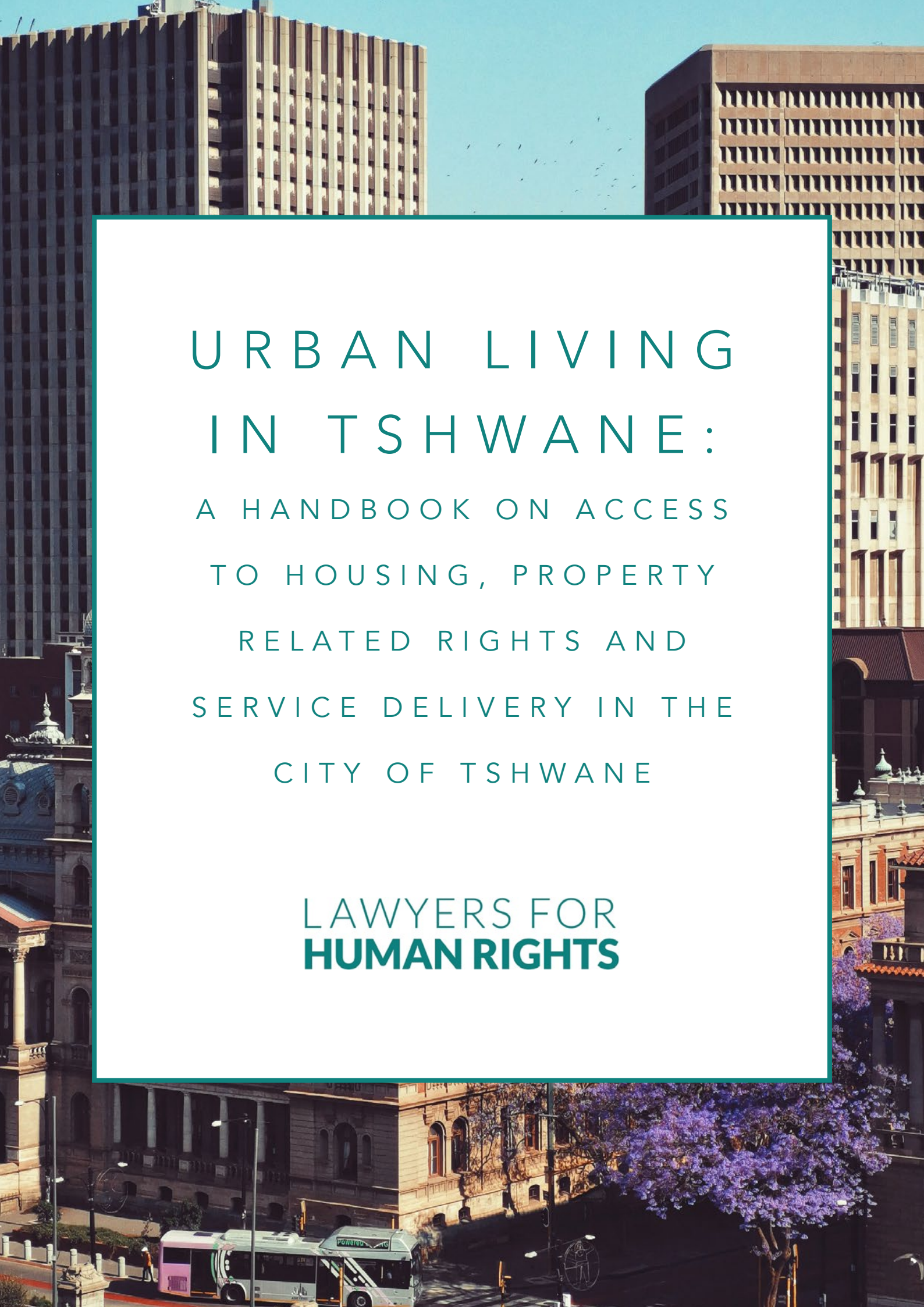

URBAN LIVING IN TSHWANE:

A HANDBOOK ON ACCESS TO HOUSING, PROPERTY RELATED RIGHTS AND SERVICE DELIVERY IN THE CITY OF TSHWANE

LAWYERS FOR HUMAN RIGHTS

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ACKNOWLEDGEMENTS

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AUGUST 2022

INTRODUCTION

The purpose of this handbook is to assist practitioners and community activists working with people facing difficulties with access to housing and/or service delivery in the City of Tshwane. It also aims to assist individuals, households and communities know their property-related rights and the recourses available them.

LHRs mandate is to support the deepening of democracy and the entrenchment in the society of core constitutional values including equality, non-discrimination, and respect for human dignity, as well as to promote the realization of economic, social and cultural rights for all. LHRs' Land and Housing Programme aims to protect the constitutional property rights of all disadvantaged and vulnerable people in South Africa. The programme assists in addressing historical property and land injustices of previously disadvantaged communities in South Africa. The programme has a number of focus areas: evictions, both of large groups and individuals; women and housing; protecting indigent people's property rights; protecting people's security of tenure; and, enabling access to property related basic services.

The right to access adequate housing is contained in section 26 of the Constitution, the provision states that the government is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right. The section also secures people's tenure (the right to occupy a property) by protecting them against arbitrary eviction or demolition. People in urban areas face an array of issues related to property. Access to adequate housing is linked to other rights, which includes equality, dignity, freedom and security, and socio-economic rights.

01 USING THIS HANDBOOK

USING THIS HANDBOOK

This handbook provides a summary of some of the key issues/problems linked to housing and services and what can be done to resolve them. In this regard, it should be seen as an overview, rather than a complete guide. The manual provides direction on how to find more detailed information relevant to issues.

Effectively using the law to resolve problems is not a matter or memorizing information. Rather, two things are critical:

1. Establishing what the problem faced is, and where in the range of rights, laws, regulations and policies it is located. Working though this manual will assist you with this first step.

2. Once you have located the problem, you need to establish the possible solutions that can be pursued. Again, the manual will assist you in this regard, but likely, it will only be the starting point; the manual cannot cover every aspect of the process required. However, the manual should provide a starting point, the key steps, and guidance as to where more detailed information can be obtained.

Establishing exactly what the problem is may not be straightforward. People's lives are complicated, and they may have multiple concerns. It must be established which issues are priority and how it can be dealt with.

LHR seeks to empower individuals as well as practitioners and community activists to help others. It is only in partnership with community leaders that we can address the many problems faced. The manual is here to equip you with an oversight of problems and solutions so that you can take the first steps to resolve the problem relating to yourself or whomever you are assisting.

Simply knowing the law or policy about a particular problem may resolve the problem. Clearly and politely letting the parties to the dispute know what each person's rights are and that there is a procedure for resolving the dispute, through legal channels may be all that is needed for agreement to be reached.

However, if despite explaining the legal rights to the parties in dispute there is no resolution, you will need to take the matter further – the manual is aimed to assist with this. What we hope is that this manual not only empowers you to assist yourself but also equips you to help members of your own and other communities access their rights. The information provided in this handbook does not, and is not intended to, constitute legal advice; instead, all information, content, and materials provided are for general informational purposes.

02
ACRONYMS & DEFINITIONS

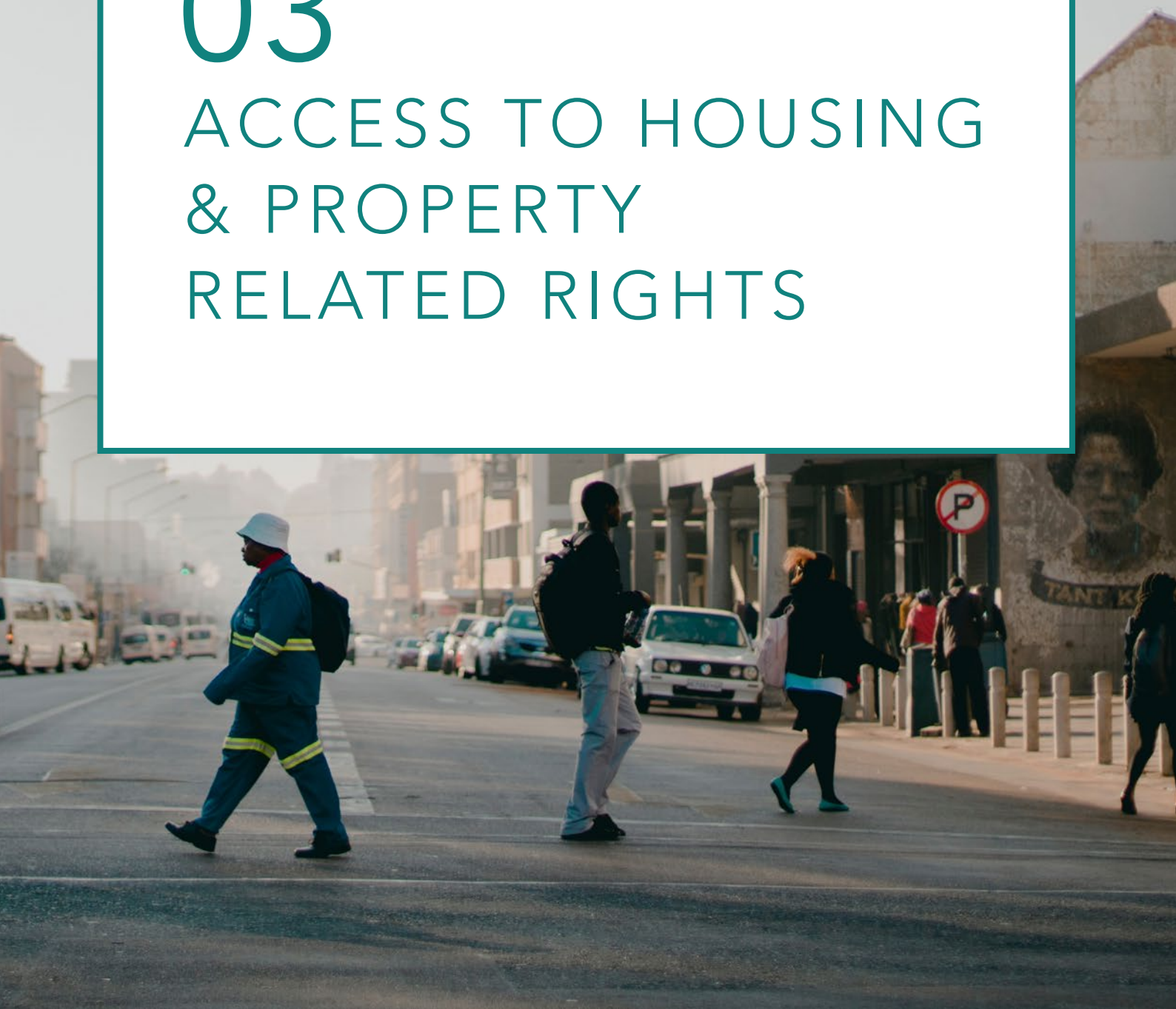
ACRONYMS USED IN THIS HANDBOOK

ESTA	*Extension of Security of Tenure Act* 62 of 1997
LHR	Lawyers for Human Rights
PIE	*Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998
RDP Houses	Government Subsidized Housing
RHA	*Rental Housing Act* 50 of 1999
ULTRA	*Upgrading of Land Tenure Rights Act* 112 of 1991

DEFINITION OF SOME IMPORTANT TERMS

Business days	These are weekdays other than those which fall on public holidays.
Conveyancer	A lawyer specialising in property transfers.
Court days	Weekdays, excluding any public holiday, and excluding the first day on which papers are served.
Dwelling	Any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure that is used for residential purposes.
Erf (plural: erven)	The legal term used to describe a piece of land within a particular settlement as recorded by the Deeds Office.
Eviction	When one or many individuals are removed from a dwelling against their will.
Formalities	The necessary steps and formats required for legal compliance.
Home	The word 'home' is not defined in the Constitution, but its normal meaning is the intention to occupy a dwelling for residential purposes permanently or for a considerable period. This includes informal dwellings constructed by the occupier. It does not include the occupation of premises for business and other non-residential purposes.
Landlord/landowner	Somebody who rents out a property to another person.
Monogamy	A marriage, union or other relationship exclusively between two people.
Permit properties	Often known as 'family houses.' Houses in urban townships in former white areas, for which permits to reside (known as Section 6, 7 or 8 permits depending on what they were granted for) were issued under Regulation 1036 of 1968, drawn up in terms of the *Bantu (Urban Areas) Consolidation Act* 25 of 1945.
Polygamy	A marriage in which a man has more than one wife.
Prescribe	Something prescribes when it can no longer be legally enforced. Many debts prescribe after three years (and so cannot be legally enforced after that date).
Sheriff	The sheriff is an independent official of the courts. They deliver (serve) official court notices in legal cases and execute court orders (such as spoliation orders and evictions).
Statutory body	An organisation set up by an act of parliament. It's powers are as prescribed in the establishing act and any subsequent regulations issues in terms of the act.
Tenant	A person who occupies land or property rented from a landlord/landowner.
Unlawful occupier	A person who occupies land/property without the express or tacit consent of the landlord/landowner, or without any lawful right.

