set up Housing Tribunals in all provinces.

Evictions from rented property

There is no longer a common law right for an owner to evict someone from their property. The Supreme Court of Appeal has determined that defaulting tenants, in other words, tenants who have not paid their rent, must be treated in the same way as all other illegal occupiers. This means that the owner or landlord must follow the provisions of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land* Act (PIE) (except in

areas where the *Extension of Security of Tenure Act* (ESTA) operates) if they want to evict a tenant.

So, defaulting tenants are entitled to the same types of procedural protection before they are evicted, such as notice of the intention to evict as well as (at least) 14 days' notice of the court hearing. This notice must also be sent to the municipality. The court will assess whether the person is an unlawful occupier and whether the owner has reasonable grounds to evict them. In its decision, the Court will take into account whether there is alternative accommodation available. ***(See pg 722: Problem 1: Landlord applies for a civil eviction order; See pg 724: Problem 3: Protecting dismissed farmworkers against eviction; See pg 725: Problem 4: Protecting labour tenants against losing land)***

The Rental Housing Tribunal does NOT have the authority to hear eviction cases. A landlord cannot, therefore, begin an eviction proceeding at the Tribunal. This can only be done in an ordinary court of law.

Evicting a tenant without a court order (for example, changing the locks when the tenant is out) is now a criminal offence, and the landlord could face a prison sentence. It is also an offence for the landlord to cut off water or electricity without a court order, sometimes called a constructive eviction.

Trespassing

Trespassers are people who go onto someone else's land without permission from the owner or the lawful occupier. The *Trespass Act (No. 6 of 1959)* gives the police the right to arrest a trespasser. If the court finds you guilty, you can get a fine or a jail sentence. In this way the owner can get you arrested if you are on their land illegally. An owner cannot use the *Trespass Act* as a way of getting people evicted from their homes – they must use the procedures prescribed in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). ***(See pg 723: Problem 2: Being arrested and charged with trespassing)***

Problems

1. A landlord applies for a civil eviction order

Cyril has received a summons for eviction from his property because he is not up to date with his rental payments. He believes this is unfair because the landlord hasn't fulfilled his duties in terms of the contract, for example, by fixing the leaking roof. He wants to fight the court action. What should he do?

WHAT DOES THE LAW SAY?

Cyril must respond to the summons. If he does not respond, the court will give the landlord the eviction order. This is called a 'default judgement'. Cyril should see an attorney immediately or get help from the Justice Centre at the Magistrate's court to help him defend the summons. ***(See pg 247: Default judgement)***

Cyril and his attorney must fill in a form on the back of the summons called a Notice Of Intention To Defend. The form must be delivered to the court not later than three days after he received the summons. Even if a Notice of Intention to Defend was delivered to the court, the landlord could still go to the court and ask for a quick judgement, called a 'summary judgement', against Cyril. To get this, the landlord must convince the court that Cyril is a real threat to him and the property. However, the landlord must send Cyril a notice if he wants to apply for a summary judgement. Then Cyril and his attorney can write a document and explain that he does have a defence.

Once the Notice of Intention to Defend is in the process it goes through the pleadings stages. The court will decide who is right. If the landlord is right, then the court will give an Eviction Order. But even if the court does this, the landlord still cannot force Cyril off the land or out of the house until he sends a document called a Warrant Of Eviction, which must be stamped by the court and delivered by the Sheriff of the Court. ***(See pg 239: Summary of steps in a civil claim)***

The Sheriff can force Cyril and the people living with him off the property. The Sheriff can get the help of the police to make Cyril leave if he refuses. The court can also fine Cyril if he refuses. The landlord must not help the Sheriff.

If Cyril owes rent, the landlord can ask the court for an order to attach his goods. If the court gives this, the Sheriff can take Cyril's goods away. The Sheriff sells the goods and pays the landlord the money that he owes. The landlord can also bring a special application to the magistrate's court for Cyril's immovable property to be attached and sold to pay the outstanding debt. The landlord could also ask the court

for an order to stop Cyril from selling his goods or taking them away before he has paid the money he owes. This type of order is called an interdict. **(See pg 251: *Interdicts*; See pg 690: *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE))**

In many cases where landlords want to evict their tenants, they will issue the tenants with an application for eviction in terms of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE). It is very important that the person receiving the application should go to court to file an affidavit stating that they want to defend the application to evict. They should do this with the help of people at a Justice Centre.

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2. Being arrested and charged with trespassing

Dilly has to appear in court on a charge of trespassing. How can she defend herself?

WHAT DOES THE LAW SAY?

Trespassing means going onto someone's land without getting permission from the owner or the lawful occupier. The police can arrest a person for trespassing. If the court finds the person guilty of trespass, they can get a fine or a jail sentence. **(See pg 721: *Trespassing*)**

WHAT CAN YOU DO?

Dilly was arrested for trespass so she must appear in court on the date given to her. If she believes she had a lawful reason for being on the land, she must explain this and defend herself in court. In other words, she can use a defence. These are some of the defences she could offer the court:

- She had a right to be on the land because she is a tenant, and proper notice was not given by the landlord
- She had permission to be on the land because she was given permission by the owner or lawful occupier or a person in charge
- She had a lawful reason to be on the land even though she didn't have permission, because:
    - She went onto the land to ask the permission of the owner or lawful occupier to be on the land
    - She went onto the land to sell or deliver something to the owner or lawful occupier
- She thought she had a lawful reason to be on the land even if she did not have permission or a lawful reason to be on the land

- She honestly believed the owner would not mind about her coming onto the land.
- She had no choice; for example, she had to walk across the land because the public road was flooded - this defence is called 'necessity'
- She has a right of retention, which means she can stay on the land until the landlord pays her compensation for any improvements she made on the land.

If she has one of these defences, she is not guilty of trespass.

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3. Protecting dismissed farmworkers against eviction

A group of 15 farmworkers was dismissed. They are told to leave the property at the same time as their jobs end. What can they do?

WHAT DOES THE LAW SAY?

If farmworkers are dismissed and evicted, then there are specific procedures to follow under the *Extension of Security of Tenure Act* (ESTA). ***(See pg 370: Solving disputes under the LRA)***

WHAT CAN YOU DO?

FAIRLY DISMISSED WORKERS

In the case of a fair dismissal, the workers would lose their right to live on the farm, and they would be given two months' notice to leave their homes. However, if the farmworkers refuse to leave, the farmer will have to apply to the court for an eviction order.

UNFAIRLY DISMISSED WORKERS

If the farmworkers believe they have been unfairly dismissed, they can refer the case to the CCMA. They can ask a magistrate to allow them to stay in their houses while the CCMA is hearing the case. If the CCMA decides that the dismissal was fair, the eviction proceedings can go ahead following the normal procedures in terms of the law. Obviously, if the workers have been successful in keeping their jobs through the CCMA, then it is unlikely that the eviction will go ahead (because there will be no grounds for this).

4. Protecting labour tenants against losing land

How can labour tenants protect themselves against losing the land? What are the legal rights of labour tenants?

WHAT DOES THE LAW SAY?

A labour tenant is someone who pays their 'rent' with labour. In other words, they work for the farmer in exchange for using the land for grazing or crops. The biggest problem is when the farmer ends the contract and evicts the tenant. The *Land Reform (Labour Tenants) Act (No. 3 of 1996)* protects labour tenants in certain ways.

The Act says that:

- Labour tenants have the right to use the land they occupy if they continue to provide labour for the farmer
- Labour tenants can only be evicted by a court order granted in terms of the Act
- A labour tenant who is 65 years or older may not be evicted for not providing labour
- If a labour tenant is evicted through a court order, the owner must pay the labour tenant compensation for improvements and crops
- A labour tenant has the right to acquire the land they have worked and lived on. This can be negotiated with the farmer, with the assistance of the Department of Land Reform and Rural Development

The land: If you have worked for the farmer for the agreed time, you must be given the same amount of time to live free on the land. The farmer can't give you notice. For example, if you worked for the farmer from January to June, you can stay free on the land from July until December. The farmer can't give you notice in September. The notice period can only start after December unless you do something seriously wrong.

Evictions: Labour tenants can only be evicted in specific circumstances, such as:

- If they breach the contract with the landlord and stop providing labour
- If there is a complete breakdown of the relationship between the labour tenant and the farmer
- Where there is a real danger of damage to the farmer or property
- Where the likely harm to the farmer is greater than the likely harm to the labour tenant
- If the farmer urgently needs the land for development, which the Land Claims Court believes is more important than the rights of the labour tenant

In all cases, the farmer must apply directly to the Land Claims Court and not to the Magistrate's Court to evict labour tenants. Labour tenants must get 14 days' notice that the farmer is going to apply for an eviction order. This gives the labour tenants a chance to oppose the eviction in court.

Alternative land: The Land Claims Court can order that a person is given alternative land if they cannot come to an agreement with the farmer about staying on the same land.

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5. Provision of land, housing and services for homeless people

What are the different legal ways for our community to get land, housing and services?

WHAT DOES THE LAW SAY?

The *Spatial Planning and Land Use Management Act* (SPLUMA) guides how land is used and managed. It defines the role that municipalities must follow in developing and implementing a Land Use Scheme (LUS) which includes making land available where people can settle and have secure tenure. SPLUMA aims to address historical spatial imbalances and promote sustainable development in planning.

But the laws alone will not deliver land or housing. Communities must also take the initiative to ensure that they get their rights. For example, in the Grootboom case, the Cape High Court and the Constitutional Court dealt with the obligations of the government regarding the right to access to adequate housing. The Court said the state must provide the children and their parents with shelter until their parents were able to shelter their own children. The bare minimum kind of shelter included tents, portable toilets and a regular supply of water. The Constitutional Court said all spheres of government (national, provincial and local) had a duty to have a plan and a programme in place to care for the needs of homeless people.

The Integrated Development Plan of a local authority must include measures that will help to create housing and must provide for homeless people and those most in need of shelter and housing. ***(See pg 167: Drawing up an Integrated Development Plan)***

WHAT CAN YOU DO?

Community organisations can ask for a meeting with the local authority in the area. They can also contact the Department of Land Reform and Rural Development. Then, they can discuss finding land and setting up services. Community leaders can also ask to be provided with the local authority's Integrated Development Plan (IDP)

which shows how job creation, housing and services in the area are going to be facilitated. ***(See pg 104: Lobbying [campaigning and petitioning])***

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6. Negotiating to upgrade an informal settlement

The authorities agree that our community can stay on the land where we have settled. How can we improve our area? What are the important things we need to work for or demand?

WHAT CAN YOU DO?

Authorities often decide that the best way to upgrade an area is to move the people out. Then, they upgrade the area. The improved land is often too expensive for the same people to move back onto, and often there are fewer sites.

Community leaders can take political steps rather than legal steps and negotiate a better way to improve the area. The upgrading can take place while the people carry on living in the area. If the community is involved in the improvements, they will have a better chance of getting what they need and want in the area. A community can make suggestions to authorities about and organise for:

Loans: Banks seldom lend money for squatter housing improvement, because they think that many people will not be able to pay the money back. The government gives subsidies to families that qualify to help them pay for housing. (***See pg 677: Land redistribution and land grants***; ***See pg 699: Types of housing subsidies***)

Communities can organise group savings schemes to save money to add to their subsidies.

Building materials and advice: Communities can approach demolishers, construction companies and companies that produce building materials, to ask for cheaper stock or second-hand materials. People in the community can also make building materials. Your local authority can assist. Contact the Department of Human Settlements to find out more about the Enhanced People's Housing Process. ***(See pg 702: Enhanced People's Housing Process)***

Investment in public buildings and services: Communities can lobby local authorities and government to build places like community centres and childcare centres. This adds to people's feeling of security in the area.

7. Applying for an individual housing subsidy

Veronica is a single, divorced parent supporting three children. She earns R2 500 per month doing odd domestic duties. She has never received a housing subsidy before and would now like to apply. Will she qualify, and how can she apply for a subsidy?

WHAT DOES THE LAW SAY?

The law says that a person may apply for an individual housing subsidy if they are South African, over 21 years of age and earning between R0-R3 500 R0-R3 500 per month. The person must also either be married or single, but with dependants, they cannot have owned a house or property anywhere in South Africa, and may not have received a housing subsidy in the past. According to these criteria, it seems that Veronica will qualify for an individual housing subsidy.

WHAT CAN YOU DO?

Veronica can apply to the local council housing department for a housing subsidy. She will have to take the following documents with her:

- Identity document,
- Birth certificates of her children,
- Her divorce papers
- Recent payslip as proof of income. ***(See pg 700: Individual Subsidy: Buying a house as an individual household)***

8. Common problems in renting a house or flat

What are the common problems tenants have, and what can they do about them?

WHAT DOES THE LAW SAY?

The *Rental Housing Act* deals with the relationship between landlords and tenants. If there is a dispute between a landlord and a tenant, then either of the parties can refer the complaint to the Rental Housing Tribunal. ***(See pg 716: Making a complaint to the Rental Housing Tribunal)***. Most problems that tenants and landlords have with each other can now be referred to the provincial Rental Housing Tribunal. Some examples of these are:

- Rent and service charges increase and this was not part of the lease agreement. *The Rental Housing Act* states specifically what should be included in a lease agreement to try and prevent disputes from arising. The lease agreement should include a

section on when and by how much rent and service charges will be increased. The landlord must stick to the terms of the agreement.

- You owe rent, so the landlord takes your belongings without a court order. The landlord may not remove any of your belongings without a court order. They should refer the problem to the Tribunal. If you are not paying rent because you believe the landlord is breaking the agreement (for example, not maintaining the building), then you should take steps to refer the matter to the Tribunal yourself rather than refuse to pay rent
- You owe rent, so the landlord takes away goods you are still paying off. If you are paying something off on an instalment sales agreement, for example, a TV set, then it does not belong to you yet. The shop you bought the goods from is still the owner. Show the sales agreement to the landlord or Sheriff of the Court, or get the company to tell the landlord that they are the owners. The landlord or Sheriff of the Court can then not take the goods away. If they have already taken them away, you should immediately go and tell them that you are still paying the goods off. Take the sales agreement with you, or get the shop to telephone them.
- The landlord does not keep the property in good repair. The common law says that it is the landlord's duty to do repairs and maintain the property in good condition. You are only responsible for maintenance, such as painting the inside walls. You can write a registered letter to complain to your landlord if they are not doing maintenance. If nothing improves, you can make a complaint to the Rental Housing Tribunal.
- The landlord enters your house or flat to inspect it without your permission - The *Rental Housing Act* says that a landlord may only inspect premises in a reasonable manner after reasonable notice. You can complain to the Rental Housing Tribunal in your province. The complaint will be recorded. If the landlord enters the premises unreasonably and without notice again, they could be fined or even receive a maximum prison sentence of two years. ***(See pg 711: The Rental Housing Act)***

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9. Falling behind on rent, rates and service payments to the local council

Alida, a single mother of three children, lives in a rented council house. Her 75-year-old disabled mother also lives with them.

The household survives on Alida's income from occasional casual work, a child support grant for one child who is under 14 years and her mother's state pension. For a long time

now, Alida has not been able to keep up with her rent payments and has fallen into arrears of R2 500.

Alida has received a notice from the council saying that they are going to take steps to evict her unless she pays all her rental arrears. The council gives her 30 days to respond.

WHAT DOES THE LAW SAY?

The council cannot evict Alida without a court order and the magistrate has to consider all the relevant circumstances of the family before granting an eviction order. ***(See pg 722: Problem 1: A landlord applies for a civil eviction order)***

Under the *Municipal Systems Act* every municipality has to draw up and pass a by-law on credit control and managing debts. This should include provisions for arrangements for people who are in arrears, particularly for people who are indigent (living in poverty). It should say what penalties there are for people who default on any of their payments, including the disconnection of services or the eviction of tenants or owners. Alida and her family fall into the category regarded as indigent and should, therefore, be protected by the council's indigency policy. ***(See pg 708: Providing public housing)***

WHAT CAN YOU DO?

You can check whether the council followed all the proper procedures before sending Alida the 30-day notice of intention to seek eviction. There might have been breaches of the right to administrative justice in the process of administering the arrears payments.

Then, you should check what protection Alida has under the council's indigency policy. If the Council has not given her protection or has ignored the socio-economic circumstances of her family, you should write a letter stating how the Council has failed to consider the circumstances of Alida's case and asking them to withdraw the threat of eviction.

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10. The hidden costs of buying a house

There are many extra costs involved in buying a house. The bank where you get a home loan can help you work out how much these costs will be.

COSTS YOU PAY ONCE

Some of these costs must all be paid at the beginning of your loan. So you will need to have money put aside for them. It could cost thousands of rands.

Deposit: You have to pay a deposit, or down payment, of 5% - 20% of the value of the house before any bank will lend you money.

Valuation fee: The bank will inspect the property to make sure the price you are paying is not too high.

Transfer duty and stamp duty: These are state taxes you pay.

Conveyancing fees (transfer costs) and bond registration fees: These cover the legal costs involved in the transfer of the house into your name and registering a mortgage bond.

Municipal deposits: These are for water and electricity

Internet connections

Removal costs: The cost someone will charge for moving your goods and furniture

COSTS YOU PAY MONTHLY

Monthly repayments on the bond

Insurance on the house: The bank insists that you insure the house against flood, fire or hail damage. The monthly cost of the insurance (the premium) will be added to your monthly bond payments. It is also useful (but not compulsory) to take out insurance on your movable household goods.

Insurance of owner's life: If you die, the money from the insurance pays off the rest of the bond. This protects the family from losing their home. Banks insist on it because it means they will be paid even if you die. You can also add to the insurance to cover the bond if you should become disabled.

Rates and taxes (also called site rent): You pay this every month or every year to the local authority for road upkeep, rubbish collection, community facilities

Electricity and water: These costs can be prepaid and are not necessarily paid every month.

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11. Falling behind on bond payments

What do I do if I fall behind on my house bond repayments?

BOND REPAYMENTS

Banks are very strict about being on time with your repayments. If you have money problems, it is a good idea to see if you can change your budget around, or take in lodgers, so that you can still meet your repayments.

If you can't do this, you must immediately go and discuss your problems with the bank where you have the bond. Don't wait until you have missed a payment. They will not be so willing to help you then.

The bank will usually try and work out something to help you. For example, if you had to take a drop in salary, they might let you pay lower payments and pay over a longer time, say 25 years instead of 20. This means the house will cost you more in the long run, but it helps you out now.

If you miss a payment, the bank will send you a letter of demand. If they do not hear from you and you miss four months' payments in a row, they will take the house away, have it sold and then use the money to cover what you owe them on the bond.

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12. Problems with a house you bought

What can we do about things that are wrong with the house we bought?

WHOSE RESPONSIBILITY IS IT?

Sometimes things are wrong with a house, for example, there is a broken window, the paint peels off the walls, the toilet leaks, there is a big crack in the floor or a problem with the electricity. Who is responsible for fixing the problem depends on whether you have the problem in the first three months or later.

CONTRACT WITH A BUILDER

If you sign a contract with a builder to build a new house for you, you must sign a delivery note when the building is completed. This is a form to say that you are satisfied with the house. Before you sign, you should go through every room and check the walls, doors, windows, plumbing, electricity, painting, ceilings and roof. Only sign the delivery note after the builder has fixed the problems and you are sure there are no more problems.

THREE-MONTH GUARANTEE TIME

After you sign the form, the builder will give you a three-month guarantee on the house. The duties of the builder are finished when the guarantee period (the three months) is over, except for latent defects. If you have a problem with the builder, do not stop paying the instalments on your home loan. Your problem is with the builder, not the bank. It is also important to remember that if the value of defects is less than R20 000 then the purchaser can go to the Small Claims Court. For bigger problems involving latent defects, people

can bring applications to court without the help of an attorney, but this can be difficult.

LATENT DEFECTS

Sometimes, hidden problems only show after three months or later. For example, if the roof collapses in the first few years, it may be the builder's fault. This is a latent defect. Here are some examples of latent defects that are the builder's fault:

- There are big cracks in the wall, and the house is only 2 years old
- There is a crack or hole in the floor, and the house is only 3 years old
- Rain pours through the roof, and the house is only 2 years old

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13. Getting money from the Land Bank for farming

THE LAND BANK

Most people who have used up their land grant to buy land want to know where they can get more money to use for farming. The Land Bank lends money to farmers. The Land Bank generally requires collateral or security as a requirement to access funding, but they also recognise that, in some cases, potential clients may not have access to this security. In this case, the bank advises applicants to get in touch with their nearest Land Bank branch to find an alternative.

WHO CAN BENEFIT?

People who qualify for assistance are:

- New farmers
- Land reform beneficiaries
- Poor farmers, especially women, who want to improve their farms

DIFFERENT KINDS OF LOANS

Many different kinds of loans are available:

- Loans with a good repayment record will qualify you for a bigger loan next time.
- Loans to buy a farm or make improvements
- Loans to buy farming equipment or livestock, with insurance to cover your loan in case you can't pay it.

Contact the Land Bank, to find out where the nearest Land Bank agent is who can give you advice about loans.

Checklist

General Land and Housing Problems

- Name and address
- Do you have permission to stay where you are living? From whom?
- Do you pay rent to anyone for your home?
- Do you pay for any other services?
- How long have you been living there?
- Where do you work?
- How long have you been working in this area?
- Do you have family or anyone else living with you? Give names and ages, and say where they work.
- Do you want to stay in this area permanently?
- What is your problem:
    - Have you been threatened with eviction?
    - If so, when?
    - By whom?
    - What was your response?
    - Has the owner got a court order?
- What was the community's response?
- Is your house about to be demolished?
    - If so, when? By whom?
    - Did you get any warning?
    - Do you need to apply for legal aid to help pay for the attorney?

Paying off a house that you have bought

- Name and address
- Are you paying the house off in instalments? If so, to which financial institution?
- What monthly costs do you have to pay for your house?
- Have you ever missed paying an instalment? If so, when?
- Why did you miss paying the instalment?
- Have you spoken to anyone at the bank about your problem? If so, who did you speak to?
- What was their response?

Environmental Law

Introduction

Parts of this chapter have been substantially adapted from *Environmental Law in South Africa* by Prof. Jan Glazewski. Certain information has also been taken from Environmental Laws of South Africa by P. W. G. Henderson.

The Constitution says that *everyone has the right to a safe and healthy environment*. What is the environment? It is a very broad concept and is generally understood to mean the surroundings within which we live, including the land, water and atmosphere of the earth; plants and animals; the relationships between these natural resources and animals, and the conditions that influence people's health and well-being.

Why do we need to protect the environment?

The quality of our environment affects all of us no matter where we live. When people abuse the environment, this affects us all. If water is polluted, if the air is full of smoke and chemicals, and if food contains poisons, people (and plants and animals) are harmed. Many of the natural resources that we use or consume every day, such as water, wood, minerals and fish, will soon run out if we do not limit the rate at which we use them. All people have a responsibility to protect and use the environment to ensure that it will be protected for ourselves as well as future generations.

Many people believe that human needs are more important than the environment and believe that our major aim should be promoting economic growth and creating jobs while the green (environmental) agenda should take second place. Some people feel hurt or insulted when others show concern over endangered species like rhinoceros when children do not have enough to eat.

However, the environment is the whole planet on which we live. Everything (winds, trees, animals, insects, people, etc) forms part of the living system of Earth. Because the earth has been so badly exploited and not protected, this has created changes in weather patterns - there are more droughts and more floods, good farmland is turning into desert, temperatures are rising, and most importantly, the ozone layer that should protect us from the dangerous rays of the sun has been damaged and is not functioning as effectively as it did before. All of this impacts how people live and is the reason why the concept of sustainable development is becoming more and more important.

What is sustainable development?

Sustainable development refers to development that can continue on an ongoing basis because it does not do irreversible harm to the environment. Development like this should balance social, economic and environmental concerns. This is not easy because these three concerns often compete with each other. For example, a sustainable forestry industry should allow a certain number of trees to be cut down and used by people, but at the same time, make sure that enough trees are left to be cut down and used in the future. This could be achieved by cutting down some of the trees and also planting new trees to replace those harvested so that there will be trees in the years ahead. Sustainable development is an international issue. South Africa has signed and ratified certain important international agreements that aim to protect the environment.

Which laws are relevant to the environment?

There are three categories of law in South Africa that affect the relationship between people and the environment:

1. The **Constitution** protects various human rights, including our right to enjoy and have access to the environment
2. The **Common Law** regulates how people interact with each other in the context of the environment and protects our use and enjoyment of our own property, for example, but limits it in certain ways so that this use and enjoyment does not interfere with the rights of other people
3. **National, Provincial and Municipal Laws (legislation)**: some laws are like a framework because they apply across all aspects of the environment. Other laws are sectoral in nature as they only apply to certain aspects of the environment, such as freshwater, the marine environment, forests or mineral resources, etc.

It is very important to understand that the different areas of law dealt with in this chapter do not work in isolation from each other. In other words, all of the laws that we talk about work together. Therefore, the Constitution, the common law and legislation work together like a web of rules, which you can use to determine the rights that people enjoy and how best to protect those rights. For example, if a community is experiencing problems with smoke pollution, you may find that they are protected by the Constitution, the common law and legislation all at the same time.

These three categories of law are discussed in more detail below. At the end of this chapter we will consider which strategies individuals and communities can use to protect their environmental rights.

The Constitution

The Constitution contains a number of sections that are relevant to the environment.

The Environmental Rights - Section 24

Everyone has the right to:

- An environment which is not harmful to their health or well-being
- Have the environment protected for the benefit of present and future generations through reasonable legislation and other measures that:
    - Prevent pollution and ecological degradation
    - Promote conservation
    - Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

Section 24, therefore, places a duty on all spheres of government to take reasonable steps - including making laws - to prevent pollution, promote conservation and ensure sustainable development.

WHAT DO THE WORDS 'HEALTH AND WELL-BEING' MEAN?

The meaning of these words is not entirely clear, so it will be up to the courts to decide on their exact meaning in the future. It seems that "health and well-being" include the following:

- Protection from pollution in the air, water, food or soil. This includes protection from dangers in the workplace and less obvious dangers to health, such as excessive noise.
- Protection of our well-being covers both physical and mental well-being. This would include protection from nuisances and invasions of privacy and dignity. The European Court of Human Rights recently ruled that a bad smell from a tannery that offended neighbouring residents was a violation of their right to privacy. In our law, this would probably qualify as a violation of the

right to well-being. The Eastern Cape High Court was required to consider a case in which the applicant argued that the production of hydrogen sulphide (which smells like rotten eggs) by a tannery was causing pollution in the neighbouring area. The Court held that to be forced to work in an 'environment of stench' was contrary to one's well-being. Therefore, we can say that something affects our well-being if it affects our ability to enjoy our life.

WHO CAN YOU ENFORCE YOUR ENVIRONMENTAL RIGHTS AGAINST?

There has been much debate about the application of environmental rights. It is quite clear that these rights apply between the state and private persons. However, the question is whether the right applies between two private persons. It seems that the courts have accepted that environmental rights can apply between private persons. ***(See pg 33: Section 8: Application of the Bill of Rights)***

Other rights relevant to the environment

The Constitution recognises the general need to improve the quality of life of all persons. Certain constitutional rights can be used to support reasonable environmental demands. However, it should also be noted that there may be tension between the environmental right and other rights in the Bill of Rights. These include:

- The right to life (Section 11)
- The right to human dignity (Section 10)
- The right to privacy (Section 14)
- Certain socio-economic rights that are relevant:
    - The right of access to adequate housing (Section 26)
    - The right of access to sufficient food and water (Section 27)
    - The right of access to health care services (Section 27)
    - The rights of children to basic nutrition and shelter, and to be protected from maltreatment, neglect, abuse or degradation (Section 28)

(See pg 43: Section 26: Right of access to housing; See pg 44: Section 27: Right of access to health care, food, water and social security)

EXAMPLE

GENERAL RIGHTS RELATING TO THE ENVIRONMENT

A community residing in an informal settlement is living with no running water, refuse removal and sanitation. The bucket toilet system is used, which is a constant health risk to the environment and community. Which rights are potentially affected in this case?

The lack of water or sanitation in the informal settlement could pose a threat to the health of the residents. The failure of the local authority to provide toilets, water, sanitation, adequate housing, and refuse removal potentially violates many constitutional rights, including:

- *The health of the residents*
- *The well-being of the residents is threatened*
- *The right of access to adequate housing*
- *The right of access to water is violated*
- *The rights of the children to be protected from degradation*
- *The right to life, due to the potential for the outbreak of a disease like cholera*
- *The rights to privacy and dignity, due to the lack of toilets*

What can the residents do?

The Constitution places a duty on all spheres of government to take reasonable steps, including making laws and policies, to provide access to basic health care, food and running water. If the residents felt that the government had not taken reasonable steps to provide access to water, sanitation and housing, they would be able to approach a court, which would be required to decide whether the steps taken by the government to realise these rights were reasonable. Strategies the residents can take are suggested on ***pg* 757: *Ways to resolve environmental disputes.***

THE RIGHT TO EQUALITY - SECTION 9

The right to equality and non-discrimination is important for people working on environmental issues. An indirect form of discrimination was recognised in the United States of America, where it was found that most hazardous or polluting industries are built in poor or black neighbourhoods. These areas then bear an unequal share of the environmental problems from these industries as a result of their harmful effects on the health and safety of residents. This practice has been called environmental discrimination or environmental racism. Many decisions about the use of land taken in South Africa during apartheid can also be criticised as environmental discrimination.

The opposite of environmental discrimination can be called **environmental justice**. Environmental justice requires that:

- The benefits we derive from the environment are shared equally among all people
- Negative aspects, such as rubbish dumps or power stations, are shared among all communities

EXAMPLE

A local municipality requires rubbish collection to take place only twice a month in a local township because the township is far from the main town centre. The wealthy neighbourhood, which is close to town, has rubbish collections once a week. This is a clear case of inequality on the part of the municipality.

THE RIGHT OF ACCESS TO INFORMATION - SECTION 32

Section 32 of the Constitution guarantees every person the right of access to any information held by the state and any information that is held by another person that is required for the protection of any rights. The right to information is important for environmental issues. Without access to the proper information, people do not know what action is being planned or the procedures that will be followed. It is not possible to participate properly in public debates if the public doesn't have relevant information. For example, the public has the right to know in advance about possible plans for the building of a new railway line or factory in their neighbourhood, and they have the right to inform decision-makers if they are against the building of these structures.

The *Promotion of Access to Information Act (No. 2 of 2000)* (PAIA) sets out detailed procedures which must be followed in order to obtain access to information.

EXAMPLE

1. *People in your community own land next to the sea. They find out that a developer has applied to the local government for permission to build a steel mill in the area in which they live. Although they have tried to get information about the proposed development from the developer, they have not been successful. Members of the community are concerned that the development of the steel mill could cause pollution and other environmental problems. They need this information to participate fully and effectively in the public consultative process that is to follow.*

2. *A large factory is established next to your community. Many people get sick and you suspect that it is caused by fumes from the factory. The company refuses to tell the community what substances are being produced by the factory. People need this information to be able to lodge a complaint with the relevant authority.*

The community can demand this information from the developer or factory as well as from any government department or local authority which has access to the relevant information. The best way to protect this right of access to information is to make an application to the court for an order telling the developer or factory to provide the community with the information that it needs.

Before a community takes any action, it will have to establish that a constitutional right (such as the environmental right) has been infringed. Secondly, it will have to prove that it needs the information to protect this right. Thirdly, the community will need to comply with the procedures set out in PAIA. Many environmental non-governmental organisations have relied on this right to obtain access to information, for example, concerning genetically modified organisms.

THE RIGHT TO JUST ADMINISTRATIVE ACTION - SECTION 33

Administrative action refers to decisions made by the state and representatives of the state. Environmental conflicts often arise as a result of the incorrect or unfair use of administrative decision-making powers. In terms of Section 33:

- Everyone has the right to administrative action that is lawful, reasonable and procedurally fair - Section 33(1)
- Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons for the decision - Section 33(2)

The Government has passed the *Promotion of Administrative Justice Act (No. 3 of 2000)* (PAJA), which sets out what administrative action is, the actions that would amount to procedurally fair administrative action, the grounds on which administrative action can be challenged, the remedies available, the procedures that

must be followed to obtain written reasons and the relief that a court can grant a person who is asking for the review of a decision. ***(See pg 48: What are the requirements of lawfulness, procedural fairness and reasonableness in terms of the PAJA?)***

EXAMPLE

Certain people in your community live in an informal settlement close to an expensive coastal resort where people from the city own holiday houses. A chemical company has been granted permission by the local authority to set up a production plant very close to the informal settlement.

This chemical plant will likely harm the environment as well as the health of the people in the community. These people want to find out how the chemical company got permission to set up the production plant and what other action the chemical company may be thinking of taking. They have formally requested the local authority to provide them with information about the new chemical production plant so that they can use the information to comment on whether they think the permission for the plant should have been granted or not. The local authority is a part of government. Therefore, any decision that it makes is an administrative decision.

What can the community members do?

The community can use the PAJA to:

- *Get written reasons from the local authority for its decision to allow the erection of the chemical production plant*
- *Challenge the procedural fairness of the municipality's decision as their rights are affected by the decision, and they were not consulted before it was made*
- *Challenge the reasonableness of the decision; here, the court would consider all of the surrounding circumstances to see whether the decision was suitable, necessary and proportionate*

Other rights that are potentially affected in this example include the right to equality if the nearby (wealthier) resort has not been negatively affected in the same way as the informal settlement and the right of access to information because the community's request for information about the chemical production plant has been ignored.

The Common Law

The Common Law is relevant in dealing with environmental issues through the Law of Delict, the Law of Nuisance and the Law of Neighbours. The rules of these laws can be used to protect people's environmental rights relating to noise pollution, air pollution and water pollution.

The Law of Delict

The common law of delict allows you to claim compensation from someone who does something that causes you harm. Provided that certain requirements are met (listed below), such an action is called a delict. For example, if a person drives their car negligently and collides with the car of another person, the owner of the damaged car could sue the driver who negligently or intentionally caused the crash and could claim the cost of repairing the damage to the car as well as compensation for any of their injuries. This claim would be made under the common law of delict.

For a delictual claim to succeed, the person making the claim (the claimant) must prove that:

- The action of the other person was wrongful because it caused harm to the claimant or their property
- The person performing the action was negligent (was at fault) or acted intentionally
- The claimant suffered loss that can be given a monetary value (such losses Are called damages)
- The claimant suffered loss that can be given a monetary value. This monetary value is called damages
- The monetary loss (damages) was suffered as a result of the action of the negligent person (the action of the negligent person caused the monetary loss)

HOW DOES THIS HELP YOU WITH AN ENVIRONMENTAL ISSUE?

> You can sue a person in court for loss caused to you by the wrongful actions of that person and claim compensation for this loss. This will have to be done through an attorney who will prepare the case and take it to court. ***(See pg 758: Ways to resolve environmental disputes)***

EXAMPLE

Eric owns a small holding with a few animals. He makes a small living from his animals. The small-holding borders on a national road.

A truck carrying fertiliser goes out of control, leaves the national road and overturns on Eric's land, spilling a load of fertiliser into the small dam on his property. As a result, the water in the dam is contaminated or polluted. Eric's animals drink from this dam. Eric is not at home to stop his animals from drinking the water, and as a result, they become sick and die. Can Eric claim compensation from the owner of the fertiliser company?

The general rule of delict says that Eric can claim compensation from someone who has done him harm, but he will have to show that all of the elements of delict are present. This means that he will have to show that:

- *The action of the driver in spilling the fertiliser into his dam was wrongful*
- *The driver, and therefore the company, was negligent*
- *The accident caused the damage (in other words, the spilling of the fertiliser polluted the dam, resulting in the death of the animals)*
- *As a result of the negligent action of the driver, he suffered a quantifiable monetary loss*

The Law of Nuisance

The most important aspect of the law of nuisance regarding environmental rights is the law of private nuisance, which recognises the right of an owner of land to enjoy their land in physical comfort, convenience and well-being without unreasonable interference from others. People do have to endure a certain amount of interference with their right to enjoy their land, for example, smoke blowing across or noise generated by another person, as long as this interference is not unreasonable. If the interference is unreasonable, then a landowner can take legal action to protect their right to enjoy their land.

The person suffering the nuisance can apply to the court for:

a. An interdict to stop the person who is causing the nuisance from continuing with the conduct, and
b. Damages (monetary compensation) where the conduct has resulted in financial loss. The claim can be made against the owner of the property.

However, a landowner is not responsible for the nuisance caused by their tenant unless they authorised the nuisance.

EXAMPLE

Bethuel lives in a small town next to a disused quarry. The local authority uses the quarry to dump all of the household waste that is collected from residents. Bethuel has become sick as a result of living so close to the waste and has started to develop bad skin ailments.

What rights are affected?

- *Bethuel has a right to an environment not harmful to his health and well-being*
- *The common law of nuisance gives him the right to enjoy his land without his enjoyment being unreasonably infringed*

In this case, it would be possible to argue that the municipality's action in setting up the waste disposal site infringes Bethuel's environmental right and constitutes a nuisance as it unreasonably infringes upon his right to enjoy his property in physical comfort, convenience and well-being.

The Law of Neighbours

It is a general rule of our law that a landowner may not use their property in a way that causes harm to another person. This means that a landowner's right to use the property is limited and there is an obligation on them not to act in a way that will infringe the rights of a neighbour. The test of whether the landowner's use of their property fails to comply with this obligation is one of reasonableness and fairness. This principle of reasonableness is relevant to all forms of polluting activities.

EXAMPLE

Derrick lives on a cattle farm in a quiet rural area. His neighbour has set up a device which makes explosive noises at regular intervals during the day and night to scare baboons away from his kitchen vegetable garden. Derrick's family cannot sleep because of the noise, and his cattle have become restless and uncontrollable.

What can he do? What rights are affected?

It is possible to see the interaction of the three branches of law that have been discussed so far:

- *The Constitution (Section 24) gives Derrick the right to an environment that is not harmful to his health or well-being. This right is being infringed by noise*

pollution.

- *The Common Law of Nuisance says that Derrick has the right to enjoy his land without his enjoyment being unreasonably infringed by another person*
- *The Common Law of Neighbours says that Derrick is entitled to require his neighbour not to use his property (the neighbours) in a way that will infringe Derrick's legally protected rights*

In this case, it would be possible to argue that:

- *Neighbour Law gives Derrick the right to have his neighbour not cause a greater noise than is reasonable for the carrying out of the neighbour's economic activities*
- *The interest which the neighbour is trying to protect (growing a vegetable garden) is very limited*
- *The method used is not in proportion to the disturbance created by the explosive device*
- *Consequently, the neighbour's use of his property is not reasonable or fair to Derrick*

Laws made by national, provincial and local government

Laws made by national, provincial and local governments add to the rights and responsibilities that are part of the Constitution and the common law. These laws, also called legislation, must comply with the Constitution, but they can amend (change) the common law.

Environmental laws made by the government set out the rights and responsibilities of people relating to three over-arching areas, namely: land-use management, pollution control and waste management control, and natural resources.

Environmental laws, therefore, regulate various activities, including who can build, what can be built, and where can they build; who can fish or mine, cut trees and shoot animals, as well as where and when this can happen.

These laws contain a number of rules. Anyone who fails to comply with these rules could be punished through imprisonment and/or a fine.

There are two broad types of laws. Firstly, there are framework laws that regulate all environmental concerns and should be taken into account when dealing with any environmental issue. Secondly, there are sectoral laws that deal with things like land-use management, pollution control and waste management, or nature conservation. So, for

example, if you are dealing with a waste site that is polluting the water in the area of your community, you will need to consider both framework laws and the sectoral laws that are relevant to land and water pollution.

Framework environmental laws

Two laws deal with the environment generally:

1. *National Environmental Management Act (No. 107 of 1998) (NEMA)*
2. *Environment Conservation Act (No. 73 of 1989)*

Two other framework laws, the *Promotion of Administrative Justice Act* and the *Promotion of Access to Information Act*, are not concerned specifically with the environment, but they give content to environmental rights and issues. These laws should be considered when dealing with all environmental issues.

NATIONAL ENVIRONMENTAL MANAGEMENT ACT (NO. 107 of 1998) (NEMA)

NEMA is relevant to the regulation of all three of the environmental areas referred to, namely land-use planning and development, natural resources, pollution control and waste management.

The object of NEMA is to provide a framework for cooperative environmental governance (making sure that the government authorities coordinate their efforts to manage the environment) and aims to achieve this by establishing principles for:

- State decision-making on matters that affect the environment and procedures for co-ordinating environmental functions

WHAT ARE THE NEMA PRINCIPLES?

NEMA sets out a range of national environmental management principles, some of which are set out below. The actions of all state institutions that 'may significantly affect the environment' must comply with these principles. These state institutions would include national, provincial and local government as well as state institutions like Eskom. The importance of these principles has been recognised by South African courts and include:

- Environmental management must put people and their needs first
- Development must be socially, environmentally and economically sustainable
- There should be equal access to environmental resources, benefits and services to meet basic human needs

- Government should promote public participation when making decisions about the environment
- Communities must be given environmental education
- Workers have the right to refuse to do work that is harmful to their health or to the environment
- Decisions must be taken in an open and transparent manner, and there must be access to information
- The costs of remedying pollution, environmental degradation and negative impacts on health must be paid for by those responsible for such pollution, degradation and health impacts (the 'polluter pays' principle)
- The role of youth and women in environmental management must be recognised
- The environment is held in trust by the state for the benefit of all South Africans
- The utmost caution should be used when permission for new developments is granted

HOW DOES NEMA PROTECT THE ENVIRONMENT?

NEMA provides a range of tools aimed specifically at protecting the environment. These include the following:

- **Integrated environmental management:** NEMA regulates the system of environmental impact assessments (EIA). The Government has passed several EIA regulations in terms of NEMA, which set out the EIA processes and requirements. These require that the potential impact on the environment of certain listed activities must be considered, assessed and reported to the relevant authorities. There are several lists of activities. One list sets out activities for which a full environmental impact assessment is required before such activities can be carried out, while another list sets out activities for which only a basic environmental assessment is required before the activities may be carried out. A further list sets out activities in specific geographical areas that require environmental authorisation.
- **Duty of care to protect the environment: P**eople whose activities cause significant pollution or degradation (spoiling) of the environment must take reasonable steps to prevent the pollution or degradation from happening or to prevent such pollution or degradation from continuing. If the activity is authorised by law or cannot reasonably be avoided or stopped, NEMA requires that the

responsible person take steps to minimise (lessen) and remedy the pollution or degradation.

- **Worker protection:** Workers can refuse to do environmentally hazardous work.
- **Emergency situations:** NEMA sets out detailed procedures that must be followed by people in the case of an emergency incident occurring which will impact on the environment.
- **Protection of whistleblowers:** People who disclose information about an environmental risk (whistleblowers) are protected.
- **Private prosecution:** People can prosecute others if it is in the public interest or in the interest of protecting the environment where the state fails to do so.
- **Access to environmental information:** People have the right to have access to environmental information from the government or private persons.
- **Controlling the use of vehicles in the coastal zone:** the Off-Road Vehicle Regulations (ORV Regulations) regulate the use of vehicles on the shoreline and the establishment of boat launching facilities.

ADMINISTRATION AND ENFORCEMENT

NEMA provides for the enforcement of provisions of certain environmental Acts and allows the Ministers of Forestry, Fisheries and the Environment, Water and Sanitation, Mineral and Petroleum Resources, or the MEC of the provincial department responsible for environmental management to appoint Environmental Management Inspectors to implement this function.

In terms of Section 24G of the *National Environmental Management Laws Amendment Act (2 of 2022)* (NEMLAA), if a person has started a listed activity without an environmental authorisation (EA) or waste management license (WML) in terms of NEMA, that person can submit an application to the authority in charge in terms of Section 24G of NEMA. If this is successful, the person will be allowed to continue lawfully with the particular activity. This is referred to as the 'rectification provision'. Where a person starts with a listed activity without the required EA or WML, a maximum administrative fine of R10 million may be imposed in certain circumstances. This aims to prevent people from starting activities without the necessary EA or WML.

What is a 'listed activity'?

In terms of the environmental management principles of NEMA, certain activities that may harm the environment are referred to as 'Listed activities' and require Environmental Authorisation (EA) from the Department of

Forestry, Fisheries and Environment. For more information see https://cer.org.za/wp-content/uploads/1999/01/Listing-Notice-1-2.pdf **(NEMA: Listing Notice 1: List of activities and competent authorities identified in terms of sections 24(2) and 24D))**

WHEN CAN YOU USE NEMA TO MAKE A COMPLAINT?

NEMA says you can take legal action to enforce any environmental law or a principle of NEMA:

- To protect your own interest
- To protect someone else's interests who cannot do so
- On behalf of a group of people whose interests are affected
- If the legal action is in the public interest
- If the legal action is in the interest of protecting the environment

WHAT DOES NEMA ALLOW YOU TO COMPLAIN ABOUT?

A person can make a complaint or take legal action under NEMA if:

- Someone, including the government, has broken an environmental law, including NEMA
- The government has not complied with a principle of NEMA
- The government has permitted an activity or development that affects the environment without properly checking how it could affect the environment and people
- Someone, including the government, has caused serious pollution or damage to the environment
- A person has been punished for refusing to do work that might harm the environment or for reporting someone who is harming the environment
- A major accident (emergency incident) that threatens the public or the environment has taken place, and there has not been a proper report about it, nor has there been a clean-up operation
- The state has not prosecuted a person for breaking an environmental law, and you believe that they might be guilty.

EXAMPLE

An explosion releases a cloud of poisonous gas. Residents are warned on the radio to go indoors and shut their windows, and asthmatics are told to seek urgent medical

treatment. People are told what kind of gas it is. The health department and municipal emergency services are told how to treat people who get sick from the gas.

NEMA requires the company that caused this incident to:

- *Minimise (reduce) the risk and to clean up the mess*
- *Find out how the incident has affected public health*
- *Send a report to the government within 14 days of the accident which deals with:*
    - *The nature and causes of the incident*
    - *Substances released and how they could affect human health and the environment*
    - *What was done to prevent this from happening again*

If the company does not take these steps, action can be taken to protect the environment and public health.

WHAT ACTION CAN YOU TAKE UNDER NEMA?

You can take action under NEMA not only when someone breaks the law but also when someone has a duty to do something and does nothing. For example, the government has a duty to stop people from polluting rivers. If the government does nothing to stop the pollution, you can take action to compel the government to fulfill its duty. Therefore, if you feel that the government or any person has violated, or is violating, an environmental law, including NEMA, you can:

- Go to the police and lay a criminal charge
- Approach the government regarding the appointment of a facilitator so that the issue can be referred to conciliation
- Ask the Director General to investigate ***(See: Complaining to the Director General)***
- Refuse to work if it could cause environmental damage
- Alert people to an environmental risk by 'whistleblowing'
- React to emergency incidents
- Approach the Public Protector
- Approach the South African Human Rights Commission or
- Approach a court for an order:
    - To stop the person or government from breaking the law
    - To compel government to stop the person from breaking the law, or
    - For the responsible person to do a clean-up of the pollution if they haven't done this when they should have

CONCILIATION UNDER NEMA

NEMA allows a person to request the government to appoint a facilitator in order to facilitate meetings of interested and affected parties, with the intention of reaching an agreement on referring a disagreement to conciliation.

ENVIRONMENT CONSERVATION ACT (NO. 73 OF 1989)

The *Environment Conservation Act* is another law that relates generally to the environment. This Act has largely been replaced by NEMA, and only a few relevant sections remain. These sections relate to:

- Limited development areas and
- Regulations regarding noise, vibration and shock

Sectoral laws relating to the environment

Certain environmental laws apply to specific environmental areas in the overarching categories of land-use planning and development, natural resources and pollution control, and waste management.

When dealing with an environmental issue falling into one of these three categories, you must consider both the sectoral legislation relevant to the issue and the framework legislation.

Therefore, if you were looking for laws relating to the development of a steel mill, you would look under land-use planning and development because the law relating to planning would be important. On the other hand, if you needed information regarding how to apply for a commercial fishing permit or commercial forestry permit, you would look at the laws dealing with natural resources because fish and forests are natural resources, and there are specific laws that deal with the allocation of fishing and forestry quotas and licences. You may also need to consider framework legislation such as NEMA and the EIA provisions contained in these laws and regulations. If your quota or licence application was refused, you could consider using the *Promotion of Administrative Justice Act* to obtain reasons for the decision or to challenge the decision.

Two sectoral laws are set out briefly here, namely the *National Environmental Management: Air Quality Act (No. 39 of 2004)* and the *National Water Act (No. 36 of 1998)*.

NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT (NO. 39 of 2004)

The objective of the *Air Quality Act*(AQA) is to improve air quality and prevent air pollution through several measures, including setting standards for monitoring, managing and controlling air quality and establishing fines and penalties for people who do not comply with the Act.

The AQA requires the establishment of a national framework for achieving the objectives of the Act and the adoption of national, provincial and local standards for ambient air quality. Ambient air refers to outdoor air, and so excludes indoor air. Importantly, the AQA makes the management of air quality the responsibility of local government through air quality management plans, pollution prevention plans, by-laws and other policies.

HOW DOES THE AQA REGULATE AIR QUALITY?

The AQA aims to regulate air by providing for:

- The establishment of a national framework for air quality
- The monitoring of ambient air quality and emissions at the national, provincial and local levels
- The collection and management of air quality data
- National, provincial and local air quality management plans
- The control of certain polluting fuels
- The control of certain fuel-burning appliances
- The control of dust, noise and offensive smells
- A licensing system for certain fuels, appliances and activities

EXAMPLE

Cape Town's Air Quality Management Unit is part of the City's HealthDirectorate and works in partnership with Water Services and Environmental Resource Management. The City's Air Quality Management Unit has developed an ***Air Quality Management Plan (AQMP)*** *in terms of the Air Quality Act. The AQMP has the following objectives:*

- *To formulate an air quality management system for the City of Cape Town*
- *To specify ambient air quality standards and targets for Cape Town*
- *To monitor pollutants that cause brown haze and affect people's health*
- *To improve air quality in informal areas*
- *To enforce current and future legislation for air quality management*
- *To compile a comprehensive omissions database for the City of Cape Town*
- *To control emissions from vehicles in the City*

- *To consider air quality in land use and transport planning*
- *To establish the bad effects of air pollution on the people who live in Cape Town*
- *To establish an education and communication strategy for air quality management*
- *To review the air pollution situation on an ongoing basis and report on progress*

TYPES OF AIR POLLUTANTS THAT ARE REGULATED BY THE AQA

Air pollutants are things like gases and particles that pollute the air. The AQA sets limits and standards for the concentrations of these gases and particles. The following are some of the most important air pollutants (for which the Minister has set national standards in regulations):

Carbon monoxide: its main source is burning fuel from motor vehicles as well as from burning wood and industrial processes;

Sulphur dioxide: coal-fired power stations and diesel engines are the main sources of this gas;

Lead: lead is found in non-lead-free fuels, paints, batteries and pipes; when it is heated, it becomes a liquid and appears in the air as fine particles;

Particulate matter: Particulates are the tiny particles in the air, such as soot, dust, smoke, pollen, ash, aerosols and droplets of liquid. This can be seen as a white or brown haze. Very small particulates can be breathed deep into the lungs. The sources of particulates include fuels, diesel engines, wood burning, industrial smokestacks and chimneys.

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(Source: City of Cape Town – Air quality)

NATIONAL WATER ACT (NO. 36 of 1998)

The *National Water Act* recognises that water is a natural resource that belongs to all people and appoints the State as public trustee of South Africa's water resources.

The *National Water Act* regulates the way in which people obtain the right to use water and provides for just and equitable use of water resources. The main purpose of the Act is to protect, conserve and manage water resources in a sustainable and equitable way so as to take account of various factors, including:

- The basic human needs of present and future generations
- The need to protect water resources
- The need to share some water resources with other countries and
- The need to promote social and economic development through the use of water.

National government, acting through the Minister and Department of Water and Sanitation, is responsible for achieving these basic principles. The Minister has the final responsibility of fulfilling certain obligations relating to the use, allocation and protection of water resources.

It is not possible to deal in detail with all of the sectoral laws. Therefore, all relevant sectoral legislation has been listed according to the three over-arching categories in the Checklist at the end of this chapter. You can use the Checklist to help you find out the laws that will apply in a particular situation. Once it has been established which laws apply, you can then follow the steps set out in the section on ways to resolve environmental disputes.

Ways to resolve environmental disputes

It is important to note that there are two ways to resolve environmental disputes:

- Using the courts and the formal legal channels or
- Using alternative 'non-legal' methods such as public campaigns, petitions, etc.

It may be appropriate to use both ways in specific situations.

When deciding what action to take to solve an environmental dispute, it is important to first determine what rights have been infringed. Once you have done this, you will be able to consider which action would be most appropriate.

Here is a suggested three-step plan for dealing with an environmental dispute:

Step 1: Establish which rights are infringed

Step 2: Work out what you want to do to address the infringement (for example, use the courts, hold a public demonstration, etc) - this would probably be informed by the relief you are seeking as well as by what is provided for in the applicable laws

Step 3: Decide who to approach for help - this would depend on the relief sought. ***(See: Resources)*** Refer to the website of the Department of Forestry, Fisheries and Environment: www.environment.gov.za.

Solving environmental disputes without going to court

There are different ways in which environmental disputes can be solved without going to court.

PUBLIC PARTICIPATION

Certain environmental laws require certain public participation procedures to be followed when the relevant authorities make decisions (such as whether or not to issue permits or licenses) or make regulations under the law. These laws include the NEMA, the AQA, the *National Forests Act* and the *Marine Living Resources Act*.

THE PROMOTION OF THE ADMINISTRATIVE JUSTICE ACT

This Act sets out requirements for procedurally fair administrative action. These requirements range from notice-and-comment type procedures to public hearings. If the relevant authority fails to comply with these procedures, their actions could be held to be invalid. The public participation procedures provide valuable opportunities for the public to become involved in the decisions and actions taken under these laws. However, public participation in these processes may require a fairly high level of expertise and awareness of planning and development procedures. Partnerships with environmental groups and supportive academics will probably be necessary. ***(See pg 48: Just Administrative Action)***

ENVIRONMENTAL CAMPAIGNS

Environmental issues are increasingly becoming the focus of public campaigns. These issues are often called green issues. Drawing the attention of the government and developers to the facts may be enough to motivate them to seek better solutions or be prepared to negotiate. It is often best to tackle a problem by appealing for negotiations or mediation with those responsible for the problem. Other actions should be considered, such as protests, media campaigns and, finally, possible court action.

Approach local community organisations to add pressure to the campaign and use local newspapers to publicise issues with the environment.

Environmental organisations may be involved in helping to develop government policy, empowering people to participate in law-making or policy processes or public participation processes, lobbying for environmental changes or actions, taking up peoples' environmental rights, taking up environmental or conservation issues caused by existing developments, working on conservation, and so on.(See Resources)

TRADE UNIONS

Members of trade unions can play an active role in environmental issues by taking up issues relating to workplace health and safety. Trade unions can extend their activities beyond immediate workplace needs to the worker environment in general. Trade unions can take action against industries that have a bad effect on the environments in which communities live. For example, if a particular industry dumps its poisonous waste products into a river that runs through a town, this can have serious consequences for people who use the river or children who play in the river. The trade union can take this up with the management and threaten to take action unless management does something about the pollution.

LOBBYING LOCAL GOVERNMENT

Many decisions affecting the environment take place at a local level. While laws about environmental issues are made at national, provincial and local levels, implementation and monitoring of the laws is often a local issue. For example, it is at local level that settlements are planned and development decisions regarding industrial, commercial and residential growth are taken. The local municipality manages sewage and drainage, waste disposal and so on. So, it is at local level that people need to contribute to environmental decisions and take up issues. If there is a particular environmental issue in your area that needs attention, you can approach the local municipality in your area and point this out to them. If they don't take action, then you could approach the relevant department in the provincial government and, thereafter, national government. The national Department of Forestry, Fisheries and Environment and provincial departments dealing with environmental affairs are mainly responsible for environmental conservation. However, other government departments would be involved if the issue concerns the provision of safe and healthy environments. You could also lobby parliamentary portfolio committees. ***(See pg 104: Lobbying, campaigning and petitioning)***

Solving environmental disputes in the courts

There are various remedies to environmental problems that are available through the legal system. However, using the courts to solve an environmental problem can be very expensive because of the legal fees involved. For this reason, going to court should be seen as the last resort in solving a problem. Other 'non-legal' methods should first be explored.

LEGAL STANDING TO BRING A MATTER BEFORE THE COURT

The law requires that a person have some personal interest in a matter to bring that matter before the court. This rule (called the requirement of locus standi) has sometimes prevented people wanting to raise an environmental issue from approaching the courts because it was found that they did not have sufficient personal interest in the matter. However, the Constitution has broadened the requirement of locus standi and states that in addition to people acting in their own interest, the following people may approach a court in connection with the infringement of a person's rights:

- Anyone acting on behalf of another person who cannot act in their own name
- Anyone acting as a member of, or in the interest of, a group or class of persons
- Anyone acting in the public interest
- An association acting in the interests of its members

Therefore, individuals and non-governmental organisations (NGOs) are allowed to take action to protect the environment in the public interest. One person from the group can represent the interests of the whole group. If the group does not have sufficient funds to pay the legal costs, it could approach an NGO to bring the relevant action.

NEMA also states that a person may approach the court for relief in the case of a breach, or threatened breach, of NEMA or any other environmental law if it is:

- In that person's or group of persons' own interest
- In the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings
- In the interest of or on behalf of a group or class of persons whose interests are affected
- In the public interest and
- In the interest of protecting the environment

NEMA also contains provisions relating to the legal costs associated with taking a matter to court. It states that if a person brings a matter to court in the

environmental or public interest and is not successful if certain requirements are met, the court may decide not to order that person to pay the costs of the successful party. In addition, if the relevant person is successful, the court may decide (on application by the relevant person) to grant them certain additional legal costs to which they would not ordinarily have been entitled. These provisions should assist people who wish to bring matters to court in the environmental or public interest.

TYPES OF LEGAL REMEDIES

STATUTORY REMEDIES

The various laws listed above each provide legal remedies that are specific to the relevant laws. To use these remedies, you will need to determine which law applies to a person's specific needs and, perhaps with the help of an attorney, decide how to use the specific law.

When trying to establish which law applies to your client's query, you should ask the following questions:

- What do NEMA or any of the other framework environmental laws say? ***(See pg 749: Framework environmental laws)***
- What sectoral laws might apply? For example, does the query relate to pollution and waste management, land-use planning and development, natural resources or workers' environmental rights?

Once you have identified the applicable law, you must decide what legal remedy you wish to pursue. The remedies that follow are useful in the protection of environmental rights.

THE INTERDICT

The courts can be approached to interdict a person from performing a harmful action without going through the process of claiming damages. ***(See pg 251: Interdicts)***

There are three basic requirements for granting an interdict:

1. There must be an action that is already occurring or which is threatening (i.e. Is about to occur)
2. The action must be wrongful – this also means that the person asking for the interdict must have a clear right that requires protection and
3. The person requesting the interdict must have no other remedy available to him

EXAMPLE

OBTAINING AN INTERDICT

Members of your community live near a sawmill, which prepares wood planks for sale to the building trade. Once the planks are made, the remaining sawdust and wood chips are burnt. This results in huge clouds of smoke, which cause serious air pollution in the area. Children living near the sawmill have started to develop serious asthma symptoms, which the doctor says is caused by the pollution.

The sawmill is causing air pollution, which may be infringing the community's (constitutional) right to an environment not harmful to their health or well-being. It is also likely that the requirements of a specific law, such as the AQA *are being violated. This factor would strengthen an application made to court for an interdict to prevent the pollution from continuing. It also appears that there is no other remedy available to the people living near the sawmill.*

The community could bring an application for an interdict ordering the owners of the sawmill to stop the burning process.

APPEAL AND REVIEW

Review - This refers to the court's ability to question whether the procedure followed by an organ of state, in making an administrative decision, was correct. You can approach the court to review an administrative decision when you feel that correct procedures have not been followed in making that decision. For example, a factory has been built without the people who live near the factory being given an opportunity to express their views on whether or not they want the factory to be built. Different laws set out different periods within which you must review a decision, and you should abide by these time frames. You will need to consult with an attorney to apply for a review. The procedures set out in the PAJA must be complied with. **(*See pg 201: What is a review*?)**

Appeal - This is another way to challenge the outcome of an administrative decision. While review limits you to test whether the procedure followed in making an administrative decision was correctly followed, when you appeal against an administrative decision, you are asking the court to look at the reasons for the decision. In other words, the court is asked to look at the information that was considered by the decision-maker in coming to the decision. You can appeal against the outcome of an administrative decision when you feel that the information available to the decision-maker should

have resulted in a decision different from the one that was made. Different laws set out different periods within which you must appeal a decision, and you should abide by these time frames. You will need to consult with an attorney to lodge an appeal. ***(See pg 201: What is an appeal?)***

DELICTUAL CLAIM

You can bring a delictual claim when the actions of another person have caused harm to your property or yourself. The harm is represented as the amount of money that you claim from the wrongdoer to compensate you for the harm that you have suffered. You will need to consult with an attorney to bring a delictual claim before the court. ***(See pg 745: Law of Delict)***

Climate change

In recent years, the problem of global climate change has received increasing attention. Climate change has been caused by a significant increase in global greenhouse gas emissions (since the Industrial Revolution) and has led to various problems, including increasing temperatures, rising sea levels and more extreme weather conditions, including droughts and floods.

Another problem of climate change is adaptation, which will see many (mainly developing) countries being forced to adapt to the negative impacts of climate change, including reduced crop yields caused by droughts. In response, the international community has adopted the United Nations Framework Convention on Climate Change ('UNFCCC') and the Kyoto Protocol to the UNFCCC, which require the reduction of greenhouse gas emissions by all countries.

In 2015, at the UN Climate Change Conference (COP21) held in Paris, the Paris Climate Agreement was adopted by 196 parties. The Paris Agreement is a legally binding international treaty on climate change falling under the United Nations Framework Convention on Climate Change (NFCCC). This is the first time that a binding agreement brings all nations together to combat climate change and adapt to its effects. South Africa is a signatory to the Paris Agreement and has made commitments to reducing Greenhouse Gas Emissions (GHG) in terms of this agreement.

HOW DOES THE PARIS AGREEMENT TO THE UNITED NATIONS WORK?

The Paris Agreement works on a five-year cycle where countries are required to increase and accelerate their actions to limit global warming. Countries must submit their national climate action plans, known as nationally determined contributions (NDCs). Each NDC is meant to show an increase in action compared to the previous version.

South Africa has a relatively high level of greenhouse gas emissions because most of South Africa's energy is produced from coal. South Africa and Southern Africa have been identified as a climate change hotspot, and a study has shown that Southern Africa is heating at twice the global average rate. The South African government has acknowledged the urgency of responding to climate change. However, it is important that any climate change-related measures that are implemented do not impact negatively on the poor.

Laws and policies on climate change in South Africa

NATIONAL ENVIRONMENTAL MANAGEMENT ACT (NEMA) AND CLIMATE CHANGE

Section 28 of NEMA makes it the government's duty to take reasonable measures to stop damage to the environment. This applies to things that are harmful and are caused by climate change.

Section 24 of NEMA requires environmental impact assessments to take place before starting any listed activity. These activities include power stations and mining operations. An environmental impact assessment must consider the impact of climate change on the activity that is being assessed.

In the 'Thabanetsi' case (*Earthlife Africa Johannesburg v Minister of Environmental Affairs*), the applicants challenged the authorisation given for a proposed coal-fired power station in Lephalale, an area with water scarcity. The High Court held that climate change impacts must be considered when an environmental impact assessment is conducted to comply with the National Environmental Management Act.

In the court case *Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* ('*Deadly Air*') 98 and *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* ('*Eskom Holdings*') - the 'Deadly Air' case - the focus was on air pollution caused by coal-fired power stations and the harmful impact of this on human health. The court held that Section 24(a) of the Bill of Rights creates the right to an environment that is not harmful to a person's health and well-being is a right that is immediately realisable. In other words, these rights are not subject to progressive realisation over time like many other socio-economic rights in the Constitution. In a subsequent judgement, the Constitutional Court endorsed this interpretation of Section 24(a).

CARBON TAX

The *Carbon Tax Act (No. 15 of 2019)* aims to reduce the impact of climate change and allows the government to tax anyone, including municipalities, with greenhouse gas emissions. The Carbon Tax works on the polluter-pays principle and helps to ensure that companies and consumers take these costs into account in their future production, consumption and investment decisions. In other words, the Carbon Tax 'puts a price' on carbon to discourage the generation of carbon dioxide as activities that generate carbon emissions will become more expensive. This aims to reduce South Africa's greenhouse gas emissions.

REGULATIONS UNDER NEMA: AIR QUALITY ACT

NATIONAL GREENHOUSE GAS EMISSION REPORTING REGULATIONS, 2016

These Regulations require polluters to submit data on emissions and related activities. In terms of the Regulations, every facility (such as Eskom power stations) must submit a separate report. The Regulations also make it an offence to fail to submit accurate data or to falsify information. However, the Regulations do not require the data to be made available to the public, which is a barrier to access to information.

THE DECLARATION OF GREENHOUSE GASES AS PRIORITY AIR POLLUTANTS AND THE NATIONAL POLLUTION PREVENTION PLAN REGULATIONS, 2017

In terms of this Declaration, Greenhouse Gas Emissions (GHGs) are declared priority pollutants. According to the Regulations any facility that emits GHGs must submit a pollution-prevention plan which sets out their plan to monitor and reduce the GHG emissions, and they must submit a progress report on the implementation of the plan.

THE NATIONAL CLIMATE CHANGE ADAPTATION STRATEGY, 2019

This policy outlines steps to decrease the degree to which systems are exposed to climate change which makes people more vulnerable. Various government departments are working on ways to adapt and respond, including job creation, growth strategies, and protecting the vulnerable.

CLIMATE CHANGE ACT (2022)

The *Climate Change Act* sets out a national response to climate change, including mitigation and adaptation action and aims to ensure that South Africa can respond to the risks and impact of climate change. The Act aims to strengthen coordination between national sector departments and provide policy and decision-making to enable South Africa to meet the commitments of its Nationally Determined Contribution (NDC) under the Paris Agreement. The NDC is a set of commitments that South Africa has made under the International Paris Agreement to reduce greenhouse emissions as part of mitigating climate change. The areas of focus in the Act include:

- **Mitigation** of climate change - the reduction of greenhouse gas carbon emissions to slow down and stop climate change. The Minister responsible for environment is required to assign carbon budgets to companies to limit their carbon emissions

- Manage climate change **adaptation** - adapting to impacts such as flooding, drought, wildfires, excessive heat and water and food insecurity - impacts which will intensify as climate change worsens. The government is obliged to assess all of the risks and expected impacts and create response plans. This happens at a national, provincial and local level
- Defines **responsibilities** for different national government departments. as well as for provincial and local government, including municipalities. This ensures that all relevant role-players are mandated to do their part in responding to climate change and work together effectively

There are six ways the Climate Change Act is fighting climate change.