03
ACCESS TO HOUSING & PROPERTY RELATED RIGHTS



ACCESS TO HOUSING

The Constitution recognises the right to adequate housing as an important basic human right, where section 26 provides that:

- The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right
- No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions

The preamble to the *National Housing Act* 107 of 1997 states that housing as adequate shelter, fulfills a basic human need.

This section deals with:

3.1 Tenants' Rights
3.2 The Rental Housing Tribunal
3.3 Evictions
3.4 Nuisance Law
3.5 Housing Programmes
3.6 Transfer of Property
3.7 Women and Housing
3.8 Housing and Customary Law
3.9 The City of Tshwane's Pathways out of Homelessness

3.1 TENANT'S RIGHTS

TENANTS' RIGHTS

A tenant is a person who occupies land or property rented from a landlord/landowner. Tenants should be aware of their rights in order to avoid abuse from the landlord/landowner. In South Africa, the rights and obligations of tenants and landlords/landowners are covered by law.

The *Rental Housing Act* (Act 50 of 1999) (RHA) applies to a lease agreement for housing (i.e. residential/living) purposes between a tenant and a landlord/landowner. The act does not apply to property lease agreements for commercial purposes.

A lease agreement binds both the landlord/landowner and tenant to the terms contained. However, there are duties and obligations that apply to the landlord/landowner and tenant whether there is a lease agreement or not or even if it is not specifically contained in the lease agreement.

THE RIGHTS OF TENANTS IN TERMS OF THE *RENTAL HOUSING ACT*

- In advertising a dwelling for leasing, or in negotiating a lease with a prospective tenant, or during the term of a lease, a landlord/landowner may not unfairly discriminate against such prospective tenant or tenants, or the members of the tenant's household, or the visitors of such tenant, on the grounds of: race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth.

- A tenant has the right, during the lease period, to privacy. The landlord/landowner may only exercise his or her right to inspect the property, in a reasonable manner, and after giving reasonable notice to the tenant.

- The tenant's rights against the landlord/landowner include his or her right not to have:

    - Their person or home searched
    - Their property searched
    - Their possessions seized, except in terms of law of general application and having first obtained an order of court
    - The privacy of their communications infringed

THE LEASE AGREEMENT

It is not a legal requirement that there be a written lease agreement. However it is advisable that there always be one as an unwritten agreement is difficult to prove in the event of a dispute. Section 5(2) of the RHA, requires the landlord/landowner to put the agreement in writing if requested by the tenant. Section 16 of the RHA makes it an offence to fail to comply with such a request and provides for a fine or imprisonment should the lessor fail to do this.

The lease agreement must contain the following:

- Name and address of the tenant and the landlord/landowner
- A description of the dwelling (e.g. house and street number)
- The rental amount, any reasonable escalation of the rent, and any other charges related to the property
- The frequency of rent payment
- The deposit (if any)
- The lease period or if non specified then the required termination notice
- Any reasonable obligations of the tenant or landlord/landowner

The following information must be contained as annexures to the lease agreement:

- A list of defects in the property drawn up by landlord/landowner and tenant when they jointly inspect the property before the tenant moves in
- A copy of any house rules for the property

Section 16 of the RHA makes it an offence to fail to provide this information in the lease agreement and/or annexures and provides for a fine or imprisonment should the lessor fail to do this.

THE DEPOSIT

If the agreement stipulates a deposit, this must be held by the landlord/landowner in an interest bearing account. The deposit must be refunded to the tenant after they vacate the leased property (subject to the conditions listed below). The deposit may be used to cover any amount the tenant owes to the landlord/landowner, including for utilities or damage to the property.

Within a three-day period before the expiry of the lease, the landlord/landowner and tenant should arrange a mutual time to jointly inspect the property.

If no such arrangement is made by the landlord/landowner, it is deemed that there is no damage to the property and the landlord/landowner must return the deposit and interest without any deductions within seven days of the lease expiring.

If the tenant does not response to a request from the landlord/landowner for the joint inspection, then the landlord/landowner should inspect the property within seven days of the lease expiring and assess any damages. The balance of the deposit and interest, after deductions to repair damage, must be returned to the tenant within 21 days of the expiry of the lease.

Should the outgoing inspection determine that the tenant did cause damage (which includes lost keys), the deposit and interest must be refunded, minus the costs of repairs, within 14 days of the lease expiring.

The landlord/landowner must make available for inspection by the tenant receipts covering the costs of repairs.

RENTAL PAYMENTS

- The tenant has a right to receive a receipt for all the money paid to the landlord.
- The tenant has a right to a rental invoice that breaks down the different costs such as rental amount, water, electricity, etc.
- The landlord/landowner cannot increase the rent during the contract period unless there is an escalation clause contained in the rental agreement. An escalation clause in a contract states how and when the rent will increase over the period of the lease.

UTILITIES

The tenant has a right to inspect the landlord's municipal account to verify the charges passed onto them.

CANCELLATION OF LEASE AGREEMENT

Usually a lease agreement is for a fixed period, for example 12 months. The lease comes to an end at the end of the period unless it is renewed or the landlord/landowner continues to accept rent. Section 14(2)(b) the *Consumer Protection Act* allows the tenant to cancel a lease early by giving the landlord/landowner 20 business days' notice in writing.

Under the *Consumer Protection Act* the landlord/landowner may also terminate the lease with 20 business days' notice, but only after giving the tenant written notice of the failure by the consumer to comply with the agreement (such as not paying the rent) and the tenant fails to rectify the failure within the 20-day period.

3.2 THE RENTAL HOUSING TRIBUNAL

WHAT IS THE RENTAL HOUSING TRIBUNAL?

The Rental Housing Tribunal is a statutory body which provides mechanisms to resolve disputes and build positive relationships between landlords/landowners and tenants concerning residential (not commercial) properties. All services of the Rental Housing Tribunal are free.

What can the Rental Housing Tribunal do?

- It can summon a landlord/landowner or tenant to a hearing or mediation.
- It can order a tenant or landlord/landowner to comply with any part of the *Rental Housing Act*.
- Its ruling has the same power as a judgement of the magistrate's court.
- It can impose a fine and/or judgement.

WHAT MATTERS CAN THE TRIBUNAL DEAL WITH?

- Determine a fair rent
- Overcrowding
- Non-payment of rent
- Failure to refund deposit
- Leases that are not in compliance with the law
- Rights and duties of the landlords/landowners and tenants
- Lack of maintenance to the dwelling
- Service cuts-offs (water and electricity) without a court order
- Damage to property
- Harassment and intimidation
- Threats and lock outs
- Evictions without a court order
- Spoliation, attachment orders and interdicts

WHO CAN LODGE A COMPLAINT?

Any tenant or landlord/landowner or group of tenants or landlords or interest group may lodge a complaint with the Tribunal concerning an unfair practice.

Complaint in the City of Tshwane should be lodged at the Rental Housing Tribunal Information Office nearest to the property (and if possible in the same City Region as the property). For details of the Rental Housing Tribunal information offices in Tshwane:
https://www.tshwane.gov.za/sites/Departments/Housing-and-Human-Settlement/Pages/Gauteng-Housing-Rental-Tribunal-Operations.aspx

Complaints must be on the prescribed form, which can obtain from the offices of the Rental Housing Tribunal or its Information Offices.

REQUIRED DOCUMENTATION WHEN LODGING A COMPLAINT

- ID/Permit/Passport
- Lease agreement
- Proof of payment of rent
- Physical address of both parties (landlord/landowner and tenant)
- Contact telephone numbers of both the landlord/landowner and the tenant

You must serve a copy of your complaint to the respondent – the person against whom your complaint is made. See regulations under the *Rental Housing Act* Sections 6-8, for how this should be done.

Until the Tribunal has made a ruling on the matter or a period of three months has lapsed since the lodged complaint, the landlord/landowner cannot evict any tenant and the tenant must continue to pay rental as per the lease agreement. The case should generally not take more than three months to be addressed.

THE PROCESS OF LODGING A COMPLAINT

The process that takes place once a complaint is lodged is as follows:

1. A file is opened with the particulars of the complainant(s) and the respondent(s) are entered into the register.
2. A letter is sent to all parties informing them of the particulars of the complaint that has been lodged and a date for the mediation and/or arbitration.
3. The Tribunal will conduct a preliminary investigation to determine whether the complaint relates to a dispute in respect of unfair practice within their mandate and/or jurisdiction.
4. Mediation happens first with the complainant, respondent and a presiding member of the Tribunal. If there is no agreement between the parties during the mediation proceeding then the matter is referred to the Tribunal hearing which is called the Arbitration stage.
5. During the arbitration (Tribunal hearing), a ruling is given which is binding to both parties.
6. A ruling by the Tribunal is deemed to be binding and enforceable like an order of a magistrate's court in terms of the *Magistrates' Court Act*.
7. If a person is dissatisfied with the outcome of the Tribunal they can appeal the decision internally as outlined in Chapter 6 of the *Rental Housing Act* Regulation. If that is unsuccessful, the matter can be taken for review before the High Court with jurisdiction.

FURTHER READING

Rental Housing Act 50 of 1999
http://www.dhs.gov.za/sites/default/files/u16/Rental%20Housing%20Tribunal_web_1.pdf
Regulations Under *The Rental Housing Act*, 1999. *Government Gazette* 44333 of 26/3/21 (Government Notice: 262 of 2021)
Consumer Protection Act 68 of 2008

3.3 EVICTIONS

WHAT IS AN EVICTION?

An eviction is when one or many individuals are removed from a property (house, flat, apartment, farm, land with structures, informal settlement etc.) against their will. Evictions can only be instituted by the owner of the property (a private owner or the state), or an authorised agent acting on behalf of the owner.

Section 26(3) of the Constitution says that "no one may be evicted from their home, or have their home demolished, without an order of court made after considering all of the relevant circumstances." The High Court and magistrate's courts are authorised to make such an order under the *Prevention of Illegal Eviction and Unlawful Occupation of Land Act* (PIE) or *The Extension of Security of Tenure Act* (ESTA). In summary, ESTA covers evictions for people residing on rural land, PIE for urban land. The correct act must be used in the court proceedings.

Evictions can be lawful or unlawful. An eviction is lawful when the landlord/landowner obtains a court order permitting removal. It is unlawful if there is no court order for the eviction. The law prohibits unlawful evictions. Under PIE and ESTA, it is a criminal offense to unlawfully evict someone, punishable by fine or up to two years imprisonment.