1. **Allocate carbon budgets:** Companies that give off a certain quantity of greenhouse gases (GHG) will be allocated a carbon budget by the Department of Forestry, Fisheries and Environment. This means there is a legal limit to the GHG emissions that each company can give off in a certain period. If the company goes over the budget, it will have to pay a higher carbon tax as a penalty. Companies that have been allocated budgets, must also submit greenhouse gas mitigation plans.
2. **Duties of provinces and municipalities:** The Act makes it the government's responsibility to assess the risks and impacts of climate change and to develop an adaptation strategy and plan. This must happen at all levels: national, provincial and municipal. For example, municipalities must map climate risks, such as extreme climate events, like the floods in KwaZulu-Natal in 2022. The Act requires provinces and municipalities to supply data and information on climate risk and then develop a plan for how they intend to respond (such as disaster risk strategies and programmes).
3. **Develop a national adaptation strategy:** The Act says that within two years of the Act coming out, the environment minister must develop and publish a National Adaptation Strategy in consultation with various other ministries, such as the Department of Agriculture or Human Settlements. These departments must then also develop adaptation plans for their sectors.
4. **Making the Presidential Climate Commission (PCC) a statutory body**
5. **List sectors that will give sectoral emissions targets:** The Environment Minister must provide a list of the sectors that are going to get sectoral emissions targets. The minister must consult with ministers responsible for each sector, including transport, electricity and energy, and agriculture, to determine their emissions targets.
6. **Accountability:** Ministers must publish by Gazette what relevant policies and measures they are developing to reach their sectoral emission targets.

The Act indicates that failure by ordinary citizens or stakeholders outside the government to supply certain information to the minister as required by law is an offence and can be punished by having to pay a fine of R5 million or five years in prison. The failure to report data or misrepresentation of data is the only offence recorded in the Act. There are no other penalties for non-compliance for ministers, MECs or mayors who fail to implement certain actions required by law.

NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY BILL

The National Environmental Management: Biodiversity Bill is currently being released for public comment. The aim of the NEMA Biodiversity Bill is to provide for animal well-being and human practices, actions and activities. It will provide the Minister of Forestry, Fisheries and Environment with the right to impose conditions, restrictions and permits or any other measures for the protection of any listed or non-listed species or ecosystem. The Bill provides for a scientific authority to regulate, restrict and assess the impact on species of international trade and to advise the Minister of Forestry, Fisheries and Environment on captive breeding operations and species. The Bill increases the sentences for wildlife violations of the regulations. If a person is convicted of an offence involving a specimen or a listed species or ecosystem for commercial exploitation, they can be fined up to R10 million or get 10 years in prison. Members of criminal syndicates or State employees found guilty of offences involving priority species (rhinos, elephants, lions, etc) will be liable for fines of up to R20 million or 20 years in prison.

Problems

1. Making complaints about environmental problems

INDUSTRIAL FUMES

A small factory in your neighbourhood is burning something that gives off fumes and clouds of smoke that make you feel ill.

WHAT CAN YOU DO?

Write a letter to the committee in the municipality that deals with environmental issues, reporting the matter and asking them to investigate.

RAW SEWERAGE

A sewerage treatment plant regularly overflows, and raw sewerage is pumped into a river where children play.

WHAT CAN YOU DO?

Write a letter of complaint to the Department of Water and Sanitation, and to the committee in the municipality that deals with water affairs.

LOCAL DEVELOPMENT

Your municipality is making a decision about a development that will change the environment in the area. You feel certain procedures of NEMA haven't been followed in the planning process and you are afraid that the development will go ahead.

WHAT CAN YOU DO?

You can:

- Approach the full-time municipality officials, like the town planning department, and explain your concern. Ask for information about the development and which committees will decide on the issue.
- Report your concerns and recommendations to the chairperson of the relevant local government committee responsible for making decisions regarding development. Ask them for feedback within a specified period of time.
- If the committee does not respond to your recommendations, write a letter of complaint to the council executive committee. Warn them if you believe they did not follow the right procedures or went against NEMA. Tell them you might go to court to challenge their decision.

Wait for the response to your complaint. If it goes against you, think about appealing or applying for conciliation, and only then consider going to court to have the decision set aside.

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2. Appealing against government environmental decisions

LAND USE

The government plans to use land in a certain way and you think it is going to have a bad effect on the environment.

WHAT CAN YOU DO?

Check with your local municipality whether there is a formal Land Use Application Appeal Form or an email address that you need to use to lodge your appeal. Also check the time limits on being able to lodge an appeal. Complete the form or send an email, and make sure you include the following information:

- Explain your complaint in detail
- Say which NEMA environmental principle/s have been violated ***(See pg 750: What are the NEMA principles?)***
- Say which law has been broken and why you think the decision is unreasonable ***(See pg 773: Checklist: Sectoral laws; See pg 693: Spatial Planning and Land Use Management Plan (SPLUMA))***

Once an appeal is lodged, the municipality should circulate it to the relevant parties for a response. Once these responses have been received and the reasons for the appeal have been considered, a report is prepared and sent to the municipal manager. The municipal manager will make a final decision, and all parties will be informed in writing. If you are not satisfied with the result of your appeal you can ask the government to appoint a facilitator to have the dispute referred to conciliation.

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3. Complaining to the Director-General

POLLUTION

A group of people have been burning large numbers of tyres in an open field to sell the steel that is found inside the tyres. Your municipality has been unable to catch

them or stop them from burning the tyres. The land owner cannot control the tyre burners either.

WHAT CAN YOU DO?

First, complain to the municipality and then to the provincial government. If you are not satisfied with the steps taken by the municipality or provincial government, you should write to the Director-General or provincial head of department. You must:

- Write a statement of the facts of the complaint
- Add copies of all letters of complaint to other government officials and answers received
- Add maps, photographs or video evidence, medical evidence of injury and so on, if you have this

If you make a complaint to the Director-General or provincial head, they must investigate the case and tell the responsible for the pollution to take reasonable steps to stop the problem by a certain date.

If you are not satisfied with the result of your complaint you can request the government to appoint a facilitator to try to have the disagreement referred to conciliation. ***(See pg 755: National Environmental Management: Air Quality Act [No. 39 of 2004])***

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4. Applying for conciliation or arbitration

GOVERNMENT AND COMMUNITY DEADLOCK

The government decides to allow a dam to be built that will destroy many villages and natural areas. A study was done on the likely impact on the environment (environmental impact assessment). However, the environmental impact assessment report does not take into account cultural considerations, like the fact that the dam will flood graves and religious sites. The local community is against the dam development because of this. The community and the government cannot resolve their differences.

WHAT CAN YOU DO?

Write a letter to the minister, member of the provincial executive council or municipal council (whichever one is concerned with the dispute), and ask them to refer the dispute to a conciliator or facilitator.

If the parties cannot agree, the conciliator can ask the two parties whether they would like the case to go to arbitration. The arbitrator's decision will then be final.

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5. Harm to the environment

WORKERS CAN REFUSE TO DO WORK THAT HARMS THE ENVIRONMENT

You work for a doctor and your work includes cleaning up and throwing away waste. The doctor always tells you to throw the medical waste in a nearby rubbish dump. You feel this is wrong, and one day, you tell the doctor why you think it is wrong and that you will not continue throwing this waste in the dump. The doctor threatens to dismiss you for failing to do your job.

WHAT CAN YOU DO?

Tell the doctor that the NEMA states you cannot be dismissed for refusing to do an action that is against the law and the environment.

REPORTING ACTIVITIES THAT HARM THE ENVIRONMENT

You work for a company that grows vegetables. One of your employers is secretly using a banned pesticide on one of the farms to grow more vegetables.

WHAT CAN YOU DO?

You may disclose this information to various persons, including a committee of parliament or a provincial legislature, the Public Protector, or the South African Human Rights Commission. NEMA helps to protect you against being victimised for blowing the whistle on your employer, provided that you comply with the provisions of NEMA.

Checklists

Best action to take when dealing with environmental issues

These are things to think about when choosing the best action to take when someone or the government has done something bad to the environment:

- How much will it cost to take this action?
- How long will the action take?
- Are we likely to achieve our aims?
- Besides financial backing, what other support do we need, such as technical support, to achieve our aims?
- Is this support available?

Sectoral laws

The laws listed here are only the most important national laws that deal specifically with environmental issues. Provincial laws are not included.

LAND-USE PLANNING AND DEVELOPMENT

LAND REFORM

- *Upgrading of Land Tenure Rights Act (No. 112 of 1991)*
- *Restitution of Land Rights Act (No. 22 of 1994)*
- *Land Reform (Labour Tenants) Act (No. 3 of 1996)*
- *Communal Property Associations Act (No. 28 of 1996)*
- *Interim Protection of Informal Land Rights Act (No. 31 of 1996)*
- *Extension of Security of Tenure Act (No. 62 of 1997)*
- *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (No. 19 of 1998)*
- *Communal Land Rights Act (No. 11 of 2004)*

PLANNING

- *Local Government Transition Act (No. 209 of 1993)*
- *Local Government: Municipal Structures Act (No. 117 of 1998)*
- *Local Government: Municipal Systems Act (No. 32 of 2000)*
- *National Building Regulations and Building Standards Act (No. 103 of 1977)*
- *Provincial Land Use Planning Ordinances*

- *Spatial Planning and Land Use Management Act (No. 16 of 2013)*

ENVIRONMENTAL ASSESSMENT

- *National Environmental Management Act (No. 107 of 1998) (Chapter 5) and Government Notices 982, 983, 984 and 985 in Government Gazette No. 38282 of 4 December 2014*
- *Minerals and Petroleum Resources Development Act (No. 28 of 2002)*
- *Marine Living Resources Act (No. 18 of 1998)*
- *National Water Act (No. 36 of 1998)*

PROTECTED AREAS

- *National Environmental Management: Protected Areas Act (No. 57 of 2003)*
- *National Forests Act (No. 36 of 1998)*
- *World Heritage Convention Act (No. 49 of 1999)*
- *National Heritage Resources Act (No. 25 of 1999)*
- *Marine Living Resources Act (No. 18 of 1998)*

THE COAST

- *Maritime Zones Act (No. 15 of 1994)*
- *ORV Regulations (GN R 1399 in Government Gazette No. 22960 dated 21 December 2001, as amended in 2004)*
- *National Environmental Management: Integrated Coastal Management Act (No. 24 of 2008)*

NATURAL RESOURCES

AGRICULTURAL RESOURCES

- *Conservation of Agricultural Resources Act (No. 43 of 1983)*
- *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act (No. 36 of 1947)*
- *Agricultural Pests Act (No. 36 of 1983)*
- *Foodstuffs, Cosmetics and Disinfectants Act (No. 54 of 1972) Subdivision of Agricultural Lands Act (No. 70 of 1970)*
- *Sustainable Use of Agricultural Resources Bill (will repeal the Conservation of Agricultural Resources Act)*

BIODIVERSITY AND GENETIC MODIFICATION

- *National Environmental Management: Biodiversity Act (No. 10 of 2004)*
- *National Environmental Management: Biodiversity Bill (2024)*
- *Genetically Modified Organisms Act (No. 15 of 1997)*

- *Plant Breeders' Rights Act (No. 15 of 1976)*
- *Plant Improvement Act (No. 53 of 1976)*
- *Animal Improvement Act (No. 62 of 1998)*
- *Conservation of Agricultural Resources Act (No. 43 of 1983)*
- *Provincial Nature Conservation Ordinances*

WILD ANIMALS, FORESTS AND PLANTS

- *Game Theft Act (No. 105 of 1991)*
- *Animals Protection Act (No. 71 of 1962)*
- *National Forests Act (No. 84 of 1998)*
- *National Veld and Forest Fire Act (No. 101 of 1998)*

Consumer Law

Introduction

When you go into the marketplace and buy goods or services for cash or on credit, you are a consumer. When a seller agrees to sell goods or services, and a consumer agrees to pay for these, they have entered into a contract. Consumer law is, therefore, all about contracts. Until recently, as a consumer in South Africa, the relationship between you (the consumer) and the company was most often an unequal one – they drew up the contract, which mostly benefited the company, and you either signed the agreement on their terms or you decided not to buy. The problem was that the next company also had a similar contract, so if you wanted the goods or services, you just had to agree to their terms.

There are many abusive practices against consumers in many industries, from overcharging to poor quality to overselling. However the laws have been revised into two acts, the *National Credit Act*, and the *Consumer Protection Act*, which are based on the international principles of the United Nations Consumer Rights and are designed to ensure consumers' rights are respected.

All consumers should know their rights in these two laws.

What is a contract?

A contract is an agreement between two (or more) people where one person offers to do something, and another person accepts that offer.

It is important to understand how a contract is made and how it can affect the rights of the buyer or the seller.

What are the requirements for a contract?

There must be an **agreement** between the people about what each person must do in terms of the contract. In other words, there must be an offer by one person and an acceptance by the other. The offer must be **serious and definite**, not vague. For example, Khanya says to Anne, 'I will buy your car sometime in the future if it suits me.' Anne agrees to this. There is no contract because the offer was not serious or definite.

The person making the contract must have the **legal power** to enter into the contract. Examples of people who don't have legal power to enter into contracts are:

- Children under 7 years
- People who are insane
- People who are very drunk or drugged

A person cannot enter into a contract if it is **impossible** to carry out what is in the agreement. For example, someone agrees to sell you a house, and you agree to buy that house. But the house gets washed away in a flood before you sign the agreement. So, the contract can't be enforced because there is no house.

The contract should be **legal** and not *contra bonos mores*. In other words, it should not be illegal or go against the morality of society. For example, if a person agrees to hijack a vehicle in return for money, the contract is void. It is not a proper contract.

It is always better to have a contract written down. This is because it can be difficult for parties to prove the terms of a verbal (spoken) agreement. In the event of verbal agreement, it is advisable to have a third party present.

Can a minor enter into a contract?

According to the *Children's Act (No 38 of 2005)*, a minor is someone under the age of 18 years. A minor who enters into a contract without the consent of the parents or guardian does not have to keep to the contract. But, if the minor says they are older than 18, then the person who entered into the contract with the minor can sue for damages. ***(See pg 815: Problem 1: Minor entering into a contract)***

Married people and contracts

Men and women must say what their marital status is when they fill in forms. Married people who are married in community of property have joint administration of the things the couple owns. To protect each spouse, the other partner's written permission is necessary for big things like buying or selling a house, signing credit agreements, and withdrawing money from accounts in the other spouse's name. In a marriage out of community of property, the husband controls his own separate estate, and the wife controls hers. ***(See pg 530: The rules of civil marriage)***

Breaking a contract

Breaking a contract is called a breach of contract. A breach of contract happens when one person does not do what they promised to do in the contract. The other person can then choose to end the contract. For example, a seller agrees with a buyer that the seller will deliver goods on a certain day. On that day the goods don't arrive. The delay was not the buyer's fault. This means that the seller 'breached the contract'.

There is also a breach of a contract if a person says or does something that makes it clear that they will not carry out their part of the contract. For example, a person promises to sell something to you and then sells it to another person.

There is also a breach if a part of the contract takes place, but something else in the contract is not carried out. For example, a customer orders certain goods, and when they arrive, it is clear that the goods are of poor quality. The seller broke the contract because they sent poor quality goods instead of the good quality ones agreed on. ***(See pg 815: Problem 2: Breaking a promise)***

What happens if there is a breach of contract?

The law will help the innocent person if there is a breach of contract. The legal options are *specific performance*, *interdict*, *suing for damages*, *and cancellation and damages.*

SPECIFIC PERFORMANCE

Specific performance means the court orders the guilty person to do what was promised. For example, the court orders a builder to finish building a house. Sometimes, the court will not order specific performance. This will happen if:

- The guilty person (the person who broke the contract) can't do what was promised
- Paying money is a better way of compensating the innocent party
- It would be unreasonable or unjust to make the guilty person carry out the contract

If the court orders the guilty person to carry out the contract, then the person must do this. If the person does not do what the court orders, they will be in 'contempt of court'. The person could get a fine or a prison sentence.

INTERDICT

You can get an interdict from the court against a person who broke a contract with you. An interdict is a court order that prevents the guilty person from doing something or orders the guilty person to do something. ***(See pg 251: Interdicts)***

SUING FOR DAMAGES

Instead of cancelling the contract, the innocent person can decide to sue the other person for damages. This means you can claim money if you lost out in any way because the contract was broken.

CANCELLATION AND DAMAGES

One person can cancel a contract if the other person has not carried out an important part of the contract. Once the contract is cancelled, nobody has to carry it out. The innocent person can also sue for damages. ***(See pg 816: Problem 3: Breach of contract)***

When does a contract end?

A contract ends when:

- Each person does what they promised to do
- Each person agrees to end the contract
- One person in the contract breaks or cancels the contract or
- One of the people in the contract dies

The National Credit Act (NCA) No. 34 of 2005

The *National Credit Act* (NCA) sets out what the law is when consumers take loans or buy goods on credit. It also provides for the establishment of the National Credit Regulator (NCR), which monitors activities in the credit market and ensures that credit providers, for example, banks, micro-lenders or companies selling goods on credit, comply with the NCA.

The *National Credit Act* (NCA) 2005 has had a major impact on protecting the rights of South African consumers who have entered into credit agreements since this time. The NCA put controls in place which restrict credit marketing practices, ensure that assessments regarding a consumer‘s ability to afford to buy goods on credit are undertaken

when they apply for credit, penalise companies who grant credit recklessly, limit interest rates and the total amount that credit providers can charge for other fees including when an account goes into arrears, and regulate credit bureaus and debt counsellors.

The National Credit Amendment Act (No. 7 of 2019)

The following amendments in the *National Credit Amendment Act* should be noted:

- **Provision for the automatic reversal of adverse consumer information:** Section 71A, in terms of which credit providers and credit bureaux must remove any adverse credit information of a consumer once the consumer has paid the debt in full, giving the consumer a 'clean slate.
- **Changing the requirements for getting clearance certificates:** The *Amendment Act* has changed to allow consumers to be issued with a clearance certificate if the consumer has paid up all other debt and the only outstanding debt is a mortgage agreement.
- **Providing clarity on the method of delivery of the notice in terms of Section 129:** The extent to which a credit provider must act to bring a Section 129 Amendment Act is clarified in this section and provides that a credit provider must deliver the notice to the consumer by registered mail or personal service to the consumer.

Evidence of proof of delivery will be written confirmation from the postal service or the consumer's signature.

The National Credit Regulator (NCR) and the Consumer Tribunal

The Act provides for the establishment of the NCR to regulate the credit industry and ensure that credit grantors comply with the NCA. The NCR has a complaints division where consumers can complain, and they have an investigation unit that investigates alleged contraventions of the Act. The NCR refers cases that have merit to the Consumer Tribunal. All credit providers, credit bureaus and debt counsellors must register and report to the NCR.

The Consumer Tribunal has also been established with the same status as a high court to hear cases where companies have allegedly not complied with the NCA. They can also grant consent orders.

Rules when marketing to consumers

Certain practices of agents canvassing for loans are now unlawful or restricted, for example, door-to-door selling and canvassing at workplaces and homes without an invitation.

Marketing practices and advertisements are also more controlled to protect consumers, for example, credit facility limits may not be automatically increased, and negative option marketing is unlawful ("if you do not refuse the offer, we will assume you agree").

Consumers must also be given a quote, valid for 5 days, with all the details about the loan so that consumers can shop around and compare prices.

Putting a ceiling on interest rates, fees and charges

There is now a maximum interest rate that credit providers can charge, depending on the type of credit and when the credit was granted. The rate, in most cases, is based on a formula that is dependent on the South African Reserve Bank repurchase (repo) rate at the time that the credit was granted. The repo rate is regularly adjusted over an 18-month cycle, so check with the Reserve Bank for the repo rate at the time that the agreement was signed. For example, in 2024, the S.A. Reserve Bank repo rate was 8.25% per year, and the commercial banks' lending rate was 11.75%.

Types of credit agreements

Consumers are still not fully informed about the various credit agreements and the maximum interest rates that apply to each. This makes people who borrow money vulnerable. The two most common types of loans are explained below.

MICROLOAN

The NCA defines a micro-loan as a 'short-term credit transaction'. This can be any amount below R8 000 and must be repaid over a period of not more than 6 months. The interest rate on microloans is usually very high. ***(See pg 811: Microlending and microlenders)***

UNSECURED LOAN

An unsecured loan (also called a personal loan) is usually for an amount above R8 000, where you don't have any assets (own anything to the value of the loan, such as

a house or a paid-up car) that the credit provider can claim from you if you stop paying the monthly instalments that you agreed to in the contract.

Some banks and credit providers offer unsecured loans of up to R350 000, which must be paid back over a period of not more than 6 years. However, the interest rate can be as high as 32% per year, which makes it difficult for many consumers to honour their contractual agreements. When applying for a loan, always make sure that the interest rate is in line with the NCA limit.

The NCA also places a maximum amount that can be charged on other fees, for example, initiation fees, service fees, default fees and collection costs.

Insurance cover on loans is allowed, but the charge must "be reasonable", and the consumer has the right to use or cede an existing policy instead of taking out a new policy. The example table sets out the rates per category of credit agreement.

CATEGORY	MAXIMUM INTEREST FORMULA	EXAMPLE: IF THE REPO RATE IS 5%
1. MORTGAGE AGREEMENT	(Repo rate x 2.2) + 5%] p.a	17.1%
2. CREDIT CARDS/FACILITIES	(Repo rate x 2.2) + 10%] p.a	22.1%
3. UNSECURED CREDIT TRANSACTIONS	(Repo rate x 2.2) + 20%] p.a	32.1%
4. SHORT-TERM CREDIT TRANSACTIONS (loans not more than R8 000 and payable in 6 months or less)	5% per month (60% p.a)	
5. DEVELOPMENTAL CREDIT AGREEMENTS	(Repo rate x 2.2) + 20%] p.a	32.1%
6. OTHER CREDIT AGREEMENTS	(Repo rate x 2.2) + 10%] p.a	22.1%
7. INCIDENTAL CREDIT AGREEMENTS (cash transactions that are not paid and the account goes into arrears e.g. doctor's bills, clothing, etc.)	2% per month (24% p.a)	

The NCA also places a maximum amount that can be charged on other fees, for example, initiation fees, service fees, default fees and collection costs.

Insurance cover on loans is allowed, but the charge must "be reasonable", and the consumer has the right to use or cede an existing policy instead of taking out a new policy.

Protection when making a loan application

Contracts must be in simple language, available in at least two languages and consumers must receive a copy.

Consumers are entitled to a reason when credit is refused.

All credit providers must assess whether a consumer can afford the loan, and all loans must be recorded on a register so that a consumer will not become over-indebted.

Reckless lending

Any credit provider that gives credit without considering whether a client can afford to repay the loan may be guilty of reckless lending. There could be severe penalties, and the credit provider may even lose the right to recover the debt.

A consumer will not be protected if they do not answer questions fully and honestly in the loan application process, for example, about existing debts and expenses. In such cases, the credit grantor will not be guilty of reckless lending.

Debt counselling

When you are in trouble with repaying debt, contact the creditors immediately in order to make an acceptable arrangement.

When a consumer cannot pay their debts, they will have the right to approach a debt counsellor for assistance. The counsellor will help the consumer to restructure or rearrange their debt repayments if the consumer is deemed to be over-indebted – this arrangement can be made an order of court.

Debt counsellors must be registered with the National Credit Regulator and do charge for their services (there are guidelines as to what these fees are). Interest continues to be charged on the debt.

Consumers should make sure that they understand exactly what will happen under counselling and should know upfront what the charges and payments will be.

Once a consumer has signed for debt counselling, this is noted on the credit bureau's consumer profile, and they are not allowed to obtain further credit until the counselling process is finalised or withdrawn.

Debt counsellors also take ownership of property in some instances, and consumers lose their assets if they are unable to stick to an agreement. ***(See pg 810: Using a debt counsellor)***

Administration order

If you are unable to repay your debts and have no assets to sell, you can apply to a court to be put under administration. This means that a court will appoint someone (an administrator) to run your financial affairs until your debts are paid.

The administrator will receive your wages/salary, give you a basic amount to live on, and then use the rest to pay back your creditors. You will be charged up to 12.5% of the amount paid to your creditors.

Once you are under administration, you will not be able to apply for credit for the next 10 years, and your creditors will only be paid a portion of your deductions once every three months.

If you are already under administration and you want to rescind (cancel) it, you have to apply to the same court where the administration order was granted. If the administrator cooperates, a 74Q document is issued to you. You submit this document to the credit bureaus for removal of the notice.

If you get no cooperation from the administrator, you need to take it upon yourself to rescind the administration order and remove it from your records. To do so, you need to compile an affidavit in which you have to convince the magistrate that you have good reason to set aside the administration order and still maintain the payments to the creditors.

The most popular and acceptable reason would be to show that your financial position has since improved. Drafting the affidavit can be a complex process, so you might want to consider asking a professional to assist you. The next step will be to serve the affidavit to the clerk of the court (who will give you a court date), the administrator and your creditors. You then argue your case in front of a magistrate, and if successful, the administration order will be removed from your credit record within 20 days. ***(See pg 808: Being under administration)***

Role of credit bureaus

If you do not meet your credit obligations, your creditors could have you blacklisted by a credit bureau. Blacklisting means that negative information has been placed on your credit profile. You can check your credit status online at a number of different websites including: https://mycreditstatus.co.za; https://www.mycreditcheck.co.za/

All credit bureaus must be registered with and submit reports to the National Credit Regulator. They must ensure that data is accurate and that inaccurate information is immediately removed without cost to the consumer after the consumer has lodged a complaint.

The NCA regulations determine how long information should remain on a consumer's profile ***(See Table below)***. Every person is entitled to receive one free copy of their credit record each year.

CATEGORY	DESCRIPTION	PERIOD INFORMATION IS RETAINED ON THE BUREAU
1. ENQUIRIES	Enquiries made on consumer's record	2 years
2. PAYMENT PROFILE	Factual information about the payment record/profile of a consumer	5 years
3. ADVERSE INFORMATION	Negative information about a consumer's default on payments	1 year
4. DEBT RESTRUCTURING	An agreement where debts are restructured	Until a clearance certificate is issued (when all payments are settled as agreed)
5. JUDGEMENTS		The earlier of 5 years or when the judgement is rescinded/the creditor abandons the judgement in special circumstances
6. ADMINISTRATION ORDERS		The earlier of 10 years or when the order is rescinded by a court
7. SEQUESTRATIONS		The earlier of 10 years or when a rehabilitation order is granted by a court

Where can consumers lodge a complaint?

The Act encourages consumers to resolve their complaints directly with the company and, failing that, to use "alternative dispute resolution" mechanisms such as ombuds offices.

If the consumer has tried to resolve the complaint with the company and they do not give them the required response, then you can help the consumer contact the following offices:

FOR ANY COMPLAINT ABOUT A BANK

The Ombudsman for Banking Services

- Tel: 0860 800900
- Email: info@obssa.co.za
- Website: https://www.obssa.co.za/resolving-complaints/make-a-complaint/

FOR ANY NON-BANK CREDIT, CREDIT BUREAU OR DEBT COUNSELING COMPLAINT

Credit Ombud

- Tel: 0860 662 837
- Fax: 011-781 0589
- Email: info@ndma.org.za
- Website: https://www.creditombud.org.za/complaints-process/

FOR ANY COMPLAINTS ABOUT DEBT COUNSELLORS/DEBT COUNSELLING

Before contacting the credit ombud about a credit bureau complaint, contact the credit bureau first. The four major credit bureaus are:

Compuscan

- Tel: 021 888 6000
- Website: https://nca.co.za/thanks-for-getting-in-contact/39429/compuscan/

Experian

- Tel: 0861 105 665
- Website: www.experian.co.za

Transunion ITC

- Tel: 0861 482 482
- Website: www.transunion.co.za

XDS

- Tel: 011 645 91000
- Website: www.xds.co.za

If you are unhappy with the outcome of the above, go to the National Credit Regulator(NCR)

- Tel: 0860 627 627
- Website: www.ncr.org.za

Consumer rights under the Consumer Protection Act, 2008 (CPA)

The CPA came into effect on 1 April 2011. It sets out what the law is when consumers buy goods and/or services for cash or sign fixed-term contracts. It also provides for the establishment of the National Consumer Commission (NCC), which oversees compliance with the Act by companies and service providers.

When you assist a consumer, always check the date that the contract was signed. To be able to use these laws, the contract will have to be signed on or after 1 June 2007 (NCA) and 1 April 2011 (CPA). For consumers, the CPA means that there is guaranteed respect and fairness when they buy goods or services, have repairs done, enter into gym contracts, or buy on auction. Consumers can now insist on a pre-quote for repairs and not pay for shoddy work, return defective goods, and have goods replaced if they are repaired and remain defective. Consumers can even stop those unwanted daily calls offering loans, cellphones or insurance.

And when they do not get the respect and fairness that the Act requires, consumers now have access to numerous free complaints mechanisms, from existing and possibly new ombuds offices, to the new Consumer Commission, which is established in terms of the Act to oversee compliance with the CPA (similarly as the National Credit Regulator oversees the National Credit Act). Consumers will also, in some cases, be able to have their cases referred to the National Consumer Tribunal, which will hear cases in terms of breaches of both the consumer laws.

In this section, some of the key rights and remedies that the Act provides to consumers are discussed. The Act is detailed and sometimes complicated, as with all laws, so if you have a specific issue, you may need to read the law itself to understand exactly what the rights and remedies are in a particular situation.

The right to privacy

RESTRICTING UNWANTED COMMUNICATIONS - AN 'OPT-OUT' REGISTER

Consumers have the right to 'opt-out' or refuse to receive unwanted sms's, telephone calls or correspondence relating to the marketing of products, by registering a 'pre-emptive block' on an opt-out register which will be overseen by the Consumer Commission.

Once a person has registered, it is the responsibility of companies to ensure that these consumers are not contacted for marketing purposes.

Currently, the Direct Marketing Association does have a similar register where consumers can opt-out. View this at: www.dmasa.org

PROTECTING PERSONAL INFORMATION - THE PROTECTION OF PRIVATE INFORMATION ACT (POPI)

The *Protection of Personal Information Act* (POPIA) aims to protect the personal information of consumers. It sets out the minimum requirements regarding accessing and processing anyone's personal information.

HOW DOES THE POPI ACT ADD TO THE PROTECTION PROVIDED TO CONSUMERS BY THE CONSUMER PROTECTION ACT?

Businesses and government bodies must comply with the law in terms of how they collect, use, store or share a person's personal information.

For example, during the Hands Off Our Grants campaign, it appeared that the re-registration of grant beneficiaries in 2012, using biometric processes, gave CPS and Net1 access to personal information collected on behalf of SASSA. Access to people's personal and confidential information was used to enable unlawful deductions from social grants to be made without the signed permission of the beneficiaries.

If a consumer believes their rights regarding their personal information have been abused, they can make a complaint to the Information Regulator, and it will be able to take action on behalf of their behalf. Alternatively, the consumer can sue for damages in a civil claim.

- If you want to find out more about how to make a complaint, follow the link: https://inforegulator.org.za/complaints/ and then follow the instructions.

- Or fill in the prescribed **POPIA Form 5** at: https://inforegulator.org.za/wp-content/uploads/2020/07/FORM-5-COMPLAINT-REGARDING-INTERFERENCE-WITH-THE-PROTECTION-OF-AN-ADJUDICATOR.pdf
    - Send it to POPIAComplaints@inforegulator.org.za

The right to choose (including the right to choose to cancel)

FIXED-TERM CONTRACTS

Consumers can cancel a fixed-term contract (for example, gym, cellphone, subscription contracts) at the end of the term. The supplier must notify them between 40 to 80 days before the term ends, of the date of termination and of any changes that would apply if they renewed the contract. The onus is then on the consumer to tell the supplier to terminate the agreement on the expiry date or agree to renew the contract on the new terms, failing which the contract will continue on a month-on-month basis on the new terms.

So, it is important that consumers keep a record of when the contract ends so that they are in control of what happens at the end of the term.

THE COOLING-OFF PERIOD AND CANCELLATIONS FROM DIRECT MARKETING

Consumers can also cancel a contract before the term has expired by giving 20 business days' notice, but will be liable for "a reasonable cancellation penalty".

Consumers can cancel an agreement which they entered into as a result of direct marketing, within FIVE BUSINESS DAYS without penalty or charges with no explanation needed. If they have paid, they must be refunded in full within 15 business days of cancelling the agreement.

CANCELLING ADVANCE BOOKINGS OR ORDERS

- When making advance reservations, e.g. airlines/accommodation or placing orders in advance, the supplier has the right to require a deposit depending on the nature of the specific circumstances.
- Consumers do have the right to cancel such booking or order and will be liable for a "reasonable charge" depending on general industry practices, the length of time of the cancellation before the event, and whether an alternative consumer can be found. No charge may apply if the cancellation is due to death or hospitalisation.
- The above does not apply to specially made orders.

KEEPING AND NOT PAYING FOR UNSOLICITED GOODS AND SERVICE

Have you ever received books or Christmas cards in the post with an invoice when you never ordered these? Or had a door salesman leave his goods with you to test out, and the company then sent you an invoice even though you never confirmed that you wanted to buy the goods?

To discourage these unethical business practices, the Act allows consumers to have unsolicited (not asked for) goods returned at the supplier's risk and expense. This includes where they received a greater quantity than they asked for (a consumer needs to pay only for what they asked).

However, goods delivered as a result of a genuine mistake are not unsolicited goods.

Where the supplier does not collect the goods within 20 business days of receipt by the consumer or the supplier being notified to collect the goods, the consumer can keep the unsolicited goods.

NOT PAYING FOR DAMAGING GOODS ON DISPLAY

A consumer is not liable for loss or damage to goods displayed by the supplier unless the consumer was grossly negligent or reckless, or their behaviour was malicious or done with criminal intent.

GETTING QUOTES FOR REPAIRS AND MAINTENANCE

A supplier must provide a consumer with a cost estimate, without charge, for repair or maintenance work unless the consumer turns down the offer of an estimate and authorizes the work or gives the go-ahead for charges up to a specified maximum. It is in the consumer's interest to insist on receiving a written estimate.

A supplier may not charge more than the estimate unless they have told the consumer of the estimated additional costs and they have approved this. A consumer also does not have to pay for services done without their approval.

Every new or reconditioned part that is installed during a repair or maintenance contract must have a warranty of a minimum of 3 months.

The right to good quality and safety

THE RIGHT TO ONLY PAY FOR QUALITY SERVICE AND REPAIRS

Consumers have the right to have services and repairs done "in a manner and quality that a person is generally entitled to expect", including within good time and

with proper notice of “unavoidable” delays. A consumer also has the right to expect their property to be returned in at least as good a condition as before.

Where the service or repair is faulty and not up to standard, the consumer has the choice to either insist that the mistake be fixed or that they be refunded a reasonable part of the price paid (“reasonable” being linked to the extent of the failure).

THE RIGHT TO GOOD QUALITY PRODUCTS AND TO RETURN FAULTY GOODS

Consumers have the right to buy and receive goods that are good quality, in good working order and free of faults, which will last for a reasonable time, and are suitable for their intended purpose - UNLESS the consumer was told of a specific poor condition and knowing this still accepted the goods.

Where the goods do not meet the required standards, a consumer has the right to return the goods within SIX MONTHS of purchase and have them replaced, repaired or get a refund.

If the goods are repaired, and a defect appears within a further 3 months, the supplier must replace or refund. In other words, it cannot go for repairs twice.

WARNINGS OF RISK AND CLAIMS FOR INJURIES OR LOSS CAUSED BY UNSAFE OR DEFECTIVE GOODS

Suppliers are required to inform consumers where goods may pose a risk (as specified in the Act), including one of which a consumer may not be expected to be aware. Packagers of hazardous or unsafe goods must also provide notices, including instructions for safe handling and use.

The Consumer Commission has to oversee this so as to reduce the risk of hazardous or defective goods and substances. This oversight role includes investigating and recalling products.

A consumer can claim damages from either the producer, the importer, the distributor or the retailer of a product where the consumer has suffered harm as a result of the supply of unsafe goods, product failure, defect, hazard or failure to give adequate warnings relating to the product. “Harm” includes death, injury, illness or loss of or damage to property. The Act also allows for the consumer to claim for indirect financial loss suffered, for example, loss of income as a result of the injury.

The right to responsible marketing

OVERSELLING AND OVERBOOKING

A supplier may not accept payment for goods or services if they do not intend to supply the goods or provide the service offered.

Where a supplier commits to supplying goods or services or accepts a reservation for a specific time and date, for example, an airline ticket, the supplier is penalized if they fail to deliver on their agreement. They must then refund the consumer, with interest and compensation for costs directly linked to the breach. This does not apply if the supplier offered comparable (similar) goods or services and the consumer either accepts this or unreasonably turns it down. It would also not apply if the breach was due to circumstances beyond the supplier's control and the supplier took reasonable steps to inform the consumer.

TRADE COUPONS, LOYALTY PROGRAMMES AND PROMOTIONAL COMPETITIONS

The Act sets out how promotional competitions, trade coupons, and loyalty programmes must be run. The offer must be genuine and available as advertised.

NEGATIVE OPTION MARKETING

A supplier may not create a sale or contract by advising the consumer that they are assumed to have accepted the offer if they do not advise that they are not taking it. Referral selling is also not allowed.

A person may not offer a consumer a rebate or commission on a purchase on condition that they assist in getting further sales, for example, by supplying the names of other consumers.

CATALOGUE MARKETING – GETTING WHAT IS ORDERED

When a consumer buys something without having an opportunity to inspect the goods, for example, by telephone or from a catalogue, they can refuse to accept the goods if they do not match the description in “all material respects and characteristics”.

The right to information

PRICES OF GOODS AND SERVICES MUST BE DISCLOSED, AND A WRITTEN RECORD GIVEN

Prices of goods and services must be given, and in the case of goods, the price must be attached to the goods. A supplier may not charge more than the displayed price (unless it is an obvious mistake and the mistake is fixed or the consumer is informed). Where two different prices are displayed, the lower price must be charged (unless one price is completely hidden by the other).

A supplier must provide a written record of each item sold or service provided with details as required in the Act (for example, name, VAT number, address, date, description, unit price, quantity, and total price).

How can consumers lodge a complaint?

As with the *National Credit Act*, the *Consumer Protection Act* encourages consumers to first try to resolve their disputes with the company or service provider concerned. If they are not successful they can lodge a complaint with the National Consumer Commission on their website using their e-Service portal.

These are the steps to make a complaint to the National Consumer Commission:

1. Go to the NCC website complaints portal: https://eservice.thencc.org.za/Complaints/Complaintsinformation
2. Register and create a profile on the portal.
3. File the complaint giving as many details as possible, including the date of transaction or purchase, the date on which the dispute arose, the proof of purchase, steps taken to resolve the matter, and any other communication with the supplier.

After filing a complaint, the consumer will be kept up to date through email notifications each time their complaint has been escalated until the complaint is resolved.

Consumers can also lodge complaints with the provincial Consumer Affairs offices. Use this link for contact details of different provinces: https://www.tourism.gov.za/AboutNDT/ProvincialConsumerAffairs/Pages/ProvincialConsumerAffairs.aspxh

Repaying debt

Legal consequences of defaulting on debt obligations

If a consumer has any problems repaying their debts, the first thing to do is to contact the creditors immediately. If they do not make an alternative payment arrangement with the creditor, the creditor can hand the matter over to a debt collector or attorney who will take legal action against the consumer to recover the money owed. If this happens, the consumer will end up paying much more for the debt because of extra interest and legal charges, and will be worse off than before.

For many consumers, the experience of receiving legal letters and documents and visits from sheriffs and debt collectors is frightening, confusing and humiliating. Below is a process that is usually followed when a consumer fails to pay a debt or to make an arrangement with a creditor.

STEPS TAKEN FOR REPAYING DEBT

STEP 1: PHONE CALLS AND LETTERS OF DEMAND

Some companies will phone a consumer when they default – this is the best option for the consumer who should take advantage of this and offer to pay as much as they can. Where there is an agreement, the consumer should confirm any telephonic agreement in writing and keep copies with fax coversheets as proof.

Also, they should make sure that they pay what they promise to pay as this will avoid their account being collected through a court process.

A consumer may instead or also receive a letter demanding payment. The *National Credit Act* now makes this letter (called a Section 129 Letter) compulsory before a creditor can take any legal action. The letter also has to advise that the consumer has the right to approach a debt counselor for help if the consumer is over-indebted.

When a consumer receives a letter of demand, they should then either:

- Contact the creditor and make an arrangement to pay, or
- If they cannot cope with all the debt that they have, contact a debt counsellor

If the consumer disagrees with the claim or the amount that they say is owed, the consumer must act immediately to contact the creditor, confirm

what the consumer disputes in writing, and ask for proof of the debt/balance of the debt.

If the consumer is still unhappy after negotiating with the creditor, refer the complaint to the next level:

- If it is a Bank, contact the Ombudsman for Banking Services
- If it is any other creditor, contact the Credit Ombud or the National Credit Regulator

NOTE

The creditor must wait 10 working days from the date that they send a letter of demand before they can take the legal process further.

STEP 2: SIGNING SECTIONS 57 OR 58 DOCUMENTS OR RECEIVING A SUMMONS

If the consumer does not respond to the letter of demand, the creditor will usually send an agent to the consumer's home or workplace to ask them to sign either:

- A Section 57 Acknowledgement of Debt where the consumer signs that they owe the money (the amount will be stated), and that they promise to pay monthly instalments in that amount. They also sign that if they default again (do not pay) on any instalment as agreed, the creditor can take the documents signed to court, have a judgement taken against the consumer, and get an emolument attachment order against the consumer's salary (see below);

OR

- A Section 58 Consent to Judgment where the consumer agrees that judgement can be taken in court immediately and that a deduction can be made against the consumer's salary.

The difference between a Section 57 and 58 is that with a Section 57 the consumer has a second chance. In other words, there is no judgement if the consumer keeps to the payment arrangement. With a Section 58, the consumer agrees to judgement immediately.

After sending a letter of demand, instead of sending an agent to visit the consumer to sign a Section 57 or Section 58, the debt collector/attorney can get the Sheriff of the Court to serve a summons on the consumer – usually at

home or work or at the address the consumer provided in the original contract (this is called the “domicilium” address). If the consumer receives a summons, they have 5 working days to advise in writing that they want to defend the case.

If the consumer does owe the money, there is no point in defending the case. The best way to respond is to call the attorney and make an arrangement to pay them monthly instalments. Suggest that they do not take judgement and ensure that the consumer keeps to this agreement. Also put what you have agreed in writing and send them a copy (keep proof).

If the consumer does not owe the money or does not agree with the amount that they say is owed, the consumer should immediately contact the attorney and advise in writing that they dispute the claim or the amount.

Try to get this dispute resolved without going to court, but if the attorney is not cooperative, the consumer must give notice that they want to defend the case. A Notice of Intention to Defend is attached to the back of the summons and must be filled in by the consumer and taken to the address provided. Once they have signed the receipt, they must take the original and a copy signed by the creditor to the Clerk of the Court.

At this stage, it will be necessary to have an attorney to assist, which can be expensive. Therefore, it is always best to first try and negotiate a settlement or an agreement.

Judgements and other court orders

If the consumer signs a Section 57 and then defaults (doesn’t pay in terms of the agreement), signs a Section 58, or if the consumer does not respond to a summons, the court will order judgement against the consumer for the amount owing plus interest and costs. The court can also award any of the following orders relating to how the creditor will recover the money from the consumer.

A WARRANT OF EXECUTION AGAINST THE CONSUMER’S PROPERTY

A sheriff will be sent to the consumer’s house to list all the goods that they own (for example, furniture, kitchen equipment, motor car, etc). These goods, up to the amount owed plus costs, will then be sold on auction unless the consumer has the money demanded, and can pay it all. The sheriff may not attach beds, bedding and clothes.

After the items are sold and the sheriff is paid, the balance is sent to the creditor. If the sale does not provide enough to cover the debt, and the consumer owns a home, this can also then be sold in execution. If there is a balance still owing after the sale, the creditor can ask the court for an emolument (salary) attachment order as well.

AN EMOLUMENTS (SALARY) ATTACHMENT ORDER

This is one of the most common ways that a debt is collected from the consumer after judgement is granted. Here, the court orders the consumer's employer to deduct the debt in specified instalments from the consumer's salary. It is sometimes incorrectly called a garnishee order. It is also unlawful for the employer to refuse to deduct the money because the instruction comes from the court.

A GARNISHEE ORDER

Here, the court orders someone (usually the bank) who owes money to the consumer to pay the creditor instead of the consumer. So, for example, if the consumer had R5 000 savings in their bank account and owed the creditor R3 000, the court would order the Bank to pay the R3 000 from the consumer's bank account to the creditor.

THE COSTS OF REPAYING DEBTS IN TERMS OF A JUDGMENT

It can cost a lot if an account is handed over to a legal collections department, especially for debt happening before the *National Credit Act*. Not only does the consumer have to pay the original debt, but they also have to pay extra interest (it is taking them longer to repay, and interest is charged every day), extra charges to lawyers, debt collectors, sheriffs and even to the employer if they are involved in paying money to your creditors.

Before the *National Credit Act*, this meant that a small debt could end up being a huge burden. Even under the NCA, a consumer can pay much more than they signed the contract for.

EXAMPLE

This is an example of the costs and interest charged on a R4 000 loan taken in May 2007 (in other words, before the NCA), where judgement was taken for R7 200 and where the court ordered interest at 15.5% per year, and a monthly deduction from an emolument attachment order of R600 per month.

Some attorneys will charge more than the above, others charge additional costs for every telephone call and letter on the file. This can also add up to a lot extra (beware that you are not overcharged by the attorneys – this can happen!)

Note also that:

- *If the interest rate was higher e.g. 22% or 30%, you would end up paying much more in interest and other costs and for a longer time.*
- *If the monthly instalment that you pay is a small amount, the interest will also be higher as interest is charged on the balance at any point in time.*

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When a warrant of execution is issued, most often, the Sheriff's auction will result in the goods being sold for much less than they are worth, and after the Sheriff takes his fees, the consumer could still end up owing quite a lot of money AND be without the furniture and other items sold.

So, it is in the consumer's interest to contact the creditor or attorney as soon as they receive notice of anything and make arrangements to pay.

DEBT RELIEF BILL

The *Debt Relief Bill* is aimed at implementing debt relief measures for certain qualifying creditors and trying to reduce the problems linked to households being in too much debt. For example, a qualifying person could be someone who has been retrenched or doesn't have work but needs to pay off debt. it includes debt

forgiveness for struggling consumers. Recommendations for debt relief under the *National Credit Act* included:

- Prescribed debts (If the last time that a consumer paid any money on the account is more than 3 years ago)
- Social grant beneficiaries
- Loans to students under the NSFAS Scheme
- Garnishee orders
- Mis-selling of insurance
- Reckless lending

The proposals for debt relief have not yet been finalised by Parliament.

Consumer rights and remedies in the legal process

There are many stories about consumers who have been badly treated by debt collectors who threaten them if they do not pay, about deductions from salaries that leave a consumer with no money to live on, and Sheriffs selling goods yet consumers still having to pay most of the debt. This section provides some general guidelines and tells you what remedies consumers have in these and other situations.

General guidelines for consumers

If a consumer owes money, they should always make some payment, however small and as much as they can. Never pay nothing. The more you pay, the less interest you will pay in the long run.

Do not have the attitude that the balance is wrong so I won't pay anything. If you owe money, you will be charged interest every day until the debt is settled in full.

Never sign any documents in blank. If a consumer is asked to sign a Section 57 or 58, make sure that all the information is filled in, including the amount due, the interest rate to be charged, the amount of the monthly instalment, when they must start paying and how.

Never sign a document that you do not agree with. What a person signs is binding and will have consequences. Always get a copy of the document signed as this is proof of the contract and helps the consumer to know what their obligations are.

Complain if there is a problem and get help if you cannot negotiate yourself.

Contact the credit provider and lawyer before they take any legal action (because of the costs), and always keep a record of who you spoke to, what time and what was discussed. Most importantly, record what was said in writing and send a letter or email to them (keep proof of this as you may need it in the future to solve the case).

Defences – Prescription and in duplum

Consumers have two defences in common law that they can use if relevant.

1. **PRESCRIPTION**

   If the last time that a consumer paid any money on the account is more than 3 years ago, and they have not admitted that they owe the money, the consumer can claim that the debt has *prescribed*. This means that the creditor has the right to ask for the money, but the consumer can raise the defence of prescription and refuse to pay the remaining balance on the debt.

   So, if a consumer receives a call or a letter on an old debt, always ask for a full statement to see when the last payment was made. Also, ensure that the consumer does not pay any money until you have investigated if prescription applies – if they pay even R50, prescription will be "interrupted", and another 3 years will pass before the claim prescribes.

NOTE

Prescription does not apply if judgement has been taken for the debt.

   If a claim has prescribed, the negative listing must be removed from the credit bureau records in terms of the *National Credit Act*.

2. **IN DUPLUM**

   If the interest on an account is more than the amount owing at the time that the consumer defaults, they can claim that some interest must be written off in terms of the *in duplum principle* that the interest may not be more than double the outstanding amount charged at the time of default.

   So if a consumer takes a loan of R5 000 and defaults when the balance is R4 000, then the balance on this account may never be more than R8 000 (double R4 000). Under the common law (which applies to credit before the *National Credit Act*, i.e.,

before 1 June 2007), interest can continue to be charged on the account so long as the balance never goes above R8 000.

When a judgement is taken, *in duplum* starts to be calculated again. For example, if judgement was taken at R7 200, the balance may accumulate again until the consumer defaults, and then the *in duplum* rule will mean double the balance at the time of this new default.

The common law *in duplum* rule was not much help to consumers, but you should look out for a balance that is over the *in duplum* maximum amount, so you can at least help to get the balance reduced.

Under the *National Credit Act*, the *in duplum* principle has been made part of the Act, and the new *in duplum* is much stricter. Now, when a consumer *defaults*, *the consumer may not be charged more than double the balance* at the time of the default. For example, if the balance is R4 000 at the time of default, the consumer only needs to pay R8 000 more (*this includes interest*, *legal fees*, *insurance and any other charges*). This is a big help in reducing the final amount that the consumer must repay, and it applies even if judgement has been taken.

IMPORTANT

When you are helping a consumer with an account, always ask for a full statement from the beginning and check for in duplum and prescription.

Debt collector's rules

Credit providers can use debt collectors to recover debts from consumers. Debt collectors are regulated by the *Debt Collector's Act (No. 114 of 1998)*, which provides for the exercise of control over debt collectors and legalizes the recovery of fees or remuneration by registered debt collectors. The overall goal of the Act is to monitor the conduct and professionalism of debt collectors and promote a culture of good governance within the profession. This will contribute to protecting consumers as well as creditors. The Council for Debt Collectors exercises control over debt collectors.

If a debt collector charges for their services, they must be registered with the Debt Collectors Council, and they are not allowed to:

- Use force or threaten to use force against the consumer or their family
- Physically threaten the consumer or their family

- Give or threaten to give information to the consumer's employer that may affect their opportunities as an employee
- Serve any false legal documents
- Present themselves as police officers, sheriffs or officers of the court
- Spread, or threaten to spread any false information about the consumer's credit worthiness
- Charge more than the tariff of fees which is set down by the Council

Debt collectors are allowed to charge for letters and notices that they send out to people. These costs usually have to be paid for by the debtor (the person who owes the money). Debt collectors are not allowed to issue a summons- this can only be issued by a court.

ADMISSION OF LIABILITY

To get a consumer to pay their debt, a debt collector may get the consumer to sign a form called an Admission of Liability. If the consumer signs this form, it means they agree that the money is now owed to the debt-collecting agency and NOT to the creditor.

By signing this form, the consumer also agrees to pay all the extra administrative charges of the debt-collecting agency. The original amount that was owed to the creditor will now increase because of these add-on charges.

If the consumer signs this form and then refuses to pay the agency, the debt-collector can refer the debt to their lawyers. The consumer will then have to pay the lawyers the original debt, the debt collector's fee and the lawyer's costs. The consequences of signing such a form are, therefore, very serious.

If a consumer is finding it difficult to repay the debt, they should contact a debt counsellor who will work with the consumer and the credit provider to try and reach an agreement on how the debt should be repaid. This allows the consumer to pay back the money through an agreed legal process, rather than wait until there are more serious consequences - like being called to court or having their goods repossessed. ***(See pg 786: Debt counselling)***

THE DEBT COLLECTOR'S ACT

The following are important provisions in the *Debt Collector's Act*:

- Establishment of a Council for Debt Collectors, which is responsible for monitoring debt collectors and their work
- Registration as a debt collector – No one, except for a lawyer, can act as a debt collector unless they are registered as a debt collector under the Act.

There is a prescribed code of conduct for debt collectors that is published in the government gazette.

- Complaints against debt collectors can be referred to the Council, which can withdraw a debt collector's registration if they are found guilty of improper conduct. An application can also be made to the court to deregister a debt collector if they don't comply with the Act.
- Debt collectors are only allowed to collect the following:
    - The amount of the original debt that wasn't paid, plus interest based on legal interest rates, for the period during which the debt wasn't paid
    - Necessary expenses and fees that are prescribed by the minister in the government gazette
- A debt collector must open a separate trust account at a bank, and any money deposited into this account must be dealt with according to specific procedures in section 20 of the Act
- If you are unhappy with the way that a debt collector has handled a matter, or if you believe that they are charging too much, complain to the Council for Debt Collectors on 012 804 9808/8483 or email info@cfdc.org.za or visit their website: https://www.councilsmart.org.za/create-complaint

For more information on the Council for Debt Collectors and a list of registered debt collectors, go to their website: www.cfdc.org.za

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When and how to have a judgement rescinded

A consumer can apply to court to have a judgement rescinded (set aside), either if it was granted in error or if the debt has been settled.

The court will only rescind a judgement in error if:

- The judgement was given without the consumer being present at court (i.e. the judgement was by default), and
- The consumer applies for the rescission within twenty (20) days after they become aware that the judgement was taken, and
- They want to defend the claim and can set out in an affidavit why they did not defend the case originally and what their defence against the claim is

If the consumer has settled their debt, the application to court must include a letter from the creditor confirming that the debt is settled and they have no objection to the consumer having the judgement rescinded.

Usually, applications to court are done by an attorney. If the consumer wants to save on these costs, they can also do it by themselves.

Applying to court to have an emolument (salary) attachment order rescinded or amended

Emolument (salary/wages) attachment orders are sometimes obtained unlawfully, for example, if the consumer signed an agreement to have this deduction from their salary at the same time as they applied for the loan. The court order can also be unfair if the consumer cannot afford the instalment.

The consumer can then apply to court to have the order set aside or amended (changed). The application will need to have a covering document called a Notice of Motion where the consumer states what they want, and they will need to submit an affidavit. This will set out the details of their case. If the consumer cannot afford the payments, they must state what they can afford to pay each month and must give full details of their income and expenses with proof attached (for example, account statements, rent receipts, salary advice). The court will then look at this and decide if the consumer's offer is reasonable.

It is in the consumer's interest to pay as much as possible as the smaller the instalment is, the more the consumer will pay in interest.

Applying to court to stop the sale of your goods

If a Sheriff appears at the consumer's home after judgement and attaches their moveable property in order to sell it on auction, the consumer can apply to Court to have the sale in execution suspended.

The court will only order this if the consumer can prove that they can afford to pay reasonable regular instalments and/or agree to an emolument attachment order being made against their salary. Again, the consumer will need to make these regular payments or the order will be reinstated, and the goods will then be sold.

If the attachment is unlawful or incorrect, the consumer can also apply to have the order rescinded.

Attorney's fees and charges

There are many complaints from consumers that attorney's fees are very high, and they do not know how to check what they can charge or how to challenge them. Attorneys can also only charge fees according to the tariff set down in the Magistrate's Court Rules. There are two tariffs for the Magistrate's Court: a standard tariff and a higher tariff, which only applies if the consumer agrees.

When the consumer signs a contract, there will usually be a clause that says that if the consumer defaults, the matter will be handed over to attorneys, and the consumer will have to pay the attorney's fees "on an attorney and client" scale. This allows the attorney to charge for more items, but the amount that they charge is still controlled.

If you think that the consumer may be overcharged, ask for a full breakdown of the costs statement, and if you are not happy, ask for the Bill to be taxed at court (negotiate as the consumer may have to pay for this).

It is difficult for a consumer to act on their own when challenging the legal fees because this requires expert knowledge. You can report the matter to the Law Society, which is a society for lawyers in the different provinces, but they are not as independent as the ombuds offices are – the best thing is to find a free counsellor or advice office or law clinic to take on the case.

REMEMBER

With the in duplum principle of the National Credit Acton credit granted from 1 June 2007, legal fees are included in the calculations so they are more controlled than before.

Being under administration

One of the major problems with debt is that there are many people who advertise and offer consumers a way to get out of debt, but these remedies often mean that the consumer pays for these services and ends up with more debt than before.

Many consumers pay an administrator an amount each month so that they can distribute the money to different creditors, and this can add to the debt.

Administrators charge for their services, usually more than R1 000, to get the court order. They also take at least 12.5% of each instalment that is paid for their fees.

Usually, the instalment that the consumer pays is much less than the total instalments they were required to pay on the debts combined, so each creditor receives much less than the original agreed instalment. However, the consumer continues to pay interest on each account, and the administrator only distributes money once every three months, so often, the balance on the debts may even go up instead of down because the creditor is receiving less than the interest that is being charged.

Some administrators also do not pay over on time; others do not pay over the money received at all.

Administrators are supposed to prepare distribution accounts every quarter, but most often, consumers do not receive copies, so they do not know what the charges are or how much each creditor is receiving. One case study showed that a consumer had to pay R49 050 on a debt that would have been R15 807 if the consumer had not paid the debt through the administrator.

If a consumer is in a situation where they have relied on one of these for-profit debt intermediators, as a paralegal, you should ask for all the distribution accounts, contact the creditors to see if the consumer can make arrangements to pay them directly, and then go to court to have the administration order rescinded. If necessary, contact a consumer advice office or not-for-profit debt counsellor for help.

Using a debt counsellor

The *National Credit Act* encourages consumers who are "over-indebted" to approach a debt counsellor or dispute resolution agent for help in developing a repayment plan for all debts to be repaid within a reasonable period. A debt counsellor will not negotiate any reduction in the amounts owed, but they can lower the overall monthly payment.

Consumers can also approach a creditor for help in developing such an arrangement on an informal basis, or the court may refer the consumer to a debt counsellor if the consumer appears about a single debt.

It is important that the person whom the consumer approaches has a good reputation, tells the consumer upfront what they charge, and that the charges are reasonable. You may find

some NGOs that do not charge or charge very little and are committed to helping consumers. Some creditors are looking to help their clients in a similar way and will not charge for their services.

With debt counsellors, the process is formal and is set out in the *National Credit Act*.

The consumer will complete forms that will include details and proof of all their debts, as well as their income and other expenses. They will look at whether any of the debts were granted "recklessly", for example, if at the time that the consumer applied for credit, the creditor properly assessed that the consumer could afford to repay the loan (the court can order a remedy if the loan was granted recklessly, but the consumer would have to have given full disclosure of all their debts and expenses or else no remedy is available). The counsellor will work out a plan as to how the debts will be settled and what the monthly repayment will be. If the repayment plan is accepted, it is made an order of court. If the creditors do not accept the proposed plan, they can oppose the plan, and the court will then decide whether to grant the order or not. Once the order is granted, the consumer's monthly payments are paid either directly by the consumer to the creditors or, most often, to a payment distribution agency that also charges for their services and distributes the portions to the creditors. The arrangement will be listed on the credit bureaus, and the consumer will not be allowed to take further credit until they have paid off their debts.

If you need a debt counsellor or if you have a debt counsellor that you are not happy with and need to complain about, contact:

The National Debt Mediator's Association via their website: www.ndma.org.za or on their helpline: 086 111 6362

Handing back (surrendering) goods bought on credit

The *National Credit Act* also provides extra protection for consumers who have purchased goods on credit and default on paying their instalments or who want to cancel the agreement.

For consumers with credit agreements signed from 1 June 2007, consumers can now return the goods to the credit provider within 5 days after they have given written notice that they are canceling the agreement. The credit provider must then give the consumer a written estimate of the value of the goods. They can then either keep the goods and continue with the contract or allow the creditor to sell the goods for the best possible price. Once the goods are sold, the credit provider must give the consumer written notice

with details of the sale and any amount that they may owe if there is a shortfall. This shortfall must be paid or the creditor can obtain a judgement against the consumer for the balance outstanding.

If the consumer is unhappy about the sale, they should approach the creditor, or get the help of a mediator or approach the Provincial Consumer Court.

Microlending and microlenders

What is microlending?

Microlending is an agreement between two people in terms of which one person agrees to lend money to another person. The person who is lending the money (the lender) will usually charge an extra amount called interest that is added onto the main loan. This is the lender's fee for lending the money.

REGISTRATION OF MICROLENDERS

In terms of the *National Credit Act* (NCA), all microlenders (as credit providers), must be registered with the National Credit Regulator. The NCA controls the amount of interest that microlenders can charge on money that has been borrowed by a consumer and all aspects of microlending. Remember the following when making a loan from a microlender:

- A microlender may not charge an up-front fee with the application, in other words, a fee when the person signs the document.
- A microlender may not keep the identity book, bank card or PIN as a collection method.
- Do not sign a document where there are blank spaces where the microlender can fill in information after you leave the office.
- Do not sign a 'Consent to judgement' form when you take a loan.
- Find out the benefits of any 'membership' fees charged by some microlenders before signing the agreement.

THE CONTRACT/LOAN AGREEMENT WITH A MICROLENDER

A microlending agreement is drawn up when a lender offers to lend a consumer money, and the consumer agrees to accept the terms of the repayment. When the consumer signs the contract they are agreeing to pay back the money and the interest according to the terms in the contract.

The consumer should always keep a copy of the contract and all the forms that have been signed. The contract must include the following information and details:

- The amount of the loan
- The interest rate Amounts repayable
- The number of instalments
- If there is insurance, the type of insurance, the name of the insurer and the amount that may be included
- The period within which the loan must be repaid
- The penalties that will be charged if you miss a repayment (also called defaulting on your payments)

Any amount that is deducted from the loan amount reduces the principal debt.

Insurance

What is insurance?

Insurance is financial protection that people get when they pay a certain amount of money every month to an insurance company. Then, if something is lost or stolen, the insurance company pays the person (also called a claimant) out.

Remember, if a person who is insured does not lose anything, or if their property never gets stolen, or if they never claim from the insurance company, then they cannot claim back the money that has been paid to the insurance company.

There are many different kinds of insurance. It is useful to get a salesperson from a reputable and well-established insurance company to explain what the options are and what would be best for your requirements. Ask the following questions:

- What do I get for the money that I pay every month?
- If I need to get the money back that I have paid, can I get it? All of it? How much? How long will it take?
- Can I afford this insurance?

Life assurance

ASSURANCE is different from INSURANCE because it has to do with **life** instead of **possessions**. Life assurance is a monthly amount paid by someone so that when they die, a certain amount of money will be paid over to the family.

It is not a good idea for someone to cash in their life assurance while they are still alive. If they do this, then the amount that they will be paid will be very small compared to what they contributed every month. The longer the policy continues, the more money will be paid out.

Short-term insurance

Short-term insurance is a policy that can be taken out over a certain period (for example, 10 years). If something happens to the policyholder during that time, then the insurance company pays a set amount to their family. But if the person does not die within that time, then at the end of the time of the policy, the contract with the insurance company is over, and the policyholder CANNOT get any of the money back.

INSURING A MOTOR VEHICLE

Every person who buys a vehicle should make sure that it is insured. Insurance is taken to cover a vehicle in the event of accidental loss, theft or damage. People who take out insurance have to pay the insurance company a certain amount of money each year. Insurance companies provide compensation when people are injured, or their property is damaged.

Insurance companies protecting people against injuries may give cover for medical bills, lost wages, pain and suffering and disfigurement (where a person's body becomes deformed).

If the insured person dies, an insurance company may pay medical and funeral expenses and compensate the people whom the dead person was supporting.

Most motor accident insurance policies provide compensation for injury and death. The Road Accident Fund automatically covers third-party insurance. This does not cover damage to the person's property (including your car). (SeeThird-party claims) Comprehensive insurance is not compulsory, but it will cover you if your car is damaged in a motor accident. Comprehensive insurance gives all the benefits of the balance of third-party (in other words, those costs that are not covered by a third-party claim), fire and theft insurance, as well as cover against damage to the vehicle no matter how the damage to your car was caused. ***(See pg 955: Comprehensive insurance)***

Investment insurance

This kind of insurance is money that you pay to the insurance company every month so that at the end of a specific period of time, the policyholder can be paid out a lump sum of money. Examples of this insurance are **Endowment Policies**.

Retirement annuity

A retirement annuity is money that a person pays to the insurance company which cannot by law be touched until they stop working due to old age (55 years minimum). The amount that is paid out becomes your pension. They can only take a third in a cash lump sum. The rest is used to pay a monthly pension.

Problems

1. Minor entering into a contract

Sizwe is 17 years old. Without telling them that he is under 18, he agrees to buy a music system on credit for R2 000 from Flash Music. He agrees to pay the money over a year. His father does not know that he has bought the music system. Sizwe runs into financial trouble and cannot pay back his monthly account for the music system. Flash Music decides to claim the remaining money from Sizwe's father because Sizwe is a minor.

WHAT DOES THE LAW SAY?

Sizwe is a minor, so he is not bound by the contract. Flash Music cannot sue Sizwe or his father for the debt. Sizwe does not have to pay the remaining money that he owes. But he cannot keep the music system. minor enter into a contract?)

WHAT CAN HE DO?

If Sizwe wants to keep the music system, he must pay the R2 000. If he wants to cancel the contract, he must return the music system and then also get back anything that he has already paid.

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2. Breaking a promise

Jimmy offers to sell Thabo a piece of land for R50 000. Thabo sends Jimmy a letter offering to pay him R50 000 for the piece of land. But when Thabo next sees Jimmy, he finds out that Jimmy has sold the land to someone else for R55 000. Thabo is upset with Jimmy and says he broke the contract between them.

WHAT DOES THE LAW SAY?

Thabo sent an offer to Jimmy to buy his land, but Jimmy does not accept his offer. A contract for the sale of land must be in writing. ***(See pg 779: What are the requirements for a contract?)*** Until there is a written offer and a written acceptance of that offer, there is no contract. In this case, there was no legally binding contract between Jimmy and Thabo.

WHAT CAN THEY DO?

There is nothing that Thabo can do to force Jimmy to sell him the land.

3. Breach of contract

Sarjid agrees to repair the roof of Veronica's house for R20 000. Veronica pays Sarjid a deposit of R5 000. Sarjid does not do the repairs.

WHAT DOES THE LAW SAY?

Veronica can cancel the contract because Sarjid's breach is serious. She can also claim back the R5 000 deposit which she paid. She can also claim damages for any loss she suffers because Sarjid failed to repair the house, for example, if it starts to rain. Because Sarjid has not repaired the leaky roof, the rain damages Veronica's new carpet. The damage to this carpet costs her R5 000 to repair. She can claim this amount from Sarjid as damages.

Veronica can also try and get a court order for specific performance instead of cancelling the contract. In other words she can ask the court to make Sarjid repair her house. ***(See pg 781: What happens if there is a breach of contract?)***

WHAT CAN SHE DO?

Veronica should approach a lawyer to help her try and decide on the best approach. If she wishes to claim for damages, she could sue Sarjid through the Small Claims Court (for amounts up to R20 000 ***(See pg 198: Small Claims Court)***

4. Something goes wrong with goods you have bought

Simon buys a TV set from a shop. As soon as he gets home, he finds that the TV set isn't working. What can he do?

WHAT DOES THE LAW SAY?

The law says that if you buy something that has a fault at the time that you buy it, and neither you nor the seller know about it, then you can get your money back.

WHAT CAN HE DO?