The word 'home' is not defined in the Constitution, but its normal meaning is the intention to occupy a dwelling for residential purposes permanently or for a considerable period. This includes informal dwellings constructed by the occupier. It does not include the occupation of premises for business and other non-residential purposes.

In the case of land invasions and the establishment of informal settlements, whether the structure erected is classified as a dwelling or not becomes significant. If they are not a dwelling (because they are not yet liveable), no court order is required to remove the structure as the land is not been occupied for residential purposes. Proof that the erected structure is a dwelling – such as photographs showing people living in them – would be important in these circumstances.

WHO CAN BE EVICTED?

Only an 'unlawful occupier' can be evicted. An unlawful occupier is a person who occupies land without the express or tacit consent of the landlord/landowner, or without any lawful right. The lawful right to occupy is provided for in several pieces of legislation which are outlined below.

An occupation of property is unlawful if a person initially occupied the premises lawfully, but subsequently lost the right to occupy and became an unlawful occupier. This can occur if:

- The rental contract expires, it is not renewed, but the tenant remains or 'holds over' and no rent is paid/accepted
- The tenant fails to pay rent during the contract period and the landlord/landowner cancels the lease agreement
- A home owner fails to pay the mortgage bond and the house is reposed by the mortgage lender, but the original owner remains in the property

The occupation of a property may be unlawful when it is initially occupied. This can occur if land or property is occupied for residential purposes without a legal right, such as the establishment of an informal settlement following a 'land invasion' or the occupation of a vacant property.

A person cannot be evicted, even if they do not have permission from the landlord/landowner, if they are given lawful right of occupation because they fall under one of a number of statutes (acts of parliament) including:

- *The Extension of Security of Tenure Act*
- *Interim Protection of Land Rights Act*
- *Land Reform (Labour Tenant) Act*

THE EXTENSION OF SECURITY OF TENURE ACT (ESTA)

ESTA caters for occupiers of rural land (land that is not a proclaimed township) whose gross income is under R13,625 per month (as of the latest regulations in the 2018 *Government Gazette* 41447). Under ESTA, residents are assumed to have consent to reside on rural land (excepting state land) if:

- They have continuously and openly resided on land for a period of one year, unless the contrary is proved
- They have continuously and openly resided on land for a period of three years, in which case it is deemed that they have done so with the knowledge of the owner or person in charge

The family of a rural occupier who has consent to reside under ESTA is also entitled to reside on the premises and may receive visitors.

The act also provides a process for lawful evictions of occupiers that fall under ESTA (outlined below).

EVICTIONS CARRIED OUT UNDER THE *PREVENTION OF ILLEGAL EVICTION AND UNLAWFUL OCCUPATION OF LAND ACT* (PIE)

The PIE Act lays out the procedures that an owner must follow in order to evict people lawfully. A court can only order an eviction if it will be just and equitable. This means the court must consider all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

There are different procedures set out in PIE depending on:

1. Whether the landlord/landowner is a private owner or an 'organ of state' (as defined in Section 239 of the Constitution)

If the landlord/landowner is a private owner, then Section 4 of PIE must be followed. If the landlord/landowner is an organ of state, then Section 6 of PIE must be followed. Section 6 of PIE requires the court to consider whether eviction is in the 'public interest.' The court must also take into account, the circumstances of the unlawful occupation, how long the land/building has been occupied, and the availability of suitable alternative accommodation or land.

2. Whether the land/property of a private owner has been occupied for longer than six months when eviction proceedings are started.

If land/property has been occupied longer than six months, the court must also consider whether alternative land has been made available or can be reasonably made available by the municipality or other organ of state for the relocation of those evicted.

THE PIE EVICTION PROCEDURE (SUMMARISED)

Where the occupation was originally lawful, but becomes unlawful (see above), the landlord/landowner must cancel or withdraw any right or consent given to the occupier in writing before commencing with the eviction.

The landlord/landowner must give the unlawful occupier (whether they have become unlawful or were unlawful when they started to occupy) notice to vacate in writing, sent by registered mail or by hand, and give the occupier reasonable time to vacate the property.

If the occupier has not vacated, the lawful owner of the property or the person in charge of the land will approach a court (the High Court or Magistrate's Court with jurisdiction for the area of the occupied property) for an eviction order against an unlawful occupier. The court will provide the landlord/landowner with the date and time that it will hear the eviction application.

The Sheriff must then serve court papers on the occupier and the municipality where the occupied property is located at least 14 court days (a court day is a week day, excluding any public holiday, and excluding the first day on which papers are served) before the eviction hearing in court. This notice, known as a Section 4(2) notice (the section in the PIE Act that requires it) must indicate:

- That proceedings are being instituted in terms of the PIE Act for eviction
- The date and time of the eviction hearing
- The circumstances surrounding the eviction
- That the unlawful occupier has the right to appear in court and defend him/herself and if necessary apply for legal aid

If the occupiers refuse to accept the notice from the Sherriff, the court will authorizes substitute service. This may take the form of erecting notices close to the property or other forms. Once this is done, the occupiers are assumed to have received the notice and are aware of the Section 4(2) notice.

UNLAWFUL OCCUPIERS SERVED WITH A PIE SECTION 4(2) NOTICE SHOULD SEEK LEGAL ASSISTANCE

Even if it is not possible to obtain legal assistance, occupiers should still attend the court and provide details of their personal circumstances including whether the occupiers are disabled, a woman, how many children are residing on the property and whether they can secure suitable alternative accommodation.

Attending the court and opposing the eviction, even without legal representation, will prevent a default judgement been given in favour of the landlord/landowner. A default judgment means that the Magistrate/High Court will consider the case based only the information provided by the person who instituted the eviction because the occupier failed to make their representation.

Given the legalistic nature of the process unfolding, legal representation is critical once this stage has been reached. Nevertheless, the role of community leaders remains important, especially when communities are threatened with eviction. They should assist their legal representative by getting community members to sign a mandate for the attorneys to represent them in legal proceedings, provide information on those threatened with eviction, and facilitate communication between their legal representatives and the community.

If the eviction application is opposed by those threated with eviction/their legal representatives, then the two sides exchange court papers (in line with the appropriate rules of court) before the hearing date. The assistance of community leaders, and all those affected, is important in assisting their legal representatives to draw up these papers.

The court hearing has two elements which are heard at separate court hearings. The first is to confirm that the steps required by the PIE Act, including Section 4(2), have been correctly followed. If they have not then the second hearing will not proceed. The second court hearing concerns the context of eviction itself (based on the considerations outlined above). The occupier/their legal representative will have an opportunity to state their case.

EVICTION FROM HOMES AS A RESULT OF DEFAULTING ON A MORTGAGE LOAN

Where a house buyer fails to pay instalments on a mortgage bond or loan and the mortgage provider then sells the house by auction (a sale in execution pursuant to a mortgage). Establishing what is fair and reasonable by the court in an eviction hearing becomes more complicated. This is because the court must now consider not only the occupier (who has failed to pay the mortgage) but also the new purchaser who has bought the property. This consideration makes the granting of an eviction order more likely.

If a house buyer is facing difficulty in paying their mortgage installments it is important that they talk to the bank or other institution providing the mortgage. Options include:

- Re-scheduling the installment payments
- Putting the house up for sale on the open market (as this will usually realize a higher price than if it is sold at auction by the mortgage provider)

If a court gives the landlord/landowner an eviction order, a date by which the occupiers are required to leave will be given. The court will also issue the landlord/landowner a warrant of ejectment. The Sheriff of the court will execute the eviction based on the warrant if the occupier does not vacate the premises by the date specified in the court order. The court may also make an order for the demolition and removal of the buildings or structures on the land in question.

The City of Tshwane has drawn up by-laws regarding the management of informal settlements. These include how any evictions of an informal settlement must be conducted. The bylaws can be found at: https://www.tshwane.gov.za/sites/business/Bylaws/Draft%20ByLaws/bylaw_informalsettlements.pdf

CONSTRUCTIVE EVICTIONS & SPOLIATION APPLICATIONS

Constructive evictions are when the owner frustrates the stay of the tenant with the aim of making them 'voluntarily' vacate the property. This is done by changing locks, disabling gate access, removing the occupant's possessions, disconnecting water or electricity, threats the tenants etc. This is unlawful as there is no court order permitting the eviction.

Spoliation is wrongfully depriving another of their right of occupation or possession. Spoliation proceedings are normally brought to court on an urgent basis with the aim to prevent persons from taking the law into their own hands, as with illegal evictions.

To obtain a spoliation order (which orders that the situation be returned to what it was before the owner of the property wrongfully deprived the occupier of possession, as with constructive eviction) an occupier needs to prove that:

- They were in peaceful and undisturbed possession of the property; and,
- They were unlawfully deprived of possession (without their consent or due legal process).

FURTHER READING

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
Extension of Security of Tenure Act 62 of 1997
Regulations for the Extension of Security of Tenure Act. Government Notice 72. *Government Gazette* 41447. 16 Feb 2018
Interim Protection of Informal Land Rights Act 31 of 1996
Land Reform (Labour Tenant) Act 3 of 1996

3.4
NUISANCE LAW

WHAT IS NUISANCE LAW?

Nuisance law is a category in neighbour law that refers to activities that may interfere with a neighbour's (people staying in the same area) quality of life. This generally refers to the abnormal usage of land or property that affects people staying in surrounding areas i.e. health, comfort, or wellbeing.

When someone owns an immovable property (land, house, or apartment), they have the right to use and enjoy the property as they see fit but there are certain limitations to the use and enjoyment of the property. An owner must not exercise their powers to the detriment of their neighbours (must not act unreasonably or in bad faith towards neighbours).

Activities that can adversely affect the neighbour's use or enjoyment of their property include:

- Smells
- Smoke
- Noise (barking dogs, loud music, shouting, fireworks or drilling, etc.)
- Indecent displays that cause annoyance, discomfort, or inconvenience

The most common nuisance activity that neighbours often have issues with is noise. In Gauteng, there are regulations that are in place to address noise nuisance, the *Noise Control Regulations 1999 in Terms of Section 25 of the Environment Conservation Act*. These regulations make provisions for the adaptations of by-laws by municipalities within the Gauteng area. Section 9 of the Noise Control Regulations describes which kinds of noises are prohibited, namely:

- Loud music – from the radio, television, musical instrument or any sound amplifier
- Shouting, loud bells, alarms
- Animal noise e.g barking dogs
- Fireworks
- Construction work or loud machinery e.g drilling
- Firearms or explosives
- Driving vehicle that will cause noise

Some of the abovementioned noise activities may be allowed for periods of times with the permission from the municipality and/or informing neighbours prior about the noise.

What to do if you are affected by nuisance activities?

- Report the nuisance to the Tshwane Metro Police Department (if the activity is in contravention of the by-laws of the area)
- Report the nuisance (noise) to South African Police Services (if the activity is in contravention of the Gauteng provincial regulations in terms of the *Environment Conservation Act*)
- Refer the matter to the municipal court in your area
- Approach the Magistrate Court or High Court in your area requesting an interdict against the nuisance activity

WHAT FACTORS WILL THE COURTS CONSIDER?

- The by-laws of the area
- The general requirements of an interdict
- Location and what the area is designated for (agricultural, industrial, residential)
- Type of conduct
- Necessity of disturbance
- Proportionality of harm suffered as opposed benefit of the person doing the "harm"
- Is the use of the property normal or abnormal
- Is the act reasonable (perhaps the offended party is sensitive)
- Whether the conduct is socially appropriate
- Whether the conduct could reasonably be expected to be tolerated

FURTHER READING

The *Environment Conservation Act* 73 of 1989
Gauteng Province Noise Regulation Notice 5479 of 1999
City of Tshwane by-laws

3.5 HOUSING PROGRAMMES

HOUSING PROGRAMMES

Section 26 of South Africa's Constitution enshrines the right of everyone to have access to adequate housing and obligates the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. As a response to this Constitutional imperative, in terms of the *National Housing Act*, Government has introduced various programmes for the provision of adequate housing to poor households.