Simon must contact the seller immediately and give the seller all the necessary information, such as the sales receipt, the date that he bought the TV set and a description of what is wrong with the goods. Simon should keep the original documents for himself and give the seller copies.

If the seller refuses to help, send them a letter with the demands. Keep a copy.

If the seller still refuses to help, try contacting any trading affiliation that the store might be registered to (e.g. Furniture Traders Association), before going to the manufacturer.

If that does not work – send a letter to the manufacturer of the product or the headquarters of the chain store. Tell them what has happened and send copies of important documents describing what is wrong with the TV and what Simon wants to be done.

Simon should keep the originals of the documents for himself. If Simon is still not satisfied, get help from one of the consumer protection agencies and organisations like the Consumer Protector or the provincial consumer affairs offices. If you cannot settle the problem in any of these ways, then Simon can take the case to court. Simon should only go to court as a last resort because it can be an expensive process and it can take a long time.

- For claims of up to R20 000, Simon can sue in the Small Claims Court, where no lawyers are allowed to represent him ***(See pg 198: Small Claims Court)***
- For claims of up to R200 000 (District Courts) or R200 000 - R400 000 (Regional Courts) he can sue in the ordinary Magistrate's Court and should use a lawyer. ***(See pg 236: Civil claims)***
- For claims over R400 000, he will need a lawyer and an advocate to sue in the High Court unless there is an agreement with the seller to use the jurisdiction of the magistrate's court.

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5. Helping a person assess their financial situation and drawing up a budget

Thabiso wants to buy a car on credit but does not know whether she will be able to afford to pay the monthly debt. She already has many other debts that she is paying off every month and she wants to know whether she can reschedule these debts so that she can pay less each month but over a longer period. She has already received a Written Notice from a credit provider claiming that her monthly payments are irregular and she owes them money. She comes to you for advice on how to deal with her debt.

The steps below explain the process of helping Thabiso manage her debt, including working out her expenses and a budget.

1. EXPLAIN WHAT CAN AND CANNOT BE DONE TO HELP THE CLIENT

Explain what you can and cannot do to help Thabiso:

- Help her assess and manage her budget and debt responsibilities
- Help her understand the different legal actions that may have been taken against her if she fails to repay her debts
- Advise her of her rights and support her in claiming these rights
- Refer her to a registered debt counsellor as well as to the other institutions that govern the National Credit Act. Tell her that some credit providers choose only to work with debt counsellors and may not want to talk with you.

You **cannot** make a recommendation to the court to declare her over-indebted so that the debt can be re-scheduled by the court unless you are a registered debt counsellor.

2. RECORD INFORMATION ABOUT THE CLIENT

- Thabiso's basic information
- Her debt and credit record
- Check if her income is more or less than her expenses
- Make as many copies of this as you need.

(*See pg 819: Form for Recording Client's Basic Information* to see what details you need to get from Thabiso).

3. DRAW UP A MONTHLY INCOME AND EXPENDITURE BUDGET

Before offering to help the client draw up a monthly income and expenditure budget, check that they are willing to do this. People may or may not be too willing to share personal information.

4. DEALING WITH DEBT QUERIES

If the problem is related to dealing with your client's debt queries ***(See pg 821: Problem 6: Helping a person who has a problem with repaying debt.)*** If the problem is related to dealing with your client's credit queries ***(See pg 823: Problem 7: Helping a person who has a problem with getting credit.)***

Based on the budget you have drawn up and the debt your client has already, you may need to advise your client as to whether you believe they are eligible

for credit, and whether it would be wise for them to borrow money. This would take into account all the expenses and debts and whether they would be able to pay the debts.

- Summarise what the main issues are and what your plan of action is
- Write down the steps you have taken to deal with the problem and all actions taken

FORM FOR RECORDING CLIENT'S BASIC INFORMATION

Client's surname: ..... First names.....

ID no: .....

Address: .....

Contact numbers: *home*: ..... *work*: .....*Cell*: .....

Paralegal's name: .....

Start date: .....

THE CLIENT'S STORY

Ask why the client has come to the advice office

(*Use a blank page to record the main points of the client's story*)

CREDIT INFORMATION CHECKLIST

(*Complete details for each debt*)

Name of credit provider (organisation/person to be paid):
.....

Department/person to be contacted: .....

Street address of the credit provider: .....

Postal address .....

Phone: ..... E-mail: .....

Amount of initial loan: ..... Period of loan: .....

Total amount still owing: .....

Amount to be paid monthly: .....

Number of payments still to be made: .....

INCOME (Received each month)

R .....

R .....

R .....

R .....

EXPENSES (Must pay each month)

Rent: .....

Electricity: .....

Phone: .....

Airtime: .....

Transport: .....

Groceries: .....

Toiletries: .....

Clothes and shoes: .....

School expenses: .....

Support of family members: .....

Debt instalments: .....

Donation to religious institution: .....

Burial society or funeral policy: .....

Insurance: .....

Cigarettes: .....

Alcohol: .....

Sweets, cool drinks and other snacks: .....

School fees: .....

Religious festivals, e.g. Christmas/Eid: .....

Birthdays: .....

Weddings: .....

Initiations: .....

Funerals: .....

Travel to visit family: .....

TOTAL MONTHLY INCOME: R :

TOTAL MONTHLY EXPENSES: R :

MONTHLY INCOME LESS EXPENSES: R :

6. Helping a person who has a problem with repaying debt

Mandla has borrowed money from a microlender to buy furniture and also to pay off the new section he has added to his house. For the past two months, he has not been able to pay his monthly instalment due to other unexpected expenses. He has received two phone calls demanding payment and a letter of demand. He comes to you for help.

WHAT DOES THE LAW SAY?

The *National Credit Act* defines the steps that must be taken to deal with this problem. ***(See pg 797: Legal consequences of defaulting on debt obligations)***

WHAT CAN HE DO?

The following steps can be used to guide you in the way you would deal with Mandla's problem.

STEPS TO HELP A PERSON WHO HAS A PROBLEM REPAYING DEBT

1. EXPLAIN WHAT CAN AND CANNOT BE DONE TO HELP THE CLIENT

- Help her understand the different legal actions that may have been taken against her if she failed to repay her debts in the past
- Advise her of her rights and support her in claiming these rights
- Refer her to a registered debt counsellor as well as to the other institutions that govern the *National Credit Act*. Tell her that some credit providers choose only to work with debt counsellors, and may not want to talk with you.

2. RECORD INFORMATION ABOUT THE CLIENT

- Mandla's details, such as name, address, ID number
- His debt and credit record
- Check if his income is more or less than his expenses

Make as many copies of this as you need ***(See pg 819: Form for Recording Client's Basic Information)***

3. DRAW UP A MONTHLY INCOME AND EXPENDITURE BUDGET

Before offering to help the client draw up a monthly income and expenditure budget, check that they are willing to do this. People may or may not be too

willing to share personal information. ***(See pg 817: Problem 5: Helping a person assess their financial situation and drawing up a budget)***

4. ASSESS THE CREDIT PROVIDER'S ACTIONS

Check the following information regarding your client's credit providers:

- When was the contract signed – before or after the NCA came into effect on 1 June 2007?
- Did the credit provider follow the correct processes in dealing with your client? Give details (*attach a separate page if necessary*) ***(See pg 786: Protection when making a loan application)***
- Do you think there may have been any reckless credit granting?
    - If yes, give details (*attach a separate page if necessary*) ***(See pg 786: Reckless lending)***
- Did the credit provider send your client a written notice (letter of demand), and did your client respond in any way?
    - If yes, give details (*attach a separate page if necessary*) ***(See pg 797: Legal consequences of defaulting on legal obligations)***
- Have legal procedures been instituted against your client?
    - Give details (*attach a separate page if necessary*)
- Were all legal processes followed correctly?
    - If no, give details (*attach a separate page if necessary*)
- Was your client refused credit?
    - Give details (*attach a separate page if necessary*)

5. DEAL WITH THE PROBLEM

From the information you have gathered in the previous steps, you will now have to assess how serious Mandla's situation is.

- If you think that Mandla is over-indebted or that a credit provider may have been reckless in granting credit, then Mandla will need to see a registered debt counsellor. If you are not registered as a debt counsellor, you must refer your client to someone who is registered.
- If Mandla has received a written notice (letter of demand) from the credit provider, check if proper procedures have been followed. It is very important for Mandla to respond to a written notice. It is still not too late for him to see a debt counsellor.
- If legal action has been taken against Mandla. Check if legal procedures have been properly followed and advise him how to respond.

- If Mandla has been treated unfairly or unlawfully in any way, ask him for permission in writing to report this to a suitable institution
- If there have been no faults in the process, discuss with Mandla what the possible solutions could be to his situation. Your advice will be important in helping him to exercise his rights and to think of constructive ways of finding solutions. You can also refer Mandla to Legal Aid South Africa (LASA) for legal support.

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7. Helping a person who has a problem with getting credit

Sharon wants to buy a secondhand car but needs to borrow money from a credit provider in order to pay for it. She goes to a microlender who says her name has been listed with a credit bureau, so they will not give her the loan. Sharon does not know anything about this listing and thinks it is unfair that they will not give her the loan.

WHAT DOES THE LAW SAY?

The *National Credit Act* defines the steps that must be taken to deal with this problem. ***(See pg 788: Role of credit bureaus)***

WHAT CAN YOU DO?

These steps can be used to guide you in the way you deal with Sharon's problem:

STEPS

1. **EXPLAIN WHAT CAN AND CANNOT BE DONE TO HELP THE CLIENT**
   - Help her understand the different legal actions that may have been taken against her if she failed to repay her debts in the past
   - Advise her of her rights and support her in claiming these rights
   - Refer her to a registered debt counsellor as well as to the other institutions that govern the *National Credit Act*. Tell her that some credit providers choose only to work with debt counsellors, and may not want to talk with you.

2. RECORD INFORMATION ABOUT THE CLIENT

- Sharon's details, such as name, address, ID number
- Her debt and credit record
- Check if her income is more or less than her expenses
- Make as many copies of this as you need ***(See pg 819: Form for Recording Client's Basic Information)***

3. ASSESS THE CREDIT PROVIDER'S ACTIONS

Check whether the correct processes were followed by the credit bureau and record the following details:

- Which credit bureau is your client listed at?
- Contact name and details: Is the bureau registered?
- Is the information correct?
- Are they holding information that they should not have?
    - Please give details:
- Have they had any difficulty getting information from the bureau?
    - If yes, please give details:

4. DEAL WITH THE PROBLEM

Sharon has the right to know the reasons for being refused credit and has been told that this is because her name is negatively listed with a credit bureau. ***(See pg 788: Role of credit bureaus)***

Remember that credit providers may refuse to lend money:

- If this would mean that the loan would be reckless
- When the credit provider is unable to check the consumer's credit record (and does not want to run the risk of reckless lending)
- When the consumer is negatively listed and is prohibited from borrowing any more money.

Given the reasons given to Sharon for the microlender refusing to give her credit, you should now follow up with the credit provider and the relevant credit bureau.

8. Granting credit recklessly

Ms Adams has just finished her studies to become a teacher and still has some student loans to pay. To get a good job, she wants to make a favourable impression during her interviews, so she wants to buy some smart new clothes. She goes to the clothing store and asks them if she can open an account. The customer service department gives her a form to fill in which asks for her personal details as well as how much she earns. She explains that she does not have a job yet. However, the customer service department tells her not to worry as she will be sure to get a job within the month and then will be able to pay the monthly instalments.

Even though Ms Adams knows she will have no money if she does not get a job, she decides to take a small loan from the store and open the account. She buys clothes for R1 000. After three months, Ms Adams still does not have a job. She now has her study loan and a clothing account to pay and she is very worried. She goes to an advice office to see what she can do.

WHAT DOES THE LAW SAY?

Under the *National Credit Act*, credit providers have a responsibility to make sure that a consumer can afford to pay back the new debt. If not, then credit may have been granted 'recklessly'. ***(See pg 786: Reckless lending)***

WHAT CAN YOU DO?

You believe that Ms Adams was granted credit recklessly because she had clearly explained to the store that she did not yet have a job. You explain what this means to her and give her the name of a registered debt counsellor to contact. ***(See pg 786: Debt counselling)***

9. Going to a debt counsellor

Ms Siswe, a single parent, works as a domestic worker earning R3 500 a month. Every month she also gets R1 000 for maintenance from the father of her two children, making her total income R4 500 per month. Ms Siswe's expenses are R5 500 per month. She comes to see you as she is unable to pay all her debts on time. She is particularly worried as she has just received a written notice from a clothing store to say she is behind with her payments.

WHAT DOES THE LAW SAY?

When consumers are unable to fulfil their repayment obligations, the NCA describes them as being 'over-indebted'. In such cases, they should apply to a debt counsellor to have the debt reviewed. The alternative to this is either to approach the credit provider to try and make an alternative repayment arrangement or for the credit provider to take legal action. ***(See pg 786: Debt counselling)***

WHAT CAN YOU DO?

- Make a list of her debts and draw up a budget with her ***(See pg 817: Problem 5: Helping a person assess their financial situation and drawing up a budget, Steps 1 – 3).***
- Ms Siswe is over-indebted. Discuss her options:
    - Go and see the people she owes money to and ask for a change in the repayment terms so that she can pay smaller amounts over a longer period (but she is sure that they will not listen to her).
    - Apply to a registered debt counsellor to have her debt reviewed.
- Give her the details of a local, reputable, registered debt counsellor. Ms Siswe must make an appointment to see her.

APPLYING TO THE DEBT COUNSELLOR

At the debt counsellor Ms Siswe explains her situation. The debt counsellor does a debt review by asking about all her debts and her income – which she then assesses. Ms Siswe gives the counsellor a copy of her budget and list of debts.

The debt counsellor agrees that Ms Siswe is over-indebted according to the Act, and makes calculations of new repayments that Ms Siswe can afford.

The debt counsellor agrees to approach the credit providers to try to reach a debt agreements with them. She does this but the creditors do not want to do this – so the debt counselor arranges to go to court.

The court declares Ms Sizwe over-indebted and orders that the debt be restructured.

Ms Sizwe is told that she may not borrow any more money until this debt has been paid off. She understands that the credit bureaus will have a record of her financial situation on their records until she has paid off her debts. Every month, she pays the agreed amount of money to her credit providers.

After Ms Siswe has paid all her debts she receives a debt clearance certificate from the debt counsellor to prove that she has finished paying all her debts. As she doesn't want her negative listing to remain on the record of the credit bureaus, she follows the debt counsellor's advice and applies to have this information removed from the credit bureau's records.

10. Repossession of goods with a valid court order

Mr Mbuli bought a set of pots for R3 000 from Kitchen Essentials. The agreement was that Mr Mbuli would make monthly payments of R600 over six months. After two months of making the payments, Mr Mbuli was retrenched as a security guard, where he had been working for three years. Mr Mbuli was now unable to make the monthly payments for the pots. Although he still owed R2 000, he did not report his retrenchment to Kitchen Essentials.

After failing to make his payment, Mr Mbuli received a written notice/letter of demand from Nkosi Debt Collectors – but he ignored the letter. The Sheriff of the Court came to Mr Mbuli's house with a summons issued by the court and removed goods from his property. They also took goods belonging to Mr Mbuli's tenant.

Mr Mbuli comes to the advice office for assistance.

WHAT DOES THE LAW SAY?

A credit provider may only begin legal proceedings against a consumer:

- After a Section 129 letter of demand has been sent to the person owing the money, and
- After 10 working days have passed since delivery of the written notice. ***(See pg 797: Steps taken for repaying debt [Step 1: Phone calls and letters of demand])***

If a consumer ignores a written notice/letter of demand, an agent of the creditor will be sent to the consumer's home or workplace to ask them to sign either a Section 57 or Section 58 document. Alternatively, the creditor can get the Sheriff of the court to go to Mr Mbuli's house to serve a summons to pay the debt or to appear in court. A summons is an order of the court and should never be ignored. ***(See pg 798: Steps taken for repaying debt [Step 2: Signing Section 57 or Section 58 documents or receiving a summons])***

If the consumer gets a summons, they have five working days to respond by:

- Making arrangements to pay the money they owe, or
- Consulting an attorney, or
- Informing the court that they intend to defend themselves (file a Notice of Intention to Defend).

If Mr Mbuli signs the Section 57 document and then defaults on his payments (in other words, he doesn't stick to the agreement), or he signs the Section 58 or ignores the summons, then the credit provider is allowed to get a court order to repossess goods. A Sheriff of the Court brings the court order to the consumer's

home. The Sheriff of the Court can take and sell as much property as is necessary to pay off the debt. The first time the Sheriff of the Court visits is for the purpose of making a list of the consumer's possessions. ***(See pg 799: Warrant of execution against the consumer's property)***

The second time the Sheriff comes, they will take the possessions away. The Sheriff is the only person who can remove possessions and must have a court order to do this. In addition, they must get the consumer's permission to enter their house or flat and should not come in the middle of the night or when the consumer is not at home. ***(See pg 797: Legal consequences of defaulting on debt obligations)***

WHAT CAN YOU DO?

Check with Mr Mbuli that he received the letter of demand and that 10 working days have passed since it was delivered.

If Mr Mbuli confirms that he did receive the letter of demand but ignored it, explain that the court, therefore, had a right to issue a summons. However, the Sheriff had acted improperly because of the following:

- He took goods from the house at the same time as issuing the summons (this meant that Mr Mbuli did not get the five days to respond after receiving the summons before any court order was taken against him), and
- He had not listed the possessions that belonged to Mr Mbuli and had taken goods that belonged to a tenant.

Advise Mr Mbuli to consult a lawyer and recommend someone who is an expert in this kind of case.

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11. Repossession of goods without a court order

Mrs Arendse says that two men arrived at her house on the weekend and took her lounge suite away. They said her husband had not paid for the lounge suite and they had come to collect it. They said she should pay the full outstanding amount on Monday if she still wants the furniture. Mrs Arendse says she thought that the lounge suite was paid for by her husband.

WHAT DOES THE LAW SAY?

A shop can only lawfully repossess goods, which means:

- If the customer consents to the goods being repossessed
- If the shop has an acourt order to repossess the goods

This is what the shop should have done in Mrs Arendse's case:

- Send Mr Arendse (who signed the credit agreement) a written notice/letter of demand (section 129) to pay the outstanding instalment
- Applied to the courts to have a summons issued against Mr Arendse
- Applied to the court for a court order to repossess goods

Once the shop has the court order, only the Sheriff of the Court can go to the house to repossess the goods. They must show this court order before they can enter the house and repossess the goods. Therefore, the shop did not repossess the Arendse's lounge suite in a lawful way.

WHAT CAN THEY DO?

The shop used unlawful ways to repossess the goods. They did not get a court order to repossess the goods and the people who entered the Arendse's house did not have a right to do this. ***(See pg 238: Steps in a civil claim)***

So Mrs Arendse can go to the Magistrate's Court to get a spoliation order to have the goods returned to her immediately. She will need to get an attorney to advise and help her. ***(See pg 253: Spoliation orders)***

But the Arendses must immediately pay the outstanding instalments, or, negotiate with the shop or contact a debt counsellor about paying the instalments. Otherwise, the shop can follow the steps above to get a court order to repossess the goods. ***(See pg 827: Problem 10: Repossession of goods with a valid court order)***

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12. How to respond to a summons

Mr Johannes received a summons from Prep Stores saying that he owes them R1 200 and that he has not paid his account with them for four months.

WHAT DOES THE LAW SAY?

Mr Johannes is under contract to pay Prep Stores every month, and he has an obligation to pay his monthly instalments as per the contract. He must respond to the summons immediately. There is no time to delay if a person receives a summons and it should never be ignored. After Mr Johannes receives the summons, he has five working days to respond to:

- Make arrangements to pay the money he owes, or
- Consult an attorney, or
- Inform the court that he intends to defend himself (file a Notice of Intention to Defend), in which case he will need to make a plea (plead guilty or explain why he believes he is not responsible for the debt).

Once a summons has been issued, Mr Johannes may no longer apply for a debt review with a debt counsellor. He should consult an attorney if he intends to go to court.

If Mr Johannes ignores a summons to appear in court about his debt, then a default judgement by the court will be made and he will be ordered to pay the money owing. This will include the outstanding debt plus the interest that has been added to it, plus the legal costs of the court order.

WHAT CAN YOU DO?

If Mr Johannes **agrees that he owes** Prep Stores (the credit provider) but cannot afford to pay the outstanding amount, explain that he needs to try and make an arrangement with the shop's attorney to pay off the debt. You can help him do this or get the help of an attorney.

If Mr Johannes has agreed to pay a certain amount to the attorney, then this amount must be paid at the attorney's office – if that is the agreement. If he forgets to pay a single instalment, then the creditor can take him to court. If Mr Johannes is taken to court, he will have to pay the other side's legal costs. This can be very expensive.

If Mr Johannes **denies that he owes** the money, then he should inform the court that he intends to defend himself. He can do this by contacting an attorney to act on his behalf, or he can go to the court by himself and fill in a form that tells the court and the other side that he wants to defend the case. This form is on the back of the summons and is called a Notice of Intention to Defend. Ask the Clerk of the Court how to fill this form in. He will be informed when he has to appear in court. He will have to go to court and explain to the court why he doesn't think that he owes the shop the money. The court will then make a decision.

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13. Repossessed goods are sold for less than the amount still owing on the goods

Faried buys a second-hand car under a credit agreement for R60 000. He pays off R10 000 but then stops paying his instalments.

The seller gets a court order to repossess the car. After repossessing the car, it is sold at a public auction for R45 000.

So far,the seller has received R10 000 from Faried plus R45 000 from the auction. This is a total of R55 000. Originally, Faried owed R60 000 for the car. So Faried still owes the seller R5 000 for the car (R60 000 – R55 000 = R5 000).

The seller claims the R5 000 from Faried, but Faried refuses to pay because he says that he has already paid R10 000 for the car, and it has been repossessed.

WHAT DOES THE LAW SAY?

The law says that Faried still owes the BALANCE of R5 000 that he has not paid. It does not matter that the seller has repossessed the car and kept the money from the auction. The seller must not lose out because Faried has not paid his account.

WHAT CAN YOU DO?

Faried must pay the R5 000 back to the seller. You can help him to try and negotiate with the seller so that he can pay the amount of R5 000 in instalments (small amounts paid every week or month).

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14. Getting a civil judgement in a criminal case

Tommy says he represents a company that builds and sells houses. Tommy sells John a new house and John pays him a deposit of R30 000. Two months later, John has heard nothing from Tommy, and the house has still not been transferred to John's name. A friend then tells John that Tommy has been in court on many fraud charges in the Regional Magistrate's Court. John wants to know what he can do.

WHAT DOES THE LAW SAY?

John cannot take his claim to the Small Claims Court because the amount is too big and over the limit for a Small Claims Court claim, which is R20 000. He can make a civil claim against Tommy in the ordinary magistrate's court. But there is another way to recover the money rather than through a civil claim which can be expensive and can take a lot of time.

Tommy is guilty of fraud so John can lay a criminal charge of fraud against him. Section 300 of the *Criminal Procedure* Act says that a magistrate can make a civil judgement in a criminal case. This means that John can use the criminal court to help him get his money back from Tommy. If he follows certain procedures and if Tommy is found guilty of fraud in the criminal case, then John will be able to recover his money after the criminal case. ***(See pg 187: Criminal and civil actions)***

WHAT CAN HE DO?

John must sign an affidavit before a Commissioner of Oaths. The affidavit must say how he 'lost' the R30 000. He must then hand his affidavit to the public prosecutor who is dealing with the case.

The public prosecutor will then attach the affidavit to the criminal record. If Tommy is found guilty of fraud, the magistrate will not only sentence Tommy but also order him to pay back the R30 000 to John Clark.

Be careful of the following points when you advise anyone to take these steps:

- This procedure will only be useful if you are sure that the person against whom you are making the claim will be found guilty in the criminal case. If the person is not found guilty, then you will not be able to claim your money through the criminal court.
- Make sure that all the relevant information is in your affidavit before you hand it to the public prosecutor. For example, make sure that all relevant receipts have been attached to the affidavit. It is a good idea to show the public prosecutor your affidavit before you sign it to make sure that it has all the necessary details.
- Try to find out whether criminal charges have been finalised before filing an affidavit with the public prosecutor. If the police are still investigating, then it may be a long time before the case is heard and you get your money back.

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15. Being robbed at an ATM

More and more people are being cheated and robbed when they draw money from a bank ATM using their bank cards. ATM fraud is becoming more and more common.

Your PIN is the code you type in, which allows you to use your bank account at an ATM. It is a secret code and no one can use your bank card without having this PIN. Criminals trick you into getting your card and your PIN, and then they can use your bank card to draw money from your bank account.

WHAT CAN YOU DO?

If your card has been stolen or lost, take the following steps:

- Immediately telephone the lost card number of your bank from a call-box or a friend's cellphone and ask them to cancel your card
- If you are at the bank, immediately report this to the person at the enquiry desk and ask them to cancel your card

REMEMBER

Don't write your PIN on a piece of paper that you keep with your bank card. If you can,

just memorise your PIN and don't have it on paper anywhere. Otherwise, keep the PIN in a safe place at home, separate from your bank card.

Always carry your bank's 'lost card' telephone number with you in a safe place, separate from the place where you keep your bank card.

Here are some of the different ways that you can be tricked when you are drawing money from an ATM machine and what you could do to prevent this from happening.

CARD-SWOPPING

A thief watches you typing in your PIN. The thief distracts you after you have drawn the money, for example, by asking you for help. While you are distracted, another thief takes your card and slips a different card into the machine. You then leave the machine and put the wrong card in your pocket. The thieves have got your card and your secret PIN.

- Stand close to the ATM when you key in your PIN, and try to use your hand and body to cover what you are typing in so no one else can see it
- Don't let anything distract you when using an ATM
- Always check your card before you leave the ATM. To make this easier, put a spot of nail polish on the corner of the card. If someone has left with your card, report this to the bank immediately and ask the bank to cancel the card.

VANDALISING ATM MACHINES

Criminals put matchsticks or other items into the ATM card slot. You insert your card, and you key in your PIN. A criminal watches to see your PIN. The matches make your card get stuck – so you think your card has been swallowed by the ATM.

The person behind you offers to make a call for you on their cell phone, saying they've got the bank's lost card number. But the call goes through to an accomplice pretending to be a bank employee. This criminal says he needs your PIN number in order to cancel the card. You then leave thinking you have cancelled your card. The thieves then take out your card from the machine with a small tool, and they have your PIN.

- Don't key in your PIN until the ATM machine asks for it

- Don’t accept help from strangers at an ATM
- Never tell anyone your PIN. The bank never needs your PIN for anything, including not for cancelling your card. So be very suspicious of anyone who asks you for your PIN for whatever reason.

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16. Cell phone scams, e-mail scams and card cloning

TELEPHONE CALL FROM A FALSE BANK OFFICIAL

You get a telephone call from a so-called bank official. They explain that the bank needs to transfer your money to an account that will be safe and give a good reason for this. You are asked to confirm your ID and account number. Then your money gets transferred out of your account, never to be seen again.

E-MAIL ASKING YOU TO UPDATE OR CONFIRM YOUR BANKING DETAILS

There are many email scams (called phishing), for example:

- You get an e-mail from your 'bank' asking you to click on a link to update or confirm your personal details. Often the message would say that it is because the 'bank' picked up a fraudulent transaction on your account.
- An email pretends to be from SARS, saying SARS owes you money and wants to pay you back but needs your banking details to do so

Clicking on the link will take you to a website that looks the same as that of your bank's or SARS's. When you enter your details, you are giving them to the fraudsters.

CARD CLONING

Card cloning can happen when, for example, you hand over your card to pay for petrol at a garage, a meal at a restaurant, or when you draw cash from an ATM. Criminals attach a card 'reader' to the card machine or ATM to copy the details on your card. They then transfer those details to a blank card using special equipment.

WHAT CAN YOU DO?

- Never confirm your personal details over the phone or by clicking on an e-mail link. None of the banks (or SARS) will ever phone you or send you an e-mail asking you to confirm your details. If you fall victim to such a scam, it could be very difficult for you to claim your money back, because the banks could say that you were negligent in giving out your personal details.
- Never let your card out of your sight – rather, ask for the card machine to be brought to you.

- In some instances (like when you buy something over the internet or the phone), the number on the back of your card will be needed to complete the transaction. Write this number down and keep it in a safe place (just as you would with your PIN), and black out the number on the card itself. This helps to protect you against fraud if your card is lost or stolen.

Checklist

Particulars to take for a consumer law problem

- Have you signed a contract with anyone for the goods you have bought?
- Has anyone tried to repossess the goods you have bought or any other goods in your house?
- Have you received any letters or court orders in connection with your repayments on the goods?
- If you have received any letters or court orders, how did you respond to them?
- Have you tried to sort out the problem by yourself, for example, by speaking to the accounts department of the other party or to the other party's lawyer?
- Did you make any arrangements with the other party to pay back the debt? What was the arrangement? Have you broken the arrangement, for example, by not paying your debt for a month?

Small Business Law

Introduction

Small business means a separate business entity, including profit-making and non-profit-making enterprises (such as a co-operative), which is managed by one or more owners and which can be classified as a micro, very small, small, or medium enterprises (also referred to as SMMEs). Micro is the smallest type of business and has no more than 5 people working for the business; a 'very small' business has no more than 20 people working for it, a 'small' business can employ up to 50 people, and a medium business can employ up to 200 people, depending on the industry.

Categories of SMMEs

The *National Small Business Act* divides SMMEs into the following categories:

SMME CATEGORY	DESCRIPTION
SURVIVALIST ENTERPRISE	• Operates in the informal sector of the economy. Mainly undertaken by unemployed persons. • Income generated below the poverty line, providing minimum means to keep the unemployed and their families alive. • Little capital invested, not many assets. Not much training required to operate. • Opportunities for growing the business very small.
MICRO ENTERPRISE	• Between one to five employees, usually the owner and family. • Informal - no licence required, no formal business premises, no labour legislation necessary. • Turnover below the VAT registration level of R300 000 per year. Turnover below the VAT threshold of R1million per year. • Basic business skills and training. • Potential to make the transition to a viable formal small business.
VERY SMALL ENTERPRISE	• Part of the formal economy, use technology. Less than 10 paid employees. • Includes self-employed artisans (electricians, plumbers etc) and professionals.
SMALL ENTERPRISE	• Less than 10 paid employees. • More established than very small enterprises, formal and registered, fixed business premises. • Owner-managed, but more complex management structure.
MEDIUM ENTERPRISE	• Up to 200 employees.

	• Still mainly owner-managed, but decentralised management structure with division of labour. • Operates from fixed premises and complies with all formal requirements.

The *National Small Enterprise Amendment Act (2023)* aims to streamline the support services that government provides to small and medium businesses.

The National Small Enterprise Amendment Act amends the National Small Enterprise Act of 1996 and provides for the establishment of the Small Enterprise Development Finance Agency (SEDFA), which will replace and incorporate the Small Enterprise Financing Agency (SEFA), the Co-operative Banks Development Agency (CBDA) and the Small Enterprise Development Agency (SEDA). SEDFA will function as a one-stop-shop for entrepreneurs and promote the development of Co-operative Banking Institutions (CBIs). It aims to integrate government support (both financial and non-financial) to small businesses. The Act also establishes the Office of the Small Enterprise Ombud Services, which can deal with complaints and promote a more equal trading environment for small businesses.

Types of businesses

If you want to start a business, you must decide whether you want your business to be:

- A sole trader or sole proprietor
- A partnership
- A close corporation (from 1 May 2011, no new closed corporations were allowed to be created, or conversions from company to closed corporation were allowed, however existing entities can continue to operate)
- A company

Sole trader or sole proprietor (Owner)

A sole trader or a sole proprietorship means one person owns the business. A sole trader does not have to register the business, for example, Vusi starts a shoe repair business, which he calls 'Cool Leather' and runs it from his home.

If you are a sole trader, the law does not see a difference between the things that you own and the things that belong to your business, which are called **assets**. This means that the

tools Vusi uses to repair shoes, the table on which he works and the cash register belong to him in the same way that his television set does.

There is also no difference between the money you owe people and the money your business owes people, which are called debts. For example, the money Vusi must pay for electricity is no different from the money he must pay the man who sells him leather to repair shoes. If Vusi doesn't pay his leather supplier for leather bought from him, the supplier can go to court to get his money. If Vusi does not have the money to pay the supplier, the court can take away his tools, his TV, his car, or anything that is a luxury and sell it to pay the supplier.

As Vusi, a sole proprietor, has given the business a name, he must refer to it in any business dealings as 'Vusi Mahlangu t/a (trading as) Cool Leather'.

Partnership

A partnership is a business that has between 2 and 20 partners who own the business together. If two or more people want to start a partnership, they should sign a written agreement. A lawyer should prepare this. The agreement must include these points:

- What happens to the assets of the business, for example, the tools and the furniture, if the partnership ends
- How the partners share the profits, for example, one partner works every day, and another partner only works three days a week; they would not want to share the profits equally because one partner has worked more days than the other
- What happens if one of the partners wants to leave the partnership **(*See pg* 779: *What are the requirements for a contract?*)**

Every time a new partner joins, the partners must sign a new agreement. Like a sole trader, the law does not recognise a difference between the partnership's assets and debts and the assets and debts of the partners themselves. Not only that, but the law does not recognise a difference between different partners' assets and debts.

For example, Nomonde's business partner, Vuyani, builds a house and does not pay the builder. The builder takes him to court to get his money. The court can take the tools and furniture of the partnership and sell them to give the builder his money. The court can do this because there is no difference between Vuyani's assets and debts and the assets and debts of the partnership. So, Vuyani's debts are also the debts of the partnership. If Vuyani cannot pay the builder, the builder can get his money from the partnership. Nomonde would be able to go to court to get the money back from Vuyani, but it is expensive to pay lawyers to take a case to court and it takes a long time before the court will hear her case.

If Vusi decides to run Cool Leathers as a partnership, he must refer to the business in any business dealings as 'Vusi Mahlangu t/a Cool Leather'.

Close Corporation (CC)

A close corporation is like a company, only less expensive and less complicated to run. Since May 2011, no new CC's were allowed to be created, and the conversion from company to CC is also not allowed. A CC is more expensive to run than a partnership or sole trader because you need to pay an 'accounting officer' to do the books of the business. You also have to keep records for the CC, and each member has to keep records for tax purposes.

The people who own and manage the close corporation are called members. There are no directors or shareholders or a chairperson of the board, like a company has. A close corporation cannot have more than 10 members.

The law sees a close corporation as separate from its members. This means that unlike a sole trader and a partnership, the assets and debts of the business belong to the close corporation, and the assets and debts of the members have nothing to do with the CC.

For example, Cool Leathers CC buys leather from a supplier to repair shoes. The CC does not pay the supplier for six months. The supplier decides to go to court to get his money from the CC. If Cool Leathers does not have the money to pay the supplier, the court can only take the things that belong to the business, Cool Leathers, to pay the debt. The court cannot take the private things that belong to Vusi and Linda, who are members of Cool Leathers.

Financial reporting has now been made the same as that of a company. A CC may be subject to an independent audit or accounting officer's report. The criteria will be the same as that of a company. If the business is a CC and the CC has a letterhead, the registration number of the CC and all the names of the members must be printed at the bottom of the letterhead.

SIGNING SURETY

> Suppliers may be scared that a CC has no money to pay. Suppliers, therefore, often make sure that somebody signs surety for the CC, which means that if the CC does not have the money to pay, the person who has signed the surety will have to pay (be liable for) the debt.
>
> Members of a close corporation must always write CC behind the name of the close corporation, for example, Cool Leathers CC. If members do not put CC behind the name whenever they write it, then the law does not see the CC as separate from its members, and the debts and assets of the CC are not separate from the debts and

assets of the members. If the business is a CC and the business has a letterhead, the registration number of the CC and the full names of the members must be printed on the letterhead. The number will look something like this: CK2008/031666/23.

If the business has an office, then the owner must have a sign showing the business is a CC. For example, if Anna has a dry cleaning business, then she must have a sign saying 'ANNA'S DRY-CLEANING SERVICES CC'.

Company

Companies have to obey all the rules of the *Companies Act*, which is a long and complicated set of laws. On 1 May 2011, the *Companies Act 2008* became the new set of regulating laws. Existing companies are subject to the transitional measures as defined in the new Act.

If **more than 10 people** want to start a business together, they will have to go to an attorney or an accountant to form a partnership or a company. The usual way to start a company is to buy a shelf company. These are companies that are already formed. A company has **shareholders and directors**. Shareholders can be people, other companies, Trusts or CC's. Shareholders put the money into the business and are the owners of the business. Directors are the managers of the business. Sometimes, the owners and the managers are the same people, and sometimes they are different people.

The law sees a company as separate from its shareholders and directors. This means that, like a CC, the **assets and debts** of the business belong to the company, and the assets and debts of the shareholders and directors have nothing to do with the Company.

Suppliers or banks, which lend money to companies will often ask the shareholders or the directors to sign surety for the company. If the company cannot pay its debts, then the people who have signed surety will have to pay the company's debts.

Directors and shareholders of a private company must always write Pty (Ltd) or Pty behind the name of the company. If they write the name of the company without writing Pty (Ltd) or Pty behind it, the law does not see the company as separate from its shareholders, and the debts and assets of the company are not separate from the debts and assets of the shareholders.

If the business is a company and the company has a letterhead, the registration number of the company and all the names of the directors must be printed at the bottom of the letterhead. The registered name and number must also appear on cheques. **(*See pg 844*: CHART: *The differences between the four types of business*; *See pg 845*: CHART: *Advantages and disadvantages of the different types of business*)**

CHART: THE DIFFERENCE BETWEEN THE FOUR TYPES OF BUSINESS				
	SOLE TRADER	**PARTNERSHIP**	**CC (CLOSE CORPORATION)**	**PRIVATE COMPANY**
Number of people	One	Two to twenty	One to ten	One to fifty
What people are called	Sole trader or proprietor (owner)	Partners	Members	Shareholders and directors (shareholders do not have to be the same people as the directors)
How it is formed	You do not have to do anything.	The partners must sign a partnership agreement.	An attorney or accountant drafts a document called a founding statement, which is registered with the Registrar of Companies. No new CCs could be set up after 2011.	A Memorandum of Incorporation (MOI) is registered at the CIPC, thereby incorporating the entity.
Existence	The sole proprietorship stops existing when the trader or proprietor stops carrying on the business.	If the partners change, they must sign a new partnership agreement, because the old partnership no longer exists.	The CC continues to exist even when the members change. It does not have to be registered again.	A company continues to exist even when the shareholders or directors change. It does not have to be registered again.
How do you end the business legally?	The sole trader ends when the trader stops doing business. If they sell the business, the person who buys it will start their own new sole proprietorship.	The partnership ends when: the partners agree that they will no longer do business together as partners, or the partners change, or a partner is declared insolvent by the court.	It is difficult to end a CC. An attorney's help is needed. A CC can end through voluntary deregistration or liquidation.	It is difficult to end a company. An attorney's help is needed. A Company can end through voluntary deregistration or liquidation.
Who owns the business's assets?	The sole trader or proprietor owns the assets.	The partners own the assets. One partner may not sell, lease or do anything with an asset without the permission of the other partners.	The assets belong to the CC, not to the members. If the CC ends, the assets are shared out among the members in the way that was agreed in the founding agreement.	The assets belong to the company, not to the shareholders. If the company ends, the assets are shared among the shareholders.
Accounting requirements	A sole trader does not have to keep records, except for VAT and income tax.	A partnership does not have to keep records, except for VAT and income tax.	Records must be kept according to the requirements in the Companies Act.	Records must be kept according to the requirements in the Companies Act.

CHART: ADVANTAGES AND DISADVANTAGES OF THE DIFFERENT TYPES OF BUSINESS			
TYPE OF BUSINESS	**ADVANTAGES**	**DISADVANTAGES**	**WHEN TO USE IT**
Sole trader	It is the cheapest and easiest type of business to start and to run.	The law does not separate the assets and debts of the sole proprietor from the assets and debts of the business.	Use it for a business which is owned by one person and the business is small and not complicated.
Partnership	It is cheaper to run than a CC or a company because it does not have to keep special books and pay an accountant to check its books.	The law does not separate the assets and debts of the partners from the assets and debts of the business. If someone takes a partner to court for personal debts, the court can take the business's assets.	Use it when the business is owned by more than one person (but not more than 20) and the owners do not want the expense of a CC. Be warned of the disadvantages, though.
Close corporation (no new CCs could be set up after 2011)	The law sees the assets and debts of the members as separate from the assets and debts of the CC.	The law says that the CC must give the Registrar of Companies statements showing how the money of the business works. A bookkeeper or accountant must be paid to do this. A CC may be subject to an independent review or audit and this can be costly.	Use it when one or more people own the business (but not more than 10), and owners want the protection of a CC. This means that if someone takes a member to court for personal debts, the court cannot take the things that belong to the business.
Company	The law sees the assets and debts of the shareholders as separate from the assets and debts of the company.	It is expensive to register a company. It is also expensive and complicated to run a company.	If there are more than 20 owners, they have to form a company, because they cannot form a CC or a partnership. It is also used when the owners want protection from the debts of the business, but there are more than 10 owners so they cannot form a CC.

Note: Anyone wanting to buy a CC or a Company or form a new Company, should get professional advice from an accountant or an attorney.

STARTING AND REGISTERING A COMPANY

A company must be registered with the Companies and Intellectual Property Commission (CIPC) which is an agency of the Department of Trade Industry and Competition in South Africa. CIPC was established by the *Companies Act (Act No. 71 of 2008)*.

Follow these steps to register a company:

1. Register a customer code on CIPC at www.cipc.co.za to be able to login to the site to register.
2. On the website, click on On-line-transacting.
3. Click on Private Company Registrations.
4. Click on Customer Login.
5. Complete the required fields and click on Login.
    - Customer Code
    - Customer password
    - Security code
    - Click on CIPC Terms and Conditions to read it, and in the circle next to it, accept the Terms and Conditions
6. The landing page of E-services will be displayed. Click on Register a New Company.
7. Follow the prompts to enter details of directors, including the following information:
    - Director type
    - Name and surname
    - Country of origin
    - ID/Passport number
    - Director status
    - Appointment date
    - Date of birth
    - Cell phone number
    - Email address
    - Physical address
    - Postal address
8. Follow the prompts to complete the company information:
    - Financial year-end
    - Authorised shares
    - Email address
    - Website
    - Physical address
    - Postal address

9. Reserve your company name: this means you can:
    - Apply for a name as part of the process (follow the prompts if you want to apply for a name)
    - Use a name that has already been approved (if you already applied for a name, click on 'Name already approved'), or
    - Register using the enterprise number as the company name (Click on "Register company using enterprise number as the name")
10. All director and company details will be displayed. Check that they are correct and edit if necessary (by clicking on 'Modify").
11. Click on Lodge Company.
12. An email will be sent to the company email address indicating the required documentation needed for registration.
13. Print the emailed forms sent by CIPC and get directors to sign where required.
14. Send the signed form and required supporting documents to eServicesCoReg@cipc.co.za for the process to be completed. The following supporting documents are required:
    - Certified identity copy of applicant
    - Certified copies of the Identity Documents or passport of the Directors
    - The name confirmation certificate (COR9.4), if applicable
    - Power of attorney (if applicable)
    - For trust or company/juristic person as an incorporator, the resolution and certified ID copy of the duly authorised representative must be attached
15. IMPORTANT POINTS TO NOTE FOR REGISTRATIONS:
    - The tracking number (e.g. 717291526) must be clearly stated in the subject heading of your email.
    - The scanned document must be in TIFF or PDF format.
    - The scanned documents must be attached as ONE attachment.
    - The CoR9.4 (Confirmation Notice of Name Reservation) must be attached for an approved name.
    - The application must be finalised within 31 calendar days from the date it was lodged, so all forms and supporting documents (with fees paid) MUST be sent within 10 calendar days from the date it was lodged. Failure to do this will result in the application being rejected.
    - Documents must only be lodged once funds are reflected in the customer code.
    - Documents must reflect as an attachment and not form part of the body of the email.

- Documents must be easily readable and only submitted once.
- An application that has been queried or rejected via the eservicescoreg.co.za e-mail cannot be reused. In this case, customers must recapture information and get a new tracking number. Attach all the supporting documents required and email them to the email address for registration (eservicescoreg@cipc.co.za).

Co-operatives

A co-operative is a business formed by a group of people who all own the co-operative and participate in its control. So, the business is owned and run by its members, who buy shares to become members. All the members of the co-operative have one vote each so that even if a company buys many shares in a co-operative, it still only has one vote, like everyone else. Members elect three or more directors who manage and control the daily affairs of the co-operative and who are answerable to the members.

FINANCING A CO-OPERATIVE

Members contribute to the capital of their co-operative and control the economic affairs of the co-operative in a democratic way. Capital is the money and equipment which the co-operative uses to carry out its goals. Co-operatives can get capital from money paid for shares issued to members, membership fees, grants, donations, loans and surplus money left over from previous years of operation. Some (and possibly all) of the capital which the co-operative uses actually belongs to the members, usually in the form of shares and bonus shares. Each member invests some money and gets some shares in return. The shares show that the member owns some of the assets (the money and property) of the co-operative. Any other capital which the co-operative uses belongs to the co-operative as a whole.

PROFITS IN A CO-OPERATIVE

Although a co-operative is not formed with the aim of making profits, most co-operatives do have a bit of profit to divide up after paying employees and meeting other expenses. In a co-operative, all the members own the profits. If the co-operative has money left over after it has paid all its debts and taxes and provided the planned benefits to its members, this is called a “surplus”. The surplus is normally used to develop the co-operative.

For example, a co-operative can use its surplus to expand and develop the co-operative’s business or the services it offers to its members. But if there is an extra unplanned surplus, this means that (in a worker co-operative) the wages could

have been higher or (in a service co-operative) the prices or fees or commissions charged for the service were too high. In this case, the surplus can be returned to the members, or used to support other activities approved by the members. Any surplus that is returned to the members must be shared in proportion to the contribution each member made to the surplus. For example, a grocery co-operative might return a portion of its surplus to its members, in proportion to the value of the purchases made by each of them during the year.

Overall, members do not usually receive a big return on the amount they contribute to the capital of the co-operative when they become members. This makes a co-operative different from a company. A shareholder in a company buys shares in the hopes of making a profit. A member of a co-operative joins the co-operative and contributes to its capital because the co-operative will provide a benefit to its members.

THE PURPOSE OF A CO-OPERATIVE

The primary aim of a co-operative is to provide services to its members. The goal of a co-operative is to provide services to its members at affordable prices or to create employment for its members. The needs of the members come first. For example, the members of a service co-operative may want to market their products at a good price. They may want to purchase goods at bargain prices. They may want to be able to get a loan at a reasonable interest rate. Employees in worker co-operatives want to earn good wages. The aim of the co-operative is to provide the desired benefits as effectively as possible in a sustainable way.

Any services provided by a co-operative must be provided mainly to its members. For example, a farmer's marketing co-operative should market mostly crops or livestock produced by its members, not by persons outside the co-operative. The sewing machines that belong to a sewing co-operative should be mainly for the use of its members, not for people outside the co-operative.

PRINCIPLES OF A CO-OPERATIVE

- It is owned by all its members. The members each make a contribution to the co-operative (for example, part of a few month's wages)
- Management makes decisions together with the members
- Management is accountable to the members
- Members themselves decide how to organise the co-operative, for example, what the wages and working hours will be
- Profit and loss is divided among the members

STARTING AND REGISTERING A CO-OPERATIVE

The *Co-operatives Act (No 14 of 2005)* creates the foundation for a more active and supportive environment for co-operatives. The registration procedure is simpler, it redefines government's role as a facilitator in promoting co-operatives, provides for different types of co-operatives in all sectors of the economy, and ensures co-operative principles are observed.

Anyone starting a co-operative must first register it with the Company Intellectual Property Commission (CIPC) which is an agency of the Department of Trade Industry and Competition.

CIPC responds to queries from the public, provides information about co-operatives and how to register them, and promotes the establishment of co-operatives in poor rural communities. CIPC is responsible for registering and deregistering co-operatives, as well as analyzing the financial statements of co-operatives. They will also provide a sample constitution for a new co-operative and other documents that are needed for the various kinds of co-operatives. The following outline summarises the steps involved in starting and registering a co-operative.

NAME OF CO-OPERATIVE

Every registered co-operative must have a name that is different from the names of other co-operatives, and it must not be misleading or prohibited in some way. The name must be reserved before registering the co-operative. Visit the CIPC website: www.cipc.co.za and click on “Online Transacting” then on “New e-Services”. Or go to BizPortal- www.bizportal.gov.za to reserve a name. A reserved name will be valid for 6 months from the date of approval but it can be extended on application and payment of a fee.

APPLICATION FOR REGISTRATION

Before a co-operative can apply for registration, there must be at least one meeting of people who are interested in forming the co-operative. There should be a minimum of 5 people and a minimum of 2 directors. The members fee must be equal for all the members of the co-operative. The people present at this meeting must adopt the constitution of the co-operative and elect the first directors of the co-operative.

After this meeting, the group must submit an online application for registration to CIPC. Visit their website: www.cipc.co.za and first register for a customer code (guidelines are provided on the site). Then login to the site, click on 'New services", and follow the prompts.

The following documents must be submitted to CIPC with the application:

- Completed, printed and signed system-generated Co-op1 Form
- Pages of the system-generated constitution signed by all founding members
- The Cor9.4 (Confirmation Notice of Name reservation) must be attached for an approved name
- Certified ID copies for South African citizens and passport copies for non-South African citizens for all the founding members must be uploaded during the capturing process

The amount of the registration fee will be provided by CIPC.

REGISTRATION

CIPC will register the co-operative if the application meets the following conditions:

- The application satisfies all the requirements in the *Co-operatives Act*.
- The constitution of the co-operative meets all the requirements in the *Co-operatives Act*.
- The constitution of the co-operative is consistent with the co-operative principles.
- The proposed name of the co-operative follows the rules in the *Co-operatives Act* about co-operative names.

If CIPC is satisfied that the application meets all of these conditions, then it will provide a registration certificate with a registration number. Once a co-operative is registered, it becomes a 'legal person'. This means that it has legal powers similar to those of companies and other such groups.

For example, a CC can continue to exist even if its membership changes over time. It can open bank accounts and own land and other property. It can enter into contracts and be a party to court cases. As a “legal person”, the co-operative will have many of the same rights and powers as individuals. Before the group is registered as a co-operative, it does not have these powers.

Once the co-operative is registered, the Department of Trade and Industry will be able to give it the necessary support if it:

1. Follows the co-operative principles
2. Consists of black people, women, youth, people who live in rural areas, or people with disabilities AND
3. Promotes equity and greater participation by its members.

THE CONSTITUTION OF A CO-OPERATIVE

CIPC can provide a sample constitution for a new co-operative. Visit their website: www.cipcco.za for details.

KEEPING RECORDS

The *Co-operatives Act* has strict record-keeping rules. A co-operative must keep the following documents at its registered office:

- Its constitution and any rules made separately from the constitution
- Minutes of all general meetings
- Minutes of all meetings of the board of directors
- Proper accounting records, including a record of the transactions between the co-operative and each member of the co-operative
- A list of its members with the following information for each member:
    - Name and address
    - The date the person became a member
    - The date that the person's membership came to an end (if this has happened)
    - The amount of membership fees paid
    - The number of membership shares held by the member
    - The number and amount of loans made to the member
- A register of its directors with the following information for each director, including both present and former directors:
    - Name, address and ID number
    - The date the person became a director
    - The date that the person stopped being a director (if this has happened)
    - The name and address of any other co-operative, company or close corporation where a director acted as a director or a member, now or in the past
    - A register of all directors' interests in contracts or other undertakings involving the co-operative

For more information on how to start and register a co-operative see the following websites:

- CIPC: www.cipro.co.za
- SEDFA (Small Enterprise Development and Finance Agency): www.sedfa.org.za for up-to-date information on co-operatives and the law

Registrations as a new employer

An employer must be registered as an employer for the following:

- Employee's tax: registering for PAYE (which stands for Pay As You Earn)
- Skills Development Levy
- Unemployment Insurance (UIF)
- Compensation for Occupational Injuries and Diseases (Compensation Commissioner – WCA)

Summary of the statutory registrations required for employers

TYPE OF REGISTRATION	EXPLANATION	EXPLANATION
PAYE	SARS. Visit www.sars.gov.za for details of your local SARS branch	Every employer deducting PAYE needs to register using form EMP101.
Skills Development Fund and Levy	SARS. Visit www.sars.gov.za for details of your local SARS branch	Completion of form EMP101 triggers registration for SDL but entities with an annual payroll below R500 000 are exempt.
Skills Development Fund and Levy	SARS. Visit www.sars.gov.za for details of your local SARS branch	Completion of form EMP101 triggers registration for SDL but entities with an annual payroll below R500 000 are exempt.
UIF	SARS. Visit www.sars.gov.za for details of your local SARS branch Local office of the Department of Employment and Labour. Visit www.labour.gov.za or www.ufiling.gov.za	Every business entity employing staff, regardless of its size, must register for UIF. If there are no staff members then it is not necessary to register. When you complete form EMP101 (for employee's tax purposes), this triggers the registration for UIF. If the business does not need to register for PAYE, it needs to register for UIF with the UIF Commissioner at the Department of Labour by completing form UF8 and returning it to the UIF Commissioner at the Department of Labour. This requirement is additional to registering for UIF with SARS. If the business does not need to register for PAYE it needs to register for UIF with the UIF commissioner.
COIDA	Local office of the Department of Employment and Labour. Visit www.labour.gov.za	Every business regardless of its size must register in terms of the Compensation for Occupational Injuries and Diseases Act. You must complete Form W.As.2 and return it to the Compensation Commissioner at the Department of Employment and Labour.

Employee's tax - PAYE

Employee's tax is money that is deducted by an employer from an employee's wage or salary on a regular (usually monthly) basis. The amount of tax that should be deducted is written in tables that are issued by the South African Revenue Services (SARS) and will change from time to time. Every employer who pays wages or salaries which have to be taxed, has to register with the SARS as an employer for employees' tax purposes.

Employees who earn do not need to complete a tax return. Employers must deduct PAYE from employees' wages if they earn enough to qualify to pay PAYE. The minimum salary required to pay income tax is decided by SARS and varies depending on the taxpayer's age.

The current personal income tax thresholds are:

- People younger than 65 years must earn more than R95 750 to pay income tax.
- People between 65 and 74 years must pay tax if they earn more than R148 217,
- People who are 75 years and older, must pay tax if they earn more than R165 689.

Employers must pay the tax that has been deducted to SARS. The employer must register with SARS as an employer and submit an EMP201 return with the payment every month.

HOW TO REGISTER AS AN EMPLOYER FOR SITE/PAYE

To register with SARS an employer must fill in a form called an EMP101 form and send it to SARS. This form can be collected from SARS or you can print the form from SARS's website: www.sars.gov.za

It is advisable to get professional help from an accountant or an attorney to help with the registration. SARS regularly changes the requirements for registration a well as the documentary evidence needed.

SARS will let the owner of the business know that it has received the EMP101 form. SARS will ask for more information if necessary. When the employer has given the information that SARS asked for, SARS will issue a letter confirming registration.

Returns are issued monthly from SARS E-filing.

WHAT MUST THE EMPLOYER DO EVERY MONTH?

When the employer pays the employees, they must deduct tax from their wages. At the end of every month, the employer pays the tax to the SARS. The employer must:

- Add up all the tax deducted from each employee's wages and write it on the form called an EMP201form

- Make payment of the tax to SARS. Either by electronic payment or by writing out a cheque to sars (keep copies of all cheques or efts made to sars)
- Submit the form EMP201 electronically on SARS E-filing and make an electronic or manual payment.

Electronic payments can be made directly into the SARS banking accounts at First National Bank, Absa Bank, Nedbank or Standard Bank or via the Internet banking facilities. In all cases, it is very important that the correct payment reference as indicated on the specific EMP201 Return is provided to ensure that tax payments can be identified and correctly allocated when SARS receives the payment:

- SARS beneficiary account ID; and
- A 19-digit bank payment reference number. This allows the allocation of such payment to a specific tax type and period.

The SARS website, www.sars.gov.za provides details and information relating to bank payment limits and bank payment reference number structuring.

SARS must receive the form and the cheque or electronic payment by the 7th of the next month. For example, the SITE/PAYE for January must reach SARS by 7 February. If it is late, SARS will fine the employer. If the seventh day falls on a weekend or public holiday, the Return and payment must be submitted on the last working day before the weekend or public holiday. SARS will send a receipt to the employer, which must then be filed.

Manual payment can also be made at most commercial banks.

Income earned below the tax threshold must be declared on a document called an IT3. The reason for not deducting PAYE must be stated. The threshold is adjusted every year.

WHAT MUST THE EMPLOYER DO EVERY YEAR?

Twice a year, SARS will ask the employer to add up all the SITE/PAYE tax paid for that period. The employer must add together all the amounts shown on the receipts and fill in a form, called an IRP501 form. At the end of February every year, the employer must give each employee a form called an IRP5 form, which says how much the employee has earned that year, what deductions have been made and how much tax the employee has paid that year. The employee must keep the form in a safe place.

At the end of February every year, the employer must give each employee a form called an IRP5 form, which says how much the employee has earned that year, what deductions have been made and how much tax the employee has paid that year.

The employee must keep the form in a safe place.

In cases where the employer has, for valid reasons, not deducted employees' tax, the employer must provide the employee with an IT 3(a) certificate.

SPECIAL SITUATION FOR MEMBERS OF CCs AND DIRECTORS OF COMPANIES (NOT APPLICABLE TO SOLE TRADERS)

If you are a director of a company or a member of a close corporation, you have to pay an employee's (PAYE) tax every month.

Employees normally earn a salary, which means that an employee earns the same amount every month. The PAYE is, therefore, easy to work out. However, the members of the CC or the Directors of the Company, who are often the owners of the business, often do not earn the same amount of money every month. The law around payment of tax for CC members and company directors is, therefore, complicated and difficult to work out. It is advisable to get an accountant or bookkeeper to help. It is also a good reason not to register a business as a CC unless it is a business that makes a lot of money and can afford to pay an accountant to help.

Look up the Small Enterprises and Development and Financial Agency (SEDFA) website: www.sedfa.org.za for more information on these procedures.

CASUAL EMPLOYEES AND TAX

An employer must deduct 25% from a casual employee's wages as PAYE tax. This will apply to employees who:

- Work for an employer for less than 22 hours per week OR
- Work for an employer without reference to a specific period
- Work daily, who are paid daily and whose wages are more than R75 per day.

Examples include:

- Casual commissions paid, for example, spotters fees
- Casual payments to casual employees for irregular/occasional services
- Payments made to office bearers of organisations or clubs

Exemptions to this rule are as follows:

- If an employee works regularly for less than 22 hours per week and provides the employer with a written undertaking that they do not work for any other employer, then they will be regarded as being in standard employment, and tax must be deducted according to the standard weekly or monthly tax tables.
- An employee who is in standard employment, in other words, working for one employer for at least 22 hours per week.

Unemployment Benefits (UIF)

An employer must register all employees for UIF with SARS. Every month, the employer must deduct UIF from the employee's wages, which is 1% of the employee's wage. The employer must make an equal contribution of 1% of the employee's wages and send the money to the Department of Employment and Labour ***(See pg 382: Unemployment Insurance Fund)***. For information on how to register or make a payment, or to download the relevant forms for registrations, declarations and payment, look at the following website, which is linked to the Department of Employment and Labour: www.ufiling.gov.za. The information that follows is based on information contained in this website. If the employer is registered for PAYE, this will be done on the EMP201 submission to SARS.

WHO MUST CONTRIBUTE TO UIF?

The *Unemployment Insurance Act (No. 63 of 2001)* and *Unemployment Insurance Contributions Act* apply to all employers and employees but not to:

- Employees working less than 24 hours a month for an employer
- Learners
- Public servants
- Foreigners working on contract
- Employees who get a monthly old age grant or
- Employees who only earn commission or do piece work

EXAMPLE

Zama cuts patterns for dresses. He pays Trevor to sew the pieces together. Trevorworks from his house. Trevor is not employed by Zama, and Zama cannot deduct deduct tax or UIF from the money he pays Trevor.

Domestic employers and their employees are included under the Act and must contribute to the UIF.

A working member of a close corporation or working director of a company must now pay UIF. All employees who earn above an amount of R261 748 per year (R21 812 per month) have to pay 1% of their earnings to UIF, but only up to this ceiling amount. For example, if Fred earns R35 000 per month, he will have to pay 1% of R21 812 and not 1% of R35 000. If Fred wants to claim UIF in the future, he will only be paid a percentage of R21 812 and not a percentage of his salary.

The employer cannot claim money from the UIF if the business fails and has to close down.

WHO MUST REGISTER FOR UIF?

All employers must register either with SARS or directly with the Unemployment Insurance Fund.

Employers must register directly with the UIF unless they:

- Are required to register as employers under the *Income Tax Act*, or
- Pay the skills development levy under the *Skills Development Act*.

Employers who are required to register their employees with SARS for the payment of PAYE (Pay As You Earn) and/or SDL (Skills Development Levy) must register with SARS for their UIF.

HOW TO REGISTER FOR UIF

There are various ways to register with the UIF. **(*See pg 859: Chart: Ways to register for UIF*)**

It is the employer's responsibility to fill in and send the forms to register themselves and their employees.

The quickest way to register for UIF is to do it online using the UIF uFiling portal. This allows you to manage all of your UIF contributions and requirements, register employees for UIF when you hire them, and make your payments.

Every employee will be registered on an electronic database system, and their details and contributions to the UIF will be recorded. Every time a new employee is employed, the employer must register this person on the UIF database.

An unemployed person wanting to apply for UIF will only have to present their bar-coded ID document to receive unemployment payments.

See Chart on the next page for ways to register.

WAYS TO REGISTER FOR UIF	
MANNER OF REGISTRATION	**STEPS**
uFiling	**Step 1:** Get the necessary information ready. get information like the ID numbers and addresses of employers and employees ready before registering. **Step 2:** Complete the online registration. go to the website: www.ufiling.gov.za (set up by the Department of Employment and Labour) and complete the online registration forms for commercial employees and for employers of domestic workers all employees, including farm workers and domestic workers.
Via e-mail	**Step 1:** Get the Form UI-8 and UI-19 (for business employers) or the UI-8D and UI-19D (for domestic employers) from the website: www.ufiling.gov.za **Step 2:** Fill in the forms for both yourself and your employees. The form for the registration of employees asks for an employer reference number. If you do not have a reference number yet, you can leave this part open. The UIF will create a reference number and send it to you. Also ignore the part asking for a signature. **Step 3:** e-Mail the forms to: Commercial Employers: webmaster@uif.gov.za. Domestic Employers: domestics@uif.gov.za.
By telephone	**Step 1:** Get the necessary information ready. get information like the ID numbers and addresses of employers and employees ready before phoning the UIF. **Step 2:** Phone the UIF on (012) 337 1680 and follow the instructions of the UIF official.
By fax	**Step 1:** Call the UIF fax line from your fax machine on 086 712 2000 and follow the voice prompts. Wait for the forms to be faxed to you. **Step 2:** Fill in the forms both of yourself and your employees. The form for the registration of employees asks for an employer reference number. If you do not have a reference number yet, you can leave this part open. The UIF will create a reference number and send it to you. **Step 3:** Fax the completed forms back to the UIF at 086 713 3000
By mail	**Step 1:** Get the Form UI-8 and UI-19 (for business employers) or the UI-8D and UI-19D (for domestic employers) from the website or at any Employment Office. **Step 2**: Fill in the forms for both yourself and your employees. The form for the registration of employees asks for an employer reference number. If you do not have a reference number yet, you can leave this part open. The UIF will create a reference number and send it to you. **Step 3:** Mail the forms to: The UIF Pretoria 0052 (Postage is payable on all mail sent)
At a Labour Office	**Step 1:** Get the necessary information ready. get information like the ID numbers and addresses of employers and employees ready before registering. **Step 2:** Get the Form UI-8 and UI-19 (for business employers) or the UI-8D and UI-19D (for domestic employers) from the website or at any Employment Office. **Step 3:** Fill in the forms for both yourself and your employees. The form for the registration of employees asks for an employer reference number. If you do not have a reference number yet, you can leave this part open. The UIF will create a reference number and send it to you. **Step 4:** Hand in the forms to the Labour Office staff

WHAT MUST THE EMPLOYER DO EVERY MONTH?

Once you have registered yourself and your employees with the UIF, you must do the following:

- Deduct 1% of every employee's salary
- Add another 1% for every employee – this is paid by the employer
- Pay the 2% contribution every month to the SARS or UIF
- Declare any new employees or change in an employee's salary to the UIF

HOW TO PAY THE UIF

There are various ways to pay the UIF. It is your responsibility as an employer to deduct money from your employees and pay it and your own contributions to the UIF or SARS.

WAYS TO PAY FOR THE UIF		
METHOD OF PAYMENT	**STEPS**	**BANKS THROUGH WHICH PAYMENT CAN BE MADE**
uFiling	Go to the UIF website: www ufiling.gov.za where you can submit your returns and declarations and make UIF payments.	
Stop Order	**Step 1:** Go to your bank and fill in the forms they give you to pay the money into the UIF account. Ask the bank to use your employer reference number as reference. **Step 2:** Send the payment advice. The UIF sends employers the payment advice form every month. You can also get it on the website. Complete this form when you pay and send it in one of the following ways: • Mail to: UIF Pretoria 0052 • Fax to: (012) 337 1931 • Email to: enquiries@uif.gov.za	FNB (employers of domestic employees only) Account number: 62052400547 Branch code: 25-31-45 FNB (commercial employers) Account number: 51420056941 Branch code: 25-31-45 ABSA (all employers) Account number: 4055481885 Branch code: 32-31-45 STANDARD BANK (all employers) Account number: 010032185 Branch code: 00-45 CDI No: 0068730083641 NEDBANK (all employers) Account number: 1454041560 Branch code: 14-54-05 *The name of the Account Holder is: Unemployment Insurance Fund.*
Internet Banking	**Step 1:** Set the UIF up as a beneficiary. Use your employer reference number as the recipient reference. **Step 2:** Send the payment advice. The UIF sends employers the payment advice form every month. You can also get it on the website. Complete this form when you pay and send it in one of the following ways: • Mail to: UIF Pretoria 0052 • Fax to: (012) 337 1931 • Email to: enquiries@uif.gov.za	

DECLARING NEW EMPLOYEES

Employers must also inform the UIF of changes (for example, new employees appointed or changes in salary) before the 7th of every month.

If you are using uFIling (the UIF online portal) you can use this to declare new employees. Or you can mail, fax or e-mail the UI-19 or UI-19D forms or do the declarations online. If employers want to send declarations, they must use the following steps:

Step 1: Fill in the form

Employers must fill in the UI-19 or UI-19D form (the same form you use to register employees) with the new details for employees. The forms are available at your nearest employment office or on the website. You can also do the declarations online.

Step 2: Send in the form

Employers can send the form to the UIF by:

- Mailing it to: UIF, Pretoria 0052
- Faxing it to: 0866492012
- Emailing it to: domestics@uif.gov.za if you are an employer of a domestic worker or enquiries@uif.gov.za if you are a commercial employer.

Employers with electronic payroll systems must send their information to declarations@uif.gov.za

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Skills Development Fund and Levy

The Skills Development Levy (SDL) is an amount of money that employers have to pay to SARS for skills development of employees.

WHO DOES THE SDL APPLY TO?

The Skills Development Levies Act applies to all employers except:

- The public service
- Religious or charity organisations
- Public entities that get more than 80% of their money from parliament
- Employers:
    - Whose total pay to all its employees is less than R500 000 per year; and

- Who do not have to register the employees with SARS for tax purposes (PAYE)

REGISTERING WITH SARS

Employers who are required to pay a skills development levy must register with SARS.

PAYING THE SDL

Employers must pay a levy of 1% of the total amount paid in salaries to employees (including overtime, leave pay, bonuses, commissions and lump sum payments) every month. The levy may not be deducted from the employees' pay. The levy must be paid by the 7th day of each month.

DISTRIBUTING THE SDL FUNDS

SARS pays 80% of the total levy money paid by employers over to the Sector Education and Training Authorities (SETAs). When employers register, they must tell SARS which (SETA) they belong to. Employers who fall under more than one SETA must consider the following when deciding which one is best for their workplace:

- Composition of their workforce
- Pay of the different employees
- Training needs of the different employees.

Employers can claim back from the SDL up to 70% of the levy, provided they can prove that they have undertaken training for their staff. SARS will supply the correct forms to fill in (SDL201 return form).

The Skills Development Fund gets 20% of the money, which is used for special training.

Payments of employees' tax, SDL and UIF contributions must be paid together into the SARS account and must be reflected correctly and separately on the EMP 201 form in order to ensure that payments are correctly allocated.

For more information on the Skills Development Fund and Levy and how to register, view the following website: www.labour.gov.za and click on 'Skills Development Levy'. ***(See pg 413: Skills Development Act)***

Compensation for Occupational Injuries and Diseases (COIDA)

Employees who get hurt at work, or become sick from diseases caused by their work, can claim Compensation from the Compensation Fund. Employers pay into the Fund. If a worker gets hurt and can claim from the Fund, they can't take the employer to court. However, there is a legal duty on the part of employers to report any accident at work where a worker has been hurt or injured. ***(See pg 394: Compensation Fund)***

The Fund does not pay the worker if the accident is the employer's fault. The employee will have to sue the employer in court.

Employers are required to register with the Compensation Fund and if they fail to do this, they can be held directly liable for any accidents at work. This means they can be sued by workers for injuries or death resulting from accidents while on duty. The Compensation Fund is insurance for employers against these claims. Claims under the Compensation Fund do not require the worker to prove liability against any party. In other words, they don't have to prove who was responsible for the accident if they get injured while on duty.

HOW TO REGISTER FOR COMPENSATION

As soon as a business employs someone, the owner of the business must register with the Department of Employment and Labour to pay compensation. An employer must register with the Compensation Fund within 7 days of employing someone.

For employers who want to apply online for registration at the Compensation Fund, follow these steps:

- Register online at www.labour.gov.za. Click Online Services, click ROE (Return of Earnings) Online (CFonline.labour.gov.za) or register online on the Departments eCOID- Compensation made easy system for online claims
- Complete the Registration Form
- Attach the CIPC certificate, UIF Proof of Registration, ID copies of the owners/directors, and proof of the business residence.
- For a Non-Profit Organisation (NPO), attach the CIPC certificate, UIF Proof of Registration, NPO certificate, ID copies of the owners/directors, a proof of the business residence
- For a Sole Trader/Proprietor, ID copies of the owners/directors, a UIF Proof of Registration, a proof of the business residence
- Forward to RegistrationCF@labour.gov.za
- A Contract Account Number (99.....) will be issued when the registration is finalised

If the business owner prefers to do the process manually, they must get a registration form from an office of the Department of Employment and Labour. . The form must be completed and sent to the Compensation Commissioner at: PO Box 955, Pretoria, 0001.

The Commissioner will send the owner a registration number in about 6 weeks. The Commissioner will also tell the owner of the business how much to pay to the Compensation Fund every year. The owner of the business only pays once a year. The amount depends on how dangerous the work is.

DOES THE EMPLOYER PAY COMPENSATION FOR ALL EMPLOYEES?

COIDA applies to the following people:

- All employers
- Casual and full-time employees who, as a result of a workplace accident or work-related disease:
    - Are injured, disabled, or killed; or
    - Become ill

This excludes:

- Employees who are totally or partially disabled for 3 days or less
- Anyone receiving military training
- Employees of:
    - The South African National Defence Force
    - The South African Police Service
- Any worker guilty of wilful misconduct, unless they are seriously disabled or they are killed and they have someone who depends on them for money
- Employees working mainly outside the RSA and only temporarily employed in the RSA.

WHAT MUST THE EMPLOYER DO WHEN SOMEONE GETS HURT AT WORK?

Report the accident - The employer must report the accident to the Compensation office in Pretoria as soon as possible, but not later than 7 days after the employer finds out about the accident or within 14 days of the employer finding out that the employee has an occupational disease. The employer reports the accident by filling in form WCL 2.

Submit a claim for compensation - A notice of an accident and claim for compensation must be completed by an employee or on their behalf on Form WCL 3. Claims for compensation must be submitted to the Commissioner or employer within 12 months of the date of an accident or death.

Employees may apply for more compensation if they have an accident due to the carelessness of:

- The employer
- An employee who acts for the employer
- Anyone in charge of machinery

Occupational Health and Safety

The *Occupational Health and Safety Act* provides measures to ensure the health and safety of all employees in the workplace.

WHO DOES THE ACT APPLY TO?

The *Occupational Health and Safety Act* applies to all employers and employees but not to:

- Mines, mining areas or any mining works (as defined in the *Minerals Act*)
- Load line ships, fishing boats, sealing boats, whaling boats (as defined in the *Merchant Shipping Act*) and floating cranes, whether in or out of the water
- People in or on these areas or vessels.

APPOINTMENT OF REPRESENTATIVES

Employers who employ 20 or more employees must appoint representatives to monitor health and safety conditions.

Employers who have appointed 2 or more health and safety representatives must form health and safety committees. Employers and committees have certain duties and functions. ***(See pg 346: The Occupational Health and Safety Act)***

Formalising the employment relationship with employees

When someone is newly employed, the employer must give the employee a letter of appointment and a contract of employment. This contract describes the terms and conditions of the employment relationship and should be agreed on by the employee before they sign it.

Conditions of employment are governed by either a sectoral or wage determination (including a Bargaining Council Agreement), the *Basic Conditions of Employment Act* and the *Labour Relations Act*. The conditions of employment should include the organisation's grievance and disciplinary procedures. The employer should also give the new employee a job description. By giving the employee a job description, the employee knows what is

expected of them, and the employer cannot later hold the employee responsible where the employee acted in terms of their duties. ***(See pg 437: Model contract of employment; See pg 1043: Guidelines for drawing up an employment contract; See pg 441: Job description; See pg 294: Laws about terms and conditions of employment; See pg 370: Solving disputes under the Labour Relations Act)***

Income tax

Income tax is the government's main source of income and is levied in terms of the *Income Tax Act* (No. 58 of 1962).

Income tax is levied on the taxpayer's income. Tax is levied on your taxable income, which consists of your gross income after taking off deductions that are allowed by the Act.

Companies and CC's are taxed at a rate of 27%. From February 2024, qualifying small business corporations are subject to the following progressive rates:

- **1 to R95 750:** 0% of taxable income
- **Over R95 750 to R365 000:** 7% of taxable income above R95 750
- **Over R365 000 up to R550 000:** R18 848 + 21%
- **Over R550 000:** R57 698 + 27% of R57 698

There is also a turnover-based taxation system with progressive rates of 0% to 3% for micro-enterprises with a turnover of not more than R1 million.

Individual tax rates are between 18% and 40%. Trusts pay tax at 45%, and is levied on any income retained in the Trust.

The scale for taxing small-business corporations can be found at the following link: https://www.sars.gov.za/tax-rates/income-tax/companies-trusts-and-small-business-corporations-sbc/

Provisional tax

If you own a business the Income Tax Act says that you must register yourself as a provisional taxpayer. In other words, any person who operates as a sole trader, partner in a partnership, member of a CC and director of a company needs to register as a provisional taxpayer.

Sole traders and partnerships need only register in the name of the sole trader or of the partners because the law does not make a distinction between the debts and assets of the people who own the business and the debts and assets of the business.

Close corporations (CC) and companies must be registered in the name of the CC or company. (The members of a CC, and the shareholders and the directors of a company still have to pay their own personal tax, so they would also be individually registered as taxpayers.) ***(See pg 840: Types of businesses)***

The CIPC (Companies and Intellectual Property Commission) controls the registration of companies. A Company will automatically be registered as a taxpayer when CIPC informs SARS of the registration of the company. A sole trader must register, but a Company will automatically be registered.

EXAMPLE

Lena Jacobs and Susan Smith own a business called KwikSave. KwikSave is a partnership. When they register for income tax, they would each have to register as taxpayers in their own names. If KwikSave was a CC, then they would register the business as a taxpayer in the name of KwikSave CC.

Individuals who are provisional taxpayers (the sole trader, partners, members and directors) must submit a provisional tax return twice a year. If a payment is due, the first provisional tax is paid before the 31st of August and the second on or before the 28/29th of February of each year.

IRP 6 returns are done through SARS e-Filing. Taxpayers can pay through a bank by using the account details on the IRP6 Provisional Returns, or through the SARS e-Filing service. Go to www.sarsefiling.co.za or www.sars.co.za for more information. The reference and account details must reflect on the IRP6 and must be used when making the payment.

A sole trader or partner calculates the tax to pay by taking her or his income and subtracting all the money spent on the business. Business expenses are things like:

- Money spent on buying whatever you need to run the business
- Rent for the place where you run the business
- Water and electricity
- Transport costs
- Salaries and wages for employees and casuals
- Money paid for compensation for occupational injuries and diseases
- Money you pay someone to help you with the books for the business

- Bank charges, if you have opened a bank account for the business

CCs and companies pay tax on the income brought into the business, after the expenses of running the business have been deducted. One of the expenses that a CC or company can subtract is the salaries paid to members or directors. Members of CCs and directors of companies cannot subtract the business's expenses from their own salaries. The CC or company will subtract these expenses when it pays CC or company tax.

The *Income Tax Act* specifies that all expenses incurred in the production of income must be deducted. These are some of the things that can be deducted:

- If people buy on credit and they do not pay you, this is called a 'bad debt'. Bad debts can be subtracted from the amount of income on which you can be taxed
- If you repair your business premises, these costs can be subtracted. You cannot subtract the cost of improving your premises
- If the business is run from home, then you work out the percentage of floor space the business takes up and subtract that percentage from costs such as electricity and water; rates; repairs and so on.

EXAMPLE

Sara runs a sewing business from her 3-roomed house. She uses about one-third of one of the three rooms, which is 10% of the floor space of the house. Sara sold R50 000 worth of clothes and duvets during the year. From this amount, she can deduct:

- *All the costs of her materials and the repairs to her sewing machine, which is an asset to her business*
- *The money she pays her sister to help her sell clothes*
- *Taxi fare to town to buy materials*
- *Cost of tea and milk she serves to her clients, plus cleaning materials for her workspace*
- *10% of water, electricity and rates*
- *10% of the cost of repairing the roof and broken window*

Even if the directors or members are provisional taxpayers, PAYE must still be deducted every month.

It is complicated to work out tax. The local SARS will help people to fill in their tax forms. A CC or company should ask an accountant to help with its tax.

ASSESSMENT

Once a year, all taxpayers have to submit an income tax return. On this return, the taxpayer must indicate all income and deductions. SARS will then determine what the final income tax payable is. This is called an Assessment. On the assessment, SARS will consolidate all provisional tax paid as well as tax credits and PAYE. The difference between what was paid through provisional tax, etc., and the final amount will show as the result of the assessment, If not enough tax was paid, the taxpayer must pay the difference to SARS. If there was an overpayment, SARS must refund the taxpayer.

How to register as a taxpayer

If you want to register as an individual taxpayer you must visit a SARS branch where you will be registered on the system. You must submit your proof of identity, proof of address, and proof of bank details.

Once you have registered for tax and given your tax number, you can register on eFiling and file income tax returns online when tax season starts. If you do not register for eFiling, SARS will send you a form that you must complete and return to them.

SOLE TRADERS AND PARTNERSHIPS

If you are a sole trader or a partner in a partnership, this is all you have to do to register.

CLOSE CORPORATIONS AND COMPANIES

If you are starting out and need to register a company, you will have to contact the Company and Intellectual Property Commission (CIPC). You first need to register with the CIPC offices before you register with SARS for an Income Tax reference number. Once a taxpayer has registered with CIPC, SARS will automatically generate an Income Tax reference number. The taxpayer must then register on eFiling to continue the process electronically.

What happens if you do not pay tax or pay late?

It is a criminal offence not to pay tax. If tax is paid late, SARS can fine the taxpayer.

SARS eFiling

Electronic filing (eFiling) through the SARS eFiling website is a way of submitting your tax returns electronically. This method of submitting your returns removes the risks and problems of manually sending in your tax returns.

Before submitting your tax returns, you first need to complete the registration process on www.sarsefiling.co.za. Click on 'Register'.

The main benefits for taxpayers of eFiling are that it is simple, much faster and more convenient. The other benefits include:

- Being able to view all form-related correspondence with SARS
- Being able to view the history of payments and forms submitted online
- Help facilities and online guides
- Due-date reminders via sms and email
- Tax forms and payment tracking
- Electronic confirmation of all transactions
- Request for extensions
- Request for tax directives

WHAT IS THE COST?

The eFiling service is offered at no charge. However, normal service charges for Internet Banking payments will apply.

WHAT ARE THE STEPS INVOLVED?

There are three options to register for tax:

1. **Automatic registration for personal income tax**

   To register on eFiling go to www.sarsefiling.co.za. Click on 'Register' and follow the prompts. You can also register for SARS eFiling on the SARS MobiApp and follow the same steps.

   When you register for SARS eFiling for the first time, and you do not have a tax reference number, SARS will automatically register you and issue a tax reference number. You must have a valid South African ID to register for eFiling.

2. **Register through your employer with SARS eFiling**

   Ask your employer to register you with SARS. eFiling allows employers to register their employees with SARS for income tax.

3. Register at a SARS branch office

You can visit a SARS branch, where a service consultant can help you register for tax. Remember to take all important documents, such as your original ID document.

For more information, contact the eFiling Call Centre on 0800 00 7277 [08h00 to 16h30, except Wednesdays: 09h00 to 16h30, and excluding weekends and Public Holidays, or visit the website: www.sarsefiling.co.za.

Value-Added Tax (VAT)

VAT is paid by each producer or distributor who handles the goods before they reach the final consumer, who is usually a member of the public. It is called value-added tax because tax is paid at every stage where value is added to the product.

VAT vendors

When a business is registered as a vendor, it means two things:

- The vendor must collect VAT from customers and pay this VAT to SARS
- The vendor can claim back any VAT that is paid on anything bought for the business

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Who should register as a VAT vendor?

If the valuable turnover (the total of all the sales, without subtracting the costs) of a business is more than R1 million per year, then the business must be registered as a vendor by completing VAT 101 and VAT127. A business will only be forced to register for VAT where the business has already had a turnover of more than R1 million, or where the business has entered into a contract which means that the business will have a turnover of more than R1 million.

If the turnover of the business is less than R1 million per year, the owner can choose to register or not. If you register, this is called voluntary registration. A business can choose to register for VAT where the business has already had a turnover of R50 000, or where the business has not yet had a turnover of more than R50 000, but expects to turnover at least R50 000 in the year after registration and this expectation is reasonable. It takes a lot of

effort and work to pay VAT to SARS regularly and to keep all the records SARS wants a vendor to have. If you don't have to register, it is only a good idea to register if the business buys lots of things from suppliers and can claim back VAT to reduce the amount of VAT you owe SARS.

Foreign suppliers of electronic services must register for VAT if their business' turnover is more than R1 million over a consecutive 12-month period.

If the business is a sole trader or a partnership, the owners must register in their own names. If the business is a CC or a company, the owners must register in the name of the business. ***(See pg 889: Problem 3: Is being a VAT vendor worth it?)***

How do you register for VAT?

VAT registration must be done using one of the following processes:

- eFiling; or
- Make a virtual appointment via the eFiling system at https://tools.sars.gov.za/SARSeBooking and select the following options:
    - Appointment channel: Telephonic engagement or Video
    - Reason Category: Other
    - Reason for appointment: VAT registration

It is important to submit the correct documents with your VAT registration application. For more information on the registration process, go to the SARS website:

https://www.sars.gov.za/types-of-tax/value-added-tax/register-for-vat/

How does VAT work?

SARS will issue the business with a registration number, which is called a VAT invoice number. This number requires the person or business to charge 15% VAT on goods or services the business sells.

EXAMPLE

Nomawethu types letters for other people. She is registered as a vendor. She charges R50 to type one page. She must charge 15% VAT on top of that. In other words, 15% of R50 is R7.50. So she charges R50 + R7.50 = R57.50 in total.

VAT INVOICES

Vendors must give their customers a VAT invoice to charge them for the goods or services. The invoice must have the following written on it:

- The words 'tax invoice'
- The VAT registration number of the business
- The amount of VAT paid by the customer separately from the price of the goods or services.
- If over R5 000, the VAT number of the buyer

Remember to check that the VAT invoices you receive from other businesses have all these details on them if you are going to claim the VAT back from SARS. If an invoice does not have all these things on it, you cannot claim the VAT back.

WHAT RECORDS MUST BE KEPT FOR VAT PURPOSES?

Businesses registered for VAT must keep records that show how much VAT they have collected. Even after the business has closed, the business must keep the records for 5 years. These are examples of records that must be kept:

- Invoices from your business to customers
- Invoices from your suppliers to you
- A list of debtors (people who owe money to the business) and creditors (people that the business owes money to)
- Bank statements, deposit slips, copies of cheques (the owner of the business must have a bank account)
- Books of account, where the owner of the business writes down how much money has come into the business every month, how much money has been spent and what it was spent on

PAYING VAT TO SARS

If you are registered as a VAT vendor, you will have to submit a return and pay the VAT over to the SARS either bi-monthly, or quarterly, depending on the category that the business falls into.

The owner of the business must calculate how much VAT is owed to SARS. A standard VAT return must be submitted on eFiling by the end of the month following the VAT period. The return form is VAT 201. SARS will impose penalties and interest for people who submit their returns late. Penalties are 10% of the amount that is owed, and interest is charged at the standard interest rates.

Businesses have to pay VAT on goods or services if they have invoiced customers. This is called paying VAT on an invoice basis. It means that if the owner of the business invoices customers, the owner has to pay the VAT to SARS even if the customer has not yet paid. This could cause cash flow problems for the business.

The owner of the business can do three things:

1. Apply to SARS in writing to pay VAT on a payments basis. This means that you only pay VAT to SARS when your customers have paid.
2. Ask customers to pay their account immediately when they buy the goods or when they receive the service.
3. Charge customers interest if they do not pay your invoices within 30 days.

CLAIMING INPUT CREDITS

The vendor can claim back any VAT that is paid on anything bought for the business which relates to providing a valuable service or supply. The VAT which the vendor can claim back is called an input credit.

You can only claim input credits for the amount of VAT shown on VAT invoices that you paid. Remember to file invoices to prove what you have spent money on. For example, you must keep salary slips, invoices from suppliers, slips to show how much petrol you have used if you use a car for business reasons, and so on.

EXAMPLE

John is the only member of a printing CC called Better Copy. Better Copy is registered as a vendor and charges 15% VAT on all printing jobs.

John has to give a Better Copy of the VAT invoice to every customer. So, if Mary wants 20 copies made, Better Copy charges her R5,00 to do this. John must add 15%, which would be 75 cents. Mary pays R5.75 and John then sends the 75c to SARS with all the other VAT paid by other customers over 4 months (because the turnover of his business is less than R1,2 million per year).

Better Copy decides to buy a new photocopy machine from IBM for R10 000. They pay R1 500 VAT on the machine, which means they pay IBM R11 500. IBM gives Better Copy an invoice with IBM's VAT registration number on it. Better Copy can now claim the R1 500 from SARS because Better Copy is registered as a vendor. This R1 500 is called an input credit.

At the end of January, John adds up all the VAT which he has collected from his customers. The total is R5 000, which he owes to SARS. But, he has an input credit of R1 500 which is

VAT he can claim back from SARS. John subtracts the R1 500 input credit from the R5 000 collected from customers. John must pay SARS R3 500.

Business licences

What types of business need a licence?

A business must have a licence if it has anything to do with:

- Making or selling food which can go off
- Health or entertainment activities, such as a business involving sauna, massage, snooker, billiards, slot machines, a night club, disco or showing films
- Selling alcohol

For example, Lotando has a spaza shop, which sells only dry goods like tea, washing powder, coke and so on. He sells no fresh foods, so he doesn't need a licence. Patrick sells fruit and vegetables. Joyce has a stand next to the road where she makes hotdogs and fishcakes. The things Patrick and Joyce sell can go off, and so they need a licence. But no licence is necessary if:

- The person makes and sells the food from their home
- The trader has a hawker's licence

How to get a business licence

Every province has its own Liquor Act and Liquor Board. You must apply to the provincial liquor board for a liquor licence if you want to sell alcohol. The procedure is complicated, and getting an attorney to help you is best.

Municipalities licence street traders and other businesses that deal with food and social events according to their own by-laws. If you are the owner of a business that sells food that can go off, a restaurant or a place of entertainment, you need a licence from your municipality to certify that your premises are safe and meet all standards for hygiene and fires. **(See pg 888: Problem 2: Starting a business which needs a business licence)**

Different government departments will contact the owner to make an appointment to visit the business. These inspectors may visit the business:

- Town planner, to see if the business is in an area that is zoned for business purposes
- Health inspector, to see that the business follows all the health rules

- Inspector from the fire department to see that the business is not a fire hazard
- Mechanical engineer

The inspectors must visit the business within 35 days after you have handed in the form. Your local municipality can give you guidelines for the things inspectors look at. The inspectors will visit the business and tell the municipality what they have found out about the business.

If the inspectors want the owner to make some changes to the business premises, the owner must apply to the local municipality for another 14 days. If the owner does not apply for another 14 days and the work on the premises is not finished by 30 days after giving in the form, the owner will have to apply again, and the inspectors will have to come again.

The local municipality will give the person the licence, allowing them to do business. The council can give the licence with specific conditions.

In most municipalities, street traders also need a street trader license to trade in public places.

EXAMPLE

Nolita applied for a licence to sell fruit and vegetables as a hawker.

The council gave her the licence, but on condition that she only trade between 8 a.m. and 6 p.m. If Nolita sells fruit and vegetables before 8 a.m. or after 6 p.m., the council can take away her licence.

The council will not give a licence if:

- The place where the owner does business is unsafe or unhygienic
- The person is not considered to be a suitable person to open a business because they have a criminal conviction or has a reputation for cheating people in the community

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Does the business licence have to be renewed?

Traders do not have to apply for a new licence every year, but they do have to apply for a new licence if they:

- Move their business to other premises
- Sell the business (the new owner will have to apply for a licence)

- Change the activities on the premises, where a licence for the new activity is required

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What happens if a person sells food and does not get a business licence?

It is a criminal offence to operate without a licence when this is required by the nature of the business. **(See pg 896: Business licence types)**

The owner can be fined or given a prison sentence of up to 3 years. It is also a criminal offence to sell alcohol without a liquor licence.

Informal trading and hawking

Informal trading and hawking is controlled by the municipality. Informal traders are required to get trading permits and can only trade in specified areas. Traders hawking food products are also required to get a business licence and comply with local health standards. Contact the local municipality for information on how trading locations are managed, the types of legal trading, operating hours, permits and licences and the responsibilities of traders.

Exporting and importing

The *International Trade Administration Act (No. 71 of 2002)* makes provision for control, through a permit system, of the import and export of goods specified by regulation. The primary function of this directorate is the administration of the provisions of the *International Trade Administration Act* about the issuing of import and export permits in terms of Section 6 of the Act and investigations and enforcement in terms of Part E of the Act.

The International Trade Administration Commission of South Africa (ITAC) is part of the DTI group of institutions and is responsible for administering the provisions of the Act, including issuing import and export permits.

Permits for exporting and importing

If you want to either import or export goods, you will need to complete the required application forms for importing and exporting and submit this to the ITAC. These forms are available on the ITAC website: www.itac.org.za (click on Documents and then Application forms).

The policy relating to importing or exporting of goods differs from one industry sector to the next. Most new goods are exempt from import control measures. If you want information regarding the import or export of particular goods you must provide ITAC with specific details of these goods.

HOW CAN YOU GET A PERMIT?

> You must complete the required application forms and submit them to the ITAC office. These forms are available in hard copy and can be collected from the ITAC and then mailed, faxed, e-mailed or downloaded from the ITAC website. Permits are issued free of charge and should be issued in approximately 3 days.

Goods that are subject to export and import controls

Not all goods or products are subject to import and/or export control measures. All used goods, second-hand goods, waste and scrap, are subject to import control measures. For a

list of schedules that contain details of the goods that are subject to import and export controls, view the ITAC website: www.itac.org.za (click on Services and then Imports).

The purpose of import controls are to:

- Ensure that used and second-hand goods do not erode the manufacturing SACU industry and the job opportunities in this industry
- Ensure that industry-sensitive goods are imported in a regulated manner
- Ensure that there is compliance with environmental requirements
- Assist agencies with the enforcement of other legislation, such as safety
- Ensure compliance with the provisions of International Agreements

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Registering as an exporter and importer

All importers and exporters in South Africa are required to register with the South African Revenue Services (SARS). To download the import and export forms, refer to the following SARS link: https://www.sars.gov.za/customs-and-excise/

For more information, call the SARS contact centre on 0800 00 7277.

Applicants must submit the relevant completed forms to their nearest SARS Customs & Excise branch office.

Administration skills for small businesses

Keeping accurate financial books and records is important from a legal and tax point of view, as well as for running an efficient business.

Bookkeeping

Bookkeeping means keeping daily records of business financial transactions. These records include a daily cash sheet, accounts receivable, and accounts payable. Bookkeeping should be done daily, and these records are kept for three main reasons:

1. To keep track of your business' money, particularly if you are in a business where large amounts of cash are involved on a day-to-day basis.
2. To keep track of your business' daily, weekly, and monthly financial performance and to see whether this performance is meeting your expectations, projections, and goal.
3. To provide your accountant, if you plan to use one, with the necessary information to quickly and accurately prepare your income tax returns and to produce financial statements as required under tax laws.

Payroll and personnel records

Most businesses will have employees besides the owners. As an employer, you have to collect various levies, including Unemployment Insurance deductions, personal income taxes and skills development levies.

To keep track of the employee payroll, you will need the following:

1. A log book to record the hours your employees worked, their gross pay, and the amount of deductions that you made. You can find these types of payroll books at most stationery stores.
2. The correct forms that you have to complete every month as well as tax tables for deducting SITE/PAYE. **(*See pg 853: Registrations as a new employer*; *See pg 866: Income Tax*).**

Other important records

There are other important records that may be kept depending on the type of business you are running. These include customer service records, inventory records and business safety records.

CUSTOMER SERVICE RECORDS

Customer service is an important part of your business. Customer service records will show you whether you are keeping your customers satisfied or not and where you can improve things. Customer service records could include the following:

- The number of customer complaints (or compliments) per week/month/year
- The nature of the complaints (were they product or service-related?)
- The number of returns (and of which particular items)
- The number of repairs made under warranty

STOCK CONTROL RECORDS

If you operate a small business, you need to keep control of your stock. This involves knowing how much and what kind of stock you have on hand.

BUSINESS SAFETY RECORDS

It is important to keep a record of the number of accidents that take place on your business premises. This will help you to take the correct action and ensure that you are complying with all health and safety laws.

Filing

Ensure you have an electronic filing system that keeps records of bank statements, invoices given to customers and invoices for things that are bought for the business, such as supplies, machinery, cars and petrol used for business trips.

Keep records of all salary slips and copies of documents sent to SARS, the Department of Employment and Labour and so on.

Filling in forms

Fill in all forms in block letters in pen, not in pencil. Fill in forms in the name of:

- The sole proprietor or partners, if the business is a sole proprietor or a partnership.
- If the business has a name, add t/a and the name of the business.
- The name of the cc with cc behind it, if the business is a cc
- The company, with (pty) ltd behind the name, if the business is a company
- Try to make a copy of all forms. If the original gets lost in the post, you can prove that it was sent. Keep a file for copies of forms filled in. Also, keep separate files for papers for PAYE, VAT, RSC levies and so on.

When you write to a government department, always include the registration number that the department has given the business. For example, if you write to the Department of Employment and Labour about UIF, use the UIF registration number that the Department gave the business. This will help the department find the business's file.

Support for SMMEs

Small businesses often need help with problems such as:

- How to write a business plan
- Where to find some money to start a business
- Where to sell their goods and services
- Training for staff (for example, in bookkeeping or computer skills)
- How to tender for a contract

The government departments that are responsible for supporting SMMEs are the Department of Small Business Development and the Department of Trade and Industry and Competition (DTIC).

The Small Enterprise Development Finance Agency (SEDFA)

The *National Small Enterprise Amendment Act (2023)* aims to streamline the support services that government provides to small and medium businesses. The *National Small Enterprise Amendment Act* amends the *National Small Enterprise Act of 1996* and provides for the establishment of the Small Enterprise Development Finance Agency (SEDFA), which will replace and merge the Small Enterprise Financing Agency (SEFA), the Co-operative Banks Development Agency (CBDA) and the Small Enterprise Development Agency (SEDA). The SEDFA will function as a one-stop-shop for entrepreneurs and promote the development of Co-operative Banking Institutions (CBIs). The SEDFA will be located in the Department of Small Business Development. It aims to integrate government support (both financial and non-financial) to small businesses and has the following objectives:

- Design and implement development support programmes for small businesses to:
    - Facilitate the building of sustainable and competitive small enterprises
    - Facilitate the promotion of entrepreneurship
    - Facilitate the creation of an enabling operating environment for small enterprises
    - Facilitate access by small enterprises to financial resources, non-financial resources, capacity-building services, products and services
    - Promote participation of historically disadvantaged people in small enterprise
    - Facilitate international and national market access for products and services of small enterprises

    - Build partnerships across all spheres of government, the private sector and relevant stakeholders to assist the Agency in achieving its objectives
    - Promote a service delivery network to facilitate access and outreach to development support for small enterprises
    - Facilitate and coordinate research relating to small enterprise support programmes
- Promote a service delivery network that increases the contribution of small businesses to the South African economy, and enhances economic growth, job creation and equity in historically disadvantaged communities
- Support, promote and develop cooperative banks and cooperative financial institutions
- Strengthen the capacity of:
    - Service providers to support small businesses
    - Small businesses to compete successfully domestically and internationally

The Act also establishes the Office of the Small Enterprise Ombud Services, which can deal with complaints and promote a more equal trading environment for small businesses. Information can be obtained from the SEDFA website: www.sedfa.org.za

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Thusong Service Centres

A Thusong Service Centre is a one-stop service centre providing information and services to communities. These centres can provide many different services depending on the needs of the surrounding community. The services that would be relevant for small businesses are as follows:

- Local Economic Development (LED) services - Small business advice and development
- Business services and community opportunities - Small, medium and micro enterprises

For more information, view the government website:
https://www.gov.za/about-government/contact-directory/thusong

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National Small Business Advisory Body

The *National Small Enterprise Act* requires the Minister of Small Business Development to facilitate a process aimed at establishing an Advisory Body to represent and promote the interests of small enterprises. This Body will also represent co-operative businesses. The functions of the Advisory Body are to advise the Minister on a range of matters, including:

- Strategies, policies or programme interventions to address market failures affecting the sector
- Impact of legislation on small businesses
- National standards applying to small businesses
- Skills development for running a business
- Access for small businesses and co-operatives into value chains
- Constraints that impact on the success of small businesses and co-operatives
- Influencing the provision of support services to small businesses and co-operatives

Consultations are currently being held with stakeholders, and the Constitution of the Advisory Body will then be finalised.

Problems

1. What type of business to start

Connie, Elizabeth, Phumlani and Themba want advice on how to start their businesses.

Connie has two sewing machines. She wants to start sewing clothes for people in the community and perhaps some uniforms for a hotel in town. She will employ one person and work from her home. She will ask her clients for a deposit and buy materials with the deposit. She wants to know how to register the business and what kind of business it should be.

Elizabeth, Phumlani and Themba want to start a business making furniture. They have borrowed money from the bank to buy materials to start. They will work from a shed, which they will rent from a farmer. They want to know what type of business they must have.

WHAT CAN YOU TELL THEM?

CONNIE

Connie's business will not be very big and she does not have the money to start a company. Advise Connie to be a sole trader and explain as follows:

- What a sole trader or sole proprietor is. Explain that she can call the business something and she would write it on forms as, for example, Connie Ndube t/a Krazy Fashions.
- She should open a bank account
- She must register herself as a provisional income taxpayer (SeeIncome tax)

If she employs someone, she will have to register for SITE/PAYE tax, UIF, Skills Development Levy and Compensation for Occupational Injuries and Diseases ***(See pg 865: Formalising the employment relationship with employees; See pg 853: Registrations as a new employer)***

If Connie's business becomes very big, for example, she sells clothes to shops in Cape Town and employs 30 people, she should think of registering her business as a close corporation. ***(See pg 844: Chart: The differences between the four types of businesses)***

ELISABETH, THEMBA AND PHUMLANI

Three owners can choose to be a partnership or a company. Explain what a partnership is and what a company is. ***(See pg 844: Chart: The differences between the four types of businesses)***

Explain the advantages of a partnership (cheaper and easier to run) and the dangers of a partnership (the court can take away the things belonging to the business to pay a partner's debts, or take away partners' goods to pay the business's debts). ***(See pg 845: Chart: Advantages and disadvantages of the different types of businesses)***

Explain the advantages of a company - the court cannot take away the company's possessions (assets) to pay the debts of the members and it can only take away a member's assets to pay the business's debts if the member has signed surety. Also explain the disadvantages - it is more expensive and complicated to run a company than a partnership.

If your clients decide they want a partnership, tell them:

- To go to a lawyer to help them write a simple partnership agreement
- They should open a bank account in the name of the partnership
- They must register as provisional taxpayers ***(See pg 866: Income tax)***
- All the things they have to do if they employ someone ***(See pg 853: Registrations as a new employer)***

If your clients decide they want a company, tell them:

- To go to a lawyer or accountant to register the company, and to find out what records they must keep
- They must always put 'pty' behind the name of the business, and the registration number of the company must be on any letterhead
- They should open a bank account in the name of the company
- They must register themselves and the company as provisional taxpayers
- The things they must do if they employ people ***(See pg 853: Registrations as a new employer)***

RUNNING THEIR BUSINESSES

Give Connie and Elizabeth, Phumlani and Themba contact numbers of organisations that help small businesses. ***(See pg 883: Support for SMMEs)***

You could explain to them about filling in forms, filing forms and writing out cheques. ***(See pg 880: Administration skills for small businesses)***

If they plan to employ people, they should also know what the duties of employers are under the labour laws. ***(See pg 865: Formalising the employment relationship with employees; See pg 853: Registrations as a new employer)***

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2. Starting a business which needs a business licence

Xolile lives in Noupoort. He wants to start a fish and chip shop. He is not sure whether he will start the shop in the kitchen at home or whether he can rent a little room from the church nearby. He will be employing his wife and his brother. His sister's child will work in the shop on a Friday afternoon after school. His wife's friend Nomonde said she will make meals in her kitchen every day. He will pay her for the number of plates of food he sells every day and give the rest of the food back to her. Xolile wants to know what he needs to do to start the business.

WHAT YOU CAN TELL HIM

Tell Xolile that he should be a sole trader and explain what this means. ***(See pg 840: Sole trader or sole proprietor [owner])***

If Xolile sells the food from his home, he does not need a licence for his business. But if he sells food from the church building, he must apply for a business licence from his municipality. ***(See pg 877: Business licences)*** Xolile should open a bank account. He must also register himself as a provisional income taxpayer. ***(See pg 866: Income tax)***

To find out at which SARS Xolile must register, look at the list of SARS. Find the big towns nearest to Noupoort, and see whether Noupoort is one of the districts under the town. Noupoort falls under Gqeberha. Xolile must register with the SARS office in Gqeberha.

Xolile will be employing people and must register as an employer for SITE/PAYE tax, UIF, SDL and Compensation for Occupational Injuries and Diseases. ***(See pg 853: Registrations as a new employer)***

His wife cannot claim UIF. Also, his sister's child works for less than 8 hours a week and cannot claim UIF. He must, therefore, not deduct UIF from their wages.

Xolile must register with the Department of Employment and Labour in Gqeberha. He can get a Compensation form from the Department of Employment and Labour in Gqeberha, but he must send it to Tshwane. Xolile will need to know:

- What the duties of employers are under the labour laws. ***(See pg 865: Formalising the employment relationship with employees)***
- How to fill in forms, file forms and write out cheques. ***(See pg 880: Administration skills for small businesses)***

- Contact numbers of organisations that help small businesses. ***(See pg 883: Support for SMMEs)***

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3. Is being a VAT vendor worth it?

Lothando comes to see you. She owns a printing and photocopy business called Thando's Copy Shop. Thando's Copy Shop is a company. The company is registered for VAT. Lothando's problem is that she has to pay VAT to SARS before some of her clients have paid her. She also spends lots of time every month filling in the forms. She asks you to help her.

WHAT YOU CAN TELL HER

Ask Lothando what her turnover is. Turnover means all the money that comes into the business before subtracting the money it costs to run the business.

Remember to subtract 15% VAT from the turnover, because the VAT does not belong to the business. The company is collecting the VAT for SARS. If the turnover is less than R1 million per year, then the company does not have to charge its customers VAT. Then, she can tell SARS that she does not want the company to be a registered vendor anymore. But it may be a good idea to stay registered if the VAT that Lothando can claim back from SARS, which she has paid when buying things for the business, is more than the VAT the company has to pay SARS. ***(See pg 871: Who should register as a vendor?)***

Ask Lothando whether she has been subtracting the VAT she pays (called an input credit) from the VAT she pays to SARS. ***(See pg 874: Claiming input credits)***

Help Lothando decide whether she should stay registered or not. Ask Lothando to show you the invoices for all the money she spends on the business, such as paper, ink for the machines, rental for the photocopy and printing machines, rental for the premises, electricity and water. See whether she pays VAT for these things. Add all the VAT together, to see how much VAT she can claim back from SARS.

For example, if the turnover of Thando's Copy Shop is R5 000 per month, the turnover for the year would be 12 x R5 000, which is R60 000. Thando's Copy Shop does not have to register for VAT, but Lothando can register for VAT if she wants to.

The VAT on R60 000 would be R9 000. Lothando would have to add 15%15% to her prices. If the VAT she pays on the things she buys for her business is less than R9 000 per year, then it is a waste of Lothando's time to collect VAT for SARS. Also, it could make her prices more expensive than her competitors! Lothando should tell SARS that she does not want Thando's Copy Shop to be registered anymore.

If the VAT she pays on the things she buys for the business is much more than R9 000 per year, then it could make sense for her to collect VAT for SARS. For example, if the VAT she pays is R12 000 per year, it means SARS will pay her the difference between the VAT she collects from her customers R9 000) and the VAT she pays (R12 000). SARS will have to pay Thando's Copy Shop R3 000.

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4. Drawing up a business plan

A business plan is a document that details the what, where, how and when of a business and converts these details into a proper financial plan. Draw up a business plan by answering the following questions.

QUESTIONS

Business description

- What products will your business be selling?
- Are you a manufacturer or a retail business?

Business law

- What licence or permit do you need to start your business?
- How long will it take you to get such a licence or permit and where do you get it from?
- Do you know what business laws apply, such as the Labour Relations Act, UIF, Workers Compensation, Occupational Safety, PAYE, VAT, and income tax laws?

Business premises

- Do you have suitable premises?
- If it is not close to your suppliers, how are you going to cut back on the costs of transporting the goods?
- If it is not close to your customers, how are you going to make it easier for customers to buy from you?
- Do you own the premises?
- If you are leasing, what is the length of the lease?
- By how much does your rent increase every month or year?

- If you are taking over from old tenants, are their electricity, water and telephone fully paid up?

Trading hours

- When will your business be open to customers?
- Will it open on Saturdays and on public holidays?

Business insurance

- How will you protect your business from the risk of:
    - Fire
    - Theft and robbery
    - Vandalism
    - Public liability
    - Loss of profits

Business operations

- What product will you be selling?
- Is this new on the market?
- Can you compete with other products on the market that are the same as yours?
- Do you know how much you will sell your product for?
- Have you calculated your total costs for making the product ready to sell?
- Do you know how much you are going to mark the product up?
- Do you know how many products you will have to sell to prevent monthly losses?
- Does the demand from customers change with the different seasons? if so, how are you going to survive in the bad seasons?
- If you have to buy machines: what is the lifespan of the machine? Who will you buy it from? What are the maintenance requirements, and how much will it cost?
- Have you got reliable suppliers for your raw materials or products?
- Will you pay cash on delivery or on credit?

Human resources

- How many people will you have to employ?
- Do you need people with special skills?
- How will you find staff?
- How much are you going to pay staff?

Business records

- Do you know which business records you have to maintain?
- Can you keep records of income, expenses, assets and liabilities?
- Do you know how to make salary payments, including deductions for tax and UIF?
- Do you know which financial reports have to be prepared? Who will do this for you?

Administration

- How many people do you need to work in administration?
- What will the costs of administration equipment and supplies be - photocopiers, cash registers, computers and printers, etc?

Operational costs

- Do you know how much you will have to pay for:
    - Rent, or loan and rates
    - Electricity, water, telephone and stationery
    - Cleaning

Financial plan

Say how much each item of your business will cost. You should work this out for every month of the year. Then, you should work this out for the next three years.

- How much money you will need to start your business?
- How much money do you have?
- How much money will you have to borrow? how long will it take to repay the loan?

Business details

- What is the name and physical address of the business?
- What is your legal structure: sole proprietor, partnership, close corporation, or company?
- Who are the owners of the business?

SUPPORT FOR DRAWING UP A BUSINESS PLAN

The Small Enterprise Development Finance Agency (SEDFA) is a state-owned entity which aims to provide support for small enterprises. SEDFA is a consolidation of SEDA and other agencies providing support to small enterprises and cooperatives. By centralising financial and non-financial assistance, offering business advice, investment support, and incubator services, SEDFA aims to enhance the support available to small businesses.

For more information, view the Small Enterprise Development and Finance Agency website: www.sedfa.org.za.

Model letter

Model letter of appointment

EXAMPLE LETTER

Bongiswa's Bakery
50, 4th Avenue
Gugulethu
7750
[Date]

Mr C. Sonto,
99 1st Avenue Gugulethu 7750

Dear Colin

LETTER OF APPOINTMENT

Congratulations on getting the job at Bongiswa's Bakery, as a baker. Your job starts on [Date].

As we discussed, the terms of your job will be as follows:

1. *You will work from 8h30 to 16h00 Monday to Friday, with a break for lunch.*
2. *I will pay you R Amount per week.*
3. *You can take 18 days paid holiday every year. We must agree in advance on the time when you can go on holiday.*

You will be on probation for three months. If you do not like the job, you can give me 24 hours' notice. I can also give you 24 hours' notice if I think you are not doing a good job. I hope you will be happy here and stay with us for many years.

Yours sincerely
Bongiswa Mtitshana

Checklists

When starting a business

- What type of business should you start?
- Do you have a bank account? Decide in what name the bank account for the business should be opened.
- Are you registered as a provisional taxpayer?
- Should you consider registering as a vendor for VAT?
- Do you need to apply for a business licence?
- Do you need to apply for a liquor licence to sell alcohol? You must go to the Liquor Board to apply for a liquor licence. The procedure is complicated, and getting an attorney to help you is best.
- Will you employ people who work from their own homes, as casual workers or at your business?
    - Are you registered with SARS for PAYE?
    - Are you registered with the Department of Employment and Labour for UIF/SDL/Compensation?
    - Are you registered with the Department of Employment and Labour for Compensation for Occupational Injuries and Diseases?
- Do you need a loan to help start the business?
- Do you need training in running a business?
- Would you like to meet other small business owners?

Business Licence Types

LICENCE TYPE	TYPE OF BUSINESS ACTIVITY
7000	SALE AND SUPPLY OF MEALS: Foodstuff that is prepared in the form of a meal
8001	HEALTH AND ENTERTAINMENT: Baths or saunas Gymnasiums or health centres that offer saunas or Turkish baths
8002	HEALTH AND ENTERTAINMENT: Massage and infra-red treatment Body massages or aromatherapy etc
8003	HEALTH AND ENTERTAINMENT: Escort agency
8004	HEALTH AND ENTERTAINMENT: Devices Business premises with 3 or more electronic machines
8005	HEALTH AND ENTERTAINMENT: Pool, snooker or billiards tables Business premises with 3 or more tables
8006	HEALTH AND ENTERTAINMENT: Nightclub or discotheque (Dancing, raves, etc)
8007	HEALTH AND ENTERTAINMENT: Cinema or theatre Shows, dinner theatre, bands, live shows, etc
9000	HAWKING IN MEALS: Boerewors rolls, hamburgers, hot chips, etc

NOTE

You will have to pay an application fee for each of these licences. The local council will tell you what the fee is in each case. The Liquor Board is responsible for issuing licences to sell alcohol.

Education and schools

Introduction

Education in South Africa is governed by two national departments. The Department of Basic Education (DBE) is responsible for managing primary and secondary education (from Grade R to Grade 12, as well as adult literacy programmes and Early Childhood Development (ECD). The Department of Higher Education and Training (DHET) is responsible for tertiary education, including universities and colleges.

One of the most important aspects of basic education is the *South African Schools Act (No. 84 of 1996)*, which is the law relating to school governing bodies. At the heart of this is the idea of a partnership between all people with an interest in education. Schools will be improved only through the joint efforts of parents, educators, learners, members of their local communities, and various education departments.

In terms of higher education, an important addition to the law has been the introduction of the National Student Financial Aid Scheme (NSFAS) which was established in terms of the *National Student Financial Aid Scheme Act No. 56 of 1999*. NSFAS provides financial aid to students who qualify at TVET colleges and public universities.

Types of schools

South African schools have traditionally been classified as either independent (also known as 'private') or public schools. While both types of schools receive funding from the state, private schools generally demand much higher school fees from the parents of children who attend, with the result that they are much wealthier schools.

Public schools are designed to be more inclusive because the fees they charge are much lower. Most public schools that serve poor learners charge no fees at all. Schools are divided into five quintiles (20% of schools) according to the levels of income of parents. The three lowest quintiles (so 60% of all schools) are not allowed to charge school fees.

Public Schools can be further categorised as “Section 20 or Section 21” Schools. This refers to the section in the Schools Act which allows for the establishment of the Schools Governing Body. Section 20 schools receive little money directly but get services and textbooks paid for by the provincial department. Section 21 schools can manage their own finances and purchases, usually charge school fees, and get money from the department.

School Governing Bodies (SGBs)

Functions of SGBs

The SA *Schools Act Section 20* describes the functions of the school governing body. This includes:

- Promoting the best interests of the school and its development
- Adopting a constitution and mission statement
- Introducing a code of conduct
- Providing support to educators and the principal in carrying out their duties
- Determining times of the school day
- Administering and controlling the school's property, buildings and grounds
- Involving parents and others to undertake voluntary duties and tasks
- Recommending to the Head of Department the appointment of educators and non-educator staff at the school, subject to the relevant legislation *Educators Employment Act, 1994 (Proclamation No. 138 of 1994)*, and the *Labour Relations Act, 1995 (Act No. 66 of 1995)*
- Managing and allowing the use of school facilities for fundraising, community, and social uses
- Maintaining and improving the school's property, buildings and grounds
- Deciding on the extramural curriculum and the choice of subject options according to provincial curriculum policy
- Buying textbooks, educational material and equipment for the school
- Paying for services to the school

Who sits on an SGB?

There are three groups represented on a governing body:

- **Elected members** who can be parents of learners at the school, educators at the school, staff members who are not educators, such as secretaries and gardeners and/or learners at the school who are in grade 8 or above (they must be elected by the representative council of learners, which is made up of class representatives)
- **School principal**
- **Optional co-opted members** who don't have the right to vote, for example, members of the community or former learners with specific expertise like accounting.

The number of parents on a governing body must be one more than half of all of the members who may vote. Parents who are employed at a school can only be elected as a representative of staff members, not as a representative of parents.

Rules guiding SGBs

Each governing body must draw up a constitution that says how it will work. The constitution must fit into the minimum requirements given by the provincial MEC for Education. The constitution must say:

- The governing body will meet at least once every school term
- A separate meeting will be held with each of these groups at least once a year: parents, learners, educators and other staff
- The governing body will report to parents, learners, educators and other staff at least once a year
- How minutes of governing body meetings must be kept

The provincial minister of education will publish these details:

- How the governing body will be elected
- How long members and office bearers may serve on a governing body
- How to remove a member from the governing body if there is a good reason For doing this
- How to fill a vacancy
- What sub-committees must be set up, for example, an executive for day-to-day decisions, committees for fund-raising, finance, sport, staff appointments, school environment and health

Each committee chairperson must be a member of the governing body, but other committee members need not be on the governing body.

CODE OF CONDUCT FOR SGBS

The provincial MEC for Education must draw up a code of conduct for the members of the SGB after consultation with associations of governing bodies in each respective province. All members are required to comply with the code of conduct.

The code of conduct must include provisions that allow for disciplinary action to be taken against a member of the governing body and also protect the member who is being disciplined. The Head of Department may suspend or terminate the membership of a governing body member for breaking the code of conduct once proper disciplinary procedures in terms of the code have been followed. A member

may appeal to the provincial MEC against a decision of the Head of Department regarding a suspension or termination of membership as a governing body member.

Responsibilities of SGBs

The governing body must:

- Decide on an admissions policy that doesn't go against the National Constitution
- Decide on the language policy of the school
- Decide on what religious practices will be followed at the school (attending any religious practices must be free and voluntary for learners and staff)
- Adopt a code of conduct for learners after consulting with learners, parents and educators
- Promote the best interests of the school and encourage its development by providing quality education for all learners
- Adopt a constitution
- Adopt the mission statement of the school (this sets out the values and beliefs of the school)
- Decide the times of the school day
- Administer the school property, buildings and grounds
- Encourage parents, learners, educators and other staff to offer voluntary services
- Recommend to provincial heads of departments on the appointment of educators at the school
- Allow school facilities to be used by the provincial education department
- The governing body can allow the community to use its facilities for community, social and school fund-raising purposes

ADOPTING SCHOOL POLICIES

There are various policies and codes of conduct that an SGB must adopt for the school.

ADMISSIONS POLICY

The SGB must decide on an admissions policy that does not go against the Constitution. This means there must be no unfair discrimination against anyone on any grounds of discrimination, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age, disability, religion, language, or culture. For this reason, schools cannot require learners to do a test to decide if they qualify for admission. The principal of a school will only make a decision provisionally on behalf of the provincial Head of Department. The MEC in each province is the political head of the provincial education department, has the final

say in decisions on admission, and has the power to overturn decisions. The MEC has the final say in admission decisions and they must exercise this power in a fair and reasonable way. The Department of Basic Education sets national norms and standards for admissions, which the SGB's admission policy must comply with.

CODE OF CONDUCT FOR LEARNERS

The SGB is responsible for creating a code of conduct in consultation with learners, parents and educators. The Code of Conduct must not go against the Constitution. SGBs can use the guidelines set by the Department of Basic Education called 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners. When developing a Code of Conduct, an SGB must consider the religious, cultural and racial diversity of the school population they serve and develop rules that are inclusive and reflect this diversity. The Code of Conduct must state what conduct is allowed and/or not allowed, and it must say what the disciplinary procedure is, including suspensions, expulsions, and the appeals procedure. The SGB can suspend a learner, but it can only recommend the expulsion of a learner to the HOD who is the only person who can decide to expel a learner. The learner has a right to appeal the decision to expel them by appealing to the MEC of the provincial DBE.

LANGUAGE POLICY

SGBs can decide on a school's language policy in terms of section 6 of the Schools Act, but they must follow the Constitution. The Courts have held that the HOD can intervene in the language policy of a school on reasonable grounds to uphold a learner's right to education. Section 29 of the Constitution provides that everyone has the right to receive education in the language of their choice where it is reasonably practical, taking into account the need to deal with historical discrimination. The language policy must also take into account the broader needs of the community where the school is based.

PREGNANCY POLICY

SGBs can make a pregnancy policy, but this must not go against the Constitution. The policy must uphold the learners' right to education and make sure there is no unfair discrimination against a learner based on their pregnancy. The policy should aim to protect pregnant learners from being stigmatised and bullied and provide counselling and sex education. It should also help learners with their pregnancy needs, in other words, so they can return to school after they give birth and are helped with their health and maternal needs.

In the DBE Policy of 2021 on the Prevention and Management of Learner Pregnancy in Schools, the policy provides for sexual and reproductive health services – which

include access to information on contraception to help learners make informed choices, avoid unintended pregnancies, and ensure safe abortions. The policy also ensures that learners can return to school after childbirth, facilitates access for pregnant learners to antenatal care, and ensures that schools provide a stigma-free, nondiscriminatory and non-judgemental environment for pregnant learners.

RELIGIOUS POLICY

SGBs can make rules about religious practices, but these rules must comply with the Constitution, which protects everyone's right to freedom of religion and opinion. The rules must also comply with Section 8 of the School Act and with the DBE's National Policy on Religion in Education. It must promote understanding and respect for different religious beliefs. Learners should be free to join or not join a school's religious practices.

The Basic Education Laws Amendment Act (BELA) - Impact on SGBs

The DBE introduced the *Basic Education Laws Amendment Act* (BELA), which includes many amendments for SGBs.

BELA aims to improve the efficient functioning and administration of SGBs by providing for greater measures of accountability of SGBs.

- Clause 14 of BELA amends section 18A of the Schools Act, which prevents members of SGBs or their families from benefiting financially from their relationship with the school.
- Clause 23 of BELA amends section 27(2) of the Schools Act to prevent SGB members from receiving any form of remuneration from the school and section 29, which will ensure that only a parent who is not an employee at a school may serve as the chairperson of the financial committee.
- Clause 28 of BELA amends section 36 of the Schools Act to introduce measures requiring the approval of the Member of the Executive Council where schools enter into loan or lease agreements.
- Clause 30 of BELA amends section 38 of the Schools Act to introduce new oversight measures when a budget is adapted during a financial year or when a quorum cannot be reached for an annual general meeting.
- Clause 31 of BELA amends section 38A of the Schools Act, which provides for processes in paying state employees. The section aims to provide greater financial oversight over a school's financial affairs. These clauses impact governance at a local level to prevent corruption.

- Clause 4 of BELA amends Section 5 of the Schools Act by providing that admission policies must be sent to the HOD for approval.
- Clause 5 of BELA amends Section 6 of the Schools Act by providing that the HOD, when approving a school's language policy, must consider the best interests of the learner and the number of learners who speak the language, the best use of resources, and the language needs of the broader community. It allows the HOD to adopt more than one teaching language.
- Clause 7 of BELA amends Section 8 of the Schools Act to allow learners to be exempt from certain rules of the school if they impact the learners' religious and cultural beliefs.
- BELA proposes changing the criteria for getting a fee exemption.

Building capacity for SGB members

The provincial Head of Department must set up a programme to provide training for newly elected governing bodies to help them perform their functions.

Additional powers that can be given to SGBs

The provincial education department can decide to give additional management functions to school governing bodies that function well and have proved themselves capable of improving their schools.

The *South African Schools Act* identifies two kinds of schools: Section 20 and Section 21 schools. Section 21 schools have greater powers and responsibilities than Section 20 schools, especially for financial management and purchasing. Section 20 schools receive allocations of textbooks and stationery from government. They also have their lights and water accounts paid directly by government. When something is broken at the school, the Provincial Education Department must send someone from Public Works to do the repairs.

Section 21 allows a school to apply in writing to the Head of Department for additional powers. This gives more independence and responsibility to the SGB, but SGBs are encouraged to make applications only if they have the capacity required to manage these additional functions and increased responsibility.

Section 21 schools are allocated finances by the department for additional functions which include:

- Maintaining and improving the school's property, buildings and grounds

- Deciding on the extra-mural curriculum of the school as well as the choice of subject options
- Purchasing textbooks, educational materials or equipment for the school;
- Paying for services to the school
- Section 21 school SGBs may also raise money to employ additional staff or educators – these are often called SGB posts.

Disclosures of members of SGBs

The *Basic Education Laws Amendment Bill (BELA)* (which is still being debated by Parliament) requires members of school governing bodies, like other public officials, to annually report their financial interests and the financial interests of their spouse, partner, and immediate family members.

Prefects and Representative Councils of Learners (RCLS)

To promote responsibility and involvement amongst learners in schools, all high schools must hold elections for RCLs. RCLs offer a useful opportunity for young people to learn about leadership and to understand the relationship between responsibility and authority. RCLs are made up of one elected representative per class. The RCL must elect two members to represent learners on the SGB.

Admission of learners to schools

Government policy on admissions

Government policy on school admissions and school fees is guided by three basic principles:

- **Equity:** to make sure that goverment gives the same basic resources to all government schools
- **Redress:** to give more government resources to learners in historically disadvantaged communities so that they have more money for textbooks and stationery, and to build schools – especially no-fee schools – in areas where none exist, and to upgrade existing schools

- **Access:** to make sure no one is excluded from attending school on the basis of race or religion or because they cannot afford the cost of school fees.

In terms of Section 3(1) of the *Schools Act*, all learners between the ages of 7 and 15, or Grade 9, whichever comes first, must attend school. This section is often interpreted and implemented by provincial education departments (PEDs) to exclude learners who are 16 years and older (referred to as 'over-aged' learners). However, it is the MEC's duty to ensure that there are enough school places for all learners in their province and not just learners who are of compulsory school-going age. Parents or caregivers must ensure that they apply to schools so that these learners can be enrolled in a school and in a grade that is appropriate for their age. While the provincial HOD has a responsibility to place a learner in a grade that is appropriate for their age, this is not necessarily in a school of the parent's choice.

If a learner has to repeat a year, the government admissions policy states that they can do this for one year per school phase if necessary. However, repeating a grade many times is not allowed.

The government's admission policy says that HODs must provide a clear process of registration for admission to public schools and must be responsible for the administration.

ADMISSION OF LEARNERS WITH SPECIAL EDUCATION NEEDS

Provincial MECs have a duty to provide enough schools for all learners in the province, including learners with special education needs, such as learners with disabilities. Section 4 of the Schools Act says the MEC must, where reasonably practical, provide education for learners with special needs and provide relevant educational support services to these learners. When a learner is registered at a public school and they have a physical disability, the school has a legal duty to admit the learner, assess their support needs, and take relevant steps to support the learner.

No learner registering at a state school can be charged a registration fee or asked to pay fees in advance. No learner can be refused entry to a state school because their parents have not paid outstanding school fees.

The provincial department of education makes regulations guiding admissions. Here are some practical steps that can be taken if a school tells a learner that it is full:

- Ask the principal if the school has been officially declared full by the Education Department. Ask to see the letter which says the school is full. If there is no letter, then the school must accept the learner. If the school refuses permission, then contact the district office

- If the school does have a letter, then the department must find a place for the learner in the nearest school to where they live.

Documents that learners should produce to be admitted to a public school

The Admission Policy for Ordinary Schools says that the only documents parents need to show the school when they apply for a learner to be admitted are:

- Completed admissions application form.
- The learner's birth certificate (if the parent is unable to produce a birth certificate, the school must accept the learner on condition that the parent gets a copy of the birth certificate from the Department of Home Affairs).
- If the learner is transferring from another school, they must produce a transfer card, a report card or any document from the previous school with an affidavit stating why the learner does not have a transfer card.
- Proof that the learner has been immunised against polio, measles, TB, diphtheria, tetanus and hepatitis B (usually, the learner's clinic card will give proof of this). If the learner hasn't been immunised, the principal must advise the parent to have the learner immunised as part of the free public primary healthcare programme.
- In terms of a person with no documents, the school can still accept the learner, but the documents must be brought within a reasonable time.

Process for admission to a public school

The head of education in each province will determine how the admissions application process will work for their province and they are responsible for the administration of admissions of learners. The process may be different in each province. For example, some provinces like Gauteng, Western Cape and Northern Cape only make use of an online application process, while KwaZulu-Natal schools only accept hard-copy application forms. Other provinces make use of both systems.

The parents or caregivers of a learner must complete and submit a school application form. If there is an online application process, the parent or caregiver must register on the provincial education department website to complete an online application form. If the school requires a hard copy application form then this usually has to be submitted to the school in person. School Principals are required to help parents with completing their admission application forms.

Refusing to admit a learner to a school

If a learner's application to a school for admission is unsuccessful, the school must inform parents and learners of their right to appeal against the decision of the school. Also, the school must provide full and proper reasons for the refusal of admission to parents and learners.

WHAT HAPPENS IF A CHILD IS REFUSED ACCESS TO A SCHOOL ON GROUNDS OF LANGUAGE?

Language cannot be used as a reason to refuse admission to learners. The language policy of the school must reflect that language or languages spoken by the learners and the school must show how it is promoting multilingualism. Government policy is clear on allowing all learners access to state schools. It also supports mother tongue instruction where this is possible. Some communities have successfully solved this matter by entering into negotiations with the school governing body.

When faced with a problem where a number of learners cannot access a school because of its language policy, paralegals or community workers can begin by finding out how many learners are without a school to attend in the community. They can then request a meeting with the Principal and the school governing body. The local Education District Office can also be approached to assist.

CAN A LEARNER BE REFUSED ADMISSION FOR FAILING TO PAY SCHOOL FEES?

The law says that no child can be refused admission to a school because their parents cannot afford to pay school fees. It is also illegal for the following to take place in relation to fees:

- To charge registration fees or other advance payments from parents when admitting a learner to a school
- To send a learner home from school because of unpaid school fees
- To refuse to give the results of tests or exams if fees have not been paid.

The law says that the paying of fees is a matter between the SGB and the parent of the learner and not a matter between a learner, educators and/or principals.

CAN A LEARNER BE REFUSED ADMISSION FOR BEING UNABLE TO AFFORD A UNIFORM, SCHOOL BOOKS OR A REGISTRATION FEE?

The ability to pay for school uniforms and books is not a condition for admission to a school. Schools are also not allowed to refuse to register learners who cannot pay a registration fee. ***(See pg 913: No-fee and Fee-charging schools)***

CAN A LEARNER BE DISCIPLINED FOR CULTURAL PRACTICES THAT ARE 'AGAINST SCHOOL RULES'?

In the case of *MEC for Education (KZN) v Navaneethum Pillay*, the Constitutional Court found that the refusal by a school to allow one of its pupils to wear a small gold nose stud (which she argued was part of her cultural heritage and identity) constituted unfair discrimination against the pupil on both a cultural and religious basis, and the school was ordered to let the pupil wear the nose stud.

CAN A DISABLED LEARNER BE REFUSED ADMISSION?

The law says that 'learners with special education needs' must, in most cases, have the chance to attend ordinary public schools. The school has to follow a process where the Head of Department (HOD) first consults parents and other educators to see if the learner can be admitted. This might include adapting some of the school's facilities. If the school feels that they do not have the capacity to admit the learner then the law says the HOD must have the learner admitted at another suitable school in the province. Learners with special needs cannot simply be refused admission. These learners are governed by Sections 22–25 of the Admissions Policy for Ordinary Public Schools.

CAN A LEARNER BE REFUSED ADMISSION BECAUSE THEY ARE HIV POSITIVE?

Every learner has a right to be treated:

- In the same way as other learners
- With human dignity

Therefore, no learner may be discriminated against on the grounds of their HIV status.

There is a National Policy on HIV/AIDS for Learners and Educators which aims to respond to the wide variety of circumstances involving HIV/AIDS in schools and to acknowledge the importance of SGBs, councils and parents in responding to this. Governing bodies are expected to implement the National Policy by developing and adopting an HIV/AIDS Implementation Plan. The National Policy deals with the following:

- Non-discrimination and equality with regard to learners and/or educators with HIV/AIDS
- HIV/AIDS testing and admission to schools and appointments of educators
- Attendance at schools by learners with HIV/AIDS
- Disclosure of information and confidentiality
- Creating a safe school environment to prevent the risk of transmission of HIV/AIDS, particularly during play and sport

- Education on HIV/AIDS
- Duties and responsibilities of all learners, educators and parents
- Consequences of refusing to study with or teach a learner with HIV/AIDS or to work with or be taught by an educator with HIV/AIDS
- School Implementation Plans
- Health advisory Committees

CAN A LEARNER BE REFUSED ADMISSION OR EXPELLED BECAUSE SHE IS PREGNANT?

A learner may not be refused admission to a school or expelled from a school because she is pregnant. The school principal and the school community should look at ways to support learners who are pregnant. The school is required to provide pregnant learners with health information.

The Constitutional Court ruled in 2013 that expelling a pregnant learner is against the law and undermines the right to education.

Appeal against a refusal to admit a learner to a school

If a learner's admission has been refused, they can appeal against this decision to the provincial MEC. Parents should make their appeal as soon as possible after they have been notified that the school has refused the learner's admission. Also, check provincial appeal timelines.

In the appeal, you must address the following:

- The current admission application to the school(s), when the application was made and whether or not the application was made in time
- The outcome of the application and the engagement the parent or caregiver has had with the principal
- Any steps taken by the parent or caregiver (especially whether or not the parent has approached other schools and if these schools' admission application dates have lapsed).
- Grounds for the appeal (reasons why the school's decision is unreasonable and without basis)
- Request that the MEC overturn the decision of the principal or the SGB, or alternatively that the MEC find alternative placement for the learner at the nearest school possible. The PED has a duty to place the learner in a suitable school, not necessarily in a school of the parent's choice.
- Include all relevant documentation. Include reference to the school's admission policy and whether the parent feels the school has not followed its own policy or acted unfairly towards the learner.

It is better for the learner's case if the parent has applied to a number of schools, as learners are not guaranteed a place in a specific school.

School fees

Public schools are funded by the government and through school fees and/or school fundraising. Laws and regulations governing school fees are as follows:

- The *South African Schools Act* (*Act 84 of 1996*) as amended by the *Education Laws Amendment Act*, 2005 (SASA)
- The Regulations Relating to the Exemption of Parents from the Payment of School Fees, 2006
- The Amended National Norms and Standards for School Funding, 2006
- The Admission Policy for Ordinary Public Schools, 1998

The government pays most of the teachers' salaries and bigger building costs and makes some contribution per learner to pay for the equipment and running costs. Over and above the government's contribution, parents of learners pay school fees that contribute to financing some schools' operating expenses.

According to the *South African Schools Act* (SASA), the SGB of a school must take all reasonable measures within its means to supplement the resources that are supplied by the government in order to improve the quality of education that is provided to all the learners at the school.

No-fee and fee-charging schools

Schools are divided up into 5 categories or quintiles, with the poorest schools being in quintile 1, and the least poor being in quintile 5.

The amount contributed by the state in a quintile 1 school (the poorest school according to the quintile status) will be higher than the amount contributed in a quintile 4 or a quintile 5 school (least poor). In other words, all these schools receive subsidies, but the amount varies depending on which quintile the school is determined to be. The amount that the state contributes per learner decreases as you move up the quintiles.

Theoretically, schools falling into quintiles 1 and 2 ought to be no-fee schools, and some schools falling into quintile 3 may be no-fee schools, too, although this is voluntary in each

province. Parents sending their children to these schools should not have to pay any fees, including registration or activity fees.

In some instances, the MEC for Education may stipulate that a school will be a no-fee school for learners in Grades R to Grade 9 but will charge fees after this.