The National Housing Code sets the underlying policy principles, guidelines, norms and standards applicable to the Government's various housing assistance programmes. The code aims to simplifying the implementation of different housing projects by providing clear guidelines.

Below is an outline of government subsidised housing, better known as the Reconstruction and Development Programme (RDP) housing, followed by a brief summary of the range of national housing programmes. These programmes are more varied than the well-known RDP house building program. However, an individual can only receive one government housing subsidy across the range of programs. More details on the different programmes can be found in the National Housing Code itself.

OVERVIEW OF THE CURRENT NATIONAL HOUSING PROGRAMMES

1. Government Subsidized Housing (RDP Houses)

It is the responsibility of the municipalities to provide and allocate RDP houses in conjunction with the provincial government which funds the building of this housing. Eligible recipients do not have to provide a deposit and receive the house for free. Applications in the City of Tshwane are made at one of the customer care centers within the City's regional structure. Go to: https://www.tshwane.gov.za/sites/about_tshwane/Regionalisation/Pages/Regions.aspx

For RDP housing in the City of Tshwane the following criteria apply:

- A South African citizen or foreigner with a permanent residence permit
- 21 years of age or older
- Married or living with a partner, or single and have dependants (single military veterans or aged people without dependants also qualify)
- Unemployed or earn less than R7,000 per month per household
- A first-time government subsidy recipient
- A first-time homeowner

After making an application, proof of registration (Form C) shows the date on which the application was made and the application reference number. Once this is completed the applicant is registered on the municipal housing waiting list. Applicants are allocated a house once a housing development is completed and they are next on the list. This can take many years.

Those allocated a RDP house are not permitted to rent it out, or to sell it for the first eight years of ownership.

2. Integrated Residential Development Programme

The Integrated Residential Development Programme (IRDP) facilitates the development of integrated human settlements in well-located areas that provide convenient access to urban amenities and places of employment. The IRDP provides for land acquisition, servicing of stands and multi-purpose land use such commercial, recreational, schools, clinics, and residential stands for all income groups. Under this programme, municipalities assume the role of developer and undertakes all planning and project activities.

3. Upgrading of Informal Settlements

An informal settlement refers to one or more shacks constructed on land, with or without the consent of the owner of the land or the person in charge of the land. The government Upgrading of Informal Settlements programme seeks to provide basic services and secure tenure for informal settlements. This is done by upgrading informal settlements *in situ* (that is without moving the residents to another site) and should involve the residents of the informal settlement throughout the project cycle.

Municipalities are the developer and should identify informal settlements to be upgraded and apply to the Provincial Departments for the funding of projects. In the City of Tshwane, Informal settlements are regulated by the City of Tshwane Metropolitan Municipality's *By-Laws Management and Control of Informal Settlements*. The municipality's Manager: Informal Settlements is required to survey informal settlements. Where the municipality recognises an informal settlement it is 'authorised' and which must then be legalised and upgraded.

For more details see the City of Tshwane By-laws: https://www.tshwane.gov.za/sites/business/Bylaws/Draft%20ByLaws/bylaw_informalsettlements.pdf

4. Provision of Social and Economic Facilities

The Provision of Social and Economic Facilities Programme funds primary social and economic amenities such as schools, clinics, community halls, recreational facilities and trading facilities where funding is not available from alternative sources.

The programme assists municipalities which do not possess sufficient financial resources to provide such facilities. The municipality then owns the facility and is responsible for the operation and maintenance costs.

5. Housing Assistance in Emergency Circumstances

The Emergency Housing Assistance Programme is used for temporary housing in the event of a disaster and is limited to absolute essentials. The programme will benefit all affected persons who are not in a position to address their housing emergency from their own resources/home insurance policies. Funding for the programme will be made available, by the Province, to municipalities as grants for the provision of temporary aid and assistance will be limited to absolute essentials.

6. Social Housing Programme

There is a need to rectify the inequalities of the apartheid induced spatial frameworks of our cities and towns by promoting integration across income and population divides. The Social Housing Programme applies to "restructuring zones" identified by municipalities as areas of economic opportunity where urban renewal or restructuring impacts can be achieved. The programme also aims at developing affordable rental housing in areas where bulk infrastructure may be under-utilised.

7. Institutional Subsidies

The Institutional Housing Subsidy Programme provides capital grants to social housing institutions which construct and manage affordable rental units in areas which are not covered by the Social Housing Programme. Houses build under this program may be sold by the social housing institution after four years.

8. Community Residential Units Programme

The Community Residential Units Programme aims to provide safe and stable rental tenure for very poor persons or households. The grant funding provided by the programme is used for the development of public rental housing which remain in public ownership and cannot be sold or transferred to individual residents. Projects are undertaken on the basis of a partnership between the relevant municipality, the provincial and the national governments.

9. Individual Subsidy Programme

The Individual Subsidy Programme provides assistance for qualifying households that wish to acquire an existing house or a vacant, serviced residential stand, linked to a house construction contract through an approved mortgage loan.

10. Rural Subsidy On Communal Tenure

Freehold tenure generally cannot be easily secured in areas of communal tenure. This necessitated the development of a programme to assist households in areas with communal tenure to access housing subsidies. Subsidies are only available on a project basis for housing developments on communal land registered in the name of the state or which will be held by community members subject to the rules or custom of that community.

The housing subsidy may be used for the development of internal municipal services where no alternative funds are available, house building, upgrading of existing services where no alternative funding is available, and the upgrading of existing housing structures or any combination thereof.

11. Consolidation Subsidy Programme

Under this programme, beneficiaries of household who receive serviced sites before 1994 may apply for further assistance to construct a house on their stands or to upgrade or complete their house which they may have constructed using their own resources.

12. Enhanced Extended Discount Benefit Scheme (EEDBS)

The EEDBS aims to ensure that occupants of public housing stock are provided with the opportunity to secure individual ownership of their housing units. Qualifying beneficiaries apply for benefit under the programme using an application form that will cover all categories of applicants.

13. Rectification of Certain Residential Properties created under the pre-1994 Housing Dispensation

The primary objective of the Programme is the improvement of municipal engineering services where inappropriate levels of services were delivered in the past, the renovation and/or upgrading, or the complete reconstruction of dwellings that are severely structurally compromised.

14. Housing Chapters of an Integrated Development Plan

An Integrated Development Plan (IDP), required by the *Municipal Systems Act*, 2000, is an inclusive strategic plan for the development of a municipality that links, integrates and coordinates plans and takes into account proposals for the development of the municipality. It is compatible with national and provincial plans and planning requirements binding on the municipality in terms of legislation. Housing is included in the IDP through the formulation of a Housing Chapter in the IDP. Municipalities must apply for funding for the compilation of Housing Chapters of IDPs and the amount of funding depends on the type of support required.

15. Operational Capital Budget (OPS/CAP)

This is a framework for a funding to assist provincial governments in achieving state housing development goals by providing for the appointing of external expertise to supplement provincial capacity for housing delivery.

16. Enhanced People's Housing Process

The People's Housing Process assists households who wish to enhance their houses by actively contributing towards the building of their own homes. The process allows beneficiaries to establish a housing support organisation that will provide them with organisational, technical and administrative assistance. Training and guidance on how to build houses is also supplied. The process is a community driven and requires skilful technical expertise to assist, train and guide the house building process.

17. Farm Residents Housing Assistance Programme

The Programme provides subsidies for developing engineering services and adequate houses for farm workers and occupiers where no other funding is available. The Programme focuses on farm residents required to reside close to their employment obligations and where the farmland is far from the nearest town, rendering the settlement of the farm residents in the town impracticable.

The farm owner is regarded as a key service delivery agent and will have options to provide formal rental accommodation on the land for the residents on the farm or may decide to subdivide the farm into small subsistence agriculture holdings and transfer these to the relevant residents. The farm owner may also decide to provide a portion of the farm to a housing institution for the provision of rental units on the farm.

FURTHER READING

Housing Act 107 of 1997
National Housing Code 2007

3.6 TRANSFER OF PROPERTY

TRANSFER OF PROPERTY

The transfer of property is when ownership is of a property is transferred from one person (or other legal entity such as a company) to another. In legal terms this is referred to as the alienation of property (since the original owner is 'alienated' from it). This section deals with the transfer of immovable property, that is land and any structure build on the land. The transfer of ownership may arise for the following reason:

- The buying/selling of property
- Forced sale/auction of property
- Marriage in community of property
- Divorce (depending on the marital regime)
- Dissolved partnership
- Inheritance
- Donation
- Exchange
- Transfer in error

Transfer can only be done by the owner; the name of the owner is on the title deed registered with the Deeds Office.

WHAT IS A TITLE DEED?

A title deed is a document which acts as proof of ownership in terms of the *Deeds Registries Act* 47 of 1937. Each property is required to have its own separate title deed. However the system of title deeds does not extend across the whole country. Where land is held communally (in the old homeland or Bantustan areas), it is registered in the name of the state. If property is purchased with a mortgage bond, the bank keeps the title deed until the home loan is fully paid. A copy of each title deed is held in a Deeds Registry at the Deeds Office closest to where the property is located.

The Deeds Registry uses erf numbers (plural: erven) which is the legal term used to describe a piece of land within a particular settlement.

The title deed includes the following information:

- A description of the property, with its size, boundaries and exact position
- The name and identity number of the person or persons who legally own the property
- The date when the property was last transferred and the purchase price
- Any factors that could restrict the sale of the property, for example a home loan
- Any restriction that applies on the purchase of the property
- An official Deeds Registry Office seal to indicate that the deed has been recorded in the name of the owner and the date

THE DEEDS OFFICE

There are several Deeds Offices throughout the country, each handling a particular area of jurisdiction. The Deeds Registry is open to any member of the public who requires access to information at a nominal cost.

You are required to go in person to obtain a title deed from the Deeds Office and you will need the property erf number (not the street address). A charge is made for a title deed search. You can also access title deeds using a commercial company, such as *mydeedsearch* or Lexis' *WinDeed*. These companies charge more, but offer a faster and more convenient service. *Mydeedsearch* and *WinDeed* provide an interactive map to identify the property that you wish to obtain the title deed information as an alternative to the erf number.

DOUBLE SALES/ALLOCATION OF PROPERTY

In some cases, people face eviction because they erroneously believe that they are the owner of the property. A legal owner of a property is the person whose name is on the title deed. Double sales can occur when the property is sold but no transfer of ownership (i.e. change in the name on the title deed) takes place. The seller is then able to sell the property again since they are still the legal owner. If the second purchaser then becomes the registered owner on the properties title deed, they will then institute eviction proceedings against the first buyer.

The conveyancer must ensure that the title deed for the property is correctly changed to indicate the name and ID number of the new owner or owners. This transfer must be made within three years of the purchase otherwise the transfer of details will have prescribed (can no longer be enforced).

A similar situation to double sales can also occur where RDP houses are (mis)allocated to two different parties, the person in possession of the title deed will usually institute eviction proceedings against the other if they have taken occupation. This means that an occupier may believe themselves to be the owners of property, but face eviction.

UNENFORCEABLE SALES OF PROPERTY

Property can only be sold/alienated by the owner with their consent. A person married in community of property must have the consent of their spouse before selling/alienating property. If property is sold without the necessary consent, the court can set aside the sale and transfer. All sales of land must comply with the formalities (procedural steps) set out in the *Alienation of Land Act*. It is very important to know that a verbal agreement of sale of property is unenforceable, even if the full purchase price was paid. This means that the purchaser may be evicted.

GRANTING TITLE DEEDS TO 'PERMIT HOLDERS'

In the past, black people could not claim ownership of their homes in townships. Local councils issued permits that gave rights of occupation to those named on the permits. In the run up to the democratic dispensation two laws were passed in order to convert these permits into ownership.