EXEMPTIONS FROM SCHOOL FEES

At each school, the School Governing Body decides what the fees will be. The majority of parents of children at the school must approve the fees at a general meeting of the parent body. Once the fees are agreed, all parents are legally required to pay them. If a parent can't afford the fees or cannot pay the full amount, they can apply at the school for an exemption. Public schools are not allowed to refuse admission, suspend pupils from classes, deny them access to sporting or social activities, or refuse to issue school reports if parents are unable to or fail to pay school fees. However, the school is allowed to request that parents come to school and collect the reports in person.

Government regulations specify the formula that must be used to calculate whether parents or caregivers qualify for a full or partial exemption. The formula takes into account the number of school-going children supported by a parent or caregiver and provides specific guidelines for calculating the amount of partial exemptions.

In terms of these regulations, certain categories of children are automatically exempt from paying fees. These include Child Support Grant beneficiaries and children in foster care. In order to work out whether parents or caregivers qualify for a full or partial exemption, they will need the following information:

- What are the annual school fees for the school
- What the parent or caregiver's annual income (or earnings) is OR, if it is a two-parent household, what the combined gross income is of both parents/caregivers
- How many learners from the same family attend 'fee-charging' schools

CALCULATING EXEMPTIONS FROM SCHOOL FEES

When applying for an exemption from school fees, the SGB will apply a certain formula. The formula is used to work out what proportion (or percentage) of the family income would be spent on school fees. If the school fees are 10% of the parent/caregiver's total income, they will be entitled to a full exemption and will not have to pay school fees.

The formula for working out exemptions is as follows:

$$E \text{ (Exemption)} = 100 \left[F \text{ (Annual fees)} + A \text{ (Additional contributions demanded by the school)} \right]$$

$$\left[C \text{ (Combined gross income of both parents)} \right]$$

Do this calculation as follows:

1. Calculate the amount in the brackets on the top line. This gives the amount in fees that the parent has to pay the school.
2. Calculate the amount in the brackets on the bottom line. This gives the income of the parents.
3. Divide the top line by the bottom line
4. Multiply the figure reached in (3) by 100 (to get a percentage)
5. E will now equal a certain percentage

If E = 10% (or more than 10%), then the parent qualifies for a full exemption because this means school fees are 10% of their income.

EXAMPLES

FULL EXEMPTION FROM SCHOOL FEES

1. *Nelisiwe is a domestic worker earning R1 500 per month. Her gross income for the year is, therefore, R18 000. She is a single parent with one child. The annual school fees for her child's school are R2 000 per year. Additional school expenses amount to R100 for the year. Would she qualify for a full exemption in school fees?*

$$E \text{ (Exemption)} = 100 \left[F \text{ (Annual fees)} + A \text{ (Additional contributions demanded by the school)} \right]$$

$$\left[C \text{ (Combined gross income of both parents)} \right]$$

$$E = 100 \left[R2\,000 + R100 \right]$$

$$\left[18\,000 \right]$$

$$E = 100 \left[R2\,100 \right]$$

[18 000]

E = 100 x 0.12

E = 12%

Nelisiwe would qualify for a full exemption because the school fees amount to more than 10% of her income.

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2. *Thabo and Maria earn a total income of R2 500 per month. This means their gross annual income is R30 000. They have a single child who attends a school where the annual school fees are R4 000 with additional costs of R500. Would they qualify for a full exemption in fees?*

E (Exemption) = 100 [F (Annual fees) + A (Additional contributions demanded by the school)]

[C (Combined gross income of both parents)]

$$E = \frac{100\ [\ R4\ 000 + R500\ ]}{[\ 30\ 000\ ]}$$

$$E = \frac{100\ [\ R4\ 500\ ]}{[\ 30\ 000\ ]}$$

E = 100 x 0.15

E = 15%

E, in this case, is greater than 10%, which means Thabo and Maria would qualify for a full exemption.

AUTOMATIC EXEMPTION

The following learners may not be charged any school fees:

- An orphan in an orphanage
- A child in foster care
- A child who has been placed in the care of a family member ('kinship caregiver')

- A child who heads a household or is part of a child-headed household
- A child whose parents receive a social grant on behalf of the same learner, for example, a Child Support Grant

NO EXEMPTION

If the school fees are 2% of a parent's total income, the parent does not qualify for any exemption unless they have five or more children at a 'fee-charging' school. If the school fees are less than 2%, a parent does not qualify for any exemption.

However, if the financial position of a parent changes, for example, if a parent is retrenched and they are unable to continue paying the compulsory school fees, then the parent must apply to the SGB to ask for the school fees to be waived until they are employed again. It will be up to the SGB to decide whether or not to give the parent an exemption and if so, what the exemption should be.

If the parent has made an application and they are found to be not eligible for exemption and are in arrears with their school fees, then the SGB may decide to take legal action against the defaulting parents. It would be important to help the parent consider whether they should move their child to a no-fee school to avoid incurring further debt if they are experiencing financial difficulty. In addition they could be advised with regard to settling their outstanding debt.

PARTIAL EXEMPTION

According to the exemption formula, if the school fees are between 3.5% and 10% of the total income, a parent will qualify for a partial exemption (see example below). The school cannot ask the parents to sign an Acknowledgement of Debt in lieu of the possibility of defaulting on payment at a future date.

EXAMPLE

PARTIAL EXEMPTION FROM SCHOOL FEES

Suraj has one child in a school. The annual school fees are R3 000 with additional costs of R150 for the year. Together, Suraj and his wife earn an annual gross income of R35 000. Will they qualify for a partial exemption from school fees?

$$E \text{ (Exemption)} = 100 \left[F \text{ (Annual fees)} + A \text{ (Additional contributions demanded by the school)} \right] \Big/ \left[C \text{ (Combined gross income of both parents)} \right]$$

$$E = 100 \frac{[\ R3\ 000 + R150\ ]}{[\ 35\ 000\ ]}$$

$$E = 100 \frac{[\ R3\ 150\ ]}{[\ 35\ 000\ ]}$$

$E = 100 \times 0.09$

$E = 9\%$

Suraj and his wife would qualify for a partial exemption because the fees are between 3.5% and 10% of their combined income. In other words, Suraj will have to pay a portion of the fees. To find out how much he will have to pay, ***See: Table for calculating exemptions from school fees****. According to this Table, which is included in the regulations, parents with one child at a school who spend 9% of their joint income on school fees, qualify for a 94% fee exemption.*

94% of the joint income of R3 000 = R2 820

R3 000 – R2 820 = R180

Suraj will, therefore, have to pay R180 in school fees for their child for the year.

PARENTS WITH MORE THAN ONE CHILD AT SCHOOL

According to the exemption formula, if the school fees are 2.5% of a parent's total annual income, the parent does not qualify for any exemption unless

they have three or more children at the same school or at another public fee-charging school.

If the school fees are 3% of a parent's total income, the parent does not qualify for any exemption unless they have two or more children at the same public school or at another 'fee-charging' school. While this sounds very complicated, it is easy to work out by using the *Table for calculating exemptions from school fees*. Also ***see Example below - Exemption from fees: More than one child at school***

EXAMPLES

EXEMPTION FROM FEES: MORE THAN ONE CHILD AT SCHOOL

1. *Thabiso has 4 children registered in the same school. The joint annual income of Thabiso and her husband is R25 000. The annual school fee for one learner is R1 500, and the additional costs at the school amount to R50 per learner. What exemption in school fees will Thabiso qualify for?*

$$E \text{ (Exemption)} = 100 \left[F \text{ (Annual fees)} + A \text{ (Additional contributions demanded by the school)} \right]$$
$$\left[C \text{ (Combined gross income of both parents)} \right]$$

$$E = 100 \left[R1\,500 + R50 \right]$$
$$\left[25\,000 \right]$$

$$E = 100 \left[R1\,550 \right]$$
$$\left[25\,000 \right]$$

$E = 100 \times 0.06$

$E = 6\%$

The school fees are between 3.5% and 10% of the parents' total income. The parents will, therefore, qualify for a partial exemption. What will this exemption be worth to Thabiso? To find this out, ***see: Table for calculating exemptions from school fees.*** *According to the Table, a parent with 4 children attending 'fee-charging' schools, who spends at least 6% of the joint family income on school*

fees, qualifies for an 81% fee exemption.

81% of the school fees of R1 550 = R1 255.50

R1 550 – R1 255.50 = R294.50

Thabiso will, therefore, have to pay R294.50 in school fees for each of her children.

2. *According to the* ***exemption formula,*** *Mary qualifies for a 7% exemption from school fees for each of her two children who attend 'fee-charging' schools. The fees are R500 per year per child. How much of these fees will Mary be exempt from paying for each child?*

   In the ***Table for calculating exemptions from school fees****, look along the top horizontal line until you get to '2' learners. Next, look down the vertical line of the table and find '7%'. Move your finger along the 7% line until it meets the '2' learners column. This will tell you that Mary qualifies for an exemption of 83% of the school fees for each child.*

   To calculate how much this is worth to her:

   83% of R500 (the cost of school fees per child per year) = R415 per child.

   R500 – R415 = R85.

   Mary will have to pay R85 school fees per year per child.

APPLYING FOR AN EXEMPTION IN SCHOOL FEES

It is the duty of the school to inform parents about exemptions. In the case of Two Mothers v Hunt Road Secondary School, the Court held that the school had acted unlawfully in attempting to sue the mothers in question for unpaid school fees when the mothers qualified for an exemption from fees in terms of their incomes but were never advised by the school of their rights to apply for such exemptions.

To apply for an exemption in fees, the parent must do the following:

- Ask the school for an application form
- Complete the application form. If there is no application form, write a letter to the Chairperson of the SGB requesting to be exempted in part or totally from fees.
- If the parent needs help in completing the application form or writing the letter, the principal of the school must help them.

- Provide a pay slip or letter from the employer explaining how much the parent earns.
- If the parent is unemployed or self-employed, they should make an affidavit saying what they earn or how they support the child, for example, on a pension or a child care grant.

Parents/caregivers who qualify for fee exemptions should apply to the SGB every year.

The SGB has 30 days (one month) to consider and decide on an application. The decision must follow what the law says in the Regulations. In considering an application for exemption, the SGB must take into account:

- The financial position of the applicant, including:
    - The total gross annual income of the parents
    - The total of their necessary annual expenses
    - A statement of their assets and liabilities.
    - The number of dependants of the applicant
    - The applicant's standard of living
    - Any other relevant information the applicant supplies.

The SGB then has 7 days (one week) to tell the parent/caregiver what it has decide.

See the Table on the next page for calculating exemptions from school fees.

TABLE FOR CALCULATING EXEMPTIONS FROM SCHOOL FEES				
PERCENTAGE OF INCOME SPENT ON SCHOOL FEES (DIVIDE ANNUAL FEES BY TOTAL PARENTAL INCOME)	EXEMPTION PER NUMBER OF LEARNERS AT SCHOOL IN SAME FAMILY			
	1 LEARNER	2 LEARNERS	3 LEARNERS	4 LEARNERS
2%	0%	0%	0%	0%
2.5%	0%	0%	0%	14%
3%	0%	7%	22%	33%
3.5%	7%	26%	50%	47%
4%	25%	40%	40%	57%
4.5%	39%	51%	59%	65%
5%	50%	60%	67%	71%
5.5%	59%	67%	73%	77%
6%	67%	73%	78%	81%
6.5%	73%	83%	82%	85%
7%	79%	87%	86%	88%
7.5%	83%	90%	89%	90%
8%	88%	88%	92%	93%
8.5%	91%	93%	94%	95%
9%	94%	96%	96%	97%
9.5%	97%	98%	98%	98%
10%	100%	100%	100%	100%

HOW TO USE THE TABLE

Look along the top horizontal line and find the number of children or learners. Next, look down the vertical line and find the percentage that has been worked out according to the exemption formula. Move your finger along the percentage line until it meets the horizontal column coming down from the number of learners. The figure in the square is how much the exemption will be worth to the parents for each child.

APPEALING AGAINST A DECISION

If the parent/caregiver is unhappy with the decision, they have 30 days to appeal against the decision in writing to the head of the Department of Basic Education in the province. A parent should be informed of the decision of the Head of Department within 7 weeks from the date the appeal was first made.

(See Pg 1086: Resources for contact details of the provincial basic education departments)

[Acknowledgements to the Education Law Project (ELP), Centre for Applied Legal Studies (CALS) at www.law.wits.ac.za/cals for the information contained in this section.]

Educators and doing business with the state

The *Basic Education Laws Amendment Act* (BELA) prohibits educators from doing business with the state or being a director of a public or private company that does business with the state. It creates an offence if an educator is found to contravene this requirement.

Discipline in schools

According to the *SA Schools Act*, a governing body of a public school must draft and adopt a Code of Conduct for the learners. This needs to follow a consultative process with learners, parents and educators of the school.

This Code of Conduct must include the types of behaviours that will be punished, the types of punishments that will be given for different forms of misbehaviour, policies on making the school a safe place against bullying and drugs, as well as grievance procedures for learners and parents if they want to take up a matter against another learner or the school, and disciplinary procedures that the school will follow if it plans to discipline a learner.

Kinds of punishment

CORPORAL PUNISHMENT

Section 10 of the *SA Schools Act* bans corporal punishment such as canings or hidings because Section 12 of the Constitution says no one should be punished or treated in a cruel or degrading way. A person who is found guilty of using corporal punishment can be charged with assault. The kinds of punishments that schools can use include a demerit system, detention, picking up rubbish on the playing field and so on. Degrading punishments like cleaning toilets are not allowed.

In 2017, the DBE published the 'Protocol to Deal with Incidences of Corporal Punishment in Schools', which sets out how corporal punishment should be reported. Incidents of corporal punishment should not be dealt with informally by the school.

LEARNERS should report corporal punishment as follows:

Step 1:

- Report the incident of corporal punishment to the school principal. If the principal is involved in the incident, then report the case to the circuit manager in the district or to the deputy director of the provincial department of education. The principal (or whoever the case has been reported to) must gather information and record this in a written statement.
- The principal must send the statement and any other relevant documents to the Directorate: Dispute Management at the head office of the provincial Department of Education (PED), marking the file as 'urgent'.
- The principal must inform the SGB of the incident.
- The principal must inform the circuit manager in the school's education district about the alleged instance of corporal punishment and confirm with them that the matter has been referred to the district director of the department of education.
- The principal must also inform the parents of the victim of the alleged corporal punishment, informing them that the matter has been referred to the head office of the PED and that they will be contacted by an official from the PED.

The district office of the education district the school is located in will then investigate the matter and compile a report. This report will be forwarded, along with recommendations, to the head of the PED for approval. Where an educator has been found guilty of corporal punishment, disciplinary action will be taken by the PED, and the matter will be simultaneously referred to the South African Council for Educators (SACE). A Form 22 should also be completed and sent to the head of the Department of Social Development, the district manager of the PED, the national Department of Basic Education, and a social worker. You can ask an adult at your school for these details. Once Form 22 has been filled out, it triggers a child protection investigation by a designated social worker.

Step 2: SAPS

All incidents of corporal punishment must be reported to the South African Police Service (SAPS) so that a case of assault can be opened against the educator.

- You can report an incident of corporal punishment at your local police station.
- If you are under 18 years of age, a parent, social worker or educator should accompany you to the police station and report with you.
- If you are over 18, you have a choice whether or not to lay a charge yourself. If you do not wish to or are under 18, a charge must be laid by the person accompanying you.

Step 3: Lodge a complaint with SACE

- This can be done by calling the hotline, faxing, emailing or posting your complaint.
- You need to give as many facts, dates and details as possible.
- If you are helping a classmate or reporting an incident on their behalf, their name must be included in the complaint.
- If you do not feel comfortable lodging a complaint you can do it anonymously, and it will be accepted. If you choose to do it this way, SACE will need the following in order to do a proper investigation:
    - Name of the person who allegedly abused the learner
    - Name of the school involved
    - Name and grade of learner involved
    - Specifics of the incident, including the date.

EDUCATORS are legally required to report incidents of corporal punishment by following the same steps as learners.

PARENTS, THIRD PARTIES AND COMMUNITY MEMBERS can also report corporal punishment by following the same steps as for learners. They can report an incident on behalf of a learner or assist a learner in reporting the incident.

HOTLINES AND NGOS - Cases involving violence/harassment by educators can also be reported via various hotline options:

- SACE Tel: 012 663 9517
- DEPARTMENT OF BASIC EDUCATION: Helpline: 0800 202 933
- WESTERN CAPE DEPARTMENT OF EDUCATION – SAFE SCHOOLS CALL CENTRE Toll-free number: 0800 45 46 47
- POLICE CHILD PROTECTION UNITS Tel: 10111 childprotect@saps.org.za
- CHILDLINE SOUTH AFRICA 08000 55 555
- CHILD WELFARE SOUTH AFRICA 0861 4 CHILD (24453) 011 452 4110
- Organisations such as the Centre for Child Law, Legal Resources Centre, SECTION27, and Equal Education can also be contacted to assist with such matters and to provide learners and families with legal advice.

SUSPENDING A LEARNER FROM SCHOOL

For serious offences, the school may suspend a learner for up to one week from school. This can only happen once there has been a fair hearing where the learner has had a chance to put their side of the story.

EXPELLING A LEARNER FROM SCHOOL

If a school feels that the offence which the learner has committed is so serious that they should be expelled from the school, the learner can be suspended from the school while the provincial Head of Department decides whether or not to expel the learner. Only the provincial Head of Department can expel a learner from a school. The principal cannot make that decision. If a learner is expelled they can appeal against the Head of Department's decision to the provincial MEC of education. The Head of Department has to make arrangements to place an expelled learner in another public school.

Taking disciplinary action against a learner

Where a learner has been told to appear in a disciplinary hearing for any misconduct identified in the Code of Conduct, they must be accompanied by a parent or person designated by the parent at the disciplinary proceedings unless the SGB can give good reasons for continuing without the parent.

Taking disciplinary action against an educator for misusing disciplinary measures

Where there has been a complaint of misuse of disciplinary measures against an educator at a school, the district office for that school will conduct preliminary investigations of the allegations. Depending on the outcome of the investigation, the district official will refer the case to the Labour Relations Directorate for further investigation and disciplinary hearings.

The *Employment of Educators Act of 1998* (EEA) governs the procedure for disciplinary hearings against educators. It has different sanctions for misconduct and serious misconduct. The EEA states that if the misconduct is also a criminal offence, then separate and different proceedings will occur. It does not make provision for legal representation in disciplinary hearings, but it allows for the presiding officer to appoint an intermediary if the learner is under 18 and will suffer 'undue stress' during the disciplinary procedure. The

EEA says that educators can also be dismissed if they contravene Section 10 of the Schools Act.

SOUTH AFRICAN COUNCIL OF EDUCATORS (SACE)

All educators are required to register with the South African Council of Educators (SACE), and to comply with its Code of Professional Ethics. SACE is a statutory body that was established to develop and maintain ethical and professional standards for educators. Corporal punishment or assault is the most common form of educator misconduct reported to SACE.

If a learner wants to make a complaint to SACE, they can follow its disciplinary procedure. After a complaint has been made, there is an initial investigation of the complaint. The matter may then be referred for a disciplinary hearing. If an educator is found guilty of misconduct, SACE has the following possible sanctions:

- A caution or reprimand
- A fine of not more than one month's salary, or
- Removing the educator's name from the register for a specific period or indefinitely.

Sexual harassment and abuse in schools

The *Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools in 2019* (referred to as the *Sexual Abuse and Harassment Protocol*) has been developed to provide the Department of Basic Education (DBE) at all levels, especially the School Management Teams (SMTs) District Directors and Provincial Managers, with guidelines to manage and report all incidents of sexual abuse and harassment as required by the *Sexual Offences and Related Matters Amendment (SORMAA) Act (No. 32 Of 2007)*. The Protocol also provides a guide to the management and reporting of sexual abuse and harassment to encourage a consistent and appropriate response to cases of sexual abuse and harassment perpetrated against learners. It provides for a standard response to allegations by learners of sexual abuse and harassment, whether they are perpetrated by fellow learners, educators or by other people.

Gender discrimination, sexual harassment and violence are against the law, which means the school management is obliged to follow prescribed legal procedures when dealing with these kinds of grievances.

Reporting sexual harassment if a victim is a learner

1. A learner who is a victim of sexual harassment can report an offence to:
    - An educator, the Principal or Grade Head, OR
    - Another learner or person they feel comfortable with who must then report it to an educator, the Principal or Grade Head, OR
    - A parent or community member who can report the complaint to any of the following people: Principal, Grade Head, a member of the School Management Team (SMT), an Educator, Circuit Manager, Department of Social Development (DSD), South African Council for Educators (SACE), Department of Health (DOH) or SAPS.
2. If another learner is the alleged perpetrator, then a disciplinary hearing must be held by the Principal or Grade Head for that learner.
3. In all cases, the Principal is responsible for the following actions:
    - Report the incident to the Circuit Manager
    - Inform the parents of the learner victim and learner perpetrator
    - Inform the School-based Support Team (SBST)
    - Inform the School Governing Body chairperson
    - Report the incident to the Department of Social Development (DSD)
4. The Circuit Manager should take the following actions:
    - Report the incident to the Provincial Department of Employment and Labour.
    - If the alleged perpetrator is a staff member, hold an Education Labour Relations Council (ELRC) arbitration and report the incident to the South African Council of Educators (SACE), which will hold its own parallel investigation.
5. If the incident is a level 4 offence (which includes sexual assault and rape), then the case should be reported to the police and the nearest Thuthuzela Care Centre.

Reporting sexual harassment if a victim is a staff member

1. A staff member who is a victim of sexual harassment should report an offence to the Principal, who should take the following actions:
    - Report the incident to the Circuit Manager
    - Report the incident to the Department of Social Development
    - Inform the School Governing Body chairperson

2. If the alleged perpetrator is a learner, the Principal must report the incident to the Grade Head, and a disciplinary hearing should be held. The incident should also be reported to the School-based Support Team (SBST).
3. The Circuit Manager should take the following actions:
    - Report the incident to the Provincial Department of Employment and Labour
    - If the alleged perpetrator is a staff member, hold an Education Labour Relations Council (ELRC) arbitration and report the incident to SACE, which will hold its own parallel investigation
4. If the incident is a level 4 offence (which includes sexual assault and rape), then the case should be reported to the police and the nearest Thuthuzela Care Centre.

Child protection register and sexual offenders register

The *Children's Act* establishes the National Child Protection Register. This is separate from the Sex Offenders Register.

The *Child Protection Register* contains two lists:

1. **Part A**: Includes details of children who have been abused and/or neglected, to assist with giving those children special protection and preventing their further abuse and neglect.
2. **Part B**: Includes the details of adults who have been found to be unsuitable to work with children or to have access to them. A finding that a person is unsuitable to work with children can be made by a court or other forum, including, for example, disciplinary action brought against a teacher or disciplinary action taken by the South African Council for Educators (SACE). Any person who has been convicted of murder or rape of a child, assault with the intent to do serious harm to a child, keeping child pornography, or of human trafficking is automatically seen to be unsuitable to work with children, and their name should be entered into Part B of the Child Protection Register.

A court can also order that a person must be listed on Part B of the Child Protection Register. The Child Protection Register is private but allows people in child protection organisations, as well as members of the police who work on child protection, to access the register. All institutions working with children should check this list before employing anyone. This information can be obtained by writing to the Director General of the Department of Social Development (DSD) on a confidential basis. The Director General must respond in writing within 21 working days to say whether the person's name appears on Part B of the Child Protection Register. Alternatively, the employer can complete Form 29 from the DSD and send it back to them with the request to complete the details.

Any person convicted of sexual offences against a child or a person who is mentally disabled will have their name recorded in the Sex Offenders Register. The Sex Offenders Register has only recently become operational and is different to the Child Protection Register. Usually, an employer would have to get a certificate from the Department of Justice and Constitutional Development to confirm that a potential employee's name does not appear on the Sexual Offenders Register. If an employer cannot get these details from the department, they should try and get a police clearance certificate from the potential employee and ask them to provide an affidavit confirming that they have never been convicted of a sexual offence against a child.

Language in schools

Section 6 of the Schools Act deals with language policy in public schools at two levels: provincial and individual school level. At provincial level, the MEC responsible for education in each province must decide on the norms and standards for language in the province, and at school level, SGBs must develop a language policy for their school that specifically promotes the best interests of the community where the school is located.

Section 3(3) of the Schools Act requires the MEC to ensure that there are enough places in schools so that every child who has to go to school (children between the ages of seven and 15 years) can attend school. This means that the MEC must make sure, within reason, that every learner has a place in a school that offers their preferred language of instruction. The school governing body's power to develop a language policy is therefore limited by the following:

- The language policy must be consistent with the norms and standards made by the MEC
- The language policy cannot discriminate against learners on the grounds of their race, culture, ethnic or social origin (or any other grounds)
- The language policy must facilitate access to school for learners in the community and must take into account what the community's needs are regarding teaching language for children at the school
- The language policy must promote the best interests of the broader community.

What this means in practice is that while the SGB makes the language policy of the school, the MEC may intervene if the language policy is discriminatory, if it unfairly restricts access to the school, or if it is unreasonable in any other way.

If no school in the school district offers a learner's preferred teaching language, the learner can ask the provincial education department to make provision for that learner:

- If there are at least 40 learners in the same grade (in grades 1 to 6) or at least 35 learners in the same grade (in grades 7 to 12) wanting a particular language of instruction, the norms and standards provide that it will be reasonably practical to provide education in that language and the provincial education department must facilitate this.
- If a smaller group of learners wants a particular teaching language, it may not be reasonable to provide this. However, the head of the provincial education department must still consider how to assist the learners and must consult the SGBs and the principals of the schools concerned to make a decision.

Even if the school cannot offer education in a particular language, and the learner must learn in a language that is different to their home language, the head of the provincial education department must still consider how it can provide additional support to that learner.

Draft policy on the introduction of African languages in schools

In 2013, the Department of Basic Education introduced a draft policy on the incremental introduction of African Languages in schools.

The purpose of this draft policy is to give protection to African languages, for learners who speak an African language at home and for learners who do not. The draft policy provides that learners in all grades should learn one language at the home language level and two on the first additional language level. This would need additional teaching time every week for learners in all grades. It would also require that the necessary learning materials are available in all of the African languages and that teachers who are qualified to teach in these languages are available to teach. This policy still needs to be finalised.

Transport in schools

In October 2015, the national Department of Transport (DoT) published a National Learner Transport Policy with the Department of Basic Education and other stakeholders. The National Policy introduced the following:

- Both the DoT and the DBE are jointly responsible for providing learner transport.

- The criteria to be used to determine which learners should benefit from government-subsidised learner transport, including:
    - Beneficiaries must be needy learners from Grades R to 12
    - Learner transport will be subsidised to the nearest appropriate school only and not to a school chosen by the parents
    - Priority must be given to learners with disabilities, taking into account the nature of the disability
    - Priority must be given to primary school learners who walk long distances to schools
    - Existing learner transport services must be taken into account when identifying beneficiaries, as no learner transport services will be provided in areas where public transport is available in order to avoid duplication of services and resources
    - That selection criteria must not discriminate on the basis of gender or race and must not deny access to learners from disadvantaged communities.

Every province has a duty to develop a provincial learner transport plan that is consistent with the National Policy. Provinces use different departments to do this. For example, in Gauteng, the DBE manages the learner transport policy, while in Mpumalanga, it is the Department of Public Works, Roads and Transport. The learner transport policies are also not all the same. Some provincial policies, such as in Mpumalanga and the Western Cape state that a minimum of ten learners are required before scholar transport will be provided for a particular route. Other provinces use the distance that learners have to walk to school as the measure; so, for example, in most provinces, learners who walk five kilometres or more per trip to school would qualify for learner transport. In KZN, the measure is 3 kilometers one way to school to qualify for learner transport. While each province must develop its own policy, the National Policy is clear that priority must be given to learners with disabilities, taking into account the type of disability, and that priority must be given to primary school learners who walk long distances.

Acknowledgements *to Section 27: Basic Education Rights Handbook 2022 for information provided for the above section.*

Universities and TVET colleges

Applying to go to a University or TVET college

Anyone wanting to apply to go to a University or TVET college can apply to register online. This has made the application process more accessible to applicants who can use the online application forms provided on the university or TVET college websites. There is no centralised online system for making multiple applications to different institutions, so separate applications must be made for every university or TVET college.

Some universities and colleges have an application fee. Check the relevant website for each university or college to see what the cost is.

Students who cannot make the online application should check the website of the relevant university or TVET college to see how to make the application in person.

Follow these steps to make an online application to a university or TVET college:

1. **Research University and TVET college options**

   Before making an application, research courses and identify the university or TVET college that provides the programme aligned with the course to be taken. Take into account factors such as location, campus facilities, and student support provided by each university or TVET college.

2. **Check application deadlines and apply before the closing date**

   Application deadlines aren't the same for all universities or TVET colleges. Common deadlines are the end of June/July or the end of September, but some course applications close even earlier or later. It is important to check this before starting the application process.

3. **Gather necessary documents and information**

   Documents should be in PDF format and might include:

   - Copy of passport or personal ID
   - Passport-size photos
   - Academic records - usually the highest education qualification (such as a high school certificate - Grade 11 and Grade 12)
   - Proof of any relevant work experience or certificates
   - Contact details
   - CV and motivation letter (if applicable)
   - Letter of reference or recommendation

- Proof of payment of application fee (if applicable) - this could be either a credit card or proof of bank deposit into the institution's bank account
- Own email and postal address

Check the specific requirements for the university or TVET college that has been chosen.

4. **Complete and submit the online application form**

   Each university or TVET college will have its own online application portal where applications can be submitted. Follow the instructions carefully when completing the application form. Attach all the documents that the application requires before submitting the application. Make sure the correct button is clicked to submit the application.

NSFAS Bursary

The National Student Financial Aid Scheme (NSFAS) is a government entity that was established under the Department of Higher Education and Training in terms of the *National Student Financial Aid Scheme (Act 56 of 1999)*. NSFAS provides financial aid to disadvantaged students who qualify to study at TVET colleges and public universities.

WHO QUALIFIES FOR A NSFAS BURSARY?

- All South African citizens
- All SASSA grant recipients
- Applicants whose combined household income is not more than R350 000 per annum
- A person with a disability where the combined household income must not be more than R600 000 per annum
- Students who started studying before 2018 and whose household income is not more than R122 000 per annum.

Students who do not qualify for an NSFAS bursary include those who:

- Have completed a previous qualification
- Have a combined household income of more than R350 000 per year
- Have already received funding for their studies

WHAT DOES THE NSFAS BURSARY COVER?

Costs for accommodation, living allowance and learning materials must be checked with the latest Department of Higher Education guidelines. These are the current figures for 2023.

UNIVERSITY

- Accommodation - Actual costs charged by the university (costs for private accommodation must not be more than costs for university residence)
- Transport (up to 40 km from the institution) R7 500 per annum
- Living allowance R15 000 per annum
- Book allowances R5 200 per annum
- Incidental/personal care allowance of R2 900 per annum for students in catered residences

TVET

- Accommodation in an urban area R24 000 per annum
- Accommodation in a peri-urban area R18 900 per annum
- Accommodation in a rural area R15 750 per annum
- Transport (up to 40 km from the institution) R7 350 per annum
- Transport R7 000 per annum
- Incidental/personal care allowance R2 900 per annum

APPLYING FOR A NSFAS BURSARY

Before applying, check on the NSFAS website for the opening and closing dates for applications for an NSFAS bursary for Universities and TVET Colleges: https://www.nsfas.org.za/content/how-to-apply.html

What documents are required to apply for an NSFAS bursary?

- Copy of student ID / Birth certificate
- Copy of parent/s or guardian/ spouse ID
- Smart card: both sides of the card required
- Proof of income (where applicable)
- Persons living with disability (Disability Annexure A form)
- An applicant who is recognised as a vulnerable child by the Department of Social Development must provide a Vulnerable Child Declaration form completed by a social worker
- An applicant who has indicated that they have no family member details and or abridged birth certificate must complete the Declaration: Non-SASSA

How to apply for an NSFAS bursary:

1. Go to www.nsfas.org.za and click on the 'myNSFAS' tab.
2. Create a 'myNSFAS' account.
3. Click on the 'Apply' tab and complete the sections on the screen.
4. Upload supporting documents where this is requested.
5. Click on submit.

DISABILITY SUPPORT FROM NSFAS

The NSFAS Disability Bursary Programme provides financial support to students with disabilities who need financial support and have the ability to pass their academic subjects. It is intended to provide support for students to manage learning barriers resulting from disabilities.

If a person has qualified for financial aid from NSFAS and has received final approval from NSFAS, they can apply for an assistive device. They can do this through the student disability unit at their university or TVET college.

For more information, go to the NSFAS website:
https://www.nsfas.org.za/content/disability-support.html

APPEALS TO REVIEW A DECISION FOR A NSFAS BURSARY

An appeal is a request to review a decision not to fund a student who applied for NSFAS funding. Any student whose application for financial aid is rejected or the financial aid for a continuing student, if withdrawn, can lodge an appeal with NSFAS.

They must submit their appeal within 30 days of receiving their application results. They must do this by logging in to their *my*NSFAS profile and providing the necessary information.

STUDENT SUPPORT FROM NSFAS

Students who receive an NSFAS bursary will get their cash funds in their NSFAS Wallet. This allows them to withdraw cash or spend it at a merchant registered by NSFAS.

LAPTOP

A student who qualifies for an NSFAS bursary and is registered at a university or TVET college can apply for a laptop. To do this, follow these steps:

- Complete and submit a DLD (Digital Learning Device) form to the Financial Aid Office on campus. The form is available from this office. Order the laptop on the DLD online order portal via the NSFAS website: www.nsfas.org.za.
- Collect the laptop after the verification process is complete, and you have been informed that your laptop is ready for collection. The student who applied must provide an ID and sign for the laptop in person.

Problems

1. Parents cannot afford to pay school fees

David and Naledi have two children at school. David was retrenched and now does casual work at a supermarket where he earns R1 600 per month (R19 200 per year). Naledi cannot find a job. They cannot afford to pay the required school fees for their children. The school has sent David and Naledi a number of reminders about the payment of school fees. The school now sends them threatening letters saying that their children will not be allowed to write the final exams unless the fees are paid. The fees for each child are R1 500 per year.

WHAT DOES THE LAW SAY?

The *Schools Act* says no child can be refused admission to a public school because their parents cannot afford to pay school fees. The right to a basic education is also entrenched in the Constitution.

Parents can apply for a full or partial exemption.

WHAT CAN YOU DO?

Work out whether the parents qualify for full or partial exemption using the required formula.

$$E \text{ (Exemption)} = 100 \left[\frac{F \text{ (Annual fees)} + A \text{ (Additional contributions demanded by the school)}}{\left[C \text{ (Combined gross income of both parents)} \right]} \right]$$

$$E = 100 \left[\frac{R1\,500}{[\,19\,200\,]} \right]$$

$$E = 100 \times 0.08$$

$$E = 8\%$$

The school fees are between 3.5% and 10% of the parent's total income. David and Naledi will, therefore, qualify for a partial exemption. What will this exemption be worth to them? Check the ***Table for calculating exemptions from school fees on pg 922*** to work out what the value of this exemption is. According to the Table, a parent with two children attending 'fee-charging' schools, who spends at least 8% of the joint family income on school fees, qualifies for a 90% fee exemption.

90% of the school fees of R1 500 = R1 350

R1 500 – R1 350 = R150

David and Naledi will have to pay R150 towards the school fees of each of their children.

You can help the parents apply in writing to the school governing body for an exemption from paying school fees. Ask the school for a formal exemption application form. If this is not available, then write a letter.

In the application, use the formula to show why they qualify for a partial exemption and what this exemption is worth to them.

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2. Learners are refused admission to a school because of unpaid school fees

A number of learners have been refused admission to a school because they are told they have not paid their outstanding fees. The parents are unable to afford the outstanding fees and want to take action against the school to force them to take their children.

WHAT DOES THE LAW SAY?

The law states that a school cannot refuse to re-admit a learner to school on the grounds that they have outstanding school fees.

WHAT CAN THEY DO?

- The learner's parents should write a letter to the school principal pointing out which part of the law they are breaking and formally appeal to the SGB against the decision. Send a copy of this letter to the Head of the Department in the province and /or the Provincial MEC (Member of the Executive Council) for Education.
- If the school still refuses to admit the learner, or if they don't reply to the letter, the learner should write to the HOD in the province and/or MEC for Education and advise them that the school continues to refuse to admit the learner.

- If the HOD or MEC does not respond, contact a public interest law organisation or a lawyer for support.

Checklist

REGULATIONS FOR THE EXEMPTION OF PARENTS FROM PAYMENT OF SCHOOL FEES	
MARK WITH A CROSS IN APPLICABLE BOX	
Has the principal informed you about the amount of the annual school fees to be paid?	●
Has the principal informed you that you are liable to pay part of school fees unless you are totally exempted from paying school fees?	●
Has the principal informed you about your right to apply for an exemption from paying school fees or part of school fees?	●
Do you wish to apply for such an exemption?	●
Do you wish to be assisted in such an application?	●
Has the principal provided you with the relevant form for application for exemption?	●
Has the principal signed this form?	●
Have you signed this form?	●
Has the principal handed over the signed copy of this form to you?	●

Motor Vehicle Accidents

Introduction

There are many risks involved in driving motor vehicles. There is the risk of injuries to the drivers of the vehicles, the passengers in the cars and pedestrians, as well as the risk of damage to the vehicles or things inside the vehicles.

If a person has suffered damages to their property (to the vehicle or things inside the vehicle) as a result of a motor vehicle accident, then they can claim compensation from the driver of the vehicle who allegedly caused the accident. If a person is injured or a breadwinner of a family dies in an accident they can claim against the Road Accident Fund (RAF). The person making the claim will have to prove that the driver of the vehicle was negligent and that this negligence caused the motor vehicle accident. So, people involved in a motor vehicle accident could have the following claims:

- A claim for damages to the vehicle and property. In this case, the person must claim from the driver whose negligence caused the accident or from the driver's private insurance (if the driver was insured)
- Drivers, passengers and pedestrians who were injured in a motor vehicle accident caused by someone's negligence can claim damages from the Road Accident Fund (RAF) in terms of the *Road Accident Fund Act*.

The Road Accident Fund (RAF)

The RAF is a fund set up in terms of the *Road Accident Fund Act 56 of 1996 (as amended by Act 19 of 2005)*. It is funded by a levy/tax included in the price of petrol and diesel which is sold in South Africa. This is known as a fuel levy. Everyone who buys petrol or diesel pays a little extra for each litre of fuel, and this levy goes to the RAF.

CLAIMS FOR PHYSICAL INJURIES TO PEOPLE

Road accidents in all vehicles are automatically covered by the *Road Accident Fund Act*. In terms of the Act, the RAF covers motor cars and motorcycles but not trains or bicycles.

The Road Accident Fund is a Fund that has been established by the Road Accident Fund Act. The main purpose of the Fund is to limit the liability of the negligent driver of a motor vehicle. The Fund steps into the shoes of the person who has negligently caused the accident and pays any compensation owing to road accident victims.

NOTE

The Fund is only liable for bodily injuries to either a driver, passenger and in some cases, a pedestrian.

A claim can only be made against the Fund if the person who caused the accident was negligent and at fault. Therefore, if a person is injured and they are not to blame for the accident (in other words, the person injured was not the negligent driver), then they can claim compensation from the RAF.

If the breadwinner of a family is injured or dies in an accident caused by the negligent driving of a motor vehicle by another person, the dependants of the breadwinner can also claim against the Fund for loss of support. There are, however cases where the claim for compensation can be limited in respect of the dependants.

CLAIMS FOR DAMAGE TO VEHICLES OR GOODS

The Road Accident Fund does not cover damage to vehicles or things inside the vehicles, such as clothes or watches. Damages for vehicle repairs or broken things must be claimed from the person who caused the accident or their insurance company.

Extra motor vehicle insurance that you buy from a private insurance company is not automatic. You choose whether you want to pay for extra insurance, for example, fire and theft insurance, balance of third party, and comprehensive insurance. You can then claim from your own insurance company for your own losses if somebody else caused the accident. If you cause an accident and you have insurance, you can ask the insurance company to pay someone else for the loss that you have caused to them.

Third-party claims

What is a third-party claim?

A third-party claim is a claim by a person, or the dependants of a person, who suffered a bodily injury or who died as a result of a motor vehicle accident caused by the negligent driving of a motor vehicle. Third-party claims are made to the Road Accident Fund, which

then automatically steps into the shoes of the negligent driver who caused the accident and pays the injured person for any injuries suffered.

Who can claim compensation from the Road Accident Fund?

You can claim compensation from the Road Accident Fund if:

- You are injured as a result of a motor vehicle accident caused by the negligent driving of a motor vehicle driven by another person
- You are the dependant of a person (the breadwinner) who was injured or died in a motor vehicle accident caused by the negligent driving of a motor vehicle by another person
- You are a close relative of the deceased in respect of funeral expenses
- You are under 21 years old, but you must have the support of a parent or legal guardian

You can claim if you were involved in an accident as a driver or a passenger in a motor vehicle or motorcycle or if you were a cyclist or a pedestrian who was injured as a result of an accident involving a motor vehicle.

NEGLIGENCE

You will only get money from the Fund if you did not cause the accident. If you and the other driver were equally to blame for the accident, you will only be paid half of your damages. If both drivers were negligent, then the Fund will take into account the *Apportionment of Damages Act (No. 34 of 1956)*. This Act allows the Fund to divide (also called apportion) the compensation so that it is a just and equitable amount that is awarded to the injured party.

If the accident was caused solely by your own negligence, you will not be entitled to claim from the Fund. This includes accidents where you were the only person and vehicle involved, for example, if you drove into a pole.

You have to prove that somebody else was driving negligently before your claim will be paid. A driver will be negligent if you can prove on a 'balance of probabilities' that they did not drive the vehicle in a way a reasonable driver would have driven in the same circumstances.

In other words, if you suffered damages caused partly by your own fault and partly by the fault of another person, the court will reduce the amount of damages in its award equal to the percentage that it feels you contributed to the accident.

Sometimes it is not the driver of the vehicle who was negligent but rather the owner of the vehicle. Owners of vehicles should make sure that everything on the vehicle is working properly. If they do not and an accident happens because of this, then they are negligent. In this case, the driver has a third-party claim.

EXAMPLE

Thami borrowed his employer's car to take some people to the town. The car had bad brakes but Thami didn't know about this. When Thami got to a stop street in the town he put on brakes, but the brakes didn't work. As a result, Thami crashed into a lorry in front of him. Three people in the car and the driver of the lorry were injured. These people can all make third-party claims because the owner of the car was negligent for not keeping the car in a roadworthy condition.

What can you claim for?

CLAIMS FOR BODILY INJURIES

If you are injured in an accident, you can claim for:

- Your medical expenses: money you paid for doctors and hospitals to treat you
- Compensation for pain, suffering and disfigurement (if your body is scarred by the accident)
- Loss of earnings if you have not been able to work after the accident

CLAIMS FOR LOSS OF SUPPORT

If the breadwinner in the family dies in an accident caused by someone else, then the dependants of that person can claim for loss of support.

A dependant is someone who depends on someone else for food, clothes, shelter, and so on. You will only succeed with a third-party claim as a dependant if the breadwinner has a legal duty to support you. For example, the widow of someone who dies could claim compensation for herself and the minor children of the deceased. But you wouldn't be considered a dependant of your friend who helps you with money every month.

Who do you claim from?

The claim is against the Road Accident Fund (RAF). The Fund has offices in Tshwane, Randburg, eThekwini and Cape Town. A third-party claim is not against the negligent driver or the owner of the vehicle. The RAF 'steps into the shoes' of the driver/ owner and pays on their behalf.

Using an attorney

The RAF employs information officers at all branch offices of the RAF to help people with their claims free of charge. However, if you wish to use an attorney, they will charge for their services. If the attorney thinks that the claim will succeed, they might ask you for a deposit to cover the first costs. If the claim is successful, you can pay the attorney with some of your claim money. The RAF will also contribute towards the legal costs if your claim is successful. If the attorney thinks that the claim will not succeed, they should advise you not to go ahead with the claim. Then, you only have to pay for the first consultation with the attorney.

At the first consultation with your attorney you should enquire about the legal costs involved. Don't wait until the end of the court case or settlement to consult with your attorney about how you are going to pay and how much it will cost you. If you think you cannot afford the legal costs involved, you should approach Legal Aid South Africa to apply for legal aid. Your attorney can help you to apply. ***(See pg 257: Applying for legal aid)***

You can also apply to the Legal Practice Council for a pro bono (free) attorney. Go to their website, www.lpc.org.za, and download a pro bono request form. To qualify for free legal support, you will need to comply with a 'means test' (a maximum monthly income or no income) and have a legal problem with merit. The Legal Practice Council will refer you to an attorney who will assist you free of charge.

The claims procedure

TIME LIMITS/PRESCRIPTION PERIODS

You must lodge the claim within three years from the date of the accident if you know who caused the accident. If you don't know who caused the accident you have two years to claim. Whatever the case, your claim must reach the Road Accident Fund in time, or you will lose the right to claim. If the attorney leaves the claim too

late, and you did not cause any delays, then you can institute an action against the attorney for not sticking to the time limits that resulted in your claim prescribing.

WHAT YOU MUST DO IMMEDIATELY AFTER A MOTOR VEHICLE ACCIDENT

There are important actions to take if you have been involved in a motor vehicle accident. This is what you need to do:

- Stop
- Help anyone who is hurt
- Find out what the damage is
- Get all relevant information
- Report the accident to the police
- Do not interfere with the evidence

STOP

If you are involved in an accident where someone is injured or dies or which causes damage to property, you are required by law to stop your vehicle. It is a crime not to stop after an accident, and you could be fined up to R36 000 or sent to prison for up to nine years, or both.

You don't have to stop or report an accident for example, if you crash into a tree and only damage your car and you are the only one that gets hurt. But, if you damage someone else's property you must stop and report the incident at the nearest police station.

When you stop, you should switch on your hazard lights to warn other traffic of the accident.

HELP ANYONE WHO IS HURT

After you have stopped, you need to find out if anyone is hurt and help them as much as you can. You also need to call emergency services. These are the numbers you can call:

- 084124 National ER N24-hour emergency
- 10177 to call an ambulance
- 10111 to call the police

If you don't know any first aid, be careful not to do anything that might make the injury worse. Unless you need to go for help, you must stay at the scene until a police officer says you can leave. You can be criminally charged for failing to help anyone hurt in the accident.

GET ALL RELEVANT INFORMATION

You must provide your name, address and vehicle registration number to anyone who has reasonable grounds for asking for this.

If you are involved in the accident, try to get the following information from all parties involved and witnesses:

- Full names
- ID numbers
- Addresses
- Telephone details
- Vehicle registration numbers
- Descriptions of the vehicles involved in the accident
- Details of police and traffic officers and ambulance staff
- Details of tow truck personnel.

To help you remember what happened, record the following as soon as possible:

- Write down the date, time, and address of the accident, the weather and road conditions when the accident happened and how the accident happened.
- Take photographs or a video of the scene of the accident from different angles, the surrounding areas, the injuries and any damage to property. Or draw a sketch plan of the accident scene.
- If the person driving the motor vehicle who caused the accident is driving a motor vehicle on behalf of their employer, write down the details of the driver and the employer.

This information will help you if you want to make a claim against your insurance or against the Road Accident Fund or if you want to claim the costs of repairs from the other party. At a later stage, you or your lawyers may need a copy of the accident report that is filled out by the police.

REPORT THE ACCIDENT TO THE POLICE

Report the accident to the police or an authorised office of a traffic officer within 24 hours with your driving license.

You have to give your name, address and vehicle registration number to the police or traffic officer, either at the scene of the accident or at a police station or traffic office when you report the accident. You must also show your driver's license. Write down the name of the police officer you spoke to

and the accident report (AR) reference number. The AR number is needed for any insurance claim or third-party claim that you make in the future.

If you are hurt and can't report the accident immediately, you must do it as soon as possible and explain why there has been a delay in reporting the accident. It is an offence not to report an accident in which another person's property has been damaged or in which another person is injured, even if neither of the drivers intends to take legal action.

When two cars are involved in a collision, and nobody is injured, the drivers may decide to pay for their repairs and not claim against each other. In such a case, it is not necessary to call the police to the scene of the accident, but it must be reported by both drivers at a police station within 24 hours.

DO NOT INTERFERE WITH THE EVIDENCE

You must NOT drink any alcohol or take any drugs unless it is on doctor's orders. If the police ask you to go for a medication examination, you must not drink any alcohol or take any drugs that have a narcotic effect before the examination and before you have reported the accident.

If anyone is injured in the accident, the vehicles may not be moved before the police or traffic officer has arrived and said that the vehicles can be moved. If the accident blocks the road, the vehicle may be moved enough to allow other vehicles to pass, but only after you have clearly marked the vehicle positions (for example, with chalk or spray paint).

VISIT A DOCTOR IF YOU HAVE BEEN INJURED

If you have been injured, visit a doctor immediately, even if the injury is not so serious.

PREPARING TO CONSULT AN ATTORNEY

It will speed things up if you have certain details ready before you go to an attorney. These are:

- Your identity document (ID)
- The registration number of the car that caused the accident
- The police case number
- Details of the driver or the owner of the car
- Details of any witnesses to the accident, for example, names and addresses, statements, and so on
- A hospital patient number

If the claim is by a dependant of the breadwinner who was killed in an accident, the following documents will also be needed:

- ID of the deceased
- Death certificate of the deceased
- Copy of inquiry, if available
- Copy of latest payslip
- Funeral expenses

DOCUMENTS YOU WILL NEED

If the attorney agrees to take the case, then you can help the attorney to get some of the necessary documents:

- **A medical report**, or if a person was killed in the accident, you must get an inquest record (this is a record of a court enquiry into someone's death)
- **A charge sheet** from the police
- **All accounts, receipts and vouchers** to prove medical expenses and hospital expenses
- **A letter from the doctor**; the doctor will say how much you will pay for medical expenses in the future because of the accident
- **A rough sketch** (drawing) of the scene of the accident
- The **name of the police station** where the accident was reported, the police case number and the police report
- A **letter from your employer** to say how much money you lost through unpaid wages, this is known as a loss of earnings certificate
- A **power of attorney from you**: this is a legal letter where you permit the attorney to make the claim on your behalf
- **Written consent** to the hospital (this gives your permission to the attorney and the Fund to look at your hospital records)
- An **affidavit** from the person who is claiming
- **Affidavits from witnesses** (people who saw the accident), if there are any
- **Salary advice slip and employment certificate** from the employer if you suffered a loss of income as a result of not working while you were recovering or if you were permanently disabled by your injuries

If you are claiming or are a witness, do not give a signed statement to anyone except your attorney.

What compensation can you get?

If your third-party claim succeeds, you will be paid a certain amount of money by the Fund. The Fund pays 'special damages' and 'general damages'.

SPECIAL DAMAGES

This is money to pay for things that cost you money, for example:

- Hospital and medical accounts for treatment that you received since the date of the accident
- Hospital and medical accounts for treatment that you will need in the future (the RAF might undertake to 'pay' these costs in the future when you undergo medical treatment; you, therefore, pay up front and then claim from them)
- Wages/earnings that you already lost as a result of your injuries
- Wages/earnings that you will lose in the future as a result of your injuries
- Cost of someone to take care of you if you cannot do this yourself
- Financial support that you already lost because a breadwinner died
- Travelling expenses
- Financial support that you will lose in the future because a breadwinner is dead
- Funeral expenses (if the dependants of someone who died in a motor vehicle accident are claiming)

Damages for loss of support are limited to R357 565 per year, in respect of each deceased breadwinner in the case of a claim for loss of support.

Damages for loss of income are limited to R357 565 per year.

These amounts of damages paid for loss of support and loss of income are adjusted quarterly to keep up with inflation.

GENERAL DAMAGES

This is not money to pay accounts. This is money to try to make up for your suffering because of someone else's fault. For example, you can get general damages:

- For pain and suffering
- For shock
- Because you now have a disability as a result of the accident
- Because your face or your body was badly scarred (disfigured)
- Because you cannot do things that you could do before the accident, like play sports, have children (loss of amenities of life)

- Because your life may now be shorter (shorter life expectancy)

The claim for general damages is limited to 'serious injuries'. A registered medical practitioner will assess claims for general damages for pain, suffering and disfigurement in the case of bodily injuries to see whether they fall into the category of a 'serious injury'.

The RAF does not pay compensation for 'secondary emotional shock', for example, if you were not involved in the accident but witnessed it. You do, however, still have a common law right to claim against the 'wrongdoer' in cases like this, and you can go to an attorney or Legal Aid to exercise this right.

PASSENGERS

Passengers injured in a motor vehicle or motorcycle accident can claim for special and general damages from the RAF, and there is no limit to what they can claim.

How long does it take to process a claim?

An attorney can issue a summons after 120 days have passed since the claim was lodged with the RAF. This gives the person handling the claim 120 days to finalise all the investigations.

When a summons is served on the RAF, the person handling the claim will usually ask your attorney for an extension of time, which will be used to see if the claim can be settled without having to go to court. The time that it takes to finalise a claim often depends on how complicated the claim is and whether all the necessary information is available.

If the RAF decides to pay out a claim, they will make an offer to the attorney. The attorney has to get your consent before agreeing to the amount offered. If the offer is not accepted the matter will be negotiated or go to court. If the offer is accepted, a discharge form will be used which says how much is to be paid. You will have to sign the discharge form and only once the RAF has received this will it make the payment.

What is an undertaking?

The RAF may issue you with an Undertaking that says it will compensate you for future medical and related expenses. These can be paid directly to you or to the medical service provider who is treating you.

Damage to your property

A third-party claim does not cover damages to your property, such as:

- Damage to your car
- Damage to your other things, such as your watch, your clothes, or your suitcase
- Damage to your fence or your house (when someone drives off the road and into your house)

If you want to claim money because your property is damaged, you must claim separately from the negligent driver or their insurance company and not from the RAF.

The *Compensation for Occupational Injuries and Diseases Act* says that you cannot sue your employer in a civil court for damages if you are injured on the job. But if your employer caused injury to you while you were not on the job, you can sue them. ***(See pg 394: Compensation Fund)***

What happens if you are not insured?

If you are not insured you will personally have to claim from the person who caused the damage to your vehicle or things. If your claim is for less than R20 000, then you can claim it in the Small Claims Court if there is one in your area. ***(See pg 242: Small Claims Court; See pg 957: Problem 2: A person's car is not insured and is damaged in an accident)***

You may also institute a claim in the Magistrates' Court; it should, however, be remembered that you may only claim for a maximum of R200 000 in the Magistrates' Court. A claim over R200 000 has to be instituted in the High Court. You will need an attorney to help you. ***(See pg 236: Civil claims)***

Comprehensive insurance

Many people pay regular amounts of money (called 'premiums') to an insurance company (the 'insurer') which is used to pay insurance claims. Such insurance usually covers damage to motor vehicles and personal things such as clothes, bags and watches. You choose whether you want to pay for private insurance to cover things like fire, theft and damage to a vehicle. The damage can be a result of the driver of the vehicle that caused the accident being negligent or of any other person being negligent.

For example, if you are involved in an accident and another person is at fault, then you can claim the cost of repairs for your vehicle from your insurance company. The insurance company might then claim from the person who caused the accident.

If the person who caused the accident was also insured, then your insurance company will claim from that person's insurance company. If the person who caused the accident was not insured, then your insurance company will claim the damages from the person. If the uninsured person cannot afford to pay, then your insurance company will have to bear the loss.

If you cause an accident and you have insurance, you can also ask the insurance company to pay someone else for the loss that you have caused.

Motor vehicle accidents during the course and scope of your employment

If a motor vehicle accident happens while you are doing your job, then you can get compensation in terms of the *Compensation for Occupational Injuries and Diseases Act* (COIDA). But if you are injured in a motor vehicle accident caused by someone else's negligent or unlawful driving, even if this is during their employment duties, then you can also lodge a third-party claim with the Road Accident Fund.

The money that you receive from the COIDA will be deducted from the third-party payment. For example, if the RAF agrees to pay damages of R15 000, but the COIDA has already paid R10 000, then you will only get R5 000 damages from the Fund. ***(See pg 956: Problem 1: Dealing with a third-party claim)***

NOTE

COIDA says you cannot sue your employer for damages if you are injured while on duty. (But if your employer caused injury to you while you were not acting during the course and scope of employment, you can sue them.) Therefore, if a motor vehicle collision occurs while you are acting during the course and scope of your employment, you will not be entitled to sue your employer in a civil court. ***(See pg 394: Compensation Fund)***

Problems

1. Dealing with a third-party claim

Jeffrey is injured in an accident while he was a passenger in a minibus taxi. In the accident, he broke his leg. He was employed as a driver, but now he is not able to do his job, so he is dismissed. The accident was not the fault of the driver of the minibus in which Jeffrey was riding but it was caused by the negligence of another car which collided with the minibus taxi. Jeffrey wants to claim damages from the driver who caused the accident. What must he do?

WHAT DOES THE LAW SAY?

Jeffrey will have a third-party claim for damages. The claim will be for injuries to his body. He can claim special damages, such as a claim for hospital and medical expenses for the injury, a claim for wages that he lost, and a claim for wages that he will lose in the future.

He can also claim general damages, such as a claim for pain and suffering and a shock claim.

WHAT CAN HE DO?

1. Jeffrey can make a claim as soon as possible so that the claim can be lodged with the Road Accident Fund.
2. The claim must reach the Fund within three years after the accident if he knows the details of the driver who caused the accident or within two years if he doesn't know who the driver was.
3. He must take the following information with him when he goes to see an attorney:
    a. His ID document
    b. The registration number of the car that caused the accident
    c. The police case number
    d. The name and address of the driver of the car
    e. The names and addresses of any witnesses
    f. His hospital patient number
    g. Salary advice slip with information about the employer
4. The attorney will tell him what other documents to get if necessary.

2. A person's car is not insured and is damaged in an accident

Tom owns a car which is not insured. His brother-in-law Simon borrows the car and has an accident which causes about R5 000 worth of damage to the car. The accident was Simon's fault. He refuses to pay for the repairs. What can Tom do?

WHAT DOES THE LAW SAY?

Tom was not injured in the accident, and no one died. So he cannot make a third-party claim.

His car is not 'comprehensively insured' so he cannot claim from an insurance company to cover the cost of the damage to the vehicle. If his car had been comprehensively insured, he could have claimed for the damages from the insurance company. They would then claim against the person who caused the accident.

Tom will have to sue Simon in one of the civil courts to get the money. Because the claim is for less than R20 000, he could sue him through the Small Claims Court. This is much cheaper and quicker than going through the Magistrate's Court or High Court. He also does not need an attorney to do this. ***(See pg 954: Damage to your property; See pg 954: What happens if you are not insured?; See pg 954: Comprehensive insurance)***

WHAT CAN YOU DO?

Ask Tom to get at least two official quotations from different garage dealers for the repairs to his car. Help him to lodge a claim at the Small Claims Court in your area and explain the procedures to him. ***(See pg 242: Small Claims Court)*** If there is no Small Claims Court, then Tom can sue Simon through the Magistrate's Court. He will have to go to an attorney to do this.

Checklists

Particulars to take for a third-party claim

- The name and address of the driver of the vehicle that caused the accident
- The registration number of the vehicle that caused the accident
- Describe how the accident happened.
- Were you injured in the accident?
- Have you been to see a doctor?
- Have you been to see an attorney?
- Have you applied for legal aid to pay for an attorney?

If your car or other property is damaged in an accident

- Was your car damaged in the accident?
- Was any other property damaged in the accident?
- Was your car comprehensively insured?
- Describe how the accident happened.
- What is the name and address of the person driving the other car?
- Who was driving your car when it was damaged? (Give the person's name and address)
- If your car was damaged in the accident, have you got quotations from a panel beater or garage?
- What will it cost you to repair your car (or anything else that was damaged)?
- Can you bring your claim in the Small Claims Court?
- Have you been to see an attorney if you can't bring your claim in the Small Claims Court?
- Have you applied for legal aid if you need to use an attorney?

Paralegal Skills & Establishing an Advice Centre

Introduction

In South Africa, it has always been difficult for poor and vulnerable people to have access to justice. Legal procedures are complicated, take a long time and often need attorneys who are very expensive. People now enjoy many new rights in terms of the Constitution, the Bill of Rights and other new laws, but they can only exercise these rights if they have access to the information and assistance to do so.

There is a growing movement of people who play the role of providers of information and assistance. Examples are community development workers (CDWs) working in local government structures, advice centre employees, parliamentary constituency office workers, employees in welfare organisations and other non-governmental organisations (NGOs), shop stewards in trade unions and ward councillors. Many of them are acting as informal paralegals.

Paralegals play an important role in providing access to justice in a transforming justice system. The Department of Justice is investigating ways of giving poor rural people access to legal help and has recognised the importance of involving paralegals in any new system that is developed.

This chapter looks at the different roles paralegals play and covers the skills they need to do their work. The last section looks at the process of establishing and running a community advice centre.

Paralegals and their role in the legal system

What is a paralegal?

A paralegal is a person who:

- Has basic knowledge of the law and its procedures
- Knows about conflict resolution procedures
- Has the necessary motivation, commitment, attitude and skills to help people and communities with their legal, human rights, administrative, constitutional and developmental problems, while at the same time empowering them to tackle these matters on their own in future

Paralegals use their knowledge and experience to help people with legal and other problems. A paralegal may investigate and refer matters to attorneys or relevant bodies for them to deal with. They can become educators on the law and rights for people in their communities. They can play a leading and supportive role in campaigns for improving community living standard sand general community development.

Paralegals are not just mini-attorneys. Obviously, they cannot assist people in court and other tribunals until they acquire the relevant qualification and accreditation. But more than this, their role is to look at a variety of methods, other than using the courts, to achieve long-term, sustainable solutions to peoples' problems. Using the courts can bring quick relief which is important in many cases, but this is not always the case. Court cases can take a long time to be finalised, the costs involved are often huge and the outcome for a person may be negative. Paralegals should aim to deal with problems in a more holistic way.

EXAMPLE

Getting a protection order

A woman and her children who are suffering from abuse at the hands of the husband and father, should be advised by a paralegal to apply for a Protection order. But the paralegal should also see the bigger picture: the woman and her children are financially dependent on the husband and father for their survival so they cannot move out of the house unless they are supported in this process. The paralegal should therefore help the woman apply for Child Support grants for her children and she should be referred to child welfare or to women abuse organisations for support.

Paralegals can also solve community or individual service problems by involving the relevant government departments and working together to help the people. In general, a paralegal should focus more on the use of conflict resolution methods like negotiation, conciliation, mediation and arbitration to resolve conflicts in communities rather than using the courts.

EXAMPLE

Eviction from a home

A farmer plans to evict ten families from his farm without a court order. A paralegal can help the families approach the courts (using an attorney) to get an urgent interdict to stop the evictions from taking place. But this only provides the families with temporary relief. It

would probably benefit the families more if they were to sit around a table with the farmer and negotiate a way of dealing with the problem, which would benefit all the parties. while they are doing this, they should be lobbying and putting pressure on the local government to provide land for the families to settle on because they don't have security of tenure rights on the farm. The paralegal can help them in all of these actions. ***(See pg 1048: Best practices for paralegal case workers)***

Paralegals in different sectors

Paralegals work in different sectors of society. These include:

- **Community advice centres:** they offer a basic free legal advice service to people who cannot afford an attorney, they provide community education on the law and rights and referral service. Some political parties and some ward councillors also run constituency offices to give basic legal advice to people.
- **Trade unions:** Organisers, training officers and shop stewards need paralegal skills for their work. They also need to know the basic principles of labour law and labour relations.
- **Service organisations and NGOs:** Field employees working in service organisations, NGOs, CBOs and attorneys' organisations need paralegal skills, for example, giving advice, monitoring abuses of rights, understanding and simplifying the law, and assisting with community education.
- **Law firms:** Paralegal employees in law firms take statements, refer people to other organisations if necessary, give advice, etc.
- Inside the legal system: Lay assessors are paralegals who participate in the criminal courts by helping magistrates reach fair decisions in criminal cases. Lay assessors should have a basic knowledge of the law and court procedures.
- **Community Development Workers (CDWs):** CDWs are based in municipal offices. Their role is to provide a link between government and communities. They need to have certain skills, including those for effective conflict resolution and they need a sound working knowledge of broad issues such as social development and welfare, disaster management, the responsibilities of local councils to communities and how to make local government accountable.

The role of paralegals

These are some of the free services that paralegals can provide:

- Give legal and general advice to people on the law and their rights

- Write or distribute pamphlets, booklets and other resources to help educate people
- Refer people to social and health services and other helpful organisations
- Refer people to attorneys where it is clear an attorney is necessary
- Help prepare people for formal legal procedures, such as what to expect in a court case
- Assist and prepare people to take labour problems to the Commission for Conciliation, Mediation and Arbitration (CCMA)
- Run workshops to educate people about their rights
- Work as a link between a community and attorneys, and help with things like taking statements, interpreting and following up cases
- Assist in making contact with the press and in publicising events and problems in a community
- Help sort out problems in a community and problems with the authorities through negotiation and mediation
- Help in the building and developing of community organisations
- Build contacts with other paralegals, resources and organisations regionally and nationally ***(See pg 1048: Best practices for paralegal case workers)***

Paralegals play an important role in the legal process because many people cannot afford attorneys and people sometimes find it intimidating to go to an attorney.

Formal recognition of paralegals in the legal system

The public and the legal profession recognise that paralegals are important because they allow disadvantaged people to have access to justice. However, for many years, paralegals were not formally recognised by the legal profession. There are a number of regulatory options being considered for paralegals, including an independent regulatory framework.

Practical skills useful for a paralegal

Paralegals should all have a basic but sound knowledge of the law and legal procedures. Advising someone about what the law says and what their rights are in a particular case is the first step in any advice-giving process. This section looks at practical skills necessary and useful for a paralegal to have in their advice-giving role. The skills fall under three main headings:

1. Communication skills
2. Administrative skills

3. Development skills

Communication skills

Paralegals can get formal diplomas at many colleges and universities. This section looks at how you can develop your communication skills with:

- The person you are trying to help ('the client')
- The people you have to contact on behalf of your client, for example, the government, an employer, a store manager, and so on
- The organisation or community to which you are accountable as a paralegal

Communication skills can involve the following:

- Interviewing clients
- Taking a statement
- Listening to clients
- Monitoring and evidence-gathering
- Counselling
- Advice-giving and problem-solving
- Referring your client to other organisations or assistance agencies
- Making telephone calls
- Writing emails and letters
- Writing reports

INTERVIEWING CLIENTS

The process of interviewing a client is as follows:

- Introduce yourself to the client and (if it is the first time) ask for their name and address. Write this down.
- Ask the person why they have come for help.
- Work out how willing or able the person is to discuss their problem. Sometimes, people find it very difficult to talk about their problems to strangers.
- Listen to the client, and don't hurry to conclusions about what you think the problem is.
- Ask the client what steps they have already taken to try and solve the problem before coming to see you.
- Discuss with your client what steps you think are necessary to try and sort out the problem. Explain these steps in detail. The client may only need some

advice or counselling or can be referred to a specialist agency that can help them.

- If you have to do some work on the case, your next step is to take a full statement.

(See pg 977: Listening skills; See pg 981: Counselling; See pg 981: Advice-giving and problem-solving skills; See pg 982: Referrals; See pg 969: Taking a statement)

When you interview someone who comes to you for help it is important to think about the language you use while talking to the person. This refers to the actual language used as well as the level of language.

WHAT LANGUAGE SHOULD YOU USE?

It is always better to interview a person in their own language. People find it much easier to tell you about their problems in their own language. It makes them feel more at ease, and they will be able to explain themselves better. Confusion and misunderstandings often happen when a person has to explain a problem in a language which is not their home language. If you cannot speak the language of the person you are interviewing, then you should have someone with you who can translate. If you need to have a translator, this person should have a good understanding of both languages, and it helps for them to have some basic knowledge of the law.

If you write to your client, you should also try to write the letter in your client's language.

USING THE RIGHT LEVEL OF LANGUAGE

It is important that the person or people you are trying to help can understand your words and sentences properly. If you do not explain things plainly and in a way that is easy to understand, you will not be helping your client. Your client will not learn anything from you and will not be able to help you try to sort out the problem.

These are some examples of language problems:

- Using difficult legal words for example, substantive, prescription, discretionary, and so on.
- Using a difficult explanation to explain a difficult word, for example, explaining that an interdict is *'a civil remedy calling on the offending party to refrain from harming the applicant'* is not as easy to understand as saying that an interdict is *'a special kind of court order which you can get to protect you from harm'*.

- Using foreign or Latin words, for example, quid pro quo, rule nisi, inter alia, vis-a-vis.
- Using jargon (words that are usually only clear to a certain group of people), for example: *workerist*, *dynamics*, *concretise*.

TAKING A STATEMENT

A statement is necessary because it helps to keep a record of a client's case. The statement is recorded on a case sheet, which is a standard question shee,t and this is kept in the client's file. You will do all of your work on the case using the information you wrote down in the first statement, and it is therefore very important for you to write down accurate and complete information. See below for an example of a simple case sheet and an example of a statement.

The statement is divided into four parts:

1. Personal details of the client, for example, name, age, address, work details, and so on
2. Description of the problem
3. What advice you give to the client
4. What action can be taken to help the client

PERSONAL DETAILS OF THE CLIENT

Write down the standard personal details of the client. The most important details are:

- **Full name** – check the spelling
- **Address** – Check whether post can be delivered to the address or not. If the person is homeless, ask for the address of a relative who has a fixed home address.
- **Identity number** – this is often useful for reference purposes
- **Age or date of birth** – If the person does not know their age, then ask if some important event happened in the year they were born, for example, a very bad drought which was recorded; this will give you an idea of the year that the person was born.

DESCRIPTION AND DETAILS OF THE PROBLEM

The details you need will be different according to the different types of problems. For example, in a complaint about non-payment of wages you need to know what work the client was doing and what the wage was supposed to be, as well as the name and address of the employer. To help with a pension application, you need the age and present income of the client.

At the end of each chapter of the Paralegal Manual, there are usually one or two checklists. These include the questions that are important to the topics covered in that chapter. Once you know what kind of problem your client has, the checklists for that chapter can help you remember what questions you should ask your client.

Write down every detail of importance. Rather include information if you are not sure whether it is important or not. It might come in useful at a later stage.

Write down all the details of the problem in the correct date order that things happened.

EXAMPLE

- *On 15 December 20..... Sara was dismissed from her job*
- *On 17 December ..... Sara returned to get her notice pay*
- *On 20 December 20..... Sara went to the union about her dismissal, etc*

ADVISING THE CLIENT

You must tell your client what their rights are. You must then explain what steps can be taken to help them.

Then, you must **listen** to your client to find out exactly what they want you to do. These are the 'instructions' that your client gives you. For example, if your client was dismissed from a job, don't just take it for granted that they want the job back, even if you feel that the dismissal was unfair. On the other hand, if your client says they only want notice pay, this may be because they do not know anything about unfair dismissal and reinstatement. It is up to you to explain to your client all their rights, and then let them make their own choices.

If there is something that the client is not clear about, ask them to find out that information and bring it to you later.

Write down details of the advice that you gave and the 'instructions' that your client gave you.

TAKING ACTION TO SOLVE THE PROBLEM

Discuss with your client what steps you will take to try to solve the problem. Make sure the client understands what you are going to do. Be **realistic** about how much you think you can do for your client and how long it will take to sort out the problem. Do not raise false hopes.

You must then agree on how you are going to **report back** to your client. This could be by writing a letter to the client or the client coming back to you on a set date.

Write down everything that you do. For example, if you make a telephone call, write this down, and what was said in the telephone call. Keep copies of all letters that you write for your client.

Keep **copies** of all documents in connection with your client's claim, for example, a UIF record card in a complaint about UIF benefits, the Instalment Sales Agreement in a problem with hire purchase, and so on. Do not write on original documents.

Documents should be stapled to the statement of the client so that they do not get lost.

See the next two pages for examples of a *simple case sheet* and *statement*.

EXAMPLE OF A SIMPLE CASE SHEET

HOPETOWN ADVICE CENTRE

Date: .....

Client's name: .....

Physical address: .....

.....

Postal address: .....

.....

Cell number: .....

Age (if necessary): .....

Type of case (e.g. grant): .....

Description and details of the client's problem:
(*give this section plenty of space*)

.....

.....

.....

.....

Advice or suggestions given to the client:

.....

.....

.....

Action taken on behalf of the client:

.....

.....

.....

.....

EXAMPLE OF A STATEMENT

STATEMENT

1. My name is Benjamin Ngwane. I am a 30-year-old male living at 52 Indwe Road, Langa, Cape Town. I am unemployed.
2. On Monday 26 September 20...., at about 8 p.m. I was walking on my way home after visiting a friend. I was walking alone on the pavement past Kentucky Fried Chicken.
3. A group of men crossed the road and came towards me. I recognised one of them. His name is Patrick Xegwana. He lives a few streets away from me in Pele Street.
4. The group stopped me and Patrick Xegwana grabbed me by my shirt and asked me where I was going.
5. I said I was going home.
6. Patrick Xegwana then slapped me on my left cheek with his left hand. One of the other men assaulted me by punching me in the stomach and kicking me where I lay on the ground. He was wearing a dark blue overall which was very torn. He was also wearing glasses. I recognised this man's face although I do not know his name. I also don't know where he lives. He is about 30 years old. I would recognise him if I saw him again.
7. I think there were five men altogether. I do not know the names of any of them except for Patrick Xegwana, but I recognised all of their faces. I would recognise them if I saw them again.
8. They were all crowding around me while I was lying on the floor being assaulted by the man in the blue overall. One of the men had a gun and was poking it in my side. I was very scared and I didn't say anything to them. They did not say why they were assaulting me. They only told me that I must not come near their area again.
9. Then I blacked out and only remembered being picked up by a person called Vuyani. He telephoned the Langa Day Hospital. They sent an ambulance to come and fetch me.
10. In hospital I was treated for two broken ribs, severe bruising all over my body, and my eye was bleeding. I had to stay in the hospital for 3 days. My hospital card number is 5487. I was treated by Dr Wyngaard at the hospital.
11. I do not know if there were any witnesses to the assault on me. I do not know if Vuyani witnessed the whole assault on me.
12. I do not know why I was assaulted by the group. I feel that I have been wronged and I want to make a claim against the people who assaulted me.

Date on which the statement was taken: 28 September 20....

Name and address of the person who took the statement:

Lawrence Ndlovu
c/o Langa Advice Centre
Telephone number: (021) 642 0202

AFFIDAVITS

An affidavit is a written statement which you swear is the truth. Another name for an affidavit is a sworn statement. You sign this statement (with your name, or X if you cannot write) in front of someone called a Commissioner of Oaths. A Commissioner of Oaths can be a magistrate, postmaster, bank manager, attorney, members of the South African Police Services (SAPS), and certain priests and social employees.

For example, when you need to prove something (like your age in order to get a pension), and you do not have any written proof that what you are saying is true, then you can put this information in an affidavit.

Usually the same information that is used for an ordinary statement will be used in an affidavit. All that happens is that an attorney or paralegal will turn the statement into an affidavit by adding some formal words at the beginning and at the end of the statement.

See *How to draw up an affidavit* and *Example of an affidavit* on the next two pages.

HOW TO DRAW UP AN AFFIDAVIT

AFFIDAVIT

1. I .....

(name of person)

do hereby make oath and say:

2. I am an adult

(male/female)

and I live at

.....

(address)

3. I am

(married/single)

unemployed/employed at .....

4. The statement (*fill in what you say is true*)

.....

.....

DEPONENT

(the person making the statement is the deponent and must sign here but only in front of the Commissioner of oaths)

(Then the Commissioner of Oaths fills in this next part)

THUS SIGNED AND SWORN TO at .....

(place)

this day of .....

(date)

The Deponent having acknowledged:

1. That they have no objection to taking the oath;
2. They deem the oath binding on their conscience;
3. They understand the contents of this Affidavit and stated that same was true and correct and uttered the words 'So help me God'.

.....

COMMISSIONER OF OATHS

(*Commissioner of Oaths signs here after asking the deponent to swear with their hand in the air that they are telling the truth*)

(*The name and address of the Commissioner will be given here, and the office held by the Commissioner, e.g. South African Police Officer*)

EXAMPLE OF AN AFFIDAVIT

AFFIDAVIT

1. I, Benjamin Ngwane, do hereby make oath and say:
2. I am an adult male and I live at Number 52 Indwe Street, Langa, Cape Town.
3. I am unmarried. I am presently unemployed.
4. On Monday, 26 September 20...., at about 8 p.m. I was walking on my way home after visiting a friend. I was walking alone on the pavement past Kentucky Fried Chicken, going in the direction of my home.
5. A group of men crossed the road and came towards me. I recognised one of them. His name is Patrick Xegwana. He lives in Pele street.
6. Patrick Xegwana slapped me on my left cheek with his left hand. One of the other men punched and kicked me in the stomach. He was wearing a torn dark blue overall and glasses. I recognised him but I don't know his name or where he lives. He was about 30 years old.
7. I think there were five men altogether. I do not know their names except for Patrick Xegwana but I recognise all their faces. I would recognise them if I saw them again.
8. They were all crowding around me while I was lying on the floor being assaulted by the man in the blue overall. One of the men had a gun and was poking it in my side. I was very scared and I didn't say anything to them. They did not say why they were assaulting me. They only told me that I must not come near their area again.
9. Then I blacked out and can only remember somone calling for an ambulance.
10. At hospital I was treated for two broken ribs, severe bruises all over my body, and my eye was bleeding. I had to stay in hospital for 3 days. My hospital card number is 5489. I was treated by Dr Wyngaard at the hospital.
11. I do not know if there were any witnesses to the assault on me. I do not know if Vuyani witnessed the whole assault on me.
12. I do not know why I was assaulted by the group.

.....

BENJAMIN NGWANE

THUS SIGNED AND SWORN TO at LANGA this 30th day of September 20..... the Deponent having acknowledged:

13. That they haves no objection to taking the oath;
14. They deem the oath binding on theirconscience;
15. They understand the contents of this Affidavit and stated that same was all true and correct and uttered the words 'So help me God'.

.....

COMMISSIONER OF OATHS

LISTENING SKILLS

It is important to listen properly to your client when they are telling you about a problem. There are different ways of showing your client that you are listening carefully.

- Use your body to say 'I'm listening':
    - Use eye contact and look at your client
    - Nod your head
    - Say 'yes', 'I see', and so on
- Let your client tell their whole story first while you just listen. Summarise the **main points** of what your client said in your own words to make sure that you have got the story right.
- Show the client that you are sympathetic to their problem. The more sympathetic you are towards your client, the more your client will trust you and confide in you.
- Don't be impatient with your client while they are telling you about a problem. If you listen carefully to your client, you will know what help they are looking for.

MONITORING SKILLS

A monitor is someone who watches and records what is happening – often when there is conflict between two sides. A monitor must be independent and not take sides. A monitor must also be someone who is reliable and truthful.

WHY DO WE NEED MONITORS?

When there is fighting between different groups, for example, in a community or between the police and other people, it helps to have monitors to give evidence about what happened from a non-involved perspective. In any conflict, each side will tell a different story. Monitors can help to find out the truth.

You can also monitor situations in your community on an ongoing basis. For example, ongoing monitoring of human rights abuses will help you build up a broader picture of the human rights situation in your community or country. You can use the information you gather while monitoring to challenge decision-makers in the different spheres of government. So, for example, you could monitor:

- Police cells and prisoners: (has the person been given access to an attorney, have they appeared in court within 48 hours / what are the

conditions in prison / what ages are the prisoners / are children in a separate cell, etc.)
- Trials: (who was the accused / what was the charge / who was the magistrate or judge / did the accused have an attorney / what was the final judgement / was there an application to appeal, etc.)
- Hospitals: (what types of illnesses or injuries are people suffering from / were medicines available/ were patients given proper treatment by doctors/nurses)
- Vulnerable groups living in or near your community, such as refugees, women, children, the disabled and minority groups

HOW DO YOU MONITOR PROPERLY?

If you are monitoring a specific situation then it helps to work together with someone in a pair. Each pair of monitors will monitor a certain area. The pairs must stay in contact with each other. You can do this by having a messenger who can run between pairs passing messages, or you can use a cell phone.

As a monitor, you must stay as close to the action as possible, but be careful not to become involved in the action.

Whether you are doing ongoing monitoring or monitoring a specific situation, you must write down everything that you see happening. If possible, you must take photographs of incidents, for example, where people were injured, you must photograph their injuries with a match or ruler next to the injury (to show the size of the injury). This is important later if you have to give evidence in court. It is also useful if you can draw a map of where the incident took place. ***(See pg 1051: Checklist: Preparing for monitoring)***

For example, if you were monitoring a community conflict situation with the SAPS, these are the important things you should write down:

- The size of the crowd
- How many police are present
- The registration numbers of the police vans and any other vehicles involved in the action
- The names of the police officers present
- The time that the action began
- Details of the events in the order that they happened
- The names of the people who are injured or arrested
- What weapons were being used

WHAT FOLLOW-UP ACTION MUST YOU TAKE?

When you are monitoring a specific incident or on an ongoing basis, you should immediately:

- Record what happens: who/what/where/when on an incident sheet
- Concentrate on the most serious abuses
- Focus on any group that is targeted for particular treatment.

You should take the following follow-up action:

1. Make sure that people have an attorney if this is appropriate (for example, if someone has been arrested or killed).
2. File all your monitoring reports/statements/photographs.
3. Review the available facts and decide what type of action you or your organisation should take. For example:
    - Should there be an immediate full investigation
    - Do you need to collect further evidence, for example, by taking statements from witnesses or victims
    - Is the complaint so common that your report forms part of a documentation of the facts for possible follow-up action later on
4. Enter the facts into a simple system for storing information. These statistics can be very useful for different reasons, for example, when you are working out your priorities as an organisation (what issues you want to focus on), when you are meeting decision-makers in government (to put pressure on individuals), when you are meeting with possible donors, and so on.
5. Organise a press conference if this is appropriate or write a report about what has happened and send this to the press. ***(See pg 1052: Checklist: Monitoring follow-up)***

EXAMPLE OF AN INCIDENT SHEET

INCIDENT SHEET FOR MONITORING PUBLIC EVENTS AND CONFLICT SITUATIONS

Date: .....

Monitor's name:.....

Monitor's address:.....

Monitor's telephone no:.....

Date of incident:.....

Place of incident (town, district):.....

Timeincident started:.....

Time incident finished:.....

People or parties involved:.....

Numbers of people involved:.....

Number of houses affected:.....

List of witnesses:.....

Number of people injured: .....

List of injured:.....

Number of people arrested:.....

List of arrested:.....

Name of the attorney and/or legal firm that has been helping: .....

SAPS or other security services information:

Names or Numbers / Rank / Wearing ID / Uniform

.....

.....

Vehicles used:

Type of vehicle / Number of such vehicles / Registration numbers

.....

.....

Weapons used: (if used by anyone other than security services, state who)

.....

Circumstances before the incident: (for example, public meeting, march and so on)

.....

.....

Description of incident:

....

Developments after the incident: (medical treatment, appearances in court, and so on)

.....

.....

Map of the incident:

Draw a map of the area where it happened, clearly showing the street names and where people were. Attach the map to the incident sheet. Also email all photos taken by yourself and attach them to the file or incident sheet.

Statements given by:.....

Contact addresses:.....

Telephone numbers:.....

COUNSELLING SKILLS

Sometimes people just want to talk to you about their problems, and it may not be necessary for you to take any further action. It might be enough for you to counsel someone about ways to deal with a problem. For example, your client might have a problem with noisy neighbours who party through the night and keep her awake. You can suggest different ways to deal with the problem, such as asking for a meeting with the neighbour to discuss the problem or getting a mediator in to help mediate between them.

Counselling is a skill used mainly by professional psychologists and social welfare employees. Where the issues raised by an advice seeker can have serious psychological consequences (for example, in the case of a child who has been abused, a person raped, etc.), they will need deeper counselling. Paralegals are not trained to provide this service, so they should refer the person to a professional.

ADVICE-GIVING AND PROBLEM-SOLVING SKILLS

Sometimes, people only need advice to help them with their problems. It is not necessary to take any other action. For example, someone comes to you for help with a grant-related problem. You can then advise them to go to the South African Social Security Agency (SASSA) for assistance.

As far as possible, you should encourage people to try and sort out their problems on their own. Often this means that you give a person some advice and tell them to

come back to you if they haven't managed to sort it out. This makes people less dependent on you to solve their problems, and it encourages them to take responsibility for dealing with their own problems.

Always make careful notes of the advice you give so that if the person comes back to you later, you can ask them whether they did as you advised.

REFERRALS

Paralegals often play an important role by linking people with a problem to an appropriate agency that is more qualified and better trained to deal with the problem. This could be a government department, or it could be a private welfare agency, NGO, religious body, etc.

Examples of assistance agencies that you may refer a client to include child welfare organisations, organisations against women and child abuse, trade unions for labour issues, the maintenance officer at the court, community development employees for issues linked to local governance, etc.

Paralegals should build up a database of agencies and contact people as part of their referral service.

Always give the person a cover letter when you refer them to another organisation. Explain why you are referring the person to them and what work, if any, you have done on the case. Advise the person to come back to you if the agency refuses or is unable to help.

TELEPHONE CALLS

Before you make a telephone call, you must make sure that you understand clearly what the problem is about and what you hope to get out of the telephone call. In other words, you must prepare yourself properly before making the telephone call.

Always introduce yourself to the other person. Tell the person you are telephoning on behalf of your client.

Always write down the name of the person to whom you are speaking and the date and time of the telephone call.

Never change the story of your client. You must only say what your client told you. If you don't know how to answer the other person, say that you must speak to your client and you will call back.

Be polite but firm about your client's rights, and never lose your temper over the phone. Try not to become involved in an argument on the telephone, because you might end up saying things that could harm your client or your future relationship with the official.

Make rough notes while you are speaking on the telephone, then write them down in more detail as soon as you have finished. This is because it is not always possible to remember everything that was said on the telephone. You might have to remember the details later for a court case.

If you reach any agreement with the other person, you must confirm what you agreed in a letter to that person.

LETTER-WRITING

MODEL LETTER SHOWING THE LAYOUT OF A LETTER

UPINGTON ADVICE CENTRE

(your address:)
Room 9, Avocado Centre
Upington
0100
(your telephone number:)

Telephone: (0555) 2345289
(your email)
Email: info@advice.org.za
(date:)
15 June 20...

(some offices give every letter its own reference number:)
Our Ref: 135/98

The Manager

(the name or title of the person who must read the letter)

Tex Stores (Pty) Ltd
PO Box 1053
Upington
0100

(the address you are writing to – then you have this on your copy of the letter)

Dear Madam / Sir

(the main thing that the letter is about – usually the client's name and the type of problem:)

MS GERDA FORTUIN: LEAVE PAY

(introduction:)

We are writing to you on behalf of Ms Gerda Fortuin. She was employed by you as a checker at your Upington branch from 20/02/96 until 20/04/24. She resigned after giving the necessary notice. Her wage was R1500 per week.

(give information to identify the client:)

Ms Fortuin's work number was 315. Her identity number is 4209050920088.

(what the problem is – setting out the details:)

Ms Fortuin says that when she received her final pay packet she was not paid out for leave owing to her. She last took leave in September 2023.

(what the law says and applying the law to the facts:)

In terms of the Wage Determination for the Commercial and Distributive Trade, an employee may receive leave pay calculated according to the following formula:

(put in the formula and your calculations)

Ms Fortuin is therefore owed 7 months pro-rata leave pay.

(what the person you are writing to must do about it:)

Ms Fortuin requests that you forward the leave pay that is owed to her to the above address within 14 days of receipt of this letter. Please contact our office if you would like to discuss this matter further.

Yours faithfully

(sign your letter)
.....
Mr P. Philander ADVISER

Always include in a letter:

- Your own address and email address (or the address that the person getting the letter must write back to)
- The address of the person to whom you are writing
- The date

Start your letter by saying that you are writing on behalf of your client. Set out clearly in your letter the details of your client's complaint.

Say exactly what it is you want from the person you are writing to. In other words, say what the person you are writing to must do about the complaint.

Remember to include information that can help to identify your client, for example, identity number, work numbers, pension number, UIF number, Compensation for Occupational Injuries case number, and so on.

Make sure that your letter is signed and has the date on it before you send it out. If possible, get another person to check your letter before you post it.

Keep a copy of all letters written in your client's file, including any hand-delivered letters.

Some standard letters can be photocopied to cut down on typing load. Type the main part of the letter that always stays the same, leaving blanks to fill in the things that change, like the client's name. Photocopy the standard letter, and then every time you need this kind of letter, you just fill in the blanks.

Examples of such letters are:

- Letter asking the client to call the office
- Letters of referral, for example, to another assistance agency
- Letters of referral to the Small Claims Court

There are standard MODEL LETTERS in this manual. These letters are there to give you some guidance on what to include in typical letters you may have to write. For example, you will often have to write a letter of demand asking someone to do something, like pay your client money that is owed.

REPORT-WRITING

Reports are written to report back about what a person, group or committee has done.

Paralegals might have to write regular reports on their work for their management structures, for funders and partner organisations.

A community-based paralegal who is monitoring a situation in a community, for example, a demonstration, should write a report on what was witnessed. This should include relevant dates, times, venue, people involved, etc.

Office-bearers in an organisation should also write regular reports, for example, a treasurer can write a monthly report on the finances of the organisation, a community liaison person should write a brief report on meetings attended on behalf of the organisation and the outcomes of those meetings. Report-writing is a

very important communication tool which enables people to share information in a structured way, and it means everyone is kept informed on what is happening.

PLANNING A REPORT

Whenever you write a report, remember to follow certain planning steps:

- Ask yourself: *Who am I writing for? What do I want to tell them? Why should they know this?*
- List the things you want to say
- Plan the order in which you will put things
- Write the report

REPORTS FOR FUNDERS

Here is a simple outline for a report for funders (after they have given money):

1. **Introduction**
2. **Achievements of the organisation in terms of the funding proposal and objectives.** Describe what you have done and link this to what you said you would do when you asked the funders for money. List each of your objectives and what you have done to achieve them. Also, describe problems that stopped you if you did not achieve all objectives. Most funders have their own format for reports - try to give them the information they want.
3. **Plans for the next year**
4. **Financial statement:** A full financial statement and records to show how you have spent the money.

REPORTS TO YOUR OWN MEMBERS OR TO A COMMUNITY ON AN ISSUE

These reports are usually given verbally in a meeting. Here is a useful outline to make sure you come across clearly:

1. **Issue –** Explain what issue is covered by the report.
2. **Facts –** Give people the basic facts about the issue or any events that have taken place.
3. **Options –** Often, you report on something where the meeting must make a decision. Try to outline the main options open to people.
4. **Proposal –** Say which option you think is the best one, or propose a clear way forward. The meeting may disagree, but the proposal provides a good starting point for discussion.

EXAMPLE OF A REPORT FOR AN ANNUAL GENERAL MEETING

CHAIRPERSON'S ANNUAL REPORT 2011

1. **MEMBERSHIP**
   We have set up a membership sub-committee under Maria Hendricks. They have been very successful and the membership has increased from 200 to 700 members.
2. **FUNDRAISING**
   We held a film show at the start of the year and raised R900.
3. **GENERAL MEETINGS**
   We have held general meetings in different areas this year. Many members came to these meetings and met the committee. This helped the committee to hear what members think.
4. **PROJECTS**
   HIV/AIDs community forum
   The HIV/AIDS Community Forum was established in May 2007. Its focus is:
   - Education and awareness around HIV and AIDS in the Mulati farming area (26 farms)
   - A Voluntary, counselling and testing campaign to have all people living on farms in this area tested.

   We have held 3 workshops on farms in the past 3 months, attended by 140 people.
5. **PARTNERSHIPS**
   We are working in partnership with the Agricultural Workers Union (AWU) and Education for Farm Workers (EFW) to get this project off the ground. They were very helpful in giving us advice and support. EFW assisted with the workshops.
6. **FUTURE PROJECTS**
   In the next year, we need to:
   - Run workshops on all 26 farms
   - Initiate the VCT programme
7. I would like to thank the committee for all their hard work.

USING THE MEDIA

Media is an important communications tool that can be used to help organisations communicate with other people. Examples of media that can be used are pamphlets, posters, newsletters, badges, banners, T-shirts, newspapers, sms, WhatsApp, Facebook, Instagram, X, YouTube, TikTok, emails, radio and television.

HOW CAN YOU USE THE MEDIA?

You can use media to:

- **Inform** other people about a situation or an event or about an organisation. For example, you can use media to inform people that pensions are a legal right.
- Explain facts to people, for instance, how to apply for an old age grant (pension) from SASSA. This **educates** people about pensions.
- **Politicise** people to make people more aware of what is happening around them. For example, you can link service delivery problems to a campaign against corruption.
- Ask people to do something. This is called **mobilising**. For example, you can try to mobilise people to protest by coming to a meeting.
- **Advertise** an event.

MAKING MEDIA

Making media includes creating posters, pamphlets, videos, and drama shows with the purpose of communicating a message to people. It is important to know what your aim is when you decide to use media. For example, if you are planning a pamphlet or a poster, you must think about:

- The aim of the pamphlet or poster
- Who the pamphlet or poster is for (the target group)
- What you want to say (the content)

The design of the pamphlet or poster is also very important. Remember these things:

- Make the language easy to read.
- Use different kinds of headings such as underlining, boxes, and capitals. Most computers can be used to make attractive pamphlets by changing the font size for different headings.
- Arrange the writing in different ways.
- Use pictures.
- Don't make the design too cluttered so that it becomes confusing or unreadable

WHAT THE LAW SAYS ABOUT PAMPHLETS AND POSTERS

A pamphlet must include the name of the organisation that produced the pamphlet, an address and who printed the pamphlet.

You must get permission from the local council in your area if you want to put up any posters in public. In many areas, you have to pay a deposit.

NEWSLETTERS

Newsletters are the newspapers of the organisation. Newsletters usually come out regularly, for example, four times per year or every two months. They take a lot of work to produce. Before deciding to have a newsletter, you should decide:

- How many pages it will be
- The topics it should cover and who should write what
- Whether you will send it out as WhatsApp, email or messages
- If there are some experienced people who can help with producing the newsletter

WEBSITES

Websites are an important source of information for people wanting to find out more about an organisation. It is, therefore, also an important communications tool. It is important if you have a website to ensure it is kept up to date with online newsletters, resources, contact details, and so on.

Administrative skills

This section looks at how you can develop your administrative skills as a paralegal. Administrative skills can involve the following:

- Filing
- Bookkeeping
- Looking up a number in the telephone directory
- Arranging and holding meetings
- Managing your time ***(See pg 1052: Checklist: Best practices for paralegal case-employees)***

FILING

Filing means keeping information (papers, letters, addresses) in a safe place. You file information by arranging it in a certain order so that you or anyone else can find it

quickly. You can have real files or set up files for documents on your computer, or do a combination of the two. Filing helps you to decide:

- Where to put information
- Into which file to put a document
- In which file to look to find a document
- Where to find an address

Filing is important because it:

- Helps you not to lose documents
- Keeps documents clean and tidy
- Helps you to find documents quickly and easily
- Helps you to be efficient

WHAT SHOULD YOU FILE?

The important things to file include:

- All documents that your organisation receives, for example, letters, notices, reports, and useful information
- All copies of documents you send out
- Documents about the money side of the organisation - receipts, vouchers, deposit slips, etc. If you get documents by email, file them on your computer, or print them out and file a copy. Make copies of slips and vouchers that fade fast - like toll slips.
- All case sheets and information relating to cases and all photographs

Filing should be done according to a carefully planned method. If you use your computer to file all documents you write or receive via email, make sure you create a backup at least once per week. If you have Internet it is worth saving everything on a cloud (a server provided by Google or others). This means you will be able to access the files even if you are in another town or if your computer is lost or crashes.

WHAT EQUIPMENT DO YOU NEED?

You need the following pieces of equipment for filing:

- Files (hanging folders or ring binders)
- A filing cabinet, shelves or something to keep your files in
- A date stamp to put the date on letters you receive - or write the date and sign it
- An A4 size hard-covered book that you call a 'day-book'

When you start a filing system, you need to decide how you want to file. Do you want to file in alphabetical order (for example, using surnames), in date order (according to the months in the year), or according to issues (such as grants, HIV/AIDS, housing development, etc). Each organisation is different. You should keep your filing system simple and easy for all to operate. Within a file, you should file in date order - with the latest documents on top.

REMOVING FILES FROM THE OFFICE

Files should never be removed from the office. If documents or statements have to be removed for any purpose, it is better to photocopy them first so that the original remains in the office.

BOOKKEEPING

Just as you keep records of meetings and letters, you also need to keep records of the organisation's money. Bookkeeping means keeping records of all the money that you collect and all the money that you spend.

Always keep every piece of paper connected with money, such as invoices, receipts and quotes.

The books you keep must show:

- **Income:** all the money that comes into the organisation (fundraising, donations, and so on)
- **Expenditure:** all the money that is spent (for example on petrol or stationery)
- **Balance:** which is the money that is left over at the end of each month

You keep books so that members can always find out what happens to the money. You need to know how much money you have and how much you still need to collect.

OPENING A BANK ACCOUNT

When you put money into a bank, the bank opens an account for you. When you open a new account, you must know:

- What kind of account will be appropriate for your organisation (savings, or current)
- What is the name of your account?
- Who will have authority to sign on the account (the signatories)?

The easiest kind of account for an organisation to use is a current account. The committee of your organisation decides who is allowed to sign for money. There should be at least two (2) signatories to the account. This

means two signatories must sign before money can be withdrawn from the account. The two signatories should be members of the management or executive committee who are usually available to sign a requisition form to withdraw cash or authorise making an electronic payment.

Money can also be transferred electronically into people's accounts but if you want to implement an electronic system, you will need to put strict guidelines and clear restrictions as to who will have the authority to do these transfers.

Cash can be taken out of the bank to make small payments, such as for stamps, tea, paper and so on. This money is called petty cash, and it is usually kept in a safe place in a small money box in the office. Put all receipts in the petty cash box so it is easy to account for spending.

Putting money into the account is called making a deposit. When you deposit money you fill in a form at the bank called a deposit slip. A copy of the deposit slip will be given to you. If you get EFT deposits, print a record of that or mark it on your bank statement. You must file this for your records.

Taking money out of the account is called a withdrawal. You can withdraw money at the bank teller or at an ATM if you have a bank card. File any slips you get from the bank or ATM. If you are paying electronically (EFTs), you should print out the payment confirmation (receipt) and file it.

The bank statement – Once a month, you will receive a bank statement. This is a record of EFTs made in that month as well as all the deposits and withdrawals made.

DAILY RECORDS

The most important books that you must keep for your daily records are:

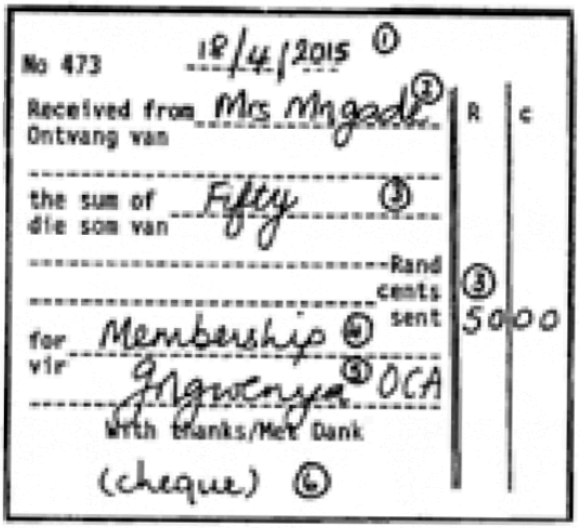
- Receipt book
- Petty cash vouchers
- Record book

Receipts

When anyone hands any money to the organisation, you must give them a receipt. This receipt proves that money was handed in. You give the original receipt to the person who gave in the money, and the duplicate is left in your receipt book.

When you receive money, you should deposit it in the bank as soon as possible. It must never be used as petty cash. It is best to buy a receipt book from a stationery shop and put your stamp on every page.

EXAMPLE OF A RECEIPT



Petty cash

You should keep some money in the office for small payments. If you need R500 for tea or milk, you will use petty cash to make these payments. How does petty cash work?

- The treasurer draws an amount of money out of the bank using a cheque. This amount could be R500 or more depending on what your monthly expenses are and how busy your office is.
- This money is put in a locked metal box called a petty cash box.
- If someone needs money to pay for something for the organisation, the treasurer will give it to them from the petty cash box.

All the petty cash that is spent must be recorded on a petty cash voucher. The receipts,invoices, or cash slips that you get when you pay for something must be kept. These slips should be attached to the petty cash vouchers.

EXAMPLE OF A PETTY CASH VOUCHER

Petty Cash Voucher / Kleinkasbewys

Date / Datum 15/3 2015

FOR WHAT REQUIRED / BENODIG VIR	AMOUNT / BEDRAG
Stamps + Envelopes for AGM minutes	60 25

Signature / Handtekening Mrs Radebe

Folio _____ Passed by / Goedgekeur Ngwenya

The petty cash book

At the end of each month, the treasurer must record the information from all the vouchers in the petty cash book. You can use an ordinary school exercise book for the petty cash book. At the end of the month, the petty cash book must be balanced.

To do this, you must:

1. Add up the expenditure column to get a total. This is called total expenditure.
2. The treasurer must then put back into the petty cash box the same amount of money that was taken out during the month. So, in other words, they must put back the total expenditure.
3. They then record this under income and add up the income column.

EXAMPLE OF A PAGE FROM A PETTY CASH BOOK			
DATE	**APRIL 2024 DETAILS**	**INCOME**	**EXPENDITURE**
1	Balance	300,00	
12	Glue & cardboard for poster		30,00
17	Envelopes for office use		32,00
19	Milk & sugar for office use		30,00
20	New window for office		100,00
21	Tea for office		15,00
25	Paper for printer		30,00
	TOTAL EXPENDITURE		**237,00**

MONTHLY INCOME AND EXPENSE RECORDS

The cash book

At the end of each month, all the records you keep during the month are recorded in one book called the CASH BOOK. This includes all bank deposit slips, payment vouchers and petty cash.

You can buy cash books at stationery shops. The deposit slips are the records of the income. The payment vouchers and the petty cash book are the records of the expenditure.

1. The income and expenditure are recorded in the cash book.
2. The whole of the left-hand page is the INCOME side of the cash book.
3. The whole of the right-hand side page is the EXPENDITURE side.

EXAMPLE OF THE INCOME SIDE OF THE CASH BOOK

In this example, there are 5 main columns on the income left-hand page:

1. *Receipt number*
2. *Date of receipt*
3. *Details - Write the name of the person or organisation who gave the money.*
4. *Analysis columns - The analysis columns tell us the kind of income it was, for example, donations, subscriptions, books, sundries, and so on. You must decide how many columns you need and what headings you need for these columns. Sundries is for any kind of income – it is like a 'general' column.*
5. *Bank – The deposits you put into the bank account are filled in this column.*

The amount from each receipt must be written in the correct ANALYSIS *column. The amount is also written under* BANK *when you deposit the money (see example below).*

CASH ANALYSIS

Rec No	Aug 2015	Details	Sundries	Donations	Books	Subs	Bank
	1	Balance	335,54				335,54
473	2	Mrs Radebe				32,00	
474	3	Mr Johnson		50,00			
475	4	Mrs Mngade			23,50		65,50
476	14	Mr Nkosi				32,00	32,00

EXAMPLE OF THE EXPENDITURE SIDE OF THE CASH BOOK

All the cash and cheque payments and bank charges are recorded on the expenditure page. This is the right-hand page of the cash book.

In this example, there are 5 main columns on the expenditure page:

1. *Transaction number*
2. *Date of each payment*
3. *Details*
    a. *Write the name of the person or organisation who was paid*
4. *Analysis*
    a. *The analysis column tells you what your expenses were, for example, petty cash, rent, printing, transport, sundries, and so on. You must decide how many columns you need and what headings you need for the columns.*
5. *Bank*
    a. *You write down any ITRS from the bank.*

All expenditures must be written in the correct ANALYSIS *column and under* BANK. *Bank charges are always recorded under 'sundries'.*

BOOK MAY 2015

Cheque No	Date	Details	Petty Cash	Rent	Printing	transport	sundries	Bank
853	1	Cash	70,00					70,00
854	4	Small printers			77,50			77,50
855	7	Johannesburg Motors				98,48		98,48
856	19	Russel Furniture					45,00	45,00
857	24	Small Printers			37,48			37,48

Balancing the cash book

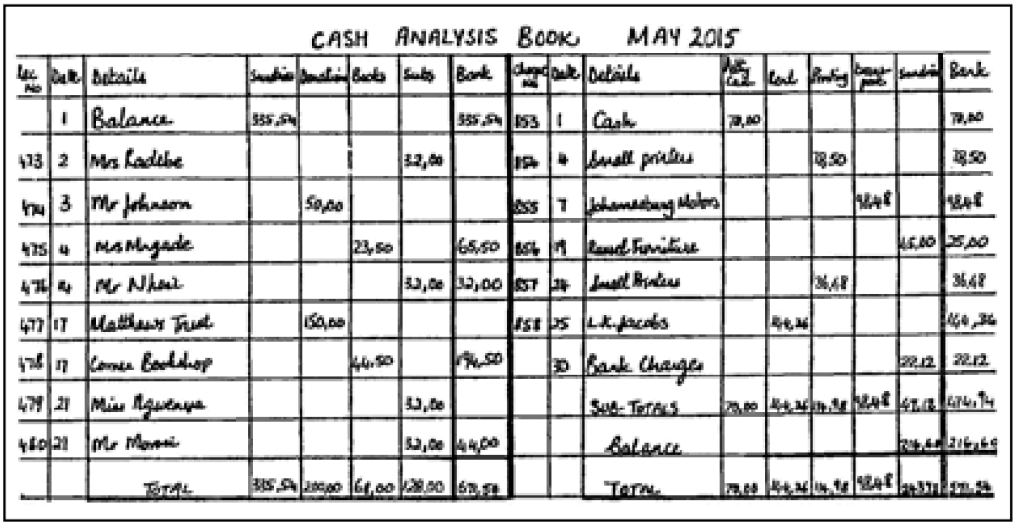
After you have recorded the income and expenditure, you need to work out how much money is left over at the end of the month. This is the balance. To get the balance, subtract the expenditure from the income.

For example, if your total income for May 2024 was R32 571 and the total expenditure was R30 305. To find out how much money was left over, subtract R30 305 from R32 571. The balance is R2 266. The balance in your cash book should be the same as the balance in your bank account.

Adding up the analysis columns

The analysis columns tell us what kind of expenditure and what kind of income there was. The analysis columns help us to answer questions like *'How much money did we get from subs from members in May 2024?'* To answer this kind of question, you need to find the totals for each analysis column.

EXAMPLE OF THE ANALYSIS COLUMNS ADDED UP



CASH ANALYSIS BOOK MAY 2015

Rec. No	Date	Details	Sundries	Donations	Books	Subs	Bank	Cheque No	Code	Details	Rec. Card	Cost	Printing	Transport	Sundries	Bank
	1	Balance	355,54				355,54	853	1	Cash	78,00					78,00
473	2	Mrs Radebe				32,00		854	4	Small printer			13,50			13,50
474	3	Mr Johnson		50,00				855	7	Johannesburg Motors				484,8		484,8
475	4	Mrs Mngadi			23,50		65,50	856	19	Round Furniture					45,00	25,00
476	4	Mr Nkosi				32,00	32,00	857	24	Small Printer			31,68			31,68
477	17	Matthews Trust		150,00				858	25	L.K. Jacobs		24,36				174,36
478	17	Comic Bookshop			41,50		196,50		30	Bank Charges					22,12	22,12
479	21	Miss Nguenya				32,00				SUB-TOTALS	78,00	24,36	14,18	484,8	67,12	674,34
480	21	Mr Moosa				32,00	64,00			Balance					226,66	216,66
		TOTAL	355,54	200,00	64,00	128,00	673,54			TOTAL	78,00	24,36	14,18	484,8	293,78	891,34

MONTHLY REPORT-BACKS

The treasurer must give a monthly report to the management or executive committee on the income and expenses of the organisation for that month. All the books should be up-to-date for the report back, for example, the petty cash book and the monthly cash book. The treasurer should have all the cash slips, bank statements, invoices, petty cash vouchers, receipts and so on at the meeting in case there are questions from the committee.

FINDING A TELEPHONE NUMBER OR ADDRESS IN A TELEPHONE DIRECTORY

All telephone books work in ALPHABETICAL ORDER.

All **government departments for national and provincial spheres** are listed at the back of the telephone book in both English and Afrikaans. The government departments are listed alphabetically. If there is no number for the department you want in your regional telephone directory, Google it or phone 1023 and get the number of the nearest office.

Provincial government departments are listed under 'P' under the heading 'Provincial Administration', in the central government departments alphabetical list at the back of the directory.

Metropolitan councils and their departments are also listed at the back of the telephone directory, for example, the Western Cape directory will have contact details of the Cape Town Metropolitan Council and its departments.

Areas that fall outside the metropolitan areas are not listed at the back of the telephone directory with the other government departments. They are listed under 'M' alphabetically with all the other telephone numbers in the directory. For example, the municipal council for Mtubatuba is listed under 'M' for municipality in the telephone directory for that area.

All **hospitals** are listed under 'H' with all the other numbers in the directory. The hospitals are then listed alphabetically under 'H'. Doctors are listed under 'Medical' alphabetically by name.

All **emergency service numbers** are listed on one of the first few pages at the front of the directory. If you are using a directory which has many different towns listed in it, then the emergency numbers for each town will appear at the beginning of each of the towns.

MEETINGS

Some ways can help make meetings go well:

- Make sure everyone necessary will be able to attend the meeting.
- The chairperson must plan the agenda in advance so that they know what should be discussed and how long it will take.
- Appoint a chairperson if there is no chairperson.
- Make sure proper minutes are kept.

CHAIRING MEETINGS

Chairing a meeting means facilitating and steering discussion so that the meeting achieves its aims.

At the start of the meeting

The chairperson starts by reading the agenda and asking whether there are any additions to the agenda. Ideally, the agenda should have been circulated by the secretary to all people attending the meeting at least a week before the meeting takes place. This seldom happens, so it is polite to ask the committee at the start of the meeting whether they have anything to add to the agenda. Important matters and items that can be dealt with quickly should be discussed first. An agenda looks like the example below.

EXAMPLE OF AN AGENDA

1. *Apologies*
2. *Read minutes of the last meeting*
3. *Matters arising from the previous meeting*
4. *Important reports for discussion*
5. *Upcoming meeting with the donors*
6. *Employing a new employee*
7. *Fund-raiser*
8. *Any other matters, or general*

During the meeting

Everyone must get a chance to talk. The chairperson must not do all the talking, and must not allow people to interrupt each other or to talk at the same time. The chairperson must make sure that everyone sticks to the topic. The chairperson must work out how much time to spend on each discussion and stop people from wasting time. It is best to introduce each topic briefly and then allow someone to report or give input. Allow for questions and discussion. Give clear direction when a decision is needed - try to outline the options if there are different proposals. Reach a decision by consensus if possible and vote only if needed.

At the end of the meeting

The chairperson must summarise what happened at the meeting. This means going over the important decisions that were made. Everyone must know what they promised to do and when it must be done.

Preparing for the next meeting

The chairperson asks members when, where and what time the next meeting will be held.

TAKING MINUTES

It is the secretary's job to take minutes at the meeting. If the secretary is not present, then the chairperson should ask someone else at the meeting to take minutes. Minutes are an important way of keeping a record of what decisions were taken at a meeting.

After the meeting, the minutes must be typed or written up neatly in a minute book. A copy should be given or sent to all the committee members. At the beginning of the next meeting, the secretary reads out the minutes of the previous meeting. The main purpose of this is to note corrections and 'matters arising': those matters that the previous meeting decided must be finalised or discussed in this meeting, and tasks that people had to do.

TIME MANAGEMENT

There is always too much to do and too little time to do it. Time management is a skill that can help you to organise your time effectively. It can help you free up time so that you can do more without feeling that you have too much to do.

NOTE

A diary is the most important tool you have when you start to manage your time. Use a book or your cell phone.

To manage the way you use time, you must know what your commitments are, for example, to your family, your friends, your job, and your organisational work outside of your job.

Problems happen when the demands from different commitments clash. So you need to plan your time.

To do this you must start by identifying your regular commitments and drawing up a list of the demands each commitment makes on you. All your other commitments must be fitted around these routine commitments. Write them in your diary.

Think ahead about all the non-routine things that will happen so that you start planning for them now (for example, a friend's wedding, an evaluation of your organisation, and so on).

WHAT ARE THE THINGS THAT IMPACT ON YOUR TIME?

- Being disorganised - wasting time looking for lost documents
- Unrealistic deadlines which mean you always feel you are ‘behind’ with your work
- Spending hours waiting for or getting to meetings
- Constant interruptions
- Feeling too busy and under stress all the time

TIME-WASTERS

Most people waste time in similar ways. Some examples of common time-wasters are:

- Disorganisation
- Procrastination (leaving things to the last minute)
- The inability to say no
- Lack of interest
- Burnout (exhaustion from too much stress)
- Visitors and interruptions
- Telephone calls and emails
- Waiting
- Meetings
- Personal crises

You can identify your own time-wasters and write them down. Then, think of ways to avoid these time-wasters.

MANAGING YOUR TIME

When you have many different demands on your time, you must decide which ones to do first, when to do them and how to do them. It is useful to keep a to-do list on your desk and then allocate the tasks to different days in your diary. Mark the tasks on your list as:

- A: Urgent and important - do it soon!
- B: Important - do it this week
- C: Do it this month

Put both your personal and work tasks on the list, but try to separate them.

If you are too busy to do something, or it is inappropriate for you to do it, then you should hand the task to someone else. This is called **delegating**.

You must also plan your use of time and set your objectives. Objectives are the things that you plan to achieve. If you are clear about your objectives, you can do things in a useful order more easily. Plan your objectives as follows:

- Long-term objectives (this year - for example, complete my UNISA course)
- Medium-term objectives (this month - for example, complete the funding report)
- Short-term objectives (this week - for example, run a workshop for the community)

Development skills

This section looks at development skills, which are very important for paralegal work as they contribute to building and empowering communities. These are:

- Conflict resolution skills, which include negotiating, mediating and arbitrating
- Facilitation skills for community education and training
- Managing projects aimed at addressing community problems such as unemployment, health issues, etc.

NEGOTIATION SKILLS

Most of us deal with some or other negotiation every day of our lives. The paralegal will constantly be involved in negotiating on behalf of clients.

WHAT IS NEGOTIATION?

Negotiation takes place when two or more people or groups who have a conflict come together to agree on how best to resolve this conflict. This might mean that one side must compromise.

Usually it means that both sides compromise so that they can reach a settlement. This is called a 'win-win' situation.

HOW DO YOU NEGOTIATE?

The main purpose of being a negotiator is to get the best settlement possible for yourself or for the person or group that you are representing. To do this, a negotiator needs certain skills, such as:

- Finding out facts and information about the other side before you start negotiating
- Knowing what questions to ask
- How to create the right atmosphere for successful negotiation - if you are too aggressive too early in the negotiation, this will create a very tense atmosphere.
- Knowing how much to tell the other person or group - for example, you should not give too many details too early in the negotiation as this gives the other person or group an advantage over you.
- Knowing when to put your proposals to the other person or group
- Controlling your attitude towards the other side - all kinds of different emotions, prejudices, different values and cultures can affect your

attitude towards the other side. This can make it harder for you to communicate properly with them.

EXAMPLE

A union official negotiates with the manager of a farm about the right of employees to join the union. The union official is very emotional because the manager is threatening to dismiss the employees. The union official also believes that the manager is not concerned about the employees and that he is cruel and immoral.

The manager is also very emotional. He believes that the union official is trying to take over the farm. He is worried about financial losses and believes that as soon as employees join a union, they will go on strike. He believes that all employees are lazy and only want money to spend on alcohol.

In this example, there are many conflicting emotions, prejudices, and values between the two sides. This will affect negotiations between the two parties.

PREPARING FOR NEGOTIATIONS

The following points are a guide to planning and preparing for a negotiation.

STEPS IN PLANNING AND PREPARING BEFORE NEGOTIATION	
1. IDENTIFY THE ISSUE	**Background and context** – Analyse the background and context of the issue. Each issue has its own particular background and history that is important to know and acknowledge in a negotiation. **Power and positions of the parties** – Look at the power and positions that the different parties will have in the negotiation you are preparing for. For example, a municipality wants to build a road through a town. To do this it needs to move people living there. The people are not prepared to move until the municipality finds them acceptable alternative land. The municipality has the power of its official position, and it has the power of the law behind it (under the Constitution, property can be expropriated in certain circumstances). The community also has the power of the law (they cannot be arbitrarily evicted from the land or be evicted without a court order). The community also has the power of large numbers.
2. DEFINE YOUR OBJECTIVES	**Work out your key points** and what you want to achieve in the negotiation.

3. BE CLEAR ABOUT YOUR MANDATE	As a paralegal, you will be representing either a person or a group in negotiations. You must **know what your mandate is** from that person or group. In other words, you must know exactly what they want and how much they are prepared to compromise.
4. SELECT A TEAM	**Select a negotiation team**. It is usually better to have more than one person in a negotiating team.
5. GET TO KNOW THE OTHER SIDE	**You need to have as much information as possible** about the people in the party you are negotiating against. For example, you need to know what their interests and needs are in the issue, their strengths, weaknesses, problems and pressures.
6. PLAN YOUR PRESENTATION	**Organise all the information** you have gathered in a logical format so that it can be used in the negotiation.

STEPS IN THE PROCESS OF NEGOTIATION	
1. PARTIES MEET	The parties meet, and they acknowledge a problem exists. Each party states the reason (as they see it) for the negotiation.
2. EXPLORING THE ISSUES	The negotiation moves into the issues, and parties say what their needs and interests are. This is the exploration phase, where the parties ask lots of questions and acknowledge the common points.
3. BARGAINING PHASE	Parties move into the bargaining phase, where they start to look for possible solutions or options for solving the problem. During this phase, the parties may even start moving closer together and there may be a feeling of working together to solve a common problem. Negotiation does not always mean that parties have to be aggressive towards each other. For a negotiation to end in an agreement, one side must show that it is ready to 'move' or compromise.
4. REACHING AGREEMENT	The parties reach an agreement. At this point you may need to take the agreement back to the person or group on whose behalf you are negotiating. If the agreement falls within the mandate you were given, then you can make a final agreement.
5. REPORT BACK TO THE GROUP	You will always need to report back to the person or group you were representing to tell them what the outcome of the negotiation was.

6. PUTTING THE SETTLEMENT INTO PRACTICE	Once you agree to something with the other side, then you must make sure that the agreement is put into practice.

EXAMPLE OF THE STAGES OF THE NEGOTIATION PROCESS

NEGOTIATING TO GET AN EMPLOYEE'S JOB BACK

You are representing an employee who has been dismissed. You have to negotiate with the manager of the company where she was working.

GETTING A MANDATE

The employee wants her job back and asks you to represent her. You have to stay in touch with this person throughout and get a new mandate if there are changes.

PREPARING AND PLANNING FOR THE NEGOTIATION

Find out all the details about the dismissal of the employee. Find out how many warnings she received in the past, her length of service, what her job was, whether she was a member of a union, why she thinks she was dismissed, etc.

Find out about the company, the name of the manager, whether the company has a reputation for treating its employees badly, and so on. Plan what you are going to say to the manager when you telephone.

MEETING OR CONTACTING THE OTHER SIDE

You telephone the manager. You explain who you are representing, and the reasons for your telephone call. You ask for the manager's side of the story. You explain that the employee wants her job back. The manager refuses but makes you another offer – for example, that she will be paid out for the notice period plus leave due and will be given a positive reference. This is called a counter-offer.

You do not have a mandate to accept this. You tell the manager that you must go back to the employee.

GOING BACK TO THE PERSON OR GROUP YOU ARE REPRESENTING

You go back to the employee and explain what the manager has offered. (If you think it is a good settlement, you can try to encourage the employee to accept it.) If the employee accepts the offer, you telephone the manager again and say that you agree to the company's offer.

PUTTING THE SETTLEMENT INTO PRACTICE

You immediately write a letter to the company confirming your agreement.

If the company does not keep to its side of the agreement, you must meet again with the employee and decide together what you are going to do.

MEDIATION

Where two conflicting parties cannot reach an agreement on the issue causing the conflict, they can agree to ask a third party (a mediator) to help them reach a solution. A mediator is a person who acts as a facilitator between the parties but does not make a decision about who is right or wrong. So, a mediator is not a judge.

The mediator goes on to assist both sides until the parties themselves come to an agreement. If it is clear that the parties are not going to reach an agreement, the mediator might have to withdraw from the process. The parties will then have to find another way to resolve their conflict, for example, by using arbitration or going to court. ***(See pg 202: Settling disputes outside of court)***

The main job of a mediator is to keep the parties in the negotiation communicating with each other. To do this the mediator must get the trust and confidence of both parties and keep this trust by always being objective. The mediator must try to find out exactly what the problem or conflict is about. When the two sides meet together, the mediator must encourage both sides to be realistic about what they want from the other side and what they are prepared to give.

If you are representing a person or group at a mediation you need to prepare for the mediation in the same way as for a negotiation.

EXAMPLES OF ISSUES WHERE YOU CAN USE MEDIATION

CONSUMER COMPLAINTS

You can use mediation or arbitration to solve consumer complaints. For example, a second-hand TV which you bought breaks down completely after a month. The company that you bought it from refuses to fix it. It is too expensive to go to court, so you could ask the company to agree to call in a third party to act as a mediator between you and the company. This is a cheaper and much quicker way of solving the problem.

DISPUTES IN THE COMMUNITY

Community or neighbourhood disputes such as those between different political groups or landlords and tenants.

THE CRIMINAL COURTS

In some cases, mediation could be used to bring the person who committed the crime together with the victim of the crime to see whether they can reach any agreement as an alternative to laying a criminal charge.

EDUCATION
Disputes between students and teachers, students and administrators, parents and administrators, and so on.

ENVIRONMENT
Disputes between communities and authorities, for example, about dams, waste disposal, land development and so on.

FAMILY OR DIVORCE MATTERS
Family and divorce disputes.

PLANNING A MEDIATION SESSION

You should be flexible when you plan a mediation session. For example, a more informal mediation between two neighbours needs a different approach compared to a mediation between a consumer and a company. On the next page is an example of a mediation session. This example is for a formal mediation session around a conflict between two organisations, parties or groups. You need to allow time for translation, for each side to caucus (speak among themselves), or to give the mediator time to meet both sides separately. ***(See pg 1052: Checklist: Mediation code of conduct; See pg 1053: Checklist: Tips for mediators)***

OUTLINE FOR A MEDIATION SESSION
1. INTRODUCTION (5 mins) Explain the structure and aims of the mediation session
2. OPENING OF MEDIATION (15 mins) Welcome Introductions Agreeing to rules and procedures (no interruptions, no aggression, time-out if needed, etc.)
3. STATEMENT OF POSITIONS (30 mins) a. Each side presents their position (their point of view) b. The mediator summarises these positions c. Allow time for clarifying questions d. Allow responses
4. FINDING COMMON GROUND (POINTS THAT BOTH SIDES AGREE ON) (30 mins) a. What is each side prepared to do - ask for practical suggestions and possible solutions b. Take responses to these suggestions c. The mediator summarises the common ground and adds an alternative solution. *Note: if there is very little common ground at this point, this might be a good time for the mediator to speak to both sides separately and in private*
5. REASSESSING AGREEMENT (10 MINS) Give both sides a chance to caucus on how they feel about suggested solutions
6. REACHING AGREEMENT (30 MINS) a. Ask each side to briefly repeat their position and say what they feel about the possible solutions b. The mediator goes over the common ground and summarises any points of agreement c. Encourage agreement on the remaining points d. Write down and read back whatever agreement is reached
7. CLOSURE OF MEDIATION (15 MINS) a. Discuss the way forward, including the enforcement, monitoring and publicising of the agreement, and the need for future meetings b. Thank everyone

ARBITRATION

In an arbitration, a third party, acceptable to both parties, is called in to help the parties resolve the conflict. The difference between an arbitration and a mediation is that in an arbitration, the arbitrator is called on to make a decision about who is

right or wrong. In other words, the arbitrator acts like a judge. The arbitrator chairs the hearing at which both parties are present, listens carefully to both sides of the story, listens to any witness, and looks at any documents which might be produced as evidence. They then go through all the evidence and decide who wins the arbitration. The arbitrator writes down the reasons for their decision in a judgement and gives this to the parties.

Before the arbitration takes place, the parties should agree in writing on the parameters of the arbitrator's powers. For example, will the arbitrator's decision be final, or will there be a right of appeal? Usually the parties agree that the decision of the arbitrator is final. This means the parties must obey this decision, and the losing party cannot appeal against the decision. An arbitrator should use proper legal principles to interpret the evidence, but the arbitration process is not as formal as in a court. ***(See pg 374: Arbitration by the CCMA or Bargaining Council)***

FACILITATION SKILLS FOR COMMUNITY EDUCATION AND TRAINING

Community education usually takes place in interactive workshops where the person running the workshop acts as a facilitator rather than a trainer.

BASIC GUIDELINES FOR RUNNING A WORKSHOP

- **Everyone must understand the aim of the workshop**
  Ask the question: '*What are you trying to achieve with this workshop?*'
- **Build on people's own experience and understanding**
  People want to have a better understanding of things that are a part of their lives, so sharing their own experiences must be part of what they learn. So, when you introduce a new idea, you must link it to things that people know about.
- **Formal inputs should be kept very short**
  Formal inputs that are too long can become very boring. There are many interesting ways of passing on information to people – for example, role-plays, problem-solving exercises, debates, videos and demonstrations.
- **Everyone must understand the language used**
  It is much better to talk to people in their home language. If this is not possible, use plain language and translate if necessary.
- **Everyone must have a chance to talk and participate**
  People learn better when they take part in the action. It is harder for people to participate in big groups. To keep people's concentration, use methods that involve people, such as small group discussions and buzz groups.

- **Let participants give direction on follow-up work**
  After the workshop you may need to do follow-up work or more workshops. All the people taking part should help you assess the workshop to decide whether there is a need for follow-up work or workshops and how this should happen.

PLANNING A WORKSHOP

You can plan and structure a workshop according to the following guidelines:

1. **Aims**
   Why are you running the workshop?
   What are its aims?
   Workshops must be planned so that they have direction and also so that something practical comes out at the end.

2. **Participants**
   Who is the workshop for?
   How many people will come?
   If it is a big group, then you need to plan for smaller group sessions during the workshop. A group of more than 30 people is difficult to handle and makes it harder for everyone to participate in a way that is meaningful to them.

3. **Language** (link to point 2)
   Which language or languages will you use?
   What level of language will be best for the workshop?
   Will you need translation?
   Who will do the translating?
   Translation takes a lot of time and skill. It must be planned and not left to the last minute.

4. **Time and venue** (link to point 2)
   When is the best time for running the workshop?
   How long should it run for?
   Where is the most suitable venue?
   Work out what facilities you will need, for example, enough room or quiet smaller spaces for small group work. People should always be able to sit around in a circle at the venue. Make all the practical arrangements, for example, booking a venue, catering, seating

arrangements, transporting the participants, having a crèche for children, and so on.

5. **Content** (link to points 1 and 2)
   What will you cover in the workshop and in how much detail?
   You can divide your workshop into the following sections:
   a. **The beginning:** This includes your welcome, your own and the group introductions, establishing ground rules for the workshop, and looking at peoples' expectations.
   b. **The middle:** This is where you deal with transferring knowledge and/or skills to people. Remember, people learn by practising what they have heard or learnt. You need to make time in your workshop for people to practice using the information they have been given or shared. For example, if you are running a workshop on mediation skills, you need to explain the theory to people and then give them time to practice the mediation process.
   c. **The end:** This includes your summary of the workshop, evaluation by participants and your own concluding remarks.

6. **Methods** (link to point 5)
   How will you get the message to people?
   What workshop methods will help you to achieve this?
   Decide how much time each part of the workshop will need. ***(See: Workshop methods)***

7. **Facilitators and resources**
   Who will run the different parts of the workshop?
   What resources will they need to run the workshop effectively?
   Prepare the resources you will need in the workshop, for example, inputs, small group questions, handouts, charts, and so on.

WORKSHOP METHODS

These are some examples of workshop methods.

Introductions

- **Go-arounds:** In a go-around everyone in the circle gets a chance to speak, for example, to introduce themselves, saying their name and organisation.

- **Wordwheels:** Ask people to stand in two circles of equal numbers, one inside the other, so that each person in the inside circle faces someone in the outside circle. Ask people to introduce themselves to each other. After a minute or two, you ask the outside person to move one place to the right. Then ask people to do a second introduction or to say something about themselves or their work.
- **Icebreakers:** Icebreakers are ways of getting people to loosen up and relax. For example, ask people to shake hands and introduce themselves to everyone in the group in two minutes. You can also try things like singing, playing games or warm-up exercises.
- **Expectations:** Ask people to say what they want out of the workshop (their expectations) using the go-around or wordwheel method.
- **Finalising the programme:** After hearing the expectations of the participants, summarise the aim of the workshop. Then, go through the workshop programme (structure), which should already be written up on a newsprint on the wall. Allow some time for questions or changes that people may want to make.

Big group (plenary) methods

- **Formal inputs (talks or lectures):** A talk by one person should not go on longer than 15 or 20 minutes. The input can be split between two people. Inputs should be kept as simple and practical as possible, and use charts, handouts and plenty of examples.
- **Big group (plenary) discussions:** There are different times in a workshop when you can have a big group discussion, for example, after small groups report back or when the big group must decide on something. In a big workshop, it is better to keep the time for big group discussions short and to make more use of different small-group methods
- **Speaking from experience:** Ask one of the participants to talk about their direct experience of the issue or problem you are discussing in the workshop.
- **Case-study input:** Give a short input on how a particular problem or issue was handled before and on what lessons can be learnt from this experience. If available, use photos, press clippings or videos to explain the case study.
- **Drama:** A prepared and well-practised play (drama) is a good way of highlighting particular issues or processes, for example, acting out the steps involved in a forced removal.

- **Role-play:** The role-play can also be used to act out everyday problems. A role-play is different from a drama because you get people in the workshop to act a part without letting them practise beforehand. Afterwards, you assess their responses to being thrown into a situation. For example, role-playing a house being raided.
- **Debate:** In a debate, you make people take up different positions on a particular issue or proposal. Have a discussion after the debate and give each side an equal chance to answer the points that came up in the debate.
- **Buzz groups:** In buzz groups you ask each person in the circle to turn to both their neighbours and to discuss something for a short time (usually 5 or 10 minutes). Then, from the chair, you do a quick go-around to get feedback by asking someone from each group to report back one point, and then other groups to only add on new points.
- **Wordwheels:** You can also use the wordwheel method to discuss questions in a big group.

Small group methods

Small group discussions are an important part of all workshops. After any long presentation (for example, an input, role-play or drama), break people up into small groups to discuss what they saw or heard. Small groups should have no more than 8 people. Give small groups at least 30 minutes for discussion. It is better to give groups one or two clear questions to discuss rather than a long list of questions.

Facilitating small groups: A facilitator is a 'group leader'. Each group should have a facilitator who has been part of the workshop planning and who is clear on the questions the group has to discuss. Ask someone else in the group to take notes and report back to the big group later on. The facilitator makes sure that everyone gets a chance to speak, that people stick to the topic and that people do not interrupt each other or get involved in one-to-one discussions. ***(See pg 1016: Guidelines for facilitating small groups)***

Floating: While people are discussing in small groups, it is a good idea to have one or more of the workshop organisers moving about from group to group, checking if everyone is clear on the questions, and, later on, reminding people how much time they have left.

Reporting-back: There must always be a full report-back from each of the small groups. Ask the report-back person to report back in a lively way. The main points only should be summarised. Write on newsprint the main points

that each group reports. You can also ask each group to write a very short summary of their discussion on newsprint. Put this up for everyone to see.

These are methods you can use to improve small group discussions:

- **Go-arounds:** The go-around method works very well in small groups. Go around in the circle giving each person a chance to talk. Do not let people interrupt or disagree with each other until everyone in the group has had their chance to speak.
- **Problem-solving and tasks:** Give each group a very practical problem or task to work on. Ask the group to give a step-by-step approach to the problem and to write this down on newsprint. Write out the problems or questions for each group on a piece of paper beforehand and give this to the group facilitator. For example, you can ask small groups to develop a short drama around the issue, or to draw a map to explain the layout of an area, or to draw up a chart or pamphlet to simplify some problem or law.
- **A listening exercise:** This is like a debate. You divide the group into two sides. Side A has to motivate for a particular solution, Side B has to motivate against it. Side A presents its argument. Before Side B responds, someone from the group must summarise Side A's argument. Then Side B gives its first argument. Side A must then summarise this point before giving the next argument. The exercise then continues in the same way until the time is up. The main aim of this exercise is to encourage people to listen to the arguments of others and to learn how to summarise important points in a short time.

GUIDELINES FOR FACILITATING SMALL GROUPS

- Be very clear on your role
- Seat the group in a circle
- Get people to introduce themselves
- Check if translation is needed and get a volunteer to help
- Ask someone in the group to take notes for reporting back later on
- Explain how much time you have and how the small group discussion will work
- Introduce ideas and questions - don't enforce your own views
- Keep looking at everyone in the group (eye-contact)
- Be aware of your own voice - don't talk too much or too loudly
- Be aware of the way you approach people in the group - for example, don't intimidate people

- Don't get into arguments or allow them to develop
- Allow and encourage different opinions
- Don't allow people to interrupt each other
- Be firm with dominant people and say that they should allow others a chance to speak
- Give people time to think and to explain what they mean
- Explain or summarise briefly where necessary, for example, with difficult words or concepts
- Check if people understand before going on to the next topic, and allow for further questions
- Use the go-around method to encourage participation from everyone in the group
- At the end, ask the report-back person to summarise to check if everyone is happy with the report

LANGUAGE

The two main problems concerning language in a community workshop situation are what language to use and the level of the language.

Choice of language: Part of your planning for the workshop should include the language you are going to use and whether you need translation. Translation could be in full, in other words, point by point, or it could be a summary after a whole section.

Level of language: The success or failure of a community workshop can rest on the level of language used. When planning the workshop it is important to identify your workshop audience and what level of language you should aim for. These are some basic guidelines:

- **Structure your input** – have a clear introduction, a list of main points, and a summary or conclusion at the end. Structure your sentences and keep sentences short and simple.
- **Don't use difficult words** – For example, jargon (difficult words that are usually only clear to a certain group of people), abbreviations (words that are shortened), legal words, foreign words, difficult expressions, and so on.
- **Never be impatient** or make people feel that they don't know anything.