The *Conversion of Certain Rights into Leasehold or Ownership Act* is generally applicable to urban townships in formally white areas, with permits (known as Section 6, 7 or 8 permits depending on what they were granted for) issued under Regulation 1036 of 1968 drawn up in terms of the *Bantu (Urban Areas) Consolidation Act* 25 of 1945.

The *Upgrading of Land Tenure Rights Act* generally applies to the former homelands with Deed of Grant or Certificate of Occupation issued under Regulation 293 of 1962 drawn up in terms of the *Native* (later renamed Black) *Administration Act* 38 of 1927.

See also: Women and Housing

PROPERTY BELONGING TO A DECEASED PERSON

Frequently disputes over family housing involve a house which the title deed is held by somebody who has since died and has not been legally transferred to another person. When somebody who owns property (or has a will) dies, their death should be reported to the Master of the High Court. Depending on the size of the estate different processes must then be followed to execute the deceased person's will or to follow the law of intestate inheritance (if the person dies without a will). See the section on Wills and Succession.

Once the will/intestate succession has been successfully executed, any property must be transferred into the name(s) of those who inherit the property, as outlined in this section.

THE PROCESS OF TRANSFERRING PROPERTY

To transfer property you will need the assistance of a lawyer specialising in property transfers, known as a conveyancer. If property is being considered for purchase then a check of the title deeds is important and the sale should not go ahead without this information.

Before transfer can take place, municipal rates and taxes for the property must be paid in full. No transfer of property can take place without a clearance certificate from the relevant municipality. It is important to note that there are always costs implications when transferring property.

The process of transferring property has administrative and legal procedures. The transferring lawyer/conveyancer drafts the relevant documents and deeds in order for the ownership of the immovable property to take place at the Deeds Office.

THE PROCESS CONSISTS OF THE FOLLOWING STEPS:

1. Contract of Sale

Before transfer that takes place, a contract of sale between the buyer and seller must be completed and signed by both parties. The contract of sale must contain the following:

- Be in writing
- Clear description of the property to be sold
- The purchase price and terms of payment must be stated
- The contract must be signed by the purchaser and the seller before the transfer process can begin

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- Clear description of the property to be sold
- The purchase price and terms of payment must be stated
- The contract must be signed by the purchaser and the seller before the transfer process can begin

2. Appointing of a Conveyancer

A conveyancer is a legal practitioner is an attorney that specializes in the transfer of property. The conveyancer receives instructions from the seller or estate agent to deal with the transfer. The following documents must be provided from the seller and purchaser:

- Identity document
- Proof of residence
- Income tax or VAT registration number
- If married, the additional documents must be provided:

    - Marriage certificates (if married in community of property)
    - Ante-nuptial contract
    - Divorce orders

The original title deed and bond account number and bond provider's contact numbers (if relevant).

3. Clearance Certificate from the Local Municipality

The Deeds Office will only register a transfer if there is proof that the rates have been paid/cleared and there are no arrears payable. The transfer cannot take place without it. It is usually up to the seller to ensure that the rates and taxes for the have been paid, after that the clearance certificate can be requested from the local municipality.

4. Transfer Duty

Transfer duty (a tax levied for property transfers) is calculated on a scale according to the property's purchase price. Transfer duty is paid only on properties sold for R1,000,000 or above.

5. Compliance certificates

In order for a compliance certificate to be provided, the property must have the correct connections for things like electric, gas, electrical fence etc. This must be obtained by the seller.

6. The seller must obtain a levy clearance certificate from the body corporate if the property forms part of a sectional title scheme.

7. The Preparation of Transfer Documents

The conveyancer will draft and prepare the transfer documents for signing by the purchaser and seller. The seller must sign the power of attorney, transfer duty declarations and affidavits. The purchaser must sign transfer duty declarations, affidavits, and power of attorney for bond documents

8. Lodgement of the Documents

For the transfer of the property, bond documents may be required for the registration of a new bond and cancellation of the seller's existing bond (if relevant) at the Deeds Office. A bond cancellation attorney will assist in cancelling the existing bond if relevant. A bond registration attorney will register the new bond if that is how the property will be purchased.

9. Preparation of the deeds in the Deeds Office

The deeds are examined at the Deed's Office and prepared for registration and execution. If no changes are required this should take between 8 and 10 working days.

10. Registration of the deeds

The deeds are executed by the Registrar who updates the register with the new transfer. Once this is done, the transfer has taken place. A title deed for the property will then be produced and ready for collection.

11. After Registration

After registration, the conveyancer will prepare the final accounts for the purchaser and the seller. The seller is then paid the purchase price. The purchaser or bondholder (if a bond was taken out) will then collect the title deed from the conveyancer.

FURTHER READING

Transfer Duty Act 40 of 1949
Deeds Registries Act 47 of 1937
Alienation of Land Act 68 of 1981
Gauteng Province: Title Deeds Distribution, Mediation and Adjudication of Title Deeds: https://www.gauteng.gov.za/Services/
Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988
Upgrading of Land Tenure Rights Act 112 of 1991
The Gauteng Housing Act 6 of 1998
Proclamation 41 of 1996, promulgated in *Government Gazette* 17320 of 26 July 1996;
Sebatana v Mangena and Others. South Gauteng High Court [2013] ZAGPJHC 246.

3.7 WOMEN AND HOUSING

WOMEN AND HOUSING

Rahube v Rahube and Others was a landmark judgement in which the Constitutional Court issued an order that protected women's housing rights, the court held that section 2(1) of the *Upgrading of Land Tenure Rights Act* (ULTRA) violated the right to equality which is enshrined in section 9 of The Constitution.

Ms Rahube approached the court, after she was evicted by her brother, alleging that she had been deprived of ownership her house through apartheid laws as well as section 2(1) of ULTRA.

In the 1970's Ms Rahube and her brother moved into a house with other members of their family. Most of her family moved out in the years between 1980 and 2000. This resulted in Ms Rahube living in the house alone, however in 1987 her brother was nominated by the family to hold the certificate of occupation for the house (only a man could be issued a certificate of occupation). In 1988 Mr Rahube was then issued with a Deed of Grant in his name. When the ULTRA was enacted, the rights that her brother had were subsequently converted into ownership rights, he became the owner of the house and was issued with a title deed.

The issue Ms Rahube raised was that ULTRA provided for the conversion of housing rights into rights of ownership but did not consider competing claims or the fact that housing rights were designated through a system and legislation that discriminated against black women and thus violated her right, and the rights of other black women, to equality based on gender and sex.

This case was heard in the High Court which found the provisions in the ULTRA unconstitutional in so far as it converted rights to ownership in a manner that was in violation of women's rights.

The Constitutional Court found that the result of the provisions was contrary to the intention of the legislature, in that by relying on the legal position created during apartheid when the ability to own land tenure rights was restricted to men. The legislature had failed to create legislation that could rectify discrimination of the past by depriving black women of the opportunity to claim and become owners of land which undermined the legitimate purpose for which the law was promulgated.

The Constitutional Court confirmed the order of invalidity made by the High Court and made its order retrospective in nature so that it provided relief to all women from the 27th of April 1994.

However, this order did not extend to:

- Property that was transferred to third parties in good faith
- Inheritance by third parties in terms of finalised estates
- The upgrade of a housing right to ownership by a woman acting in good faith

In June 2020 the amendments to ULTRA were promulgated. The act still allows for the upgrading of land tenure rights to ownership rights for:

- Anyone who is a holder of a land tenure right must apply to the Minister of Rural Development and Land Reform to convert that right into ownership
- Any land tenure rights to land that is registered in a township register that was already opened at the commencement of the upgrading of land tenure rights act 1991 would automatically be converted to ownership
- Any right to land that was registered in a township register after the commencement of the act shall be converted to ownership
- Any rights to surveyed land not forming parts of a township should be converted to ownership

The amendments included further requirements that serve as safeguards:

- The minister should publish a notice in the gazette which informs all interested people about the application for conversion
- This notice should give all interested people

    a. An opportunity to object to the conversion
    b. Time frames to object to the conversion

- After receipt of the application the minister should institute an inquiry to determine the facts and make a decision

FURTHER READING

Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988
Upgrading of Land Tenure Rights Act 112 of 1991
Rahube v Rahube and Others [2018] ZACC 42
Upgrading of Land Tenure Rights Amendment Act 6 of 2021

3.8
HOUSING & CUSTOMARY LAW

HOUSING & CUSTOMARY LAW

Under colonial and apartheid legislation, just 13 percent of South Africa's land was set aside for African people (what became the so-called homelands or Bantustans). These areas were under the control of traditional leaders, while ownership of most of this land is the name of the Government of South Africa. Despite formal ownership by the state, and the political authority of traditional leaders, rights to this land rests with the people who have occupied and used it for generations, what is known as the 'underlying ownership.'

The notion that the land belongs to traditional leaders, in the same way as somebody who has a title deed to a property, is incorrect. However, this belief has rendered rural communities across the country vulnerable to land rights deprivation and abuses by traditional leaders, government, and private companies. Believing they own the land, many traditional leaders charge community members fees for the allocation of plots and enter into deals with the private sector, such as mining companies, without the consent of the communities.

The Constitutional Court case *Maledu v Itereleng Bakgatla Mineral Resources* is an example where a group of 13 families, the Lesetlheng Community, which held 'underlying ownership,' was not properly consulted by the traditional authorities which granted mining rights on the land to the Itereleng Bakgatla Mineral Resources company. Nor were the provision for dispute resolution between land owners and mining companies, contained in Section 54 of the *Mineral and Petroleum Resources Development Act* fully utilised. The court found that the 13 families were wrongfully prevented from farming the land which they had occupied for generations. As a result, their eviction was set aside and compensation in return for the right of the company to mine the land agreed.

Section 25(6) of the Constitution states that those whose rights to land are insecure because of past discriminatory laws and practices are entitled to security of tenure.

Traditional leaders do not therefore have the right to make unilateral decisions about the land without the consent of the community. Most importantly, traditional leaders/authorities cannot remove people from the land without their consent. The right of the occupants is confirmed in the Constitution and the *Interim Protection of Informal Land Rights Act*.

Section 1(a) (i) of this act states that customary law rights are extended to wherever land is used, occupied or accessed in terms of "any tribal, customary or indigenous law or practice of a tribe".

- There is no individual ownership under customary land law, the land use is according to the customs of that particular community and is only overseen by traditional authority. The traditional authorities do not own the land. Rather, they have an administrative role for the interests of the community.
- This law was adopted to protect people living on communal land. It recognised informal customary land rights as property rights. This means that no one can be deprived of an informal land right without their consent, except by lawful expropriation.

FURTHER READING

Interim Protection of Informal Land Rights Act 31 of 1996
Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] ZACC 41
Mineral and Petroleum Resources Development Act 49 of 2008

3.9 HOMELESSNESS AND THE CITY OF TSHWANE'S PATHWAYS OUT OF HOMELESSNESS

HOMELESSNESS AND THE CITY OF TSHWANE'S PATHWAYS OUT OF HOMELESSNESS

There is widespread homeless in South Africa. In 2008 the Human Science Research Council estimated that the national homeless population was between 100 000 and 200 000. Given economic conditions, including the effects of the COVID-19 pandemic, it is likely now much higher.

Homelessness can be caused by the following:

- Economic homelessness – homelessness due to unemployment and inadequate income.
- Situational homelessness – where people who are homeless as a result of a particular circumstance such as domestic violence, conflict with family, release from prison or a psychiatric hospital, and migration from other provinces or other African countries (refugees or asylum seekers).
- Chronic homelessness – people with chronic mental health illness or substance abuse which hinders their capacity to find sustainable housing options.
- Near homeless – people who are at risk of being homeless at any stage due to the vulnerability of their current stay e.g. people due for release at correctional facilities or psychiatric households, child-headed households and women in transactional relationships.