Written materials should be easy for the audience to read and understand. These are some of the ways to make written materials easier to read:

- Use short, clear sentences and avoid long paragraphs

- Use point form, numbering and subheadings
- Use pictures, maps, diagrams, charts - have summaries of main points and even use pictures and charts as a way of summarising
- Use questions and answers
- Use a typeface and print that is easy to read

WORKSHOP RESOURCES

These are examples of workshop resources which can be used during workshops or after workshops for people to take away and read:

- Plain language booklets, pamphlets and handouts
- Diagrams, charts, pictures, cartoons and maps
- Plenty of newsprint to write on and stick on the wall
- Videos and other visual material like slides, photographs and press clips
- Training manuals, handbooks and resource packages

EVALUATION AND ASSESSMENT

Evaluation is a process where a facilitator gets feedback from participants about how they experienced the workshop. Assessment is a process for measuring what participants have learnt and whether they have achieved their objectives (for the workshop).

Evaluation

Evaluation is about judging the overall value or worth of your workshop. By using various evaluation tools, you can get information from participants that will tell you how they experienced the workshop, what contributed to the learning process and what hindered it. This information will help you decide whether the workshop was successful, whether it achieved what you wanted it to, and what the problems were. In this way, you can build on your strengths and learn from your mistakes. So, workshop evaluations can be used for different purposes, such as:

Finding out whether workshop aims have been achieved (from the participant's perspective) Finding out how things can be improved during the workshop or for future workshops Showing participants that their views are valued Giving feedback to donors or other interested parties

What are you evaluating?

Your evaluation will provide you with information about one or more of the following aspects:

- Were the participants satisfied with the workshop?
- Did the workshop meet their expectations?
- What did participants believe they learnt in the workshop?
- How participants experienced specific aspects of the workshop, such as:
    - General flow of the workshop plan (do the activities flow / are people keeping up?)
    - Facilitation methods
    - Material
    - Practical issues (such as the venue, accommodation, food and transport)
    - The content (is it too complex or should it be simpler / is it relevant to the participants)

When do you evaluate?

As a rule, you should always include some form of evaluation in your workshop plan, either as an ongoing evaluation throughout the workshop or at the end of the workshop.

The most common form of evaluation is probably the questionnaire handed out at the end of a workshop for participants to complete and hand in. However, evaluation can be included at different stages of a workshop. For example, a 'Mood evaluation' can be done at the same time each day to evaluate participants' moods. This can help you pick up any negative feelings about the workshop early on, and you can try to deal with the issues that are creating the negative feelings.

Assessment

While evaluation looks at the overall value and worth of the workshop, assessment has to do with measuring what participants have learnt at the workshop. Assessment measures what participants have learnt against set standards. 'Set standards' in a workshop programme are the learning objectives defined at the beginning of the programme. The learning objectives should say clearly what the participants should be able to do at the end of the workshop and the assessment helps to see whether they have actually achieved this.

EXAMPLE

In a workshop on child abuse and human rights protection mechanisms, the learning objectives are for participants at the end of the workshop to be able to:

- *Identify different types of abuse suffered by children*
- *Define the rights that protect children from abuse and neglect and the laws that give effect to these rights*
- *Describe the steps to follow in dealing with cases of child abuse*

So, by the end of the workshop, participants should be able to do what is described in the objectives. They could write a test or complete an assignment to determine whether or not these learning objectives have been achieved.

What do you assess?

To see whether participants have achieved the objectives, you will measure one or more of the following:

- What knowledge was gained
- What skills were developed
- What attitudes were changed

When do you assess?

You do not always have to include assessment in your training workshop. It all depends on the nature and the purpose of the workshop.

EXAMPLES

1. *At the end of a workshop on managing an advice centre, participants should be able to:*
    a. *Define a budget (knowledge objective)*
    b. *Draw up a budget (skills objective)*

Your assessment of the learning in these workshops could be to set a test where participants have to draw up a budget for a specific case-study set or do an assignment where they draw up a budget for a specific project.

2. *At the end of a workshop on the rights of refugees, participants should be able to:*
    a. *List the rights that apply to refugees (knowledge objective)*
    b. *Apply these rights in the work that they do (skills objective)*
    c. *Explain attitudes of xenophobia and describe how they can change negative attitudes in their community towards refugees (attitude changes)*

Your assessment of learning in this workshop could include a test where participants have to list the rights that apply to refugees, explain how they would apply these rights in their own casework and define positive steps that can be taken to stop discrimination against refugees in their own community.

NOTE

You need to be cautious if you do decide to include assessment in your workshop. Adults are not used to being assessed and may feel threatened.

So, if you are planning to do an assessment, you should discuss this with the participants at the beginning of the workshop – they need to understand why it is necessary and how it can help them.

ORGANISATIONS THAT TRAIN AND SUPPORT PARALEGALS

You can find the addresses and telephone numbers for organisations that provide training and support for paralegals under Resources.

Establishing an advice centre

Paralegals working in advice centres are there to serve the community by giving people easier access to the law and social services. They will try to help people who have problems by giving them advice, referring them to an organisation that can help them, or taking up the case on their behalf. The role of an advice centre is to help people learn about their rights and in this way give them the confidence to try and sort out their own problems in the future. It does this in the following ways:

- By identifying the social and health services available to the community, referring people to them and supporting them in this process
- By offering a **free advice service** to people and taking up individual cases
- By running public **education programmes** for volunteers in the office and **educational workshops** for community organisations.
- By encouraging people to resolve disputes through methods which do not involve the law courts, such as negotiation and mediation

An advice centre should have strong links with the community it serves so that it is always aware of the needs of that community. Usually, the management committee of the advice centre consists of members elected by the community. An advice centre should also create useful relationships with other services, institutions and organisations – for example, the magistrates office, different welfare services, and so on.

Factors to consider when setting up an advice centre include the following:

- The role and functions of the committee as the 'manager' of the centre must be defined.
- Identifying the venue for the centre – the venue should be identified with the following in mind:
    - How near and how accessible will the centre be to the community it is aiming to service
    - How near to other resources in the community should the centre be, for example, social services, magistrates' courts, and so on
    - Whether the venue can be located in existing offices of other organisations, the municipality, etc., so that it keeps the running costs low
- Constitution – what will this include
- Budgets for running the centre
- Long-term sustainability of the centre
- Employing people for the centre and how they will be paid
- Training of employees, volunteers and committee members (where appropriate)

Consulting the community

Setting up an advice centre begins with consultations with organisations in a community. Organisations from the community should meet to discuss the need for an advice centre and to decide on its purpose.

The community must decide whether it needs to be serviced by an advice centre, and the organisations must decide whether they will give the advice centre their commitment and support. There must be clarity about how the advice centre will link to the services being

offered by other community organisations, municipality and government departments so that there is no conflict or competition for resources.

Setting up a managing structure for the advice centre

Once the community has decided that they need to have an advice centre, a committee must be elected to set this up. This committee can be called a **steering committee**. Its job will be to set up and guide the advice centre in its early stages before a proper **management committee** is elected. The Constitution must state exactly what portfolios the management committee should consist of, how its members will be elected and its powers and functions, etc. ***(See pg 1023: A Constitution for an Advice Centre).***

The following are examples of different types of committees:

- **Representatives from organisations:** The committee consists of people who represent their organisations (in this way, the organisations have a direct say in the running of the centre).
- **Members of organisations:** The committee consists of people who are members of organisations (although not necessarily representatives of these organisations). This may exclude certain individuals who could make a valuable contribution to the advice centre, for example, a doctor, attorney, teacher, and so on.
- **Sub-committees of community organisations:** Some communities prefer that the committee be drawn from a particular organisation, for example a civic association or a religious institution. This means that the management committee is directly accountable to the civic or religious institution.
- **Individuals:** The committee can consist of a number of individuals drawn from the community who are broadly accountable to the community either through regular meetings or Annual General Meetings (AGMs), to where all organisations are invited.

The type of committee and its accountability to the community depends on the conditions in each area as well as the available resources.

Office bearers and the work they do

In a good structure, everyone knows what each person must do, and everyone knows what is happening in the organisation, who to ask for what information, and who must do specific tasks. Good structures make it more difficult for a few people to take advantage of the organisation, for example, to control the money.

In organisations such as an advice centre, the management committee consists of office bearers who are responsible for the day-to-day management. This includes the chairperson, vice-chairperson, secretary, treasurer and ad hoc members. To decide what office bearers your committee needs, start by listing the work the committee must do. Then,, you can decide what office bearers you need to do each part of the work.

Before electing office bearers, it is a good idea to discuss what job each office bearer will do and what kind of person will be good for that job. For example, a treasurer must be able to do basic bookkeeping - understanding bank accounts, writing receipts and so on. Office bearers are responsible for the following tasks:

- The **Chairperson** helps to organise meetings and usually runs meetings.
- The **Secretary** lets people know when and where meetings will be held and takes minutes. ***(See pg 1000: Taking minutes)***
- The **Treasurer** keeps a record of all the money that comes into the organisation and all the money that the organisation spends. The treasurer must ensure that income and expenses are in line with budgets. They must keep committee members informed about the organisation's finances and is also responsible for fundraising.

Sub-committees – These are small committees that are accountable to the management committee. For example; fundraising sub-committee, project sub-committee, and so on.

Portfolios – individuals are usually given specific portfolios that they take responsibility for, for example, newsletter editor, press liaison person, and public relations.

A Constitution for an Advice Centre

Before an organisation like an advice centre writes and approves a constitution, it must be clear:

- **Why** the organisation exists, in other words, what its aims and objectives are
- **How** the organisation intends to work - its policies, principles and strategies

These matters must be carefully discussed in order to see whether they are appropriate to the needs of the community. This means an organisation can exist for some time before it is ready to finalise its constitution. A draft constitution can be discussed with the various stakeholders and then finally approved and adopted by the highest decision-making body.

A constitution is a set of rules and regulations that govern the structures of an organisation and how it should function. Organisations need constitutions so that people are clear about:

- The aims and objectives of the organisation (why it exists)

- Who the organisation's key constituency and stakeholders are (who should benefit from its work)
- How the organisation works:
    - The structures
    - The duties of members
    - The duties of elected membership

The Constitution should be clear and simple so that members understand their rights and responsibilities, leaders understand their mandate and how to be accountable, and members of the public understand why the organisation exists and how it operates. In law, the constitution is called the 'founding document', and it is legally binding on the executive and members of the organisation.

The *Non-profit Organisation Act* has detailed and clear sections on what needs to be included in the constitution of a nonprofit organisation if it wants to register under the act. ***(See pg 1033: The Non-profit Organisations Act (No. 71 of 1997)***

WHAT ARE THE MAIN PARTS OF AN ORGANISATION'S CONSTITUTION?

NAME

The name of the organisation.

AIMS AND OBJECTIVES

- The organisation's immediate goals
- The organisation's broader political or social aims

MEMBERSHIP

- Who may join
- The duties and privileges of members
- What the membership fees are

Some organisations like an advice centre may not be membership-based organisations. so they will not include a membership section.

STRUCTURES AND DECISION-MAKING

- What structures exist
- How they are formed/elected/employed/appointed
- What powers and duties each structure has
- To whom they are accountable

Structures could be:

- General meetings, including an Annual General Meeting (AGM)
- Executive Committee and/or Management Committee
- What office bearers certain structures have, for example the Executive Committee may have positions of Chairperson, Secretary, Treasurer
- Sub-committees
- Employees
- A staff committee
- National structures
- Regional structures
- Branch structures
- Local structures

Decision-making includes:

- What powers and duties each structure or portfolio has
- The notice period required for certain meetings
- What quorum is needed to make meetings constitutional ('Quorum' means that a certain number of members must be present at a meeting if any decisions are to be made. For example, a constitution may say that at least two-thirds of the committee must be present at any committee meeting. Here a quorum will be two-thirds of the total number of the committee.)

MEETING PROCEDURE

- Who will chair meetings
- What type of things will be on the agenda
- How voting will take place
- How minutes are recorded, read and approved

ELECTION OF OFFICE BEARERS

- At which structure or level office bearers are elected
- How office bearers are elected, for example by verbal nomination and show of hands, or by nomination forms and ballot papers
- How the results of the voting procedure are announced
- How vacancies are filled

STAFF

- How staff are appointed
- What positions they hold
- What their duties are
- To whom they are accountable and how they report on their tasks and activities

DISCIPLINE

- What kind of behaviour is expected of members, office bearers or staff
- What kind of behaviour is unacceptable
- When an investigation or disciplinary hearing will be held
- How people may be disciplined

FINANCIAL CONTROL

- Who is responsible for keeping records of all financial income and expenditure
- To whom is that person accountable, for example to an executive committee
- Who can sign payment requisitions
- How often money has to be banked and by whom
- Who has to approve withdrawals from the bank account
- Who must draw up financial statements
- How often these have to be submitted to a controlling structure
- When the organisation's financial year will begin and end
- When and to whom audited statements are submitted, for example to the AGM

AFFILIATION

- To whom is the organisation affiliated
- What responsibilities or duties this carries

AMENDMENTS TO THE CONSTITUTION

What percentage of the membership is needed to vote in favour of amending the constitution How a member or members wishing to propose an amendment go about this

DISSOLUTION

- What percentage of members is needed to vote in favour of ending the organisation
- What decisions must be taken with regard to the organisation's assets
- The appointment and duties of a liquidator (the person who administers the dissolving of an organisation)

A constitution with all these parts would be very long and involved. On the opposite page is an example of a very simple constitution. You must draw up your constitution to suit the needs of your organisation.

EXAMPLE OF A CONSTITUTION

CONSTITUTION OF THE KAROO RURAL ADVICE SERVICE

1. ***The name of*** *the advice centre is the Karoo Rural Advice Service (KRAS).*

2. AIMS AND OBJECTIVES

   The aims and objectives of the Karoo Rural Advice Service are to:

   - *Serve the needs of all people living in the Colesberg area by running an efficient and effective advice centre*
   - *Work with other organisations and people in addressing the problems of residents*
   - *Work with other advice centres that share similar aims and objectives*
   - *Negotiate with the town council to improve living conditions and public facilities*

3. STRUCTURES AND DECISION-MAKING

   - *The Annual General Meeting (AGM) will be held once a year.*
   - *General Meetings will be held at least once every 3 months. The powers of the General Meeting will be to propose and implement projects and campaigns, to discuss and approve the appointment of staff, and to debate and decide on all issues raised by the Management Committee.*
   - *Management Committee meetings will be held at least once every 2 weeks.*

   At least half of the Management Committee members must be present.

   The Management Committee is made up of a Chairperson, Vice-chair, Secretary, Treasurer and 3 other members. Office bearers will be elected at the AGM. If there are vacancies between AGMs, elections will take place at General Meetings.

   The powers and duties of the Management Committee are as follows:

   - *To look after the finances of the KRAS*
   - *To have the finances properly audited for approval at the AGM*
   - *To take responsibility for the general office administration of KRAS*
   - *To plan the activities of the KRAS in accordance with its aims and objectives*

STAFF: *Advice employees in KRAS are accountable to the Management Committee for their activities. Employees must submit monthly reports to the Management Committee.*

DISCIPLINE: *The Management Committee has the right to investigate the actions or*

attitude of any staff member who acts against the aims and objectives of the organisation.

FINANCES: *The Treasurer is responsible for all accounting and money matters of KRAS. The Treasurer must produce quarterly financial statements to the Management Committee. An audited financial statement must be presented at every AGM.*

AMENDMENTS: *The constitution can be changed by a two-thirds majority of a General Meeting.*

DISSOLUTION: *Only the General Meeting can dissolve the advice centre.*

Budgets

WHAT IS A BUDGET?

Income Is the money an organisation receives. Expenses are the amounts of money an organisation pays out.

A **budget** sets out the amounts the organisation expects its income and expenses to be for a fixed period of time, such as a year. In other words, the budget tells you how much money the organisation thinks it will need to do its work in the next one to three years; where it hopes some of the money will come from, and how much money it still needs to find.

The Management Committee must decide what should be included in the budget. Someone - usually the treasurer - must be given the job of drawing the draft budget up. The Management Committee - or the highest decision-making body- then has to approve this.

Once the budget has been prepared, it needs to be checked and discussed by other members of the executive. Then it must be approved by the trustees, management committee or whoever has authority in the organisation.

- The budget should be presented to the membership, either at the Annual General Meeting or in the Annual Report, and it should be used regularly as a way of monitoring the spending of the organisation.
- Budgets are also an important part of trying to raise money from funders. You cannot fool funders with made-up amounts. Amounts must be properly motivated, either in the funding proposal or in a note with the budget. An

example of such a note is, 'A motor vehicle is essential for the field employee because the settlements are, on average, 150 kilometres apart, and there is no public transport.'

WHAT PERIOD OF TIME SHOULD A BUDGET COVER?

There is no fixed rule about this. A budget can cover any time, from months to years. With an overall budget for an organisation, you need to budget for at least three years. This shows a sense of commitment and continuity.

If you are preparing a budget for more than one year, you must remember to add on a percentage to cover the cost of living increase for each year. This is called 'inflation'. So, if salaries cost R60 000 in 2024, they should cost R66 000 in 2025 if the cost of living goes up by 10%. Find out what the cost of living is by reading the financial section of the newspapers or by talking to an accountant. When preparing a budget for more than a year, you need to remember that some projects could expand. The office may also set up new projects, bring out a new publication, and get new staff and new equipment.

HOW TO CALCULATE EXPECTED EXPENSES AND INCOME

Before you can work out what your organisation's expenses will be and how much money you will need, you must be clear about the organisation's objectives and how you plan to achieve them in the period for which you are preparing a budget.

ANALYSE WHAT THE ORGANISATION SPENDS MONEY ON

Once you are clear about what work the organisation will do for the time the budget covers, you must write down everything that costs the organisation money. Start off with a list of everything you can think of. Afterwards, you can put the items into groups or categories.

So your final list could look like this:

STAFF

- Salaries
- Medical aid
- Pension fund
- Internet
- UIF

ACCOMMODATION

- Rent
- Electricity and water
- Telephone and Internet service provider

ADMINISTRATION

- Stationery
- Telephone, fax
- Postage

TRAINING DEPARTMENT

- Transport
- Food
- Cost of venues

- Bank charges
- Groceries

EQUIPMENT

- Rent/purchase
- Repair and maintenance
- Accommodation for participants

PUBLICATIONS

- Printing costs
- Distribution costs

When you have worked out what you plan to spend money on, you can work out how much each item and each category costs. You can use your own records to work out the costs.

EXAMPLE

If stationery has cost your Advice Centre R500 per month in the past year in the Ezikweni Advice Centre and inflation is at 10%, what should you budget for in the following year?

R500 + 10% inflation = R550 per month

R550 x 12 months = R6 600 per annum

But the records show that the number of clients who came to the Advice centre over the past six months increased by 10% every month. This means there will be an increase in spending of approximately 10% on stationery.

The calculation will then look like this:

R500 + 10% inflation = R550 per month

R550 + 10% increase in spending due to an increase in number of clients = R550 + R55 = R605 per month

R605 x 12 months = R7 260 per annum

DOING AN INITIAL BUDGET FOR AN ORGANISATION

If this is the first time that your organisation is preparing a budget, you should make a list of the items and categories you think you will need to spend money on.

Remember to include those items which you will need in the beginning, but that you will not have to buy again, such as desks, chairs, kettle, filing cabinets, rent deposit, telephone installation, advertising jobs, computer and printer. This is called capital outlay.

Running costs are those costs that you spend on a regular basis to keep the organisation going.

It is important to include a section in your budget on expected income. This means the income that you expect to get from your own fundraising, or membership fees and so on.

You are then telling the funder what your needs are and also how you expect to pay for these needs.

WRITING THE BUDGET

When you have calculated your expected expenses and income, the next step is to write your budget down in a way that is useful for the organisation and for funders.

For the organisation's own use, it should be possible to understand, at any time, how amounts were decided upon and what they are.

Motivations for particular items in the budget do not have to be written into the budget, but they can be part of the written proposal, or they can be attached to the budget as notes.

Where you think that something in the budget may be unclear to the reader, it is worth including a note to explain it. For example, when in the first year of the budget, you have a fairly small amount, but in the second year, it is much bigger, you should have a note explaining the big increase.

WHAT SHOULD YOU SEND WITH YOUR BUDGET TO THE FUNDERS?

If you are preparing a budget to send to funders, you will have to send certain other documents with it. These could include:

- Overall funding proposal
- Project proposal
- Annual report
- Programme of action for the year to come
- Audited statement
- Copies of publications (if available)
- Copies of newsletters (if available)

See the next page for an example of a simple budget for an advice centre.

EXAMPLE OF A SIMPLE BUDGET FOR AN ADVICE CENTRE			
EXPECTED EXPENDITURE (IN RANDS)		**PER MONTH**	**2024/2025**
Administration:	Auditors	250	3 000
	Bank charges	100	1 200
	Travel (work-related)	1 000	12 000
	Equipment and repairs	500	6 000
	Rent	1 200	14 400
	Stationary	300	3 600
	Telephone and postage	600	7200
	SUBTOTAL	**3 950**	**47 400**
Staff:	Salaries (1 person)	3 000	36 000
	Staff training	500	6 000
	SUBTOTAL	3 500	42 000
Publications:	Printing	1 250	15 000
	SUBTOTAL	**1 250**	**15 000**
Training:	Trainer's fee	600	7 200
	Travelling and sundries	300	3 600
	SUBTOTAL	**900**	**10 800**
Overall expenditure	**TOTAL**	**9 600**	**115 200**

EXPECTED INCOME (IN RANDS)		**2024/2025**
Income generated:	Raffle	3 500
	Evening Function	6 000
Donations:	Membership fees	20 000
OVERALL INCOME	**TOTAL**	**29 500**

MONITORING YOUR BUDGET MONTHLY

To calculate the amount that you can spend each month, you must divide your total annual budget by 12 months. So, for example, if your total expenditure budget is R115 200 per annum, then you should be spending about R9 600 per month.

AUDITED STATEMENTS

An audited statement is the complete record of all your expenditure and income for a year, as shown by your bookkeeping system and checked and approved by a qualified accountant. Organisations should have their bookkeeping audited (checked and approved by an accountant) at the end of each financial year. The financial year is different from the ordinary year. It does not go from January to December but can be from 1st April of one year to 31st March of the next. This will differ between organisations.

The audited statement shows exactly how much money was spent in the year, what it was spent on, where the income came from and whether you spent more than you had or less. Donors also use the audited statement to check how good the financial management in your organisation is before they give you any more money.

Fundraising

When people give money to an organisation, they want to know that there are budgets and structures in place to manage the money properly. Monthly and annual bookkeeping records must be kept to show clearly what money is collected and what money is spent. So, all these things need to be in place before embarking on a fundraising initiative. An organisation like an advice centre should register with the Department of Social Development as a non-profit organisation (NPO). This gives the organisation credibility with donors and the community. There are also other advantages offered by the government to organisations that do register. We will first look at the Act itself and then at the process of registering as an NPO.

THE NON-PROFIT ORGANISATIONS ACT (NO. 71 OF 1997)

The *Non-profit Organisations Act* (*the* NPO Act) has repealed the Fund-raising Act except for chapter 2 of the *Fund-raising Act*, which deals with disaster and relief funds. The NPO Act says an NPO is a trust, company or other association of people:

- Established for a public purpose, and
- The income and property are not distributed amongst its members or staff except to pay for a service

So, in terms of the Act, NPOs are civil society organisations (in other words, they are not part of government) that have self-governing boards which are accountable to their owners or members. To summarise, NPOs:

- Provide a public service or have some public purpose that goes beyond serving the personal interests of the members of the NPO (such as the promotion of social welfare, economic development, religion, charity, education or research)
- May make a profit but may not give any of the profits to its members – they can use the profits they make for the work of the organisation
- Often have to fund-raise from donors because they don't make enough money (income) to cover their expenses

The NPO Act encourages organisations to register as NPOs with the Department of Social Development. Organisations can benefit from being registered because it formalises the institution and, in this way, makes them more credible to donors and to the public. There are also certain benefits from government for organisations that register. However, it is not compulsory to register as an NPO in order to exist. Registration is a choice, but in the long run, it will benefit the organisation. **(*See: Resources: NPOo registration*)**

The Act aims to meet these objectives by allowing organisations to register with the Directorate of the Department of Social Development. This is called voluntary registration.

VOLUNTARY REGISTRATION

The NPO Act encourages non-profit companies, trusts and voluntary associations to register with The Directorate in the Department of Social Development. However, organisations only have to register if they want to and if they meet certain requirements, which are:

- It must not operate for profit (it must be a non-profit organisation)
- It must have a separate legal identity to its members

The purpose of voluntary registration is to make NPOs more accountable and transparent to the public by prescribing certain rules on how they must function.

BENEFITS OF VOLUNTARY REGISTRATION

NPOs that register with the Department of Social Development will qualify for certain benefits and allowances from the government. In the future, it is possible that the government will not pay benefits or allowances to an NPO

unless it is registered with the Department. The following acts also say that NPOs must be registered under the NPO Act in certain circumstances:

- The *Lotteries Act* – if the NPO wants to run a lottery
- The tax laws – if the NPO receives a tax benefit

HOW DOES AN ORGANISATION REGISTER AS AN NPO?

Before applying to register as an NPO the organisation must check that their founding documents are in order and meet the requirements of section 12(2) of the NPO Act. The founding documents are:

- The Constitution for a voluntary association
- The Deed of Trust for a trust
- The Memorandum and Articles of Association for a non-profit company

NPOs should then send two copies of their founding documents together with the application form to the NPO directorate.

DUTIES OF AN NPO THAT HAS REGISTERED

Once an NPO has registered with the department, it must follow certain procedures. The most important procedures are:

- To keep all accounting records
- To draw up financial statements within six months of the end of the financial year (these must include a statement of income and expenditure and a balance sheet)
- To arrange for an accountant to compile a written report within two months after drawing up its financial statement. The report must say that the financial statements are consistent with the accounting records and that the NPO has complied with all the financial reporting requirements of the NPO Act.

TAX LAW FOR NPOS

The *Tax Laws Amendment Act No. 30 of 2000* amended the *Income Tax Act No. 58 of 1962* (*the Tax Act*). There are two main tax benefits for NPOs under the Tax Act:

- Income tax exemption – the NPO doesn't have to pay any tax on its income
- Donor tax deductions for people or bodies that donate money to the NPO

HOW TO REGISTER AS A NON-PROFIT ORGANISATION (NPO)

An NPO can be a non-profit company, a trust or a voluntary association of persons. An organisation that is not-for-profit can be set up as a non-profit company.

A non-profit company is similar to a normal profit company, but it is not allowed to operate to make a profit, and it can't share the profits amongst the company members.

Large organisations that run big programmes and budgets and have lots of staff usually set up a non-profit company.

Non-profit companies have separate or independent legal identities that are distinct from their members. This means –

- The organisation, not its members and staff, are responsible for the organisation's debts, contracts and other legal responsibilities
- The assets of the organisation are in the name of the organisation, not its members
- The organisation carries on with its work even if its members or staff change
- The organisation can sue, be sued and enter into contracts in its own name

WHO RUNS A NON-PROFIT COMPANY?

A company consists of members and directors. The members appoint the directors who have executive powers. The directors are responsible for the day-to-day running of the company.

HOW DO YOU FORM A NON-PROFIT COMPANY?

All companies, including non-profit companies, are registered with the Registrar of Companies under the Companies Act. To register as a non-profit company, your organisation must:

- Be established for a lawful objective
- Have as its main objective the promotion of religion, the arts, science, education, charity, social activity or a communal or group interest
- Only use its income and property to promote the main objective
- Not distribute its money or property to the members or staff unless they are being paid for work they have done
- Appoint official auditors
- Keep financial and accounting records
- Hold an annual general meeting

THE MEMORANDUM AND ARTICLES OF ASSOCIATION FOR A COMPANY

The founding documents for a non-profit company are the Memorandum and the Articles of Association. The Memorandum sets out the purpose of the NPO and the Articles of Association say how it will work.

TRUSTS

An organisation can be set up as a Trust under common law and theTrust Property Control Act No. 57 of 1988. It is easier to set up a Trust than a non-profit company. A trust is a written arrangement between an owner and trustees. The owner hands over property and/or funds to a group of people (called trustees) who look after the property and funds and use it for the benefit of other people (called beneficiaries) for a specific objective.

WHO RUNS A TRUST?

A trust is run by a Board of Trustees. A Deed of Trust will say what the powers and duties are of a trust. Trustees can be paid for the work they do for the NPO.

WHICH LAWS GOVERN TRUSTS?

Trusts are governed by the common law and the Trust Property Control Act. Trusts do not have a separate legal personality. If there is a legal dispute, the trustees, not the trust, can sue or be sued. The property of the Trust is protected and the Trust Property Control Act says trust property must be kept separate from the trustees' personal property. Trusts must have their own bank accounts.

HOW DO YOU FORM A TRUST?

A notary public must write and attest your trust deed and the trust must be registered with the Master of the High Court. If there are any changes to trustees at any stage, then the Master must be given notice of this.

THE TRUST DEED

The trust deed is the founding document of a trust.

REGISTERING AS A TRUST UNDER THE NPO ACT

If a trust registers as an NPO under the NPO Act (in addition to registering with the Master of the Court) it will become a body corporate with an independent legal personality.

VOLUNTARY ASSOCIATION

This is the easiest and simplest structure to set up and manage. It also has the same powers and can do the same thing as a trust or non-profit company. A voluntary association can be set up when three or more people enter into an agreement to form a non-profit organisation. Voluntary associations are best suited to small community-based organisations that do not need to own or manage large amounts of money or property and equipment. For example, a school parent association. A voluntary association is the quickest and cheapest structure to set up.

WHO RUNS A VOLUNTARY ASSOCIATION?

There is usually a constitution that provides for the appointment of a group of people with executive and/or management powers.

WHICH LAWS GOVERN VOLUNTARY ASSOCIATIONS?

The common law and the *Communal Property Associations Act (No. 28 of 1996)* govern voluntary associations.

If you want to make a voluntary association an independent legal personality, the law says the constitution must specify that:

- The organisation will continue to exist even if the membership changes
- The assets and liabilities (debts) of the organisation will be held separately from those of its members

HOW DO YOU FORM A VOLUNTARY ASSOCIATION?

You can form a voluntary association by having a written or verbal agreement. There is no government registry that you have to register with, but you can register under the Non-profit organisation Act.

THE CONSTITUTION OF A VOLUNTARY ASSOCIATION

The written agreement of a voluntary association is called the constitution. These are the rules which say how the organisation will run. It also says what its main purpose and objectives are, who will make the decisions and how decisions will be made.

The constitution of a voluntary association will usually have detailed and clear sections on:

- The purpose of the organisation
- The objectives of the organisation – what it wants to achieve
- The type of organisation it is: for example, a non-profit voluntary association

- The membership of the organisation – who may become a member and the rights and duties of members; how people can join, resign or be expelled
- The structures and main procedures of decision-making in the organisation
- Annual general meetings and other meetings
- Elections and appointments for the different structures of the organisation
- The powers and functions of each structure
- Who makes what decisions
- How the organisation is governed and how decisions are made
- How it is organised to get the work done
- The roles, rights and responsibilities of people holding specific positions and of the different structures: what individuals and structures are responsible for, to whom must they account.
- How the finances and assets of the organisation are controlled
- Financial year and audit process
- Closing down the organisation – what process must be followed, and what will happen to the money and assets of the organisation

REGISTERING AS A VOLUNTARY ASSOCIATION UNDER THE NPO ACT

If a voluntary association wants to register as an NPO under the NPO Act, it will have to follow the requirements set out in the Act. It can be an advantage to register under the NPO Act because funders generally prefer to work with organisations that have been formally and legally recognised. NPOs that have registered under the Act also have access to certain government benefits.

GUIDE TO CHOOSING A STRUCTURE FOR AN NPO

The following factors are guidelines to help you choose a structure for your organisation.

Size, capacity and complexity of your organisation – Large organisations with big programmes and budgets will usually set up a non-profit company. Smaller organisations will usually set up a trust or voluntary association.

Funder's needs – People funding the organisation, for example, overseas funders or government may prefer a particular structure. For example, corporate (business) funders usually prefer organisations to be non-profit companies.

Paying tax – It doesn't matter which structure you choose. This does not affect the amount of tax your organisation might have to pay. The factors that influence your tax status are the purpose, objectives and activities of the organisation.

Registering with a government registry – Only non-profit companies and trusts have to register with a government registry. The advantages of doing this include:

- There are rules and regulations which organisations have to follow if they are registered, this helps to make things clear to those inside and outside the organisation
- Organisations have to be accountable to the public which means all stakeholders, for example, donors, people benefiting from the organisation's work, the general public and the government are aware of how money is being spent by the organisation

RAISING FUNDS THROUGH FUNDRAISING ACTIVITIES

Each office should have an income plan for at least three years which includes a range of activities, including fundraising.

- Most organisations with members have a membership fee called a **subscription or membership fee.**
- You can **charge a fee** for some or all of the services you provide. You can do this on a sliding scale of affordability.
- You can have public **fundraising** events, such as raffles, parties or suppers, cake or jumble sales, fairs, and so on.
- You can ask for **donations** of money or things (for example, office equipment or items to be prizes for fundraising events) from religious bodies, businesses or other organisations.
- You can approach large local and international funders as well as government. To do this it will be necessary to draw up a funding proposal.

STEPS IN PLANNING A FUNDRAISING EVENT	
1. WHAT TO DO?	• Decide how much money you want to raise • What resources do you have available? (time, money, people) • How much is the event going to cost you to run?
2. WHEN TO DO IT?	• Decide on a date for the event • What time of the day will the event take place?
3. WHERE TO DO IT?	• What venue will be suitable? • Is the venue easy to get to?
4. WHAT EXTRAS TO OFFER	• Will you offer refreshments? • Will you offer a place where people can leave their children?
5. PUBLICITY	• What kinds of publicity will you use? (pamphlets, posters, banners, stickers, newspaper advertisements, radio, and so on) • Where will you advertise, for example, where will you distribute your pamphlets? • When will you advertise?
6. WHO DOES THE WORK?	You will need people to do the preparation work and to work on the day. Without committed employees, no fundraising event can be a success. There must be a co-ordinator who takes overall responsibility. But there are also hundreds of small jobs and the coordinator cannot do them all. The coordinator must delegate many of the jobs. Their job is to make sure that everyone else does what they promised.
7. EVALUATION	When it is all over, the money is counted. Then it is important to ask: • What did you do right? • What did you do wrong?

WRITING A FUNDING PROPOSAL

Funding proposals can be written for the organisation as a whole or for specific projects initiated by the organisation. Funding proposals can be found in newspapers, on websites, or sent via email from other organisations. It is, therefore, very important for the advice centre to be registered on the databases of other organisations, such as provincial forums, government departments and funders.

Calls for proposals will often provide specific guidelines and details of the information to be provided. Sometimes, donors will ask for an expression of interest before inviting a proposal.

Here is a list of things that should be included in a funding proposal:

- **Name and address** of your organisation
- **Background and motivation** (why you are asking for funds) - Give the reader (funding agency) some information about when the organisation was formed and why it was formed. It is always useful to include figures in your motivation for funding, for example, if you are asking for funds for a literacy programme, state that there are 9 million people in your country who cannot read.
- **Aims** of your organisation
- **Description of activities** for the past year or two; send your annual reports
- **Plans for the future** – include specific outcomes for what you intend to achieve in year 1, year 2 and so on
- **Timelines** – give details of when you intend to start with the implementation of specific activities and how
- **Organisations you have worked with or intend to work with**
- **Description of the structure** of your organisation
- **Income**
    - Money received in the past from different agencies
    - Money receiving now
    - Ways in which the organisation has raised money itself
- **Budget -** List the expenses and income you think you will have in the next year. ***(See pg 1031: Budgets)***

Send your proposal with a **cover letter**. If you receive funding, always send letters of thanks.

Employing people in an organisation

When an organisation employs people, it wants employees to have a clear idea about what the goal of the organisation is, and a commitment to fulfilling it. The employee must be clear about the job that they are expected to do. The organisation must also ensure that it has performed all its duties as an employer, for example, having registered employees for UIF, SITE and PAYE. ***(See pg 854: Registrations as a new employer; See pg 281: The contract of employment)***

The basis of the relationship between an employer and an employee is the **employment contract.** This is an agreement that spells out what the organisation expects the employee to do and what the employee can expect from the organisation.

GUIDELINES FOR DRAWING UP AN EMPLOYMENT CONTRACT

- State who the employer is and the employee.
- State the day on which the employee will begin work.
- Describe the expectations that the organisation has of the employee, such as:
    - Job description and performance standards
    - Promoting the best interests of the organisation
    - Discretion and confidentiality
    - Use of time, equipment and materials
- Describe the conditions of employment:
    - Salary
    - Office hours and employment
    - Notice: termination of employment
    - Leave: ordinary, maternity or paternity, sick, study, or long leave
    - Fringe benefits: provident or pension fund, medical aid, staff loans, housing subsidies
    - Travelling expenses, including the use of a private car for work purposes
    - Grievance and disciplinary procedures
    - Redundancy policy
    - Staff training and development

A formal contract of employment must be shown to the new employee. Both the new employee and the committee (or representative of the committee) responsible for running the office and making employee appointments must sign the contract.

DRAWING UP A JOB DESCRIPTION

A job description sets out the specific duties and responsibilities that go with a staff position, the skills and qualifications required for the position, and the person or structure to whom the person filling the position is accountable. The first step in drawing up a job description is to analyse exactly what is involved in the job.

The second step is to write it up following certain guidelines.

Analysing the job means looking at the following:

- All the tasks involved in the job
- All the knowledge and skills needed to do the job properly
- The relationship of the job to other jobs in the organisation

Guidelines for writing a job description

Include the following in a job description:

- The title of the job
- A brief statement about the purpose of the job
- The responsibilities of the job, listed in order of importance
- The tasks involved in fulfilling the responsibilities. As far as possible, you must say:
    - The proportion of time to be spent on each task
    - The minimum acceptable standard (for example, typing at 40 words a minute)
- A person specification, which states what kind of person should be employed for the job. this covers two areas:
    - Skills, education levels, experience, abilities (for example, language abilities) needed
    - Personal and physical attributes needed. In other words, things that would suit your organisation and the staff already working in it
- Conditions under which the person doing the job must be able to work. This includes, for example, having to work weekends or nights.
- The management structures and lines of accountability, and how the person doing the job described fits into them.

DISCIPLINE AND TAKING DISCIPLINARY ACTION

Discipline is any action taken by the managing committee to change unacceptable behaviour or job performance of an employee who works for the organisation. Below is an example of a formal notice to tell an employee that they must come to a

disciplinary inquiry. The notice can be changed to suit each organisation's own needs.

Employees have to work and behave according to the standards set by the organisation's Constitution and the contracts of employment. If an employee does not work according to these standards, action must be taken to correct and improve the employee's performance. However, if the employee's conduct or performance is very bad, the organisation may decide to dismiss the employee. Before the organisation decides what action to take, the employee must get a chance to present their case fully.

The organisation might decide to take any of the following kinds of disciplinary action:

- Formal counselling
- Recorded verbal warnings
- Written warnings
- Suspension without pay (as an alternative to dismissal)
- Dismissal

The type of action taken by the organisation depends on how serious the employee's action was and anything else in the employee's favour or against the employee.

If the employee's actions seem serious enough to allow for dismissal, then the organisation must follow legal procedures. ***(See pg 360: What is a dismissal; See pg 361 When is a dismissal fair or unfair?; See pg 370: Solving disputes under the LRA)***

Every organisation should also have a simple Grievance Procedure that employees can use if they have a problem at work and they feel that it cannot be dealt with at a committee meeting.

EXAMPLE OF A NOTICE OF A DISCIPLINARY ENQUIRY

NOTICE OF A DISCIPLINARY ENQUIRY

To:.....

From: .....

Today's date: .....

A disciplinary enquiry will be held on ..... at o'clock at .....

The enquiry is about the following alleged offence(s):

1.....

2.....

Please note that you have the right to:

1. A representative
2. Call your own witnesses
3. Ask questions
4. Give evidence
5. Plead in mitigation
6. An interpreter
7. Appeal against a penalty

CHAIRPERSON .....

DATE.....

EMPLOYEE .....

DATE.....

WITNESS 1. .....

DATE.....

WITNESS 2. .....

DATE.....

Evaluating the activities in an organisation

Evaluation means measuring the value of what the organisation is doing. It is a way of stepping back from our work and asking ourselves: 'How are we doing? What should we change to do better?' Different people have different ideas of progress and problems. At an

evaluation session, people come together to share their ideas in an organised and planned way.

When we evaluate, it is much easier to make decisions about the future of the organisation. For example, after an evaluation, it may be clear that the structure of the organisation is not working very well. Therefore, the structure will have to be changed. It may become obvious after an evaluation that the work methods being used by the employees of the organisation are not very effective. People will then have to think about ways of improving the effectiveness of the organisation.

Here are some examples of questions that can be part of an evaluation:

- What has been achieved in the time between this evaluation and the last one?
- What aims have not been achieved?
- What needs to be continued, changed or stopped?
- What are the organisation's strengths and weaknesses?

The reasons why we evaluate include:

- To help us see where we are going and if we need to change direction
- To help us to make better plans for the future
- To make our work more effective
- To collect more information
- To see if our work is costing too much and achieving too little
- To see if all the effort has been effective
- To be able to share our experiences
- To compare our organisation with others like it
- To criticise our own work
- To see where our strengths and weaknesses lie
- To be able to improve our methods
- To measure progress
- To see what has been achieved

WHEN TO EVALUATE

Evaluation is usually an ongoing process. This means that a day (or more) is set aside for evaluation at regular times in the year, or maybe only once a year. Sometimes if employees have been working on a specific project, then it is worthwhile to make time for an evaluation after the project has been running for a while.

WAYS OF EVALUATING

There are many different ways of evaluating in a group. The aims of evaluating should be to encourage everyone to join in actively and to get out the information and ideas that will help the organisation understand its problems in a way that will make everyone feel motivated to do something about them. Evaluations should show the strengths and weaknesses of the organisation.

Checklists

This section provides the following checklists:

- Best practices for paralegal case-workers
- Preparing for monitoring
- Monitoring follow-up
- Mediation code of conduct
- Tips for mediators

Best practices for paralegal case-workers

Use this as a guide and adapt it to suit your own needs.

ATTITUDE

- Should be willing to go the extra mile for advice seekers
- Advice-seekers problems are seen as part of a bigger socio-economic problem which needs action from individuals as well as at a collective level
- Dedication and commitment to work
- Understand the core values of the organisation
- Understand what it means to empower somebody
- Have a vision of a society based on a respect for human rights

CASE-WORK KNOWLEDGE

- Know the material in the Paralegal Manual and can work with it
- Can give information to advice-seekers based on the following primary laws:
    - COIDA
    - Labour Relations Act

- Basic Conditions of Employment Act
- Social Assistance Act and the Regulations
- Prevention of Family Violence Act
- Maintenance Act
- Divorce Act
- UIF Act
- Children's Act and CHildren's Amendment Act

REMEMBER

These are just examples; you must write down the laws that are relevant to your organisation's work.

Understand the following and work with them:

- Constitution of South Africa
  - Welfare White paper
  - Socio-economic rights
  - GEAR (government's economic policy)
  - Know the problems experienced by rural advice seekers
  - Know and understand how to use the State institutions supporting democracy (for example, the SA Human Rights Commission, Public Protector, etc.)
- Able to identify, contact and refer to the process of:
  - Legal aid
  - Insurance Ombudsman
  - Pension Fund Adjudicator
  - Consumer institutes
  - CCMA
  - Independent Complaints Directorate of SAPS, Correctional Services and other sectors
  - Key bargaining councils of five main sectors presenting to the advice centre
  - Small Claims Court
  - Magistrate's Commission and public prosecutions appeal divisions
- Know how the office administration system works in respect of:
  - Administration systems
  - Budgets

    - The need for co-operation amongst staff
    - The need for honesty

INTERVIEWING AND COMMUNICATION SKILLS

My interviewing and communication skills need to be excellent so that I can:

- Present advice seekers with options for their problems which they can easily understand and suggest action to deal with problems which are in the advice seekers' best interests and not what I think is best for them.

CASE-RECORDING SKILLS

My case-recording skills need to be accurate, and people must be able to read what has been written.

KEEPING MY OWN RECORDS

- I know how to record problems on the computer
- The monthly print-out of problems accurately reflects my work
- I am up to date with recording cases on the computer
- I record any meetings attended

REFERRALS PROCEDURE

I can refer advice seekers to appropriate structures when necessary and appropriate and I send a professionally prepared report with any advice seeker when I refer them.

EFFECTIVE USE OF TIME

I ensure that time-wasting is cut to a minimum.

FOLLOW-UP

My follow-up of cases is well planned, proactive and consistent, for example, recording dates to follow up, and making appointments when necessary.

CLOSING CASES

I follow up with advice seekers to make sure that I can close a case.

ADMINISTRATION

- My writing is clear for all to read
- My notes are filed in order of date received
- The name of the person is clearly written at the top of the file I put the files where others will know where to find them

- All letters have spelling and grammar checked
- All faxes have the fax record stapled to the letter

IDENTIFICATION OF MY LEARNING NEEDS

I am able to identify areas where I am weak in knowledge. I feel free to acknowledge this and will either find the information myself or ask other staff members for advice.

USING DIFFERENT REMEDIES

I know what remedies to use to deal with different cases.

ANALYSING TRENDS IN CASE-WORK

I can identify common problems of advice seekers, identify what is causing the problem and make the necessary interventions to deal with the problems.

REFERRING CASES TO COURT

I can identify good test cases that should be referred to court and understand the legal problem involved I have kept a file of all the documentation and work done I have explained to the client what action will be taken and the possible outcomes I will frequently follow up the case with the attorney

MEETINGS WITH OTHER PEOPLE AND ORGANISATIONS

- I must work with members of my organisation and within the organisation's strategy when planning a meeting and inform them who will be attending
- I must prepare in advance and decide on priorities
- I must be on time
- I must send a follow-up letter to the person thanking them for the meeting and summarising what was agreed and prepare a report for my organisation

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Preparing for monitoring

This is a checklist to prepare yourself for monitoring public events or incidents like police conflict, community conflict, and registration and voting for elections:

KNOWLEDGE

What are your rights as a monitor; the procedure for making complaints; where the nearest police station is; the background to the event; what the area looks like; names of organisations working in the area, and services you can call on for support.

EQUIPMENT

Stationery for recording the event; incident sheets; useful contact numbers; your ID; money, and a cell phone with camera.

DRESS

Dress appropriately with an armband or identification card to identify you as a monitor, but no activist badges or t-shirt.

PLANNING AND TEAMWORK

Know the plans for the event and establish a communication network within your organisation, and with other organisations.

Monitoring follow-up

- After monitoring a public event, report back verbally to your co-ordinator or organisation, and prepare a written report to submit to your organisation
- Take necessary action steps, for example, go to the police station, find witnesses or go to the hospital or clinic
- Co-ordinate with other organisations or structures and liaise with the media
- Hold a debriefing session to give all the monitors a chance to talk about what happened

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Mediation code of conduct

This is a checklist of rules and procedures which you can get each side to agree on before you start to run a mediation session:

- Trust and respect for the chairperson (who will be the mediator) and the mediating team (if there is more than one person)
- Should there be translation, and who should do it?
- Is the venue secure and neutral?
- Do the chairs and tables have to be re-arranged?
- Size and leadership of delegations.
- Should observers be allowed?
- Agree to behave in a polite and disciplined manner.
- No interrupting of other speakers.
- No verbal abuse and shouting.
- No physical intimidation (for example, pointing) or violence.

- No presence and carrying of weapons. Should smoking, drinking and eating be allowed?
- No distracting behaviour, for example, caucusing while the other side is speaking.
- How long should the sessions be?
- Equal time for each side to speak and who should speak first.
- Opportunity to caucus and consult when necessary.
- How should the mediation be minuted?
- What parts of the discussion should be confidential?
- How should the agreement be reported back to members?
- Should the outcome of the mediation be publicised, and how?

Tips for mediators

This is a checklist of things you can do as a mediator to make a mediation session run better:

- Explain that the purpose of mediation is to get the two sides to discuss their points of view and to get a voluntary agreement between the two sides
- Apply the rules and procedures that both sides have agreed on to both sides equally.
- Always stay impartial by keeping your personal opinions to yourself and be careful of the way you address people. For example, if you call people 'comrade', or 'ladies and gentlemen', will this suit all the people who are there?
- Be aware of personal tensions between the sides. If possible, try to get these out of the way before going on, or at least stress that people should avoid being personal
- Encourage each side to listen and to keep a note of questions and comments
- Give each side a chance to state their position fully before allowing questions and answers
- Give each side a chance to start off speaking, and then alternate this (this means give each side a chance to speak first)
- Announce the time allowed for each speaking turn, for example, 5 minutes each
- Inform people when they have one minute of speaking time left
- Whenever it is useful, summarise the main points and ask both sides if they are happy with your summary
- Make notes of questions asked and practical solutions suggested
- If a speaker makes very general or vague points or accusations, encourage the speaker to be more specific
- Try to encourage agreement on easier and less heated issues first
- To encourage both sides to compromise, suggest that for mediation to succeed, a 'give-and-take' attitude is needed, rather than a 'winner-take-all' approach

- If one side admits something or makes a compromise, then encourage the other side to respond
- If things are very heated, suggest a short break or ask the sides to hold the particular issue till later
- If there is a deadlock (no progress on an issue), try to break it by speaking separately to each side
- If one side says something important in a separate meeting with the mediator, encourage them to say it directly to the other side
- To start moving to an agreement, link the different solutions suggested by either side and add alternative solutions from the chair (especially solutions which make both sides do something, for example, both sides agree not to attack members of the other side)
- When drawing up an agreement, first list the things that force both sides to do something. Then list the different things that each side needs to do, alternating them (that means, first one from side A and then one from side B). Lastly, write down what will happen if anyone breaks the agreement.

RESOURCES

Chapter 1: The South African Constitution and Bill of Rights

CONSTITUTIONAL COURT

Tel 012 359 7400, *Toll Free* 0800 1 20 40

email info@concourt.org.za

Website www.concourt.org.za

Postal address Private Bag X1, Constitution Hill, Braamfontein 2017

Street address 1 Hospital Street, Constitution Hill, Braamfontein

REGISTRAR OF THE CONSTITUTIONAL COURT

Tel 01 359 7400, *Fax* 01 339 5098/086 649 3626

email director@concourt.org.za

THE PUBLIC PROTECTOR

NATIONAL OFFICE (PRETORIA)

Tel 012 366 7000/7112, *Fax* 012 362 3473

Fax2email 086 575 3292

Toll-free 0800 11 20 40

Postal address Private Bag X677, Pretoria 0001

Street address: Hillcrest Office Park, 175 Lunnon St, Brooklyn

Email publicprotector@pprotect.org.za

Website www.pprotect.org

New complaints: Registration2@pprotect.org.com/PublicProtector

Facebook: https://web.facebook.com/PublicProtectorSouthAfrica/?_rdc=1&_rdr

www.youtube.com/channel/UCxDLWsRKZgNU2IqGRPAj0aw

EASTERN CAPE

Tel 040 635 1286/7/1145/1126

Fax 040 635 1291

Postal address PO Box 424, Bisho 5605

Street address Unathi House, Independent Ave, Bisho

FREE STATE

Tel 051 448 6185/6172, *Fax* 051 448 6070

Postal address PO Box 383, Bloemfontein, 9300

Street address 2nd Floor, Standard Bank House 15 West Burger St, Bloemfontein

GAUTENG

Tel 011 492 2897/2493, *Fax* 011 492 2365

Postal address P.O. Box 32738, Braamfontein 2017

Street address: Lara's Place, 187 Bree Street (corner Bree and Rissik Streets), Johannesburg

KWAZULU-NATAL

Tel 031 307 5300/5250/5251, *Fax* 031 307 2424

Postal address PO Box 4267 Durban 4000

Street address: Suite 2114, 22nd Floor, Commercial City Bldg, 40 Commercial Road, Durban

LIMPOPO

Tel 015 295 5712/5699/ 5956, Fax 015 295 2870

Postal address PO Box 4533, Polokwane 0070

Street address: Landros Mare Street, Polokwane

MPUMALANGA

Tel 013 752 8543, *Fax* 013 752 7883

Postal address PO Box 3373, Nelspruit 1200

Street address: Suite 101 Pinnacle Bldg, 1 Parkin St, Nelspruit

NORTHERN CAPE

Tel 053 831 7766, *Fax* 053 832 3404

Postal address PO Box 1505, Kimberly, 8300

Street address: 2nd & 3rd Floors, Pretmax Building, 4 Sydney Street, Kimberley

NORTH WEST

Telephone 018 381 1060/1/2, *Fax* 018 381 2066

Postal address PO Box 512, Mafikeng 2745

Street address Public Protector's Chambers, corner Martin & Robinson Streets, Mafikeng

WESTERN CAPE

Tel 021 423 8644, *Fax* 021 423 8708

Postal address PO Box 712, Cape Town 8000

Street address: 4th Floor, 51 Wale Street (cnr Wale & Bree Streets), Cape Town

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Website www.sahrc.org.za

General information email info@sahrc.org.za

Complaints complaints@sahrc.org.za

X: @SAHRComission

Facebook SAhumanrightscommission

YouTube: youtube.com/user/SAHRC1

HEAD OFFICE (GAUTENG)

Tel 01 01 877 3600

Street address Sentinel House, Sunnyside Office Park, 32 Princess of Wales Terrace, Parktown, Johannesburg

Switchboard: 011 877 36

Complaints: www.sahrc.org.za/lodge-complaints

Fraud Hotline: free call: 0800 701 701

EASTERN CAPE

Tel 043 722 7828/21/25, *Fax* 043 722 7830

Street address 4th Floor Oxford House, 86 Oxford Street, East London

FREE STATE

Tel 051 447 1130, *Fax* 051 447 1128

Street address 18 Keller Street, Bloemfontein

GAUTENG

Tel 01 877 3750, *Fax* 01 403 0668

Street address Braampark Forum 3, 33 Hoofd St, Braamfontein

KWAZULU-NATAL

Tel 031 304 7323/4/5, *Fax* 031 304 7323

Street address 1st Floor, 136 Margaret Mncadi, Durban

LIMPOPO

Tel 015 291 3500, *Fax* 015 291 3505

Postal address PO Box 4431, Polokwane 0700

Street address 102 Library Garden Square, corner Grobler & Schoeman St, Polokwane

MPUMALANGA

Tel 013 752 8292, *Fax* 013 752 6890

Street address 4th Flr Caltex Building, 32 Bell Street, Nelspruit

NORTHERN CAPE

Tel 054 332 3993/4, *Fax* 054 332 7750

Postal address PO Box 1816, Upington, 8800

Street address 1st Flr Ancorley Building, 45 Mark & Scot Rd, Upington

NORTH WEST

Tel 014) 592 0694, *Fax* 014 594 1069

Street address 25 Heystek Street, Rustenburg

WESTERN CAPE

Tel 021 426 2277, *Fax* 021 426 2875

Street address 7th floor, Absa Bldg,132 Adderley St, Cape Town

COMMISSION FOR GENDER EQUALITY (CGE)

Website www.cge.org.za

email cgeinfo@cge.org.za

HEAD OFFICE (GAUTENG)

Tel 01 403 7182, *Fax* 01 403 5609/7188

Street address 2 Kotze St, East Wing, Old Women's Jail, Constitution Hill, Braamfontein

EASTERN CAPE

Tel 043 722 3489, *Fax* 043 722 3474

Street address 2nd Flr Permanent Bldg, 42-44 Oxford Street (corner Oxford & Terminus Streets), East London

FREE STATE

Tel 051 430 9348, *Fax* 051 430 7372

Street address 2nd Flr, Fedsure Building, 49 Charlotte Maxeke Street, Bloemfontein

KWAZULU-NATAL

Tel 031 305 2105, *Fax* 031 307 7435

Street address Suite 1219 Commercial City, 40 Dr A.B Xuma Road, eThekwini

LIMPOPO

Tel 015 291 3070, *Fax* 015 291 5797

Street address 106 Library Garden Square, cnr Grobler & Schoeman Streets, Polokwane

MPUMALANGA

Tel 013 755 2428, *Fax* 013 755 2991

Street address Office 212-230, 32 Belle Street, Mbombela

NORTHERN CAPE

Tel 053 832 0477, *Fax* 053 832 1278

Street address 143 Du Toitspan Road, Kimberley

WESTERN CAPE

Tel 021 426 4080, *Fax* 021 424 0549

Street address 5th Flr ABSA Building, 132 Adderley St, Cape Town

AUDITOR GENERAL

HEAD OFFICE (PRETORIA, GAUTENG)

General Information email agsa@agsa.co.za

Tel 012 426 8000, *Fax* 012 426 8257

Postal address PO Box 446, Pretoria 0001

Street address 300 Middel Street, New Muckleneuk, Pretoria

GOVERNMENT ANTI-CORRUPTION HOTLINE

Tel toll-free 0800 701 701

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)

Tel 01 566 3000/3001

email info@icasa.org.za

Consumer complaints
consumer@icasa.org.za

Website www.icasa.org.za

Postal address Private Bag X10002, Sandton, 2146

Street address Blocks A – D, Pinmill Farm, 164 Katherine Street, Sandton

INDEPENDENT ELECTORAL COMMISSION

You can check your registration details by sending an SMS with your ID number to 32810

NATIONAL OFFICE

Tel 012 622 5700, *Fax* 012 622 5784

Postal address P/Bag X112, Centurion 0046

Street address Election House, Riverside Office Park, 1303 Heuwel Avenue, Centurion

Website www.elections.org

email iec@elections.org.za; info@elections.org.za

LAND CLAIMS COMMISSIONER

See LAND & HOUSING

LAND CLAIMS COURT

See LAND & HOUSING

PARLIAMENT

Tel 021 403 2911, *Fax* 021 403 8219

Postal address PO Box 15, Cape Town 8000

Street address Parliament St, Cape Town *email* info@parliament.gov.za

Website www.parliament.gov.za

Facebook
https://web.facebook.com/ParliamentofRSA?_rdc=1&_rdr

X
parliament.gov.za/parliament-twitter-accounts

Youtube
https://www.youtube.com/user/ParliamentofRSA

Instagram
www.instagram.com/ParliamentofRSA/

PROVINCIAL GOVERNMENTS & GOVERNMENT DEPARTMENTS

Website www.gov.za

Look in the back of telephone directories of capital cities of provinces.

Chapter 2: Citizenship

DEPARTMENT OF HOME AFFAIRS

HEAD OFFICE (GAUTENG)

Tel 0800 601 190

email csc@dha.gov.za

Postal address Private Bag X114, Pretoria 0001

Street address Hallmark Building, 230 Johannes Ramokhoase Street, Pretoria

Website: www.dha.gov.za

Facebook: https://web.facebook.com/HomeAffairsZA?_rdc=1&_rdr

X: https://x.com/HomeAffairsSA

https://x.com/HomeAffairsSA

https://www.youtube.com/DeptHomeAffairs

MIGRATION AND REFUGEE PROBLEMS

DEPARTMENT OF HOME AFFAIRS REFUGEE RECEPTION OFFICES/ASYLUM DETERMINATION OFFICES

EASTERN CAPE

Tel 041 487 1026

Postal address PO Box 348, East London, 5200

Street address KIC, 5 Sidon Street, North End, Port Elizabeth

GAUTENG

JOHANNESBURg

Tel 01 226 4600/4687, *Fax* 01 226 4602

Postal address Private Bag X11, Crown Mines, 2092

Street address Planet Avenue, Crown Mines, Johannesburg

PRETORIA

Tel 012 327 3500, *Fax* 012 327 0086

Postal address Private Bag X11, Crown Mines, 2092

Street address cnr. DF. Malan and Struben Streets, Marabastad, Pretoria West

KWAZULU-NATAL

Tel 031 817 0000, *Fax* 031 817 0034

Postal address PO Box 208, Durban 4001

Street address 137 Moore Road, Glenwood, Durban

LIMPOPO

Tel 015 534 5510

Street address 8 Harold St, Musina

WESTERN CAPE

Tel 021 650 3775

Postal address PO Box 348, East London, 5200

Street address 5th Floor, Customs House Bldg, Foreshore, Cape Town

LAWYERS FOR HUMAN RIGHTS

CAPE TOWN LAW CLINIC

Tel 021 650 3775

Street address 4th floor Poyntons Building, 24 Burg Street, Cape Town

DURBAN LAW CLINIC

Tel 031 301 0531, *Fax* 031 301 0538

Street address 20 Diakonia Avenue (formerly St. Andrews St), Durban

JOHANNESBURG LAW CLINIC

Tel 011 339 1960, *Fax* 011 339 2665

Street address 2nd Flr Braamfontein Centre, 23 Jorrisen Street (cnr Jorrisen & Jan Smuts), Braamfontein

MUSINA LAW CLINIC

Tel 015 534 2203, *Fax* 015 534 3437

Street address 18 Watson Avenue, Musina

PRETORIA LAW CLINIC

Tel 012 320 2943, *Fax* 012 320 2949/320 7681

Street address Kutlwanong Democracy Centre, 357 Visagie St, Pretoria

UPINGTON LAW CLINIC

Tel 054 331 2200, *Fax* 021 331 2220

Postal address PO Box 1877, Upington 8800

Street address Rooms 1 0 – 1 1 Rivercity Centre, corner Scott and Hill Streets, Upington

LEGAL RESOURCES CENTRE

See Courts and Police

THE TRAUMA CENTRE: RETURNED EXILES AND REFUGEE PROJECT

Tel 021 465 7373, *Fax* 021 462 3143

Street address Cowley House, 126 Chapel Street, Woodstock, Cape Town

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

Tel 012 354 8346, *Fax* 012 3548390

email unhcrrsa@wn.apc.org

Postal address PO Box 12506, Tramshed 0126

Street address 8th floor Metropark Building, 351 Francis Baard Street, Pretoria

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Chapter 3: Democracy, government and public participation

NATIONAL PARLIAMENT

Keep yourself informed about what is going on in Parliament through the media, the internet or reading Hansard.

Hansard is a complete record of everything said in the National Assembly and the National Council of Provinces (NCOP).

PUBLIC PARTICIPATION & INFORMATION SECTION OF PARLIAMENT (CAPE TOWN)

Tel 021 403 2911, *Fax* 021 403 6019

email info@parliament.gov.za

Website www.parliament.gov.za

Street address 14th Floor, Parliament Towers, 103-107 Plein Street, Cape Town

PROVINCIAL PUBLIC PARTICIPATION

Most provincial legislatures have a public participation division that provides information on how to participate in the provincial legislature.