Homelessness also limits access to food security, safety and security, hygiene, and sanitation. This results in begging, informal trading, informal services, stigma, and substance abuse.

The City of Tshwane's homelessness policy, *Pathways Out of Homelessness*, was introduced in 2019. The purpose of the policy is to uphold people's right to dignity and the right to adequate housing. *Pathways Out Of Homelessness* aims to decrease street homelessness in the City of Tshwane through minimizing the negative impact of homelessness on persons; optimizing the impact of interventions; supporting the prevention of homelessness; and, creating sustainable pathways out of homelessness.

The following can help prevent homelessness:

- Affordable, well-located social housing options
- Lawful evictions where a court will consider if it is just and equitable to grant an eviction order/require the provision of alternative accommodation
- Access to transit centres (previous known as shelters) or temporary emergency accommodation for homeless people
- Transitional housing programmes
- Drop in centres (places for homeless people to shower and access electricity during the day)
- Skills development programmes
- Employment/trading opportunities especially in the informal sector such as recycling projects
- Support programmes for people with substance abuse problems
- Legal advice for homeless people

FURTHER READING

Catherine Cross, John Seager, Johan Erasmus, Cathy Ward & Michael O'Donovan (2010) Skeletons at the feast: A review of street homelessness in South Africa and other world regions, *Development Southern Africa*

Homelessness Policy for the City of Tshwane 2017: https://www.tshwane.gov.za/sites/business/Bylaws/Draft%20ByLaws/Feedback%20of%20Research%20report%20on%20Homelessness%20Review%20of%20CoT%20Homelessness%20Policy.pdf

04 PROPERTY RELATED RIGHTS

PROPERTY RELATED RIGHTS

There are several other laws that affect property rights in terms of ownership. It is important to be aware of how other laws can change and/or determine ownership of property especially in terms of succession and marital regimes.

This section deals with:

1. Wills and Succession
2. Marital Regimes

4.1 WILLS & SUCCESSION

WILLS & SUCCESSION

Under South African law, a person may make a will directing how his or her assets or estate (their 'deceased estate') will be distributed after their death, in which case the law of testate succession in terms of the *Wills Act* 5 of 1953 will apply. To die testate means that you have a valid will when you die. If the will is valid, the deceased person's assets will be distributed according to their intentions as contained in the will.

When a person dies without leaving a valid will (to die intestate) the law of intestate succession in terms of the *Intestate Succession Act* 81 of 1987 applies. Intestate succession has a prescribed procedures on how the assets of the deceased will be divided amongst the spouse and family members. If a person dies having made a will, but the will does not dispose of his entire estate, they have died partially testate and partially intestate. The assets in their estate not covered in their will then devolve on their intestate heirs as determined by the *Intestate Succession Act*. It is best for a person to have a will in order for them to have control over what happens to their estate once they are deceased and to minimise the administrative burden left after their death.

The disposal of the estate of a deceased person, whether testate or intestate is governed by the *Administration of Estates Act* 66 of 1965. The disposal of estates is either conducted by an executor provided with a Letter of Executorship by the Master of the High Court or, if below the value established by government regulation, by direction of the Master.

TESTATE SUCCESSION (LEAVING A WILL)

What is a will?

A will, or testament, is an expression of how a person, known as the testator, wants the property in their estate to be distributed after their death.

Requirements for a valid will

- The will must be voluntary made.
- The testator must at the time of making their will have testamentary capacity. This means they must be older than sixteen years and were mentally capable, that is of sound mind, and so able to appreciate what they were doing. It is assumed that anyone making a will is mentally capable unless it is proved otherwise.
- The will must comply with the required formalities outlined in the *Wills Act*.

If any of these requirements are not met then the deceased will have died intestate.

Formalities for a will

Making a will, known as signing or execution, must be accordance with the formalities (correct format and procedure) required by the *Wills Act*. These formalities must be strictly adhered to in order for the will to be valid. In terms of section 2(1)(a) of the *Wills Act*:

- The will must be written. Verbal wills, even if audio or video recorded, are not valid. Nor are electronic versions valid as they (currently) do not permit the requirement for signatures.
- The will must be signed as close as reasonably possible to the last words of the will by the testator (person making the will) or *amanuensis*. An *amanuensis* is somebody who signs the testator's will in their presence and under their direction, because the testator is physically unable to do so. The amanuensis signs the name of the testator and not their own.
- If the will has more than one page, every page apart from the last one (which must be signed immediately after that last words) must be signed (not initialled) anywhere on the page by the testator or *amanuensis*.
- The testator's or *amanuensis's* signature must be made in the presence of two or more competent witnesses (any person above the age of 14 years who is competent to give evidence in a court of law).
- The witnesses must acknowledge and sign the will in each other's presence and in the presence of the testator and/or *amanuensis*.
- If the testator signs with a mark or the *amanuensis* signs the will on behalf of the testator, a commissioner of oaths must be present to certify the will.

A will not executed in accordance with the above formalities will be invalid and will have no effect *unless* a court orders otherwise.

It is recommended, though not a formal requirement, for a will to have a final attestation clause. An attestation clause records the date and place of signature and that the signatories have signed in each other's' presence.

Example of an attestation clause:

> Signed at Pretoria on the 18th Day of February 2022 in the presence of the undersigned competent witnesses present at the same time and who have attested and signed this will in the presence of myself and of each other.

Amendment and revocation of a will

The testator is free to change the contents of his or her will at any time. The testator may also revoke (cancellation of the whole will or a part of a will) at any time.

Why should you make a will?

- To avoid conflict between members of your family
- To dispose of your assets in a manner that is legally valid
- To have peace of mind knowing that your estate will be distributed as you wish
- To provide for your loved ones in the event of an untimely death
- Name the guardian(s) of your minor children (under 18 years) in the event of your death
- To expedite the distribution of your estate after your death

Should you get an attorney to draft your will?

The legal requirements for a valid will are exacting. Attorneys can advise you on your will. Attorneys ensure that your will is valid and is an accurate representation of your wishes. The legal practice council website provides a database of practicing attorneys (https://lpc.org.za/list-of-legal-practitioners/). Some banking institutions also draft wills, you can approach your bank to enquire if this is a service that they provide.

Once a year the Law Society of South Africa (LSSA) facilitates a National Wills Week during which participating law firms will draft basic wills for free. See the LSSA Website for details (https://www.lssa.org.za/).

Law firms and banks generally charge to draw up your will. They will also charge for advice, so establish up front what the costs will be. Some banks will draft your will for free, but they will expect you to appoint them as your executor (see below).

Drafting your own will

Legal Aid South Africa provides a comprehensive guideline on drawing up your will and a pro-forma template that you can used: https://legal-aid.co.za/2018/09/26/drafting-of-wills/

The Executor: *Administration of a will after the testator has died*

Any will should name an executor of the estate (do not confuse this position with the act of executing, the signing or drawing up, of a will by the testator). The executor may be an attorney or a close family member or friend. If a family member or friend, it is advisable to also nominate an attorney as co-executor as the attorney will deal with any legal issues. The executor must be approved by the Master of the High Court (see below) who will issue a Letter of Executorship empowering the appointed executor to deal with the deceased's estate. The executor is responsible for carrying out all the instructions of the will to completion, in line with the provisions of the *Administration of Estates Act* 66 of 1965.

The executor must:

- Place an advertisement in the *Government Gazette* as well as in one local newspaper in the area where the deceased resided. This is to notify creditors of the death. Creditors have 30 days to lodge a claim against the deceased's estate
- Open an Estate Late bank account, into which financial assets are placed.
- Obtain full details of the estate's assets.
- Ascertain the liabilities of the estate.
- Draft a Liquidation and Distribution Account indicating assets, liabilities, heirs, etc.
- Lodge this account with the Master of the High Court within six months of the Letter of Executorships being issued.

After approval of the Liquidation and Distribution account by the Master, the account must be advertised and open for inspection for 21 days at the Magistrate's Court in the jurisdiction that the deceased resided. Any written objections must be dealt with. In the event that there are no obligations, the Executor pays all the creditors and heirs and transfers assets to the heirs.

Unless the will stipulates the fees for the executor, the standard rate is 3.5 percent of the estate and 6 percent of any income earned after the testator's death (such as interest on investments or rents). Thus, for example the standard executor fee for an estate worth R1 million is R35,000 (plus six percent of additional income earned). Attorneys and banks will specify their rates.

If the value of the deceased's estate is below R250,000 an executor need not be appointed. The Master will provide a Letter of Authority and the process of disposing of the estate is less onerous and there is no executor's fee payable. If the estate is below the value of R125,000 and the estate is intestate it may under certain circumstances be disposed of by a Magistrates court (see: www.justice.gov.za/master/deceased-how.html)

What happens if a deceased has no will?

If a person dies without a will, their estate is administrated under the *Intestate Succession Act* 81 of 1987. This stipulates how the estate will be divided.

In terms of section 1(1) of the Act:

- If the deceased is survived only by a spouse, the spouse will inherit the whole intestate estate.
- If the deceased is survived only by children/grandchildren, they will inherit the intestate estate in equal proportions. The status of the child (whether born of a marriage or not and whether adopted) is irrelevant to their right to inherit intestate in terms of the Act.
- If the deceased is survived by a spouse and children/grandchildren, they will inherit the intestate estate in a specified ratio.
- If there is no spouse and children/grandchildren, the deceased's parents and his or her siblings will inherit the intestate estate.
- If there are no parents or siblings of the deceased, his or her grandparents and other relatives will inherit the intestate estate.

Intestate estates and African customary law

Under African customary law, a man may marry more than one wife, if the man then dies intestate the Recognition of *Customary Marriages Act* 120 of 1998 provides for intestate succession. For more information: www.justice.gov.za/master/deceased.html

Reporting a deceased estate

When a person who owns assets or has made a will dies, their death must be reported within 14 days to the Master of the High Court in the area where the testator resided. Their will (if the person dies testate) and relevant documents must be lodged at the Master's office.

Who can report the deceased estate?

The death can be reported by any person having control or possession of any property or documents that is or intends to be a will of the deceased. The estate is reported by lodging a completed death notice and other reporting documents with the Master which can be obtained from any office of the Master of the High Court or from the website: https://www.justice.gov.za/master/

FURTHER READING

Administration of Estates Act 66 of 1965
Wills Act 7 of 1953
Intestate Succession Act 81 of 1987
Recognition of Customary Marriages Act 120 of 1998

4.2 MARITAL REGIMES

MARITAL REGIMES

There are a number of different, legally-recognized, marital and partnership regimes in South Africa. The different marital and partnership regimes affects the ownership of the property owned by those in the marriage/partnership. When one of these marriages or partnerships ends, usually as a result of death or divorce, allocation of the property is determined by the form of marriage or partnership.

There are three different forms of marriage or partnership recognized in South African law:

- Civil Marriage
- Civil Union
- Customary African Marriage

South African may choose which Act they wish to be married or enter into a union under, subject to it being applicable to their marriage/union. Same-sex couples are only allowed to marry in terms of the *Civil Union Act* and polygamous marriages (where a man has more than one wife) can only take place in terms of *Customary Marriages Act*.

In addition to these three forms of marriage/union, the law gives some recognition to:

- **Life partnership** when people live together the law provides some spousal benefits to the parties
- **Religious marriage** conducted under religious law and which are given limited protection in certain circumstances

Couples may conduct two or more marriage *ceremonies*. For example, a couple may first enter a civil marriage at a magistrate's court, then hold a 'white wedding' at a church, and finally conduct traditional African wedding rituals. However, in law, persons who are in a valid civil marriage or a civil union cannot subsequently enter into a customary marriage and should they conduct such a customary marriage it is void. Similarly, anybody who is in a valid customary marriage may not enter a civil marriage or union with a different spouse. Two people in a monogamous customary marriage may however enter into a civil marriage with each other after first dissolving their customary marriage. So, in our example, having entered into a civil marriage at the magistrate's court, the subsequent white wedding and African traditional ceremonies are rituals with symbolic importance to the couple and their families, but are not of legal consequence.