Visit your provincial legislature website for contact details:

Eastern Cape: www.ecprov.gov.za

Free State: www.fsl.gov.za

Gauteng: www.gautengonline.gov.za

KwaZulu-Natal: www.kwazulunatal.gov.za

Limpopo: www.limpopo.gov.za

Mpumalanga: www.mpumalanga.gov.za

Northern Cape: www.northern-cape.gov.za

North West: www.nwpl.gov.za

Western Cape: www.wcpp.gov.za

Chapter 4: Local Government

For information on local government visit the website www.gov.za (*click on local government*)

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION (SALGA)

Website www.salga.org.za

NATIONAL OFFICE

Tel 012 369 8000, *Fax* 012 369 8001

Postal address PO Box 2094, Pretoria 0001

Street address Menlyn Corporate Park Block B, 175 Corobay Avenue (corner Garsfontein & Corobay), Waterkloof Glen ext11, Pretoria

EASTERN CAPE

Tel 043 727 1150, *Fax* 043 727 1156/67

Postal address P.O. Box 19511, East London 5214

Street address 1st Floor Suite 3, Berea Terrace Office Building, East London

FREE STATE

Tel 051 447 1960, *Fax* 051 430 8250

Postal address PO Box 14, Bloemfontein 9300

Street address 36 McGregor Street, East End, Bloemfontein

GAUTENG

Tel 01 276 1150, *Fax* 01 276 3636/7

Postal address PO Box 32161, Braamfontein 2017

Street address 3rd Flr, Braampark Forum 2, 33 Hoof St, Braamfontein

KWAZULU-NATAL

Tel 031 361 1236, *Fax* 031 361 1234

Postal address PO Box 1525, Durban 4000

Street address 4th Floor Clifton Place, 19 Hurst Grove, Musgrave, Durban

LIMPOPO

Tel 015 291 1400, *Fax* 015 291 1414

Postal address Private Bag 9523, Polokwane, Limpopo 0966

Street address 127 Marshall Street, Polokwane, Limpopo

MPUMALANGA

Tel 013 752 1200, *Fax* 013 752 5595

Postal address PO Box 1693, Nelspruit 1200

Street address Salga House, 1 Van Rensburg Street, Nelspruit

NORTHERN CAPE

Tel 053 836 7900, *Fax* 053 833 3828

Postal address PO Box 3183, Kimberley 8300

Street address Block Two, Montrio Corporate Park, 10 Oliver Road, Monument Heights, Kimberley

NORTH WEST

Tel 018 462 5290, *Fax* 018 462 4662

Postal address PO Box 1286, Klerksdorp 2570

Street address Room 400, Jade Square, Corner OR Tambo & Margaretha Prinsloo Streets, Klerksdorp

WESTERN CAPE

Tel 021 469 9800, *Fax* 021 418 2709

Postal address P.O. Box 185, Cape Town 8000

Street address 7th Floor, 44 Adderly Street, Cape Town

EDUCATION & TRAINING UNIT

For training on local government and publications

Tel 01 648 9430/1, *Fax* 01 648 2054

Fax2email 086 685 81 0 *email* edutrain@iafrica.com *Website* www.etu.org.za

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Chapter 5: Courts and police

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Tel 012 315 1111, *Fax* 012 357 1112

Postal address Private Bag X81, Pretoria 0001

Street address Momentum Centre, 329 Pretorious Street (cnr Pretorious & Sisulu Streets), Pretoria

Website www.justice.gov.za

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID))

NATIONAL OFFICE

Tel 012 399 0000, *Fax* 012 326 0408

Postal address Private bag X941, Pretoria 0001

Street address City Forum Building, 114 Madiba St, Pretoria

email complaints@icd.gov.za

Website www.icd.gov.za

EASTERN CAPE

Tel 043 706 6500, *Fax* 043 706 6526

Postal address Private bag X7491, King Williams Town 5600

Street address Mezzanine Floor, Permanent Bldg, 4244 Oxford St (cnr. Oxford & Terminus St) East London 5200

FREE STATE

Tel 051 406 6800, *Fax* 051 430 8852

Postal address Private bag X20708, Bloemfontein 9300

Street address Ground Floor, Standard Bank Bldg, 15 cnr Andrew & West Burger Sts, Bloemfontein

GAUTENG

Tel 011 220 1500, *Fax* 011 333 2705

Postal address Private bag X25, Johannesburg 2000

Street address 20th Flr, Marble Towers Bldg, 208-212 Jeppe St, Johannesburg

KWAZULU-NATAL

Tel 031 310 1300, *Fax* 031 305 8214

Postal address Private bag X54303, Durban 4000

Street address 3rd Floor, The Marine Building

22 Dorothy Nyembe Street (Gardiner St) Durban

LIMPOPO

Tel 015 291 9800, *Fax* 015 295 3409

Postal address Private Bag X9525, Polokwane 0700

Street address 2nd Flr, Femnic Bldg, 66 A Market St, Polokwane

MPUMALANGA

Tel 013 754 1000, *Fax* 013 752 2602

Postal address Private bag X11325, Nelspruit 1200

Street address 2nd Flr, Nedbank Centre, 48 Brown St, Nelspruit

NORTHERN CAPE

Tel 053 807 5100, *Fax* 053 832 5615

Postal address Private bag X6105, Kimberley 8301

Street address 39 George St, Kimberley

NORTH WEST

Tel 018 397 2500, *Fax* 018 381 1495

Postal address Private bag X2017, Mafikeng 2745

Street address 1st Floor, Molopo Shopping Centre, 1 Station Road, Mafikeng 2745

WESTERN CAPE

Tel 021) 941 4800, *Fax* 021 949 3196

Postal address Private bag X9173, Cape Town 8000

Street address 1st Flr, Fintrust Building, cnr Petrusa & Mazzur Streets, Bellville 7530

ORGANISATIONS

Lawyers for Human Rights

See Migration & Refugee Problems

Legal Aid Board

Tel 011 877 2000

Legal aid advice 0800 110 110

Ethics Hotline 0800 204 473 toll free

Street address 29 De Beer Street, Braamfontein, Johannesburg

Email communications2@legal-aid.co.za

Website www.legal-aid.co.za

Students for law and Social Justice (SLSJ)

Volunteer legal services

Website www.slsj.org

Legal Aid Justice Centres

Alexandra	011	786 3603
Aliwal North	051	633 2579
Athlone	021	697 5252
Benoni	011	845 4311
Bloemfontein		051 447 9915
Butterworth	047	401 3800
Caledon	028	212 1815
Cape Town	021	426 4129
Colesberg	051	753 2280
Durban	031	304 3290/0100
East London	043	704 4700
Empangeni	035	792 4949
Ermelo	017	819 7291
Garankuwa	012	700 0595
Germiston	011	825 7836
George	044	802 8600
Germiston	011	825 7836
Grahamstown	046	622 9350
Graaf Reinet	049	807 2500
Groblersdal	013	262 4769
Johannesburg		011 870 1480
Kimberley	053	832 2348
King Williamstown	043	604 6600
Klerksdorp	018	464 3022
Kroonstad	056	216 4800
Krugersdorp	011	660 2335
Ladysmith (KZN)		036 638 2500
Lichtenburg	018	632 7600
Lydenburg	013	235 9940
Mafikeng	018	384 4261
Makhado	015	519 1100
Middelburg	013	243 5964
Modimolle (Nylstroom)	014	717 4977
Mthatha	047	501 4600
Nelspruit	013	753 2154
Newcastle	034	312 3423
Phuthaditjhaba		058 713 4953
Pietermaritzburg		033 394 2190

Piet Retief	017	826 4567
Pinetown	031	710 2700
Polokwane	015	291 2429
Port Elizabeth		041 408 2800
Port Shepstone		039 688 9600
Potchefstroom		018 293 0045
Pretoria	012	401 9200
Queenstown	045	807 3500
Rustenburg	014	565 5704
Secunda	017	634 8532
Soweto	011	988 9011
Stellenbosch	021	882 9221
Uitenhage	041	991 1811
Umlazi	031	918 8100
Upington	064	337 9200
Venda	015	962 6268
Vereeniging	016	421 3527
Verulam	032	533 2654
Vredendal	027	201 1030
Vryburg	053	927 0145
Vryheid	034	989 8300
Welkom	057	357 2847
Witbank	013	656 5290
Worcester	023	348 4040

LEGAL RESOURCES CENTRE

NATIONAL OFFICE

Tel 011 836 9831, *Fax* 011 834 838 4876

Postal address P.O. Box 9495, Johannesburg 2000

Street address 15th & 16th Flrs, Bram Fischer Towers, 20 Albert St, Marshalltown, Johannesburg

Website www.lrc.org.za

Constitutional Litigation Unit

Tel 011 836 9831, *Fax* 011 834 834 4273

Postal address P.O. Box 9495, Johannesburg 2000

Street address 15th & 16th Flrs, Bram Fischer Towers, 20 Albert St, Marshalltown, Johannesburg

CAPE TOWN

Tel 021 481 3000, *Fax* 021 423 0935

Postal address PO Box 5227, Cape Town 8000

Street address 5th Floor, Greenmarket Place, 54 Shortmarket Street, Cape Town

DURBAN

Tel 031 301 7572, *Fax* 031 304 2823

Street address N240 Diakonia Centre, 20 St. Andrews Street, Durban

GRAHAMSTOWN

Tel 046 622 9230, *Fax* 046 622 3933

Postal address P.O. Box 932, Grahamstown 6140

Street address 116 High Street, Grahamstown

JOHANNESBURG

Tel 011 836 9831, *Fax* 011 834 4273

Postal address

P.O. Box 9495, Johannesburg 2000

Street address 15th & 16th Flr, Bram Fischer Towers, 20 Albert St, Marshalltown, Johannesburg

UNIVERSITY LEGAL AID CLINICS

The following universities have legal aid clinics. Check in your telephone directory for the contact number.

North West University, Mahikeng;

University of Cape Town

University of KZN, Durban

University of KZN, Pietermaritzburg

University of the North

University of Free State

Limpopo University

North West University, Potchefstroom

Nelson Mandela Metropolitan University

University of Pretoria

University of Johannesburg

Rhodes University

University of South Africa

University of Stellenbosch

University of Western Cape

University of Witwatersrand

University of Zululand

Chapter 6: Labour law

DEPARTMENT OF EMPLOYMENT AND LABOUR

Website www.labour.gov.za

HEAD OFFICE

Tel 012 309 4000, *Fax* 012 320 2059

Postal address Private Bag X117, Pretoria 0001

Street address Laboria House, 215 Francis Baard Street, Pretoria

EASTERN CAPE

Tel 043 701 3000, *Fax* 043 701 3297

Postal address Private Bag X9005, East London 5200

Street address Laboria Bldg, 3 Hill Street (cnr Oxford & Hill Streets) East London

FREE STATE

Tel 051 505 6200, *Fax* 051 447 9353

Postal address PO Box 522, Bloemfontein 9300

Street address 43 Maitland Street, Bloemfontein

GAUTENG (JOHANNESBURG)

Tel 011 853 0300, *Fax* 011 497 3076

Postal address PO Box 4560, Johannesburg 2000

Street address 77 de Korte Street, Braamfontein, Johannesburg

GAUTENG (PRETORIA)

Tel 012 317 – 7800,

Fax 012 320-6597/8, 012 320 6600/2

Postal address Private Bag X176, Pretoria 0001

Street address 239 Metro Park Building, 351 Fran-cis Baard Street, Pretoria

KWAZULU-NATAL

Tel 031 366 2000, *Fax* 031 307 1933
Postal address PO Box 940, Durban 4000

Street address 11th Floor, Royal Building, 267 Anton Lembede (Smith Street), Durban

LIMPOPO

Tel 015 290 1744, *Fax* 015 290 1740

Postal address Private Bag X9512, Polokwane 0700

Street address Old Boland Bank Building, 42A Schoeman Street, Polokwane

MPUMALANGA

Tel 031 655 8700

Postal address Private Bag X 7263 Witbank 1035

Street address Labour Building, cnr Hofmeyer Street and Beatty Avenue, Witbank

NORTHERN CAPE

Tel 053 838 1500, *Fax* 053 832 4798

Postal address Private Bag X5012, Kimberley 8300

Street address Corner Compound and Pniel Roads, Kimberley

NORTH WEST

Tel 018 387 8100, *Fax* 018 384 2745

Postal address Private Bag X2040, Mmabatho 2735

Street address Provident House, University Drive, Mmabatho

WESTERN CAPE

Tel 021 441 8000, *Fax* 021 441 8137

Postal address PO Box 872, Cape Town 8000

Street address Wesbank Bldg, cnr Riebeeck & Long Streets, Cape Town

COMMISSION FOR CONCILIATION, MEDIATIONA AND ARBITRATION (CCMA)

HEAD OFFICE

Tel 011 377 6650/6600, *Fax* 011 834 7351

Street address CCMA National Office, 28 Harrison St, Johannesburg

email info@ccma.org.za

Website www.ccma.org.za

EASTERN CAPE

East London

Tel 043 743 0826, *Fax* 043 743 0810

Postal address Private Bag X9068, East London 5200

Street address Cnr. Church & Oxford St, East London 5201

email el@ccma.org.za

Gqeberha Tel 041 505 4300, *Fax* 041 586 4410/4585

Postal address

Private Bag X 22500, Gqeberha, 6001

Street address CCMA House, 107 Govan Mbeki Avenue, Gqeberha

email pe@ccma.org.za

FREE STATE

Bloemfontein

Tel 051 441 1700, *Fax* 051 448 4468/9

Postal address Private Bag X20705, Bloemfontein 9300

Street address CCMA House, cnr Elizabeth & West-Burger Streets, Bloemfontein

GAUTENG

Ekurhuleni

Tel 011 845 9000, *Fax* 011 421 4723/48

Postal address Private Bag X23, Benoni 1500

Street address CCMA Place, cnr Woburn & Rothsay St, Benoni

email ekurhuleni@ccma.org.za

Johannesburg

Tel 011 220 5000,

Fax 011 220 5101, 0861 392 262

Postal address Private Bag X 96, Marshalltown 2107

Street address CCMA House, 20 Anderson Street, Johannesburg *email* johannesburg@ccma.org.za

Pretoria

Tel 012 317 7800,

Fax 012 392 9702, 012 320 4633/04

Postal address Private Bag X176, Pretoria 0001

Street address Metro Park Bldg, 351 Francis Baard Street, Pretoria *email* pta@ccma.org.za

KWAZULU-NATAL

Durban

Tel 031 362 2300

Fax 031 368 7387, 031 740 74633/04

Postal address Private Bag X54363, Durban 4000

Street address 6th & 7th Floors Embassy House, 199 Anton Lembede (Smith Street), Durban

email kzn@ccma.org.za

Newcastle

Tel 034 328 2400, *Fax* 034 312 5964

Postal address Private Bag X6622, Newcastle 2940

Street address 71 Scott Street, Newcastle *email* kzn@ccma.org.za

Pietermaritzburg

Tel 033 328 5000, *Fax* 033 345 9790

Street address 3rd Floor Gallway House, Gallway Lane, Pietermaritzburg

Port Shepstone

Tel 039 688 3700/3702, *Fax* 039 684 1771

Postal address Private Bag X 849, Port Shepstone 4240

Street address The Chambers, 68 Nelson Mandela Drive, Port Shepstone

LIMPOPO

***Tel* 015 287 7400, *Fax* 015 297 1649**

Postal address Private Bag X9512, Polokwane 0700

Street address 104 Hans van Rensburg Street, Polokwane

MPUMALANGA

Tel 013 656 2800, *Fax* 013 656 2885/6

Postal address Private Bag X7290, eMalahleni, 1035

Street address CCMA House, Eadie Street, eMalahleni

MBOMBELA

Tel 013 752 2155, *Fax* 013 753 3835/2785

Street address 7th Floor, Sanlam Centre Building, 25 Samora Machel, Mbombela

email wtb@ccma.org.za

NORTHERN CAPE

Tel 053 831 6780, *Fax* 053 831 5947/8

Postal address Private Bag X6100, Kimberley 8300

Street address CCMA House, 1A Bean Street, Kimberley

NORTH WEST

Matlosana

Tel 018 487 4600, *Fax* 018 462 4126/4053

Postal address

Private Bag X5004, Matlosana 2571

Street address 47–51 Siddle St, Matlosana

Rustenburg

Tel 014 591 6400, *Fax* 014 592 5236

Postal address Private Bag X82104, Rustenburg 0300 *Street address*

1st Floor Sanlam Centre, Old Sanlam Building, 43–45 Boom St, Rustenburg

WESTERN CAPE

Cape Town

Tel 021 469 0111,

Fax 021 465 7193/97/87, 021 462 5006

Postal address Private Bag X9167, Cape Town 8000

Street address CCMA House, 78 Darling Street, Cape Town *email* ctn@ccma.org.za

George

Tel 805 7700, *Fax* 044 873 2906

Postal address Private Bag X9167, Cape Town 8000

Street address 2 Cathedral Square, 63 Cathedral St, George 6529

UNEMPLOYMENT INSURANCE FUND

Contact your nearest Department of Employment and Labour office

REGISTRATION OF COOPERATIVES

For information on how to start and register a cooperative see the following Websites:

CIPRO www.cipro.co.za

DTI www.dti.gov.za

SEDA www.seda.org.za

Telephone the Department of Trade & Industries (DTI) call centre on 0861 843 384 and choose the option for Cooperatives

DEPARTMENT OF TRADE & INDUSTRY

Tel 0861 843 384, *Fax* 0861 843 888

Postal address Private Bag X84, Pretoria 0001

Street address 77 Meintjies Street, Sunnyside, Pretoria

COIDA

Compensation Commissioner

HEAD OFFICE

Tel 0860 105 350

Fax 012 326 1570, 012 357 1772

Postal address PO Box 955, Pretoria 0001 *Website* www.wcomp.gov.za

Forms are available from the labour department

ORGANISATIONS

Centre for Applied Legal Studies

Tel 011 717 8654, *Fax* 011 403 4321

Postal address Wits University, Private Bag 3, Wits 2050

Email postmaster@crls.org.za

Western Cape

Tel 021 883 8032/3, *Fax* 021 886 5076

Postal address PO Box 1169, Stellenbosch 7599

Street address 38 George Blake Ave, Plankenburg

email crls@crls.org.za

Website www.crls.org.za

CONGRESS OF S.A. TRADE UNIONS (COSATU)

HEAD OFFICE

Tel 011 339 4911, *Fax* 011 339 5080/6940

Postal address P.O. Box 1019, Johannesburg 2000

Street address Cosatu House, 110 Jorissen Street, corner Simmonds, Johannesburg

Website www.cosatu.org.za

LABOUR RESEARCH SERVICES

Cape Town

Tel 021 447 1677, *Fax* 021 447 9244

Postal address P.O. Box 376, Woodstock 7915

Street address 7 Community House, 41 Salt River Road, Salt River, Cape Town

Email lrs@lrs.org.za

Website www.lrs.org.za

Legal Resources Centre

See Legal Resources Centre

NATIONAL ECONOMIC, DEVELOPMENT AND LABOUR COUNCIL (NEDLAC)

Johannesburg

Tel 011 328 4200, *Fax* 011 447 6053 / 2089

Postal address PO Box 1775, Saxonwold 2132

Street address 14A Jellicoe Ave, Rosebank 2196 *Website* www.nedlac.org.za

info@nedlac.org.za

Instagram: *Nedlac*

X: *@nedlac*

TRADE UNION LIBRARY AND EDUCATION CENTRE

Cape Town

Tel 021 447 7848

Postal address PO Box 376, Salt River 7848

Street address Community House, 41 Salt River Road, Salt River

Pension Funds Adjudicator

NATIONAL

Tel 0800 111 667 free call

Fax 0800 00 77 88 free fax

Postal address P.O. Box 580, Menlyn 0063

Street address 4th Floor, Block A, Riverwalk Office Park,

41 Matroosberg Road, Ashlea Gardens, Pretoria

email enquiries@pfa.org.za

Website www.pfa.org.za

Chapter 7: Social grants

DEPARTMENT OF SOCIAL DEVELOPMENT

Tel 012 312 7500, *Fax* 011 447 6053/2089

Grant and fraud hotline 0800 601 011 toll free

Street address HSRC Building, 134 Pretorius St, Pretoria 0001

Website www.dsd.gov.za

South African Social Security Agency (SASSA)

NATIONAL

Tel 012 400 2000, *Fax* 012 400 22577

Street address SASSA House, Prondisa Bldg, Cnr Biko & Pretorius Streets, Pretoria 0001

Website www.sassa.gov.za

EASTERN CAPE

Tel 043 707 6460, *Fax* 043 707 6480

Postal address Private Bag X9001, Chiselhurst, East London 5200

Street address BKB Building, cnr Fitzpatrick and Merino Roads, Quigney

email GrantsEnquiriesEC@sassa.gov.za

FREE STATE

Tel 051 410 0804/5, *Fax* 051 409 0862

Postal address Private Bag X20553, Bloemfontein 9300

Street address African Life Building, 75 Andrews St, Bloemfontein

email GrantsEnquriesFS@sassa.gov.za

GAUTENG

Tel 011 241 8300, *Fax* 011 241 8305

Postal address

Private Bag X120, Marshalltown 2170

Street address 28 Harrison St, Johannesburg

email GrantsEnquiriesGP@sassa.gov.za

KWAZULU-NATAL

Tel 033 846 3300, *Fax* 033 846 9595
Postal address

Private Bag X9146, Pietermaritzburg 3201

Street address 1 Bank St, Pietermaritzburg

email GrantsEnquiriesKZN@sassa.gov.za

LIMPOPO

Tel 015 291 7400, *Fax* 015 291 7996

Postal address Private Bag X9677, Polokwane 0700

Street address 43 Landros Mare St, Polokwane 0699

email GrantsEnquiriesLIM@sassa.gov.za

MPUMALANGA

Tel 013 752 5400, *Fax* 013 752 5109

Postal address

Private Bag X11230, Nelspruit 1200

Street address 18 Ferreira Street, Nelspruit

email GrantsEnquiriesMP@sassa.gov.za

NORTHERN CAPE

Tel 053 802 4900, *Fax* 053 831 4038

Postal address Private Bag X6011, Kimberley 8300

Street address Du Toitspan Building, 95-97 Du Toitspan Road, Kimberley

email GrantsEnquiriesNC@sassa.gov.za

NORTH WEST

Tel 018 388 0060, *Fax* 086 611 9740

Postal address Private Bag X44, Mmabatho 2735

Street address Master Centre, Industrial Mafikeng

email GrantsEnquiriesNW@sassa.gov.za

WESTERN CAPE

Tel 021 469 0200, *Fax* 021 469 0260

Postal address Private Bag X9189, Cape Town 8000

Street address Golden Acre, Adderley St, Cape Town

email GrantsEnquiriesWC@sassa.gov.za

ORGANISATIONS

Lifeline & Childline

Lifeline 086 132 2322, 021 461 1111

Childline 080 005 5555, 021 461 1114

Gender Violence 0800 150 150

HIV/Aids 0800 012 322

Tel 011 715 2000, *Fax* 01 715 2001

Postal address P.O. Box 32201, Braamfontein 2017

Street address 8th Flr, North City House, cnr Melle & Jorrisen Street, Braamfontein 2001

Website www.lifeline.org.za

NATIONAL INSTITUTE FOR CRIME PREVENTION AND REHABILITATION OF OFFENDERS (NICRO)

Tel 021 462 0017, *Fax* 21 462 2447

Postal address P.O. Box 7905, Caledon Square7905

Street address 1 Harrington St, Cape Town8001 *Website* www.nicro.org.za

Bloemfontein	051	435 5193
Cape Town	021	422 1690
Durban	031	309 8333
East London	043	722 4123
Kimberley	053	831 1715
Nelspruit	013	755 3540
Pietermaritzburg	033	345 4425
Port Elizabeth	041	582 2555
Pretoria	012	326 8111

Local organisations

Having up-to-date lists of the local organisations in each area is useful. We have suggested some categories of organisations (see below).

A good place to start collecting local addresses is from your local Lifeline *resource directory.*

Association for the Physically Disabled Child and Family Welfare Society Church welfare programmes Disabled People South Africa Funding Agencies

Health care: day hospitals, clinics, psychiatric services

Nutritional programmes

People Living with HIV and Aids

(and local support groups)

Treatment Action Campaign (TAC)

Chapter 8: Family law AND Chapter 9: Gender-based violence

CHILD PROTECTION UNIT, SAPS

Look in the back of the telephone directory under SAPS, under Government

RAPE CRISIS

Observatory

Tel 021 447 1467, *Fax* 021 447 5458

Counselling line 021 447 9762

Postal address P.O. Box 46, Observatory7936

email info@powa.org.za

Website www.rapecrisis.org.za

Athlone

Tel 021 684 1180, *Fax* 021 447 637 9432

Counselling line 021 633 9229

Khayelitsha

Tel 021 361 9228, *Fax* 021 361 0529

Counselling line 021 361 9085

RURAL WOMEN'S MOVEMENT

Tel & Fax 031 579 4559

Postal address PO Box 1326, Hilton, Pietermaritzburg 3245

Street address 38 Valley Road, Sea Cow Lake, Durban 4001

email ruralwomensmovement@gmail.com

CHILD AND FAMILY WELFARE SOCIETY

Look in the telephone directory for large towns

COMMISSION FOR GENDER EQUALITY

See Commission for Gender Equality

DIVORCE COURT CENTRES

North Eastern Divorce Court Tel 031 332 9034

Central Divorce Court Tel 011 639 0311

Southern Eastern Divorce Court Tel 043 642 2842

FAMSA (FAMILY COUNSELLING)

JOHANNESBURG

Family Life Johannesburg

Tel 011 788 4784/5

email familylife@iafrica.com

CAPE TOWN

Tel 021 447 7951

email famsa@famsawc.org.za

NICRO

See Social Welfare

People Opposing Women Abuse

Tel 011 642 4345/6, *Fax* 011 484 3195

Postal address P.O. Box 2143, Johannesburg 2000

email info@powa.org.za

Website www.powa.org.za

WOMEN'S LEGAL CENTRE

Tel 021 424 5660

Street address 7th Flr Constitution House, 124 Adderley St (cnr Church St), Cape Town

Website www.wlce.co.za

Chapter 10: HIV/AIDS and TB

DEPARTMENT OF HEALTH

Tel 012 395 8000/9000, *Fax* 012 395 9019

24-hour HIV/AIDS helpline in all 11 official languages 0800 012 322

Website www.doh.gov.za

Lifeline manages the AIDS helpline for the Department of Health. Anyone with any questions on HIV or AIDS can call the helpline.

ORGANISATIONS

AIDS CONSORTIUM

Tel 011 403 0265, *Fax* 011 403 2106

Postal address P.O. Box 31104, Braamfontein 2017

Street address 1st Flr, Block 1 Omnipark, 66 Sailor Malan Avenue, Aeroton

email info@aidsconsortium.org.za

AIDS LEGAL NETWORK

Tel 021 447 8435, *Fax* 021 447 9946

Postal address P.O. Box 13834, Mowbay 7705

Street address Suite 6F, Waverley Business Park,Dane Street, Mowbay Cape Town 7700

Email alncpt@aln.org.za

Website www.aln.org.za

SECTION 27

Tel 011 356 4100

Street address Unit 6, 6th Flr, Braamfontein Centre, 23 Jorissen St, Braamfontein 2001

Website www.section27.org.za

COUNCIL FOR MEDICAL SCHEMES

Website www.medicalschemes.com

Health Professions Council of South Africa (HPCSA)

Tel 012 338 9300, *Fax* 012 328 5120

Postal address The Registrar, Health Professions Council of South Africa, P.O Box 205, Pretoria 0001

Street address Cnr Hamilton and Madiba Streets, Arcadia, Pretoria

LIFELINE

See Lifeline and Childline

RAPE CRISIS

See Rape Crisis

SOUTH AFRICAN NATIONAL TUBERCULOSIS ASSOCIATION (SANTA)

Tel 011 454 0260, *Fax* 011 454 0097

Postal address Private Bag X 10030, Edenvale 1610

Street address Unit 37, Hingham Office Park, Boe-ing Road, East Bedfordview, Johannesburg

email info@santa.org.za

Website www.santafoundation.org.za

Eastern Cape

Tel 046 622 7720, *Fax* 046 622 3984

Gauteng

Tel 011 454 0260, *Fax* 011 454-0096

Kwazulu-Natal

Tel 031 208 8474, *Fax* 031 208 8473

Mpumalanga

Tel 017 712 6854, *Fax* 017 712 6854

Northern Cape

Tel 053 631 1499, *Fax* 053 631 1499

Western Cape

Tel 021 715 8901, *Fax* 021 715 8908

TREATMENT ACTION CAMPAIGN (TAC)

Tel 021 422 1700, *Fax* 021 422 1720

Postal address PO Box 2069, Cape Town 8001

Street address 3rd Floor, Westminster House, 122 Longmarket St, Cape Town 8001

Visit the Website for contact details of TAC offices in all the provinces.

email info@tac.org.za

Website www.tac.org.za

Chapter 11: Land and Housing

DEPARTMENT OF LAND REFORM AND RURAL DEVELOPMENT

(Note that in July 2024 the Department of Agriculture, Land Reform and Rural Development was split into two government departments, the Department of Agriculture and the Department of Land Reform and Rural Development. Check the updated website for the Department of Land Reform and Rural Development)

Website www.dalrrd.gov.za

For more details on where to find the provincial offices, go to the Department of Land Reform and Rural Development website and click 'where to find us'.

NATIONAL CALL CENTRE

Tel 0800 007 095

COMMISSION ON RESTITUTION OF LAND RIGHTS

Tel 012 312 8882, *Fax* 012 321 0428

Postal address Private Bag X 833, Pretoria 0001

Street address Department of Land Reform and Rural Development, 184 Cnr. Jacob Mare & Paul Kruger St, Pretoria

Website: www.dalrrd.gov.za (Note that in July 2024 the Department of Agriculture, Land Reform and Rural Development was split into two departments., the Department of Agriculture and the Department of Land Reform and Rural Development. Check the updated website for the Department of Land Reform and Rural Development).

Land Claims Commissioner

HEAD OFFICE

Tel 012 312 9244, *Fax* 012 321 0428

Postal address Private Bag X833, Pretoria 0001

REGIONAL OFFICES

Eastern Cape 043 700 6006

Free State 053 807 5700

Northern Cape 051 403 0700

Gauteng 012 310 6620

North West 018 392 3080

KwaZulu-Natal 033 355 8531

Limpopo 015 284 6301

Mpumalanga 013 755 8100

Western Cape 021 409 0312

DEPARTMENT OF HUMAN SETTLEMENTS

Call centre 0800 146 873

Mon – Fri 6 a.m – 10 p.m

Fax 012 341 8512

Fraud & Corruption 0800 701 701

Postal address DHS Private Bag X644, Pretoria, 0001

Street address Govan Mbeki House, 240 Justice Mahomed Street, Sunnyside, Pretoria

email info@dhs.gov.za

Website www.dhs.gov.za

DEVELOPMENT BANK OF SOUTH AFRICA

Tel 011 313 3911, *Fax* 011 313 3086

Postal address PO Box1234, Halfway House 1685

Street address Headway Hill, 1258 Lever Road, Midrand *Website* www.dbsa.org

LAND CLAIMS COURT

Tel 011 781 2291, *Fax* 011 781 2217/2218

Postal address Private Bag X10060, Randburg 2125

Street address Randburg Mall, Trust Bank Centre, cnr Kent Ave & Hill St, Johannesburg

Website www.justice.gov.za/lcc/

ORGANISATIONS

CENTRE FOR RURAL LEGAL STUDIES

Tel 021 883 8032/3, *Fax* 021 886 5076

Postal address PO Box 1169 Stellenbosch 7599

Street address 39 George Blake Ave, Plankenbrug, Stellenbosch

email crls@crls.org.za

Website www.crls.org.za

DEVELOPMENT ACTION GROUP

Tel 021 448 7886, *Fax* 021 447 1987

Street address 101 Lower Main Rd, Observatory, Cape Town 7925

email dag@dag.org.za

Website www.dag.org.za

SURPLUS PEOPLE'S PROJECT

Tel 021 448 5605, *Fax* 021 448 0105
Postal address P.O. Box 468, Athlone 7760

Street address 2nd Flr, 266 Lower Main Road, Salt River 7925

email spp@spp.org.za

Website www.spp.org.za

PLANACT

Tel 011 403 6291,

Fax 011 403 69812, 086 567 1239

Postal address P.O. Box 30823, Braamfontein 2017

Street address 28 Juta St, Braamfontein *email* info@planact.org.za *Website* www.planact.org.za

LOCAL GOVERNMENT

Look under Municipality in the telephone directory

Chapter 12: Environmental law

DEPARTMENT OF FORESTRY, FISHERIES AND ENVIRONMENT

Tel 012 399 9000

Postal address Private Bag X447, Pretoria 0001

Street address 472 Steve Biko St, Arcadia

email call centre@environment.gov.za

Website www.dffe.gov.za

ENVIRONMENTAL MONITORING GROUP

Tel 021 448 2881, *Fax* 021 448 2922

Postal address P.O. Box 13378, Mowbray 7705

Street address 10 Nuttal Road, Observatory, Cape Town

Email info@emg.org.za

Website www.emg.org.za

Chapter 13: Consumer law

BLACK SASH

Black Sash's publication on the National Credit Act, Debit and Credit: A reference guide for paralegals, can be freely downloaded from their website: www.blacksash.org.za.

ORGANISATIONS

Institutions which protect peoples' rights about debt and credit:

COUNCIL FOR DEBT COLLECTORS

If the consumer wants to check whether a debt collector is registered and whether the debt collector's behaviour was appropriate.

Tel 012 804 9808, 012 804 8483, 012 804 3402 *Fax* 012 804 0744

Postal address PO Box 836, Silverton 0127

Street address Ground Flr, Rentmeester Park, West wing, 74 Watermeyer St, Val de Grace, Pretoria

Website www.debtcol-council.co.za

CREDIT INFORMATION OMBUDSPERSON

If consumers feel they have been incorrectly or unfairly negatively listed by a credit bureau. Email them for general enquiries on credit information matters. Use their website for general information.

Tel 0861 662 837, *Fax* 086 683 4644

Postal address Post Suite 123, Private Bag X10015, Randburg 2125

Street address Fernridge Office Park, 5 Hunter St, Ferndale, Randburg

email ombud@creditombud.org.za
Website www.creditombud.org.za

NATIONAL CONSUMER COMMISSION

Tel 012 761 3000/3400,

Toll free 0860 00 3600 *Fax* 086 758 4990

Postal address Private Bag X33, Highveld 0169

email complaints@thencc.org.za

Website ncc@thedti.gov.za

NATIONAL CONSUMER TRIBUNAL

If a consumer is dissatisfied with the way in which the dispute was resolved by the NCR.

Tel 012 683 8140, *Fax* 012 663 5693

Postal address Private Bag X 110, Centurion 0046

Street address Ground Flr, Block B, Lakefield Office Park, 272 West Ave (cnr West and Lenchen North), Centurion

email registry@thenct.org.za

Website www.thenct.org.za

NATIONAL CREDIT REGULATOR (NCR)

If the consumer needs help with calculating interest rates on credit agreements, interpreting contracts, verifying the registration of credit providers or debt counselors, or wants to report a dispute with a credit provider.

Street address 127, 15th Road, Randjespark, Midrand

Tel 0860 627 627 / 011 554 2700

email complaints@ncr.org.za

Website www.ncr.org.za

THE INDUSTRY AND COMPETITION SMME

Tel 0861 843 384

SOUTH AFRICAN NATIONAL CONSUMER CONSUMER UNION (SANCU)

Tel 012 428 7122, *Fax* 012 086 672 8585

Postal address PO Box 27852, Sunnyside 0132, Pretoria

Chapter 14: Small business law

SOUTH AFRICAN REVENUE SERVICES (SARS)

Contact Centre (local callers) 0800 00 7277

Contact Centre (international callers)

+11 602 2093

Fraud and Anti-Corruption Hotline 0800 00 2870

Website www.sars.gov.za

National eFiling email address for specific eFiling enquiries eFilingAssist@sars.gov.za

Follow call-back options 1-6

Email or fax one of the four SARS *dedicated mail centres:*

CENTRAL SOUTH AFRICA

Taxpayers residing in Gauteng South (including Midrand, the greater Johannesburg area, Kempton Park, Boksburg, Vereeniging and Springs), the Free State and Northern Cape, please use:

email Contact.central@sars.gov.za *Fax* 010 208 5005

EASTERN SOUTH AFRICA

Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London) please use:

email Contact.east@sars.gov.za

Fax 031 328 6018

NORTHERN SOUTH AFRICA

Taxpayers residing in Gauteng north (including Centurion and Pretoria), North West, Mpumalanga and Limpopo, please use:

email Contact.north@sars.gov.za *Fax* 012 670 6880

SOUTHERN SOUTH AFRICA

Taxpayers residing in the Eastern Cape (south of East London) and the Western Cape please use:

email Contact.south@sars.gov.za

Fax 021 413 8905

SARS Guide for VAT Vendors

Download the publication from the SARS *website* www.sars.gov.za

Department of Employment and Labour

Tel 012 309 4000 Fax 0866889835

Postal address Private Bag X117, Pretoria 0001

Street address Laboria House, 215 Francis Baard Street, Pretoria *email* webmaster@labour.gov.za

Website www.labour.gov.za

MINISTER'S OFFICE CAPE TOWN

Tel 021 466 7160, *Fax* 021 462 2832

Postal address Private Bag X 9090, Cape Town 8000

Street address Room 1207, 12th Flr, 120 Plein Street, Cape Town *email* webmaster@labour.gov.za

MINISTER'S OFFICE PRETORIA

Tel 012 392 9620, *Fax* 012 320 1942

Postal address Private Bag X499, Pretoria 0001

Street address Laboria Bldg, 215 Francis Baard Street, Pretoria

email webmaster@labour.gov.za

For information on UIF, Compensation and Skills Development Levy contact your nearest Labour Centre. Visit www.labour.gov.za/contacts/Labour%20Centres

ORGANISATIONS

THE SMALL ENTERPRISE DEVELOPMENT AGENCY (SEDA)

SEDA is the *Department of Trade and Industry*'s agency for supporting small businesses in South Africa. They provide information on microfinancing and microlending.

Tel 012 441 1000

Business Information Centre 0860 103 703

Postal address P.O. Box 56714, Arcadia 0007

Street address The DTI Campus, Block G, 77 Meintjies St, Sunnyside, Pretoria

email info@seda.org.za

Website www.seda.org.za

SMALL ENTERPRISE FUNDING AGENCY

Call centre 012 748 9600

Street address Eco Fusion 5, Building D, 1004 Teak Close, Witch Hazel Avenue, Highveld, Centurion

email helpline@sefa.org.za

THUSONG SERVICE CENTRES

A one-stop service centre providing information and services to communities

Website www.thusong.gov.za

Eastern Cape 043 722 2602

Free State 051 448 4504

Gauteng 011 834 3560

KwaZulu-Natal 031 301 6787

Limpopo 015 291 4689

Mpumalanga 013 753 2397

Northern Cape 053 832 1378/9

North West 021 421 5070

Western Cape 0800 007 081

Chapter 15: Education and schools

DEPARTMENT OF BASIC EDUCATION

NATIONAL

Tel 012 357 4026/4036, *Fax* 012 323 5989

Postal address Private Bag X603, Pretoria 0001

Street address Room TF1062, Sol Plaatjie House, 222 Struben Street, Pretoria

Website www.education.gov.za

Provincial

EASTERN CAPE

Tel 040 608 4200

Postal address Superintendent General: Education, Private Bag X 0032, Bisho 5605

Street address Steve Vukile Tshwete Education Complex, Zone 6, Zwelitsha

Website www.ecdoe.gov.za

FREE STATE

Tel 051 404 8000

Postal address
Superintendent General: Education, Private Bag X 20565, Bloemfontein 9300

Street address 55 Elizabeth St, FS

Provincial Government Building,

Bloemfontein

Website www.fsdoe.fs.gov.za

GAUTENG

Tel 011 355 0000

Postal address
Superintendent General: Education, Private Bag X 7710, Johannesburg 2000

Street address
111 Commissioner Street,

Johannesburg *Website*

www.education.gpg.gov.za

KWAZULU-NATAL

Tel 033 846 5000

Postal address
Superintendent General: Education, Private Bag X 9137, Pietermaritzburg 3200

Street address 247 Burger Street, *Pietermaritzburg*

Website www.kzneducation.gov.za

LIMPOPO

Tel 015 290 7611

Postal address Superintendent General: Education, Private Bag X 9489, Polokwane 0700

Street address cnr 113 Biccard & 24 Excelsior Streets, Polokwane *Website* www.edu.limpopo.gov.za

MPUMALANGA

Tel 013 766 5000

Postal address Superintendent General: Education, Private Bag X 11341, Nelspruit 1200

Street address Building No. 5, Government Boulevard, Riverside Park, Mbombela *Website* www.mpumalanga.gov.za/education

Northern Cape

Tel 063 839 6500

Postal address Superintendent General: Education, Private Bag X 15029, Kimberley 8300

Street address 09 Hayston Road, Harrison Park

Website ncedu.ncape.gov.za

NORTH WEST

Tel 018 388 2562 / 2564

Postal address Superintendent General: Education, Private Bag X 15029, Kimberley 8300

Street address 2nd Flr Executive Block, Garona Building, Mmabatho

Website www.nwdesd.gov.za

WESTERN CAPE

Tel 021 467 2000

Postal address Superintendent General: Education, Private Bag X 15029, Kimberley 8300

Street address Grand Central Towers, cnr Darling and Lower Plein Streets, Cape Town

Website http://wced.pgwc.gov.za/

EDUCATION RIGHTS PROJECT (ERP)

A project of the WITS Education Policy Unit

ERP booklets available online on the rights of learners and educators.

Tel 011 717 3076, *Fax* 011 717 3029

Postal address Private Bag X 3, Wits University 2050 *Website* www.erp.org.za

EDUCATION LAW PROJECT (ELP)

ELP booklet: School fees: Your Rights available online on the website

Tel 011 717 8600, *Fax* 011 717 1702

Postal address Centre for Applied Legal Studies (CALS), Private Bag 3, Wits University 2050

Website www.law.wits.ac.za/cals

Chapter 17: Paralegal skills and establishing an advice centre

ORGANISATIONS

BLACK SASH

National Office

Tel 021 686 6952

Helpline 072 663 3739 or

063 610 1865

Street address 189 Imam Haron Road, Claremont, Cape Town 7708

email info@blacksash.org.za

Website www.blacksash.org.za

Regional offices

Western Cape

Tel 021 686 6952

Street address 189 Imam Haron Road, Claremont, Cape Town, 7708

Kwa-Zulu Natal

Tel 031 301 9215

Street address Diakonia Center, 20 Diakonia St, Durban 4001

email kznro@blacksash.org.za

Eastern Cape

Tel 041 487 3288

Street address 105 Main Road, Walmer, Gqeberha, 6070

email ecro@blacksash.org.za

Gauteng

Tel 011 834 8361

Street address 62 Marshall Street, 8th Floor, Khotoso House, Johannesburg, 2001

email gro@blacksash.org.za

LEGAL AID BOARD

See Legal Aid Board

LEGAL AID JUSTICE CENTRES

See Legal Aid Justice Centres

LEGAL RESOURCES CENTRE

See Legal Resources Centre

LEGAL SUPPORT SERVICES

FOR NON-PROFIT ORGANISATIONS

This project provides support to non-profit organisations on how to establish, register, and administer nonprofit organisations.

It also provides legal support services to community-based advice offices.

Tel 011 810 238 5651

Street address 16th Flr, Bram Fischer Towers, 20 Albert St, Marshalltown Johannesburg 2001

email info@mott.org

Website www.lrc.org.za

To register under the NPO Act

Send your application for voluntary registration under the NPO Act *to:*

Postal address NPO Directorate, Department of Social Development, Private Bag X901, Pretoria 0001

Street address HSRC Bldg,134 Pretorius St, Pretoria 0001

Tel 012 312 7500

email Npoenquiry@dsd.gov.za

Website www.dsd.gov.za/npo

REGISTRAR OF COMPANIES

Tel 012 310 9791

Postal address Companies Registration Office, PO Box 429, Pretoria 0001

Website www.ciproza.co.za

THE CENTRE FOR CONFLICT RESOLUTION

For training in conflict resolution

WESTERN CAPE

Tel 021 689 1005, *Fax* 021 689 1003

Street address Coornhoop, 2 Dixton Road, Obser-vatory, Cape Town 7925

email mailbox@ccr.uct.ac.za

Website www.ccr.org.za

THE SOUTH AFRICAN NGO COALITION (SANGOCO)

NATIONAL OFFICE

Tel 011 403 7746, *Fax* 011 403 4966

Provinces in south africa:

www.commonwealthofnations.org/info/provinces-in-southaftrica/

GAUTENG

Tel 012 429 6040, *Fax* 012 420 2316

KWAZULU-NATAL

Tel 031 307 1061, *Fax* 031 306 2261

LIMPOPO

Tel 018 381 4901, *Fax* 018 381 6258

NORTHERN CAPE

Tel 027 712 3011, *Fax* 027 712 1212

Publications

Community Organisers Toolbox. Education and Training Unit www.etu.org.za:

Non-profit Organisations Law and Practice Manual. Legal Resources Centre

LEGAL DICTIONARY

This is a list of words that will be useful for you as a paralegal. We have tried to choose words that you may generally come across in working with the law, and words that are used a lot in this manual.So you will not find all the difficult words that are used in the manual in this dictionary. Words that you can find elsewhere in this dictionary are in *italics*.

Accessible – open, available, easy to get to

Accrual system – this applies to marriages after November 1984 that are out of *community of property*; all income and assets that are gained during the marriage will be shared equally if there is a divorce

Accused – a person charged with a crime

Act – a law made by parliament

Acting for – representing, a lawyer taking on a case for you

Action, civil – a case made by someone against another person or institution to claim money for damages or losses; also called *civil claim* or *suing*

Action, criminal – a case made by the state to punish someone who has committed a crime; also called a *criminal charge/case* or *prosecution*

Acquitted – found not guilty

Ad hoc – committee (or decision) for this purpose only

Admissible – allowed as *evidence* in a court case

Admission – saying you did something or you know something without admitting guilt

Admission of guilt – admitting guilt for a small crime and paying a fine instead of going to court e.g. traffic fine

Advocate – a lawyer who specialises in court work; also called counsel

Affidavit – a written statement that is sworn to be the truth in front of a *commissioner of oaths*; can be used as *evidence* in court

Affirm – swear in court that you will speak the truth, without swearing to God in the usual way

Agent – a person who is *authorised* to represent someone else

Aggravating factors – things that will cause you to get a heavier sentence, e.g. *previous convictions*, causing bad injuries

Albeit – if

Alibi – your witness who can say you were doing something else at the time of the crime

Alien – a person who is not a citizen of the Republic of South Africa

Alleged / Allegation – when something has not yet been proved in court

Alternatively – or

Annuity – what you pay to an insurance company every year

Ante-nuptial contract – a *contract* made before marriage to say what will happen to the property and possessions of the couple if they divorce

Anticipate – expect

Appeal – asking a higher court or authority to overrule the judgment, sentence or decision of a lower court or authority

Appear – be in court

Appellant – the person or institution making an appeal

Applicant – a person, a CC, a company or an institution who applies for something. For example, a person or institution that applies to the court for an *interdict* or *court order*. If a CC fills in a form to be registered for VAT, it is applying to be registered and is called the applicant. If you apply for a disability grant, you are called the applicant.

Apropos – to do with

Arbitration – people who have a disagreement agree to use a third person to hear the case and to make a decision

Argument – summing up at the end of a case, done by *prosecutor* and *defence* to state the strength of their case

Articled clerk – see *candidate attorney*

Assessor (court) – someone who helps a judge in the High Court

Assessor (property) – a person who is registered to decide what something is worth

Assets – property that you own, for example houses, cars, furniture, linen, books, money in the bank and insurance policies, that can be used to pay your debts

Assurance – making payments as insurance on your life

Attach property – to seize someone's property when they owe money, after getting a court order

Attorney – a lawyer who works in a law firm

Attorney-client privilege – whatever a *client* tells an *attorney* is secret and cannot be told to anyone else without the client's permission

Attorney-General – see *Director of Public Prosecutions*

Authorise / Authority – to give/have permission or power to do something

Awaiting trial prisoner – being held in a police station or a prison between the time of arrest and the court case or bail hearing

Bail – money paid by the *accused* to the court so s/he can go free until the trial which will decide whether they are guilty or not

Balance of probabilities – the amount of proof that you need to win a *civil action*; when you weigh up the two sides in the civil action, you have to show that your story is stronger than the other side's story on a balance of probabilities

Bar Council – you can make a complaint to this body that controls advocates

Bargaining Council – a body in an industry where workers and employers make agreements on wages and working conditions

Beneficiary – someone who gets money or property in a will as an *heir* or *legatee*

Benefit society – a society that offers *insurance* against illness, unemployment, etc.

Bequest – a *legacy*, something left to someone in a will

Beyond reasonable doubt – the amount of *proof* needed for someone to be guilty in a criminal trial; the case has to be proved beyond reasonable doubt – there must be no doubt at all

Bill of Rights – a list of rights and freedoms for all people living in a country, which is

part of the law of that country; South Africa has a Bill of Rights in our Constitution

Bona fide – in good faith, believing that you are doing something you have a right to do

Breach of contract – breaking the terms agreed on in a *contract*

By-law – law made by a local authority

Candidate attorney – someone with a law degree who works for a law firm for two years before qualifying as an *attorney*; used to be called an *articled clerk*

Capacity – see *legal capacity*

Case-docket – file opened by police when investigating a crime

c.f. – compare with

Chambers – the offices where advocates work

Charge-sheet – the document in the Magistrate's Court that lists all the crimes that someone is charged with

Children's Court – special court at Magistrate's Court that decides cases affecting the welfare of children

Citizen's arrest – when you arrest someone that you see committing a serious crime or you have a good reason for thinking was involved in a serious crime, e.g. murder, rape, theft

Civil action/claim – claiming money through the civil court from a person who caused you harm

Civil union – legal recognition of a marriage or civil partnership between two persons regardless of their sexual orientation or gender identity but may only be registered by two civil union partners who would not otherwise be allowed by law to marry each other under the Marriage Act or Recognition of Customary Marriages Act

Clerk of the Court – official in Magistrate's Court who receives and *issues* legal papers

Client – the person you give advice to or act for as a *paralegal* or *attorney*

Commission of Enquiry – government- appointed investigation, often headed by a judge

Commissioner – person who decides cases in the *Small Claims Court*; also used as abbreviation for Commissioner of Oaths, Commissioner of Inland Revenue, Compensation Commissioner, and so on

Commissioner of Oaths – person in front of whom an affidavit can be sworn, e.g. police, ministers, postmasters, bank managers

Common cause – what is agreed by all parties

Common law – laws not made by parliament that have been around for centuries, for things like murder, theft, assault, etc.

Community of property – all the possessions of a married couple are shared between them

Community Service Order – doing a sentence of community service in the community instead of going to prison

Compensation – money that a court orders you must be paid for damages or losses you suffered; money paid from the Compensation for Occupational Injuries and Diseases Fund

Complainant – a person who makes a *criminal charge* against someone else at a police station

Comprehensive Insurance – general *insurance* covering matters like personal injuries, fire, theft and damage to property

Confession – admitting that you committed a crime

Consensus – agreement which everyone is satisfied with

Consent – giving your permission or agreement to something

Consultation – meeting between lawyer and client

Contempt of Court – breaking a *court order* or showing disrespect for the court, e.g. swearing at the magistrate

Contract – written or verbal agreement between people

Conveyancer – lawyer specialising in property transfers

Conviction – found guilty of a crime by a court

Correctional supervision – a conditional release from prison, similar to *parole* and *probation*, where you are released and monitored by someone called a Correctional Official

Correspondent – local lawyer used by law firm from another town

Costs / Legal costs – expenses of a legal action

Counsel – *advocate*, lawyer who appears in court

Court order – an official order by a judge telling someone to do something or to stop doing something

Credit – when someone is allowed to buy things and pay them off later

Credit agreement – a written *contract* about how money owed will be paid off

Creditor – person money is owed to

Criminal charge / case / action – court case against someone who committed a crime

Criminal record – list of all the crimes you have been found guilty of; also called *previous convictions*

Cross-examination – chance for the other side in a court case to ask you questions about your evidence

Custody (arrest) – being held in police or prison cells

Custody (of children) – day-to-day care and control of a child who lives with you

Customary African law – the indigenous laws of African tradition

Customary union / marriage – marriage according to African customary law

Damages – money claimed for loss, harm or pain suffered

Debt – money which one person or institution owes another; for example, *Sarah owes Petrus R100 and she owes Thandi R200, so she has debts of R300*

Debt collection – collecting of money owed

Debt counsellor– a person who is trained and registered to assist consumers who may have become over-indebted as a result of entering into credit agreements

Debtor – person who owes money

Deed of sale – written sale agreement for the sale of land or houses

Deed of transfer – certificate of the transfer (handing over) of land or houses; proof of ownership of the land or house

Deeds office – government office where ownership of land is recorded

De facto – real or actual

De novo – new

Default judgment – judgment given against someone in a civil claim when they do not come to defend themselves

Defective goods – goods that have something wrong with them

Defence – legal reason to explain or excuse what you did, e.g. you hit someone because you were provoked

Defence / Defence counsel – lawyer or team of lawyers defending someone in a criminal case

Defendant – the person against whom a *civil claim* is made

Delict – a civil wrong done by one person against another, which might lead to a *civil action*

Demarcation – setting a limit, drawing a line between

Dependant – someone who is financially dependent on another person, e.g. a child on a parent

Deponent – person who makes an *affidavit*

Deposit – money paid when you buy something on credit

Deputy-Sheriff – court official who delivers legal *documents* in a High Court case

Deregulation – removing labour laws and regulations to make it easier to work or set up a business in an area or sector

Derogate – take away from

Detainee – person held in prison or police cells

Determine – decide

Desist – stop

Director of Public Prosecutions – boss of all the *state prosecutors* in a region, who decides about who should be charged in criminal cases

Disburse – pay or pay out

Discharge – court case being stopped because of a lack of *evidence*

Discovery – a legal procedure to get someone to show you what documents they have in their possession

District Courts – ordinary Magistrate's Courts in each big town

District Surgeon – doctor employed by the state to gather medical *evidence* for court cases, to treat prisoners, to give the public injections, etc

Divorce Courts – courts where people can go to have divorce cases resolved more cheaply and quicker

Documents / Documentary evidence – legal papers which could also be used as *evidence* in court

Domiciled – living somewhere permanently

Duress – force or pressure

Estate – all the things and money that belonged to a person who has died

Evidence – information, including *statements* and *documents*, that is used as proof in a court case

Ex officio – arising out of or by virtue of a job or position, e.g. all police are ex officio *peace* officers

Ex parte application – a very urgent court *application* that is done verbally without written papers or without going through all the usual procedures (e.g. giving the other side a chance to get to court)

Ex post facto – afterwards or later

Excess – the first part of the claim that an insured person has to pay; for example, *out of a R1 000 claim, the insured pays R200 and the insurance company the other R800*

Exculpatory statement – a *statement* to the police where you state your innocence or you don't make any *admissions*

Executor – the person who sorts out the affairs of a dead person

Expert / Expert witness – someone who has specialist knowledge of something and who could be called to court to give evidence on this

Express terms – things written down or spoken in a contract

Expropriate – the state taking over land and paying the owner for the loss

Final order – when the court makes a final order, it replaces any previous (interim) *court orders*

Finance charges – payments made for using someone else's money, e.g.interest

Finding – decision of a court or a *Commission of Enquiry*

Foreclose – selling property to get back a loan made under a mortgage

Foster grant – money to pay for things like food, clothes and education for a child that has been entrusted to you by the state because her/his own parents do not look after the child

Fraud – the crime of lying or deceiving in a way that causes harm to someone else

Fraudulent misrepresentation – lying on purpose

Freehold – the right to buy and own property (land, house or buildings)

Friendly society – a society for insurance against sickness, etc.

Further particulars – asking the other side to give you more details about the charge or the allegations in a criminal or civil case

Garnishee order – when the court orders people who owe the consumer money to pay the credit provider who is owed money, instead of the consumer. A garnishee order also allows the credit provider to take money that the consumer expects to receive from, for example, an inheritance

Guarantee – a promise that things bought are in good condition

Guardian – a person who has legal *authority* over a child

Hearsay evidence – something you heard from someone else

Heir – a person who inherits from a will

High Court – higher court than Magistrate's Court, for serious cases or cases involving large amounts of money

Hire purchase agreement – see *Instalment Sales Agreement*

Identity parade – where you try to point out someone to be charged in a criminal case

Illegal – against the law, breaking the law

Immoveable property – property that you cannot move like land, houses and other buildings

Implied terms – things in a *contract* that are understood between the two sides even though they are not written down or spoken

In-camera – a hearing or court case without members of the public present

In lieu of – instead of or in the place of

Income tax – tax on the money you get from employment or property

Indemnity – when the law says you cannot make a case against someone even though they have done something wrong

Indictment – the paper in the High Court listing all the crimes someone is charged with

Inquest – *judicial* investigation into whether any person or group of people was responsible for the death of someone who did not die of natural causes

Insolvency – bankruptcy, when you owe more money than you have in money or possessions; when a person does not have enough assets to pay their *debts*, the court will say that the person is insolvent and appoint someone to manage the insolvent person's affairs

Instalment – money paid by a buyer each week or month

Instalment Sales Agreement – a *contract* where the buyer pays off the price of something in instalments, and the seller usually stays the owner until the last instalment has been made

Instruct / Instructions – telling someone, e.g. a lawyer, what to do

Insurance – protecting yourself against loss by making certain payments

Inter alia – among other things

Interdict – a *court order* to protect someone or to force someone to do something

Interest – money charged to you when you borrow money; money you earn when you lend money e.g. when you keep your money in a bank account you are lending the bank the money

Interim order – a *court order* that is temporary (for the time being) and not final

Intestate – dying without a will

Invoice – a paper saying what was sold and what it cost

Ipso facto – by / through that fact

Issue / Issuing – when the court official puts the official stamp on a document

Judgment – decision made by judge or magistrate

Judicial – to do with the courts

Junior counsel – an ordinary or junior *advocate*, who assists a senior, more

experienced advocate in a court case

Jurisdiction – the powers and functions of a court or other institution

Justices of the Peace – senior public officials who are given powers by the government to keep the peace and to perform certain tasks in an area, e.g. magistrates, *state advocates*, lieutenants or higher ranks in the SAPS or SANDF

Juvenile – under the age of 18

Juvenile Courts – special courts at the Magistrate's Court which decide cases where the accused is a juvenile

Labour Court – court where workers can make a case against their employers or employers can make a case against workers

Latent defects – problems or faults in things that you buy that the eye cannot see

Law Society – you can make a complaint to this body that controls the work of *attorneys*

Lawful – done with power given by the law

Lawyer – general name for someone who has a law degree

Lease – *contract* that allows someone to rent the property of another person

Leasehold – the right to rent property for a certain length of time

Legacy – a bequest, something left to someone in a will

Legal – something that the law allows, not breaking the law

Legal aid – state assistance to someone who can't afford a lawyer

Legal Aid Board – you can appeal or make a complaint to this body about legal aid

Legal capacity – ability in law to take legal *action* or to have action taken against you

Legatee – someone who benefits from a *legacy (bequest)* in a will

Legislation – laws passed by parliament

Lessee – a person who rents something from someone else

Lessor – a person who rents something to someone else

Letter of demand – letter demanding payment in a civil claim

Levy – a tax

Liable / Liability – when by law you are responsible for something or owe money; if a person or a company owes someone money, then they are *liable* for paying that money and can be taken to court if they don't pay; if the person owes R1 000, then their *liability* is R1 000

Lien – the right to keep something you have repaired until the owner pays you for the work

Lieu / in lieu of – instead of, in the place of, e.g. salary in lieu of notice

Life policy – *insurance* that gets paid out when someone dies

Liquidation – declaring a company bankrupt

Litigant – a person who takes legal action Litigation – legal action

Lockout – employers keeping workers out of the workplace to force them to come to an agreement

Locus standi – legal standing, the right to bring a case to court, e.g. a child does not have locus standi

Magistrate's Courts – lower courts run by a magistrate

Maintenance – money paid by a parent to the person looking after his/her children e.g. by the father to mother if he does not live with her and his children; also money paid to a divorced wife by her ex-husband

Maintenance Court / Officer – place and person for sorting out maintenance problems at the Magistrate's Court

Mala fide – something done in bad faith, not in the way or in the spirit it should be done

Malicious – when someone causes harm or damage on purpose

Marriage (civil) – registered marriage that took place in front of a magistrate or a minister of certain religions

Marriage (common law) – living together without being legally married

Matter – case or legal problem

Means test – test used to decide whether someone is poor enough to get *legal aid* or state grants

Mediation – using a go-between to help sort out a disagreement between people

Messenger of the Court – court official who delivers court papers in the Magistrate's Court

Minor – person under 18

Misrepresentation – making a false or incorrect statement

Mitigation / Mitigating factors – reasons why someone who has been found guilty of a crime should get a light sentence

Mortgage / Mortgage bond – signing away part of your house as *security* for a loan; if you do not pay back the loan, the house can be sold to pay back the money

Mutatis mutandis – with the necessary changes

Negligent / Negligence – not being careful enough

Negotiation – when people who have a disagreement talk to each other to try and sort it out

No-claim bonus – a discount given in insurance payment if no claims have been made for a long time

Nolle prosequi – the certificate that the *Director of Public Prosecutions* writes when he/she decides not to prosecute someone

Notary public – an *attorney* who specialises in certifying or drawing up legal documents

Notice (civil claim) – special kind of *letter of demand*, e.g. in cases against the police, where you demand payment by a certain date

Notice (work) – period of advance warning that someone gets before being dismissed from work

Notice of intention to defend – after a *summons* is served on someone in a *civil claim*, they can send back a paper to say they will defend themselves against the claim

Notice of motion – a paper sent by the *applicant* in an interdict or other court *application* to the person against whom the case is made, to let them know

Oath – swearing that something is the truth

Offence – crime

Oral evidence – telling your story in court

Order of court – see *court order*

Ordinance – law made by a provincial council

Out-of-court settlement – see *settlement*

Paralegal – a person without a law degree who has legal skills, knowledge and experience

Parole – being released from prison on condition that you do not misbehave

Particulars of claim – a *document* in which the legal grounds for a *civil claim* are set out

Party – one of the sides or people involved in a court case or legal dispute

Peace Officers – public officials who through their job have certain powers to keep the public peace, e.g. the power of all members of the SAPS to arrest or search you

Peace Order – an official letter from a magistrate to someone warning them that if they do not stop certain behaviour, they will be arrested and charged, e.g. to a man who is beating a woman

Pending – being held over or waiting for, e.g. pending a decision

Pension fund – fund which usually when you retire immediately pays you out one third of what you have paid in and two thirds over the rest of your life

Per se – in itself

Perjury – lying under *oath* in court or in a sworn *statement*

Place of Safety – a home for children who have no-one to look after them

Plaintiff – the person who makes a civil claim

Plea / Plead – saying 'guilty' or 'not guilty' to charges in a criminal case;also stating your *defence* in a *civil action*

Pleadings – *documents* in *civil actions* where the *parties* set out their cases

Pointing out – showing the police some place, person or thing; a kind of *evidence* that can be used against you in court

Post-mortem – medical examination of dead body to find cause of death

Power-of-attorney – a legal *document* you sign giving someone else the right to do certain things for you, e.g. collect your wages

Precedent – example or standard that can be used or followed in future

Premium – amount paid each year for *insurance*

Prescribe / Prescription period – time limit before a case falls away

Previous convictions – see *criminal record*

Prima facie – at first sight, as it looks at first

Prisoner's Friend – Magistrate's Court official who can help you with matters like getting money to pay for *bail* or fines

Private prosecution – a special kind of *criminal case* you can make when the *Director of Public Prosecutions* decides not to *prosecute* someone

Privatisation – where the government sells public services to private owners, e.g. telephone and electricity supplies

Pro deo counsel – see *Public Defenders*

Probation – a trial period where people, often *juveniles*, have a chance to prove that they can behave

Probation Officer – person, usually a social worker, who has to make sure that someone on probation behaves themselves

Procedural – to do with procedures and process rather than the content of something

Professional Assistant – fully qualified *attorney* who works in a law firm, but who is not a partner in the firm

Profit – all the money a business gets in minus all the money the business spends on costs; for example, *Busy Bees pre-school looks after 30 children. The parents each pay R50 per month to Busy Bee. The pre-school therefore gets 30 times R50, which is R1 500 (the turnover). There are two teachers, who are paid R450 each per month. Other monthly costs are electricity and water - R10; cooldrink and bread for the children - R200; and crayons and paper - R100.* All the costs together add up to R1 210. The profit is worked out by taking the R1 500 turnover *and subtracting the R1 210 costs. The profit is therefore R290 per month.*

Proof – enough *evidence* to win or at least to make a good case

Prosecute / Prosecution – bringing a case against someone accused of breaking the law

Prosecutor – see *state prosecutor*

Provident fund – a fund which usually pays you out all your pension money immediately as a lump sum

Provisional taxpayer – someone who owns a business or earns more than R1 000 profit every year must register as a provisional taxpayer with the South African Revenue Services; this means that you pay all your tax 2 or 3 times a year

Provisions – rules made by a law

Public Defender – government-employed lawyers who have the job of defending people who can't afford lawyers in *criminal cases*

Public Protector – a public official appointed by the government to investigate complaints of corruption and *unlawful* actions by government officials or civil servants

Quid pro quo – one thing for another, exchange

Rebates – amounts taken off the tax you have to pay

Re-examination – the time after *cross-examination* in a court case when your lawyer gets a chance to ask you some more questions

Receipt – paper to prove money was paid or to claim back things taken away from you

Recognition agreement – a *document* signed by employers saying that a union is allowed to organise their employees; also contains agreements on *retrenchments*, disciplinary procedure, etc.

Reformatory – a special kind of prison for *juveniles*

Regional Courts – higher Magistrate's Courts in large towns or cities that have more powers than *District* (Magistrate's) *Courts*

Registrar – court official at the High Court, responsible for *issuing* documents and setting dates for cases

Regulation – a law made by a government minister who is given the *authority* to do so

Reinstatement – re-employing a dismissed worker

Retrenchment – an employer cutting down on his/her workforce by paying off workers

Remand – postpone

Remission – time taken off a prison sentence for good behaviour

Repossession – taking back goods sold on credit if instalments are not paid on time

Respondent – person against whom an *application* (including an interdict), or an *appeal*, is made

Restrain – to stop

Return day – the date when a court *application* (including an *interdict*) will come back to court for a decision or for the next step to be taken; also called a *rule nisi*

Review – higher court looking at decisions made by lower courts or authorities, to see if anything was done wrongly, e.g. correct procedures were not followed

Roadworthy certificate – a *document* saying a vehicle is fit to be driven

Rule nisi – see *return day*

Sectional title – ownership of part of a building or block of flats

Security – being a *surety* or cover for someone, especially to pay money

Self-incrimination /Right against self-incrimination – the right to stay silent and not to say things that can be used against you in court

Senior Counsel – a senior *advocate* who will work with a junior advocate in a court case

Sequestration – the process for declaring someone bankrupt or *insolvent*

Serve / Service – when official court documents are delivered to you and you have to sign to say you have received them

Servitude - right to use land that belongs to someone else without paying rent

Set aside – to cancel

Settlement – an agreement between *parties* in a *civil claim* to accept what is offered and to stop the court case

Sine die – without a date; when an *application* is postponed without a fixed date being set for when the case will carry on

Sine qua non – essential part or requirement

Small Claims Court – court for civil claims up to R20 000

Solvent – able to pay *debts*

Specific performance – when a court orders someone to do exactly what they promised under a *contract*

Spoliation order – special *court order* to immediately get back something that was taken away from you

Stamp duty – a tax you have to pay on *freehold* property

State advocate – advocate who works in the *Director of Public Prosecutions*' office and who represents the state in court

State prosecutor – person who presents the case against the accused in a *criminal case*; lawyer for the state

State witness – witness used by the *prosecutor* to prove the case against the accused

Statement – a written or verbal account of what happened, which could be used as *evidence* in court

Status quo – the position or situation as it is now, without any change

Statutes – laws passed by parliament; also called *Acts*

Sub judice – being heard in court (usually used to say the media cannot comment on a case because it is still being heard)

Submit / Submission – stating something which is an opinion or *allegation*

Subpoena – official paper used to tell witnesses they must come to court to give *evidence*

Subsidy – a hand-out of money for purchases like housing, usually from the government or an employer

Substantive – to do with the content or substance of something, not the procedures involved

Succession – law dealing with what happens to people's property after they die

Sue / Suing – to claim money through a *civil action* from someone who caused you damage

Summary dismissal – being sacked without notice or notice pay

Summons (civil) – a *document* that contains a demand for money and starts a *civil action*

Summons (criminal) – a *document* calling a person to come to court to stand trial for breaking the law

Supreme Court of Appeal – the highest court in the country (except for the Constitutional Court)

Surety – being a *security* for someone, by paying or being in a position to pay money, e.g. helping with bail; If one person signs a piece of paper saying that they will pay

another person's debt if that person cannot pay the debt, they have stood surety for that person. For example: STANDING SURETY – Vuyiswa owes Paul R500. Nolita signs a piece of paper that *says if Vuyiswa cannot pay Paul the money she owes him, then Nolita will pay Paul the money. Nolita has stood surety for Vuyiswa. If Nolita refuses to pay Paul, he can take her to court*.

Suspended sentence – part of a prison sentence or fine is put off or postponed and will only be imposed if the same crime is committed within a stated time

Sworn statement – a *statement* sworn under *oath*, which is strong *evidence* in court; also called affidavit

Tariff – the lists of what to charge for different kinds of legal work, which lawyers are meant to follow

Tenant – a person who rents property from a landlord/lady

Tenure – way of possessing or occupying, e.g. land tenure

Testate – having a *valid* will

Testator – a person who makes a *valid* will

Testify – give evidence in court

Third-party – someone other than the two *parties* who make an agreement

Third-party insurance – automatic *insurance* for all cars to pay people who are injured in car accidents

Title deed – the legal *document* which shows who owns a property

Transfer duty – the tax you have to pay when land is transferred

Trespass – to go onto or stay on a property without the permission of the owner

Trial – court case

Trial-within-a-trial – a trial held as part of another trial to decide whether certain evidence will be allowed

Turnover – all the money that comes into the business from sales and services, without subtracting the money that is spent on the business, such as wages, materials, and so on. For example: TURNOVER – Busy Bees preschool *looks after 30 children and the parents each pay R50 per month to Busy Bee, so the turnover is 30 times R50, which is R1 500*. (Turnover is different from *profit*. To work out the profit, you subtract the costs from the turnover.)

Vires – beyond the *authority* given by law

Unfair dismissal – where an employer unlawfully fires a worker

Unfair labour practice – employers doing something that the law or the courts say is unfair

Unlawful – outside the powers given by law

Urgent application – applying to the High Court for an urgent *court order* or *interdict*

Usufruct – the right to use and enjoy the fruits of land that belongs to someone else

Valid – well-based or good in law, e.g. a valid claim

Visa – permit to enter a country

Vis-a-vis – to do with Viz. – namely

Voetstoots – just as it is

Wage determination – *regulations* for wages and working conditions in a specific industry or area

Warning / Released on warning – released without *bail* and warned to *appear* on a certain date

Warrant – a *document* issued by a magistrate (or sometimes a police officer of the rank of lieutenant or higher) that permits things like arrests, searches, and evictions

Warrant of Execution – a *document* giving court officials the right to take away certain property to cover your debts

Warranty – see *guarantee*

Will – a signed *document* saying how a person's possessions should be disposed of after they die

Wind up – collect all possessions and money that belong to an estate and pay all the *debts*

Witness – person who saw something and may give *evidence* in a court case

Witness's friend – a person at the Magistrate's Court who *explains* witnesses' rights and pays their transport costs