Couples often get married in a religious ceremony. Where the religious leader officiating at the ceremony has been appointed as a marriage officer and the necessary formalities are conducted, the marriage that is entered into is civil marriage. Only marriage officers may conclude a civil marriage. All magistrates are marriage officers. Other people, such as religious leaders, are appointed by the Minister of Home Affairs as a marriage officer.

A common belief is that there is a 'common law marriage.' In fact, there is no such marriage form in law, though couples living together will be in a life partnership, which has some recognition in law if their relationship, whether hetro- or homosexual, has the characteristics of marriage, such as mutual support.

A traditional African marriage may be between man and a woman or, as governed by the *Recognition of Customary Marriages Act* 120 of 1998, between a man and more than one woman.

CIVIL MARRIAGE

A civil marriage is entered into between a man and a woman. A civil marriage is automatically in community of property unless an ante-nuptial contract is entered into which specifies an alternative.

CIVIL UNION

A civil union is a voluntary union entered into between a man and a woman or persons of the same sex, both of whom are 18 years of age or older. The parties may choose to have their civil union registered as either a civil partnership or a civil marriage, the consequences of which are identical. A civil union (whether marriage or partnership) is automatically in community of property unless an antenuptial contract is entered into by the parties.

PROPERTY IN CIVIL MARRIAGES AND CIVIL UNIONS

The property in a civil marriage or civil union can in or out of community of property. If it is out of community of property it can be with or without accrual, as explained below.

IN COMMUNITY OF PROPERTY

Marriage in community of property is the default matrimonial property regime in South Africa. This means that unless it is specified otherwise in an antenuptial contract (see below) the estates of the two people are joined together. Without an antenuptial contract they become co-owners and own everything of any monetary value on a 50/50 basis or in community of property. This means that written consent is required from the other party when purchasing or selling property. If one person already owns property and they enter a civil marriage or union in community of property, the property automatically becomes part of the join estate even if both their names are not reflected on relevant documents.

There are a few exceptions to this rule of joint ownership. As well as being excluded in an antenuptial contract prior to the marriage (see below), inheritances or donations are not jointly owned if it is specified in the will, or by the donor, that these are not for the joint estate.

If no antenuptial contract is entered into before the marriage, a couple will automatically be married in community of property. When the marriage is dissolved by divorce, the joint estate will be divided in half with each party being entitled to their half. This may mean that property has to be sold to allow each party to take their half of its value.

In the event of one spouse dying, the joint estate is dissolved. The surviving spouse is entitled to half of the estate. The half of the estate belonging to the deceased spouse is transferred by the appointed executor either following the will of the deceased or if they had no will following the rules of intestate inheritance. Under the rules of intestate inheritance the surviving spouse will receive the half of the estate belonging to their deceased partner. If the deceased spouse left a will nominating heirs other than their marriage or union partner, problems may arise if, for example, the house that the couple shared now has to be sold in order to fulfill the deceased partner's will.

OUT OF COMMUNITY OF PROPERTY

Since the default system of property ownership in civil marriages and unions is community of property, partners wanting their estates not to be combined must make an antenuptial agreement or contract with each other.

Antenuptial Agreement

An antenuptial agreement or contract is one draw up between the two people *before* they join together in a civil marriage or union. An antenuptial agreement can contain any provisions that the partied agree on provided it is lawful. This process requires an attorney and a Notary Public. A Notary Public is an attorney who has been authorised by the High Court to witness signatures, draw up and attest (confirm) contracts and statements, as well as authenticating the validity of documents. An attorney drafts the antenuptial contract which must be signed before a Notary Public. The contract is then registered at the Deeds Office for a fee.

OUT OF COMMUNITY OF PROPERTY WITH ACCRUAL

The accrual system allow both spouses to share in the growth of their estates during a marriage without their estates being joined together as in community of property. However, spouses share gains made during the marriage. During the marriage each owns their property separately, but in the event of their civil marriage or union ending, the *growth* of their individual estates is calculated and combined. This figure is then divided by two, with each spouse (or their deceased estate) entitled to half of the combined growth. In other words, they equally share any growth or increase in their individual property that occurred during the marriage. This means that the value of each partners assets, at the commencement of the civil marriage or union, much be recorded in their antenuptial contract.

Simplified example of the accrual system

Partner	Estate prior to civil marriage or union	Estate at dissolution of civil marriage or union	Growth of their estates over the duration of the civil marriage or union	Growth of their separate estates combined	Share of the growth each receives	Components of their individual estate on dissolution of the civil marriage or union: initial amount + 50% of combined growth	Value of their individual estate on dissolution of the civil marriage or union
A	20,000	50,000	30,000	40,000	20,000	20,000 + 20,000	40,000
B	10,000	20,000	10,000		20,000	10,000 + 20,000	30,000

Should there be an overall loss in the combined separate estates (i.e. the combined amount is less at the end of the civil marriage or union than it was at the commencement) then the loss is equally shared, using a similar calculation.

The accrual system protects a spouse who might not earn any income, and therefore doesn't increase the value of their own estate, but contributes in other ways to the marriage, for example being the primary caregiver of children.

The accrual system automatically applies to marriages out of community of property, unless it is excluded in an antenuptial contract.

OUT OF COMMUNITY OF PROPERTY WITHOUT ACCRUAL

Two people entering a civil marriage or union may specify in their antenuptial contract that any profit and loss in the estate of either party during the marriage is excluded. This will result in the partners having separate assets with no property shared in their joint names. In the event of their civil marriage or union ending, each partner, or their deceased estate, will remain with their separate estate.

CUSTOMARY MARRIAGE

Customary marriage is defined by the *Recognition of Customary Marriages Act* 120 of 1998 as a marriage concluded in accordance with the customary law. That is, the customs and usages traditionally observed amongst the indigenous African people of South Africa. In Kwa-Zulu Natal Province these are codified (written down) by the *KwaZulu Act on the Code of Zulu Law and the Natal Code of Zulu Law*. In other parts of the country the requirements for customary marriage are un-coded and vary.

The *Recognition of Customary Marriages Act* came into effect on the 15th November 2000. The act sets out the requirements for a customary marriage. Marriage that existed before this date and which complied with the provisions of the act (retrospectively) are recognized, as are marriages conducted after that date provided they meet the requirements.

Requirements of a valid customary marriage

- The prospective spouses must be both over 18 years
- They consent to be married to each other
- The marriage is negotiated and entered into or celebrated in accordance with the customary law

How to register a customary marriage?

- The spouses must register their marriage at a Department of Home Affairs office or through a designated traditional leader within three months after the marriage
- The registering officer will issue a certificate of registration, which constitutes as proof of the particulars contained in it

Despite the requirement to register a customary marriage, the failure to register does not affect its validity.

Section 6 of the *Recognition of Customary Marriages Act* confers equal civil rights on a wife, in addition to whatever rights she has in traditional law. In the Constitutional Court case *MM v MN*, the majority of the court held that Section 6 means that the first wife must consent to a subsequent marriages by her husband and to the marital property arrangement in the polygamous marriage. Without her permission, any subsequent polygamous marriages are void.

PROPERTY RIGHTS IN A CUSTOMARY MARRIAGE

In a monogamous customary marriage, the couple are married in community of property, unless they make an antenuptial agreement specifying another form of matrimonial property arrangement. Following the Constitutional Court case *Gumede v President of the Republic*, this applies irrespective of when the customary marriage was concluded.

If a man wishes to enter into a polygamous marriage (that is marry a second wife) after the 15th November 2000 when the *Recognition of Customary Marriages Act* came into effect, he must in addition to obtaining permission from his first wife to marry another must, before the polygamous marriage takes place, obtain court approval for a written contract regulating the future property system of the marriage.

In the event of divorce, the *Recognition of Customary Marriages Act* provides the court granting the divorce the powers provided for in Sections 7-10 of the *Divorce Act* allowing it to make any order in regard to property that it deems just. The *Recognition of Customary Marriages Act* does not regulate the distribution of property when a polygamous marriage terminates as a result of death

LIFE PARTNERSHIP (UNMARRIED COUPLES STAYING TOGETHER/COHABITATION)

Despite popular belief, there is no such thing as a 'common law marriage' that confers equivalent rights on couples living or cohabiting together as provided for by civil or customary marriages and civil unions. The 2011 census found that 3.5 million people in South Africa were cohabiting or in a life partnership (a term recognized by the courts).

The lack of legal recognition of the social reality of cohabitation/life partnerships is a problem. If one of the couple dies intestate their partner is not recognized as a spouse and there has no right to the estate of the deceased partner (see the section on wills and succession) or maintenance. Typically, this involves the widow who may well be 'chased away' by the deceased man's relatives who legally stand to inherit from his intestate estate (see: Charlene May 'The fight for equality in domestic relationships goes to the courts' *Mail & Guardian* 8 July 2020).

By drawing up valid wills, partners to a life partnership can determine to whom their estate will be left in the event of their deaths. Additionally, under the common law (the laws developed by the courts and not contained in acts of parliament or statues), any couple can enter into a 'universal partnership' by means of a contract between the two of them. There are two types of universal partnership:

- One is a partnership in which they agree to share all their property, present and future, in common.
- One is a partnership in which they agree to share all they acquire during the existence of the partnership from commercial undertakings.

A court may recognize a universal partnership as a tacit agreement entered into (i.e. implied by their behavior as a cohabitating couple). However this does not grant the partners the rights of civil or customary marriages or civil unions.

RELIGIOUS MARRIAGE

A religious marriage is one which is entered into in terms of a religion such as Islam, Hinduism or Judaism. They are not recognised in South African law but are given limited protection in certain circumstances. They are treated as marriages out of community of property without the accrual system.

FURTHER READING

Marriage and Matrimonial Property law Amendment Act 3 of 1988
Recognition of Customary Marriages Act 120 of 1998
Marriage Act 25 of 1962
Customary Marriages Act of 1998
Civil Union Act 17 of 2006
KwaZulu Act on the Code of Zulu Law 16 of 1985
Natal Code of Zulu Law, Proclamation R151 of 9 October 1985, *Government Gazette* 10966.
MM v MN 2013 (4) SA 415 (CC)
Gumede v President of the Republic 2009 (3) BCLR 24 (CC)
Divorce Act 70 of 1979

05
ACCESS TO SERVICE DELIVERY

ACCESS TO SERVICE DELIVERY

South Africa's municipalities are responsible for a number of services including:

- Water supply
- Sewage
- Refuse removal
- Electricity supply (where there is not a direct supply from Eskom)
- Municipal roads and storm water drainage
- Street lighting
- Municipal parks and recreation

Service delivery is an important because it accompanies the right to adequate housing. There are charges made for the use of some of these services, such as water, sewage, refuge removal and electricity. This can be a flat or fixed rate amount per household, or based on the amount of services used (or a combination of flat rate and charge per amount used). These are known as municipal charges. Because not everybody can afford these services which are essential for a safe and dignified life, there are policies for indigent (poor) people.

Other services, which cannot be linked to specific households, for example street lighting, are paid for out of municipal rates which are a tax levied by municipalities based on the value of properties and what they are being use for (domestic, commercial etc.).

This section deals with:

1. The municipal government structure in South Africa and service delivery
2. Water and Sanitation
3. Electricity
4. Disconnection of water and electricity
5. The Indigent Policy for the City of Tshwane
6. Municipal Rates and Taxes

5.1 THE MUNICIPAL GOVERNMENT STRUCTURE IN SOUTH AFRICA AND SERVICE DELIVERY

THE MUNICIPAL GOVERNMENT STRUCTURE IN SOUTH AFRICA AND SERVICE DELIVERY

Under the South African Constitution, the country has 'wall to wall' municipal government. That means that every part of the country falls into a municipal government, as well as provincial and national government – the three spheres or levels of governance. Outside of the eight metropolitan (or city) municipalities, there are in fact four levels of government: national, provincial, district and local (see the box below).

THE THREE SPHERE OF GOVERNANCE IN SOUTH AFRICA

- National Government
- Provincial Government (the nine provinces)
- Local Government or Municipal Government

There are three types of municipal government, making up the local government sphere:

- Eight metropolitan municipalities. Three of these are in Gauteng province: City of Tshwane, City of Johannesburg, and City of Ekurhuleni. These metropolitan municipalities are usually divided up into sub-regions for administrative purposes. Thus, The City of Tshwane has seven regions while the City of Johannesburg originally had 11 regions, but these were then consolidated to seven.

- Forty-four district municipalities. In Gauteng the areas not falling under the three metropolitan municipalities are covered by the West Rand District Municipality and Sedibeng District Municipality.

- Two-hundred and five local municipalities fall under the district municipalities.

The three levels of local government are prescribed by Chapter 3 of the Constitution: *Co-Operative Government*.

Each municipality has an elected council, with the exception of district municipalities (see the explanatory box) these are made up of constituency-based wards (that is people vote for a councillor to represent them in their area) and proportional representation (PR) councillors taken from party lists. This 'mixed-member proportional representation' system results in a council that closely reflects the overall votes cast (the combined ward and PR votes). The City of Tshwane has a total of 214 councillors: 107 ward councillors and 107 PR councillors.

Section 73 of the *Local Government: Municipal Services Act* provides that municipalities must give effect to the Constitution and, in a financially and environmentally sustainable way:

- Give priority to the basic needs of the local community
- Promote the development of the local community
- Ensure that all members of the local community have access to at least the minimum level of basic municipal services

A minimum level of services: water, sanitation, electricity (where there is supply) and refuse collection, must be provided free of charge to indigent (or poor) households. Indigent households need to apply to the local municipality for these free services. The municipality will apply a means test which evaluates the income of the household.

Because municipalities receive a subsidy from national government for indigent households based on survey data, restricting successful applications by indigent households provides a source of income for municipalities that can be used elsewhere. One way in which applications for free basic services are limited is through onerous application requirements.

Some municipalities provide more than the government-prescribed minimum level of free services. Nevertheless, even when municipalities provide more than the minimum this is generally well below the basic level of household consumption. For example the minimum amount of electricity to be supplied (outlined below) is 50 kWh. However, an energy audit of low-income households in Gauteng townships by Earthlife Africa in 2010 found that the average use of electricity was some 750 kWh a month while desktop projections of the minimum amount of electricity required for essential household use range from 260 to 420 kWh a month depending on the season and what is counted as essential. A further limitation is that the free minimum is provided per stand and therefore does not cover those living in backyard rooms, even though there are an estimated 1.4 million such dwellings in the country.

The actual delivery of municipal services to the public is carried out by:

- Municipal employees (that is employees of the council)
- Companies set up and owned by the municipality (for example the City of Johannesburg's City Power that supplies electricity to residents of Johannesburg), or
- A municipal service partnership, an agreement between a municipality and a service provider. A service provider may be another public authority (such as a water board), a private company, a NGO or CBO. The service provider provides a municipal service on behalf of the municipality with specific timeframes, budget and targets.

In Pretoria, services are provided directly by various departments of the municipality. These services are regulated by the City's by-laws which can be found at: https://www.tshwane.gov.za/sites/business/Bylaws/Pages/Promulgated-By-Laws.aspx

FURTHER READING

Local Government: Municipal Services Act 32 of 2000
Tracy Ledger (2021) Broken Promises: *Electricity Access for Low-income Households: Good Policy Intentions, Bad Trade-offs and Unintended Consequences*. PARI.
Earthlife Africa Johannesburg (2010) Free Basic Electricity: *A Better Life for All:*
https://earthlife.org.za/wp-content/uploads/2020/11/Free-Basic-Electricity-Final-Low-res.pdf

5.2 WATER AND SANITATION

WATER AND SANITATION

Section 27(1) (b) of the Constitution provides that, "Everyone has the right to have access to sufficient food and water". To give effect to this right, Parliament enacted the *Water Services Act*. This provides for the rights of access to basic water supply and basic sanitation. All spheres of government (national, provincial and local/municipal) have a duty, within the limits of physical and financial feasibility, to provide water and sanitation services. The National Department of Water and Sanitation is the custodian of South Africa's water resources. However, it is municipalities which are responsible for providing water and sanitation services to communities, including informal settlements.

The Water and Sanitation Division is responsible for water supply and sanitation services, as well as infrastructure planning and implementation, in the City of Tshwane.
See: https://www.tshwane.gov.za/sites/Departments/Public-works-and-infrastructure/WaterSanitation/Pages/Water_and_Sanitation.aspx

The minimum basic water and sanitation services

- The government must provide a minimum of quality potable water (fit for human consumption) of 6,000 litres per household per month for indigent households
- At a flow rate of not less than 10 litres per minute
- Within 200 metres of a stand
- No consumer can be without water for more than seven days per year.

Excess water used over and above 6,000 litres has to be paid for. Water is charged at a rising tariff. This means that the more is used the more it costs per litre.

The amount of free water provided by the City of Tshwane to indigent households is 12,000 litres of potable water per month.

Where to get help

Problems with water and sanitation should be reported to your municipality, ward councillor or community development worker. For the City of Tshwane see the Customer Service Delivery Charter: https://www.tshwane.gov.za/sites/Departments/Public-works-and-infrastructure/RelatedDocuments/Customer%20Service%20Delivery%20Charter.pdf

See also the section on Service Disconnection below.

FURTHER READING

Water Services Act 108 of 1997
By law on water supply for the City of Tshwane: http://www.tshwane.gov.za/sites/business/Bylaws/Promulgated%20ByLaws%20Documents/bylaw_WaterSupply.pdf

5.3 ELECTRICITY

ELECTRICITY

Statistics South Africa's *General Household Survey* of 2019 estimate that 85 percent of households are connected to mains electricity. Most electricity in South Africa is produced by the state-owned enterprise Eskom which transmits it along high-voltage power lines of the national grid before it is delivered to customers. This last phase, distributing or reticulating lower-voltage supply, is shared with municipal distributors which buy electricity from Eskom and then sell it, at a mark-up, to customers. In 2019 there were 14.6 million households with electricity of which approximately 6.4 million were directly supplied by Eskom and the rest, some 8.2 million, by municipalities.

The government plays an important role in the electricity industry in South Africa. Schedule 4, Part B of the Constitution lists electricity and gas reticulation as a local government responsibility.

As with water, indigent households may apply for free basic electricity. This is set by the *Free Basic Electricity Policy* at 50KwH per household. In theory, this is sufficient to provide basic lighting, basic media access, basic water heating using a kettle and basic ironing.

The amount of free electricity provided by the City of Tshwane to indigent households, delivered to a stand and not individual households, is 100 KwHs per month.

Electricity Meters

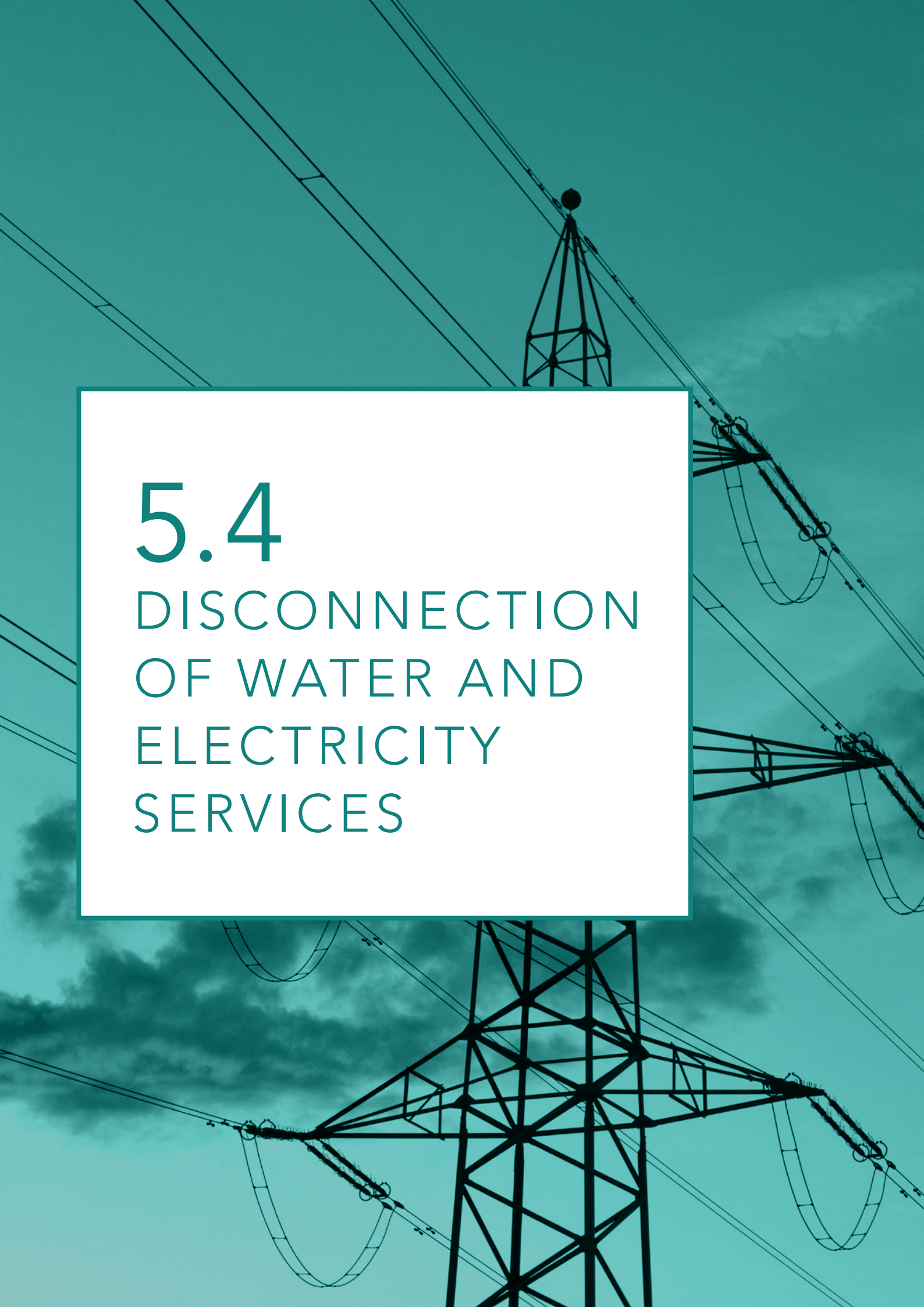
Payment for electricity is either calculated using a credit or pre-paid meter. A credit meter measures the amount of electricity used after which the consumer is billed on a monthly basis. If a consumer with a credit meter falls into arrears, interest may be charged on the overdue accounts. With a pre-paid meter, consumers are required to pay for electricity in advance by purchasing coupons either from Eskom or their municipality depending on who supplies them with electricity. Owners of buildings with multiple tenants may install 'back meters.' These are pre-paid meters installed in each unit and belong to the landlord. The landlord/landowner is responsible for paying the electricity supplied to the building as whole (including communal areas) whether on a credit or pre-paid meter basis. Individual tenants are responsible for paying for the electricity passing through the meter installed in their section of the property. Often the landlord/landowner increases the rate paid on the back meters from that paid to Eskom or the municipality. However, under NERSA regulations resellers of electricity must a) be registered as resellers with either Eskom or a distributing municipality and b) must sell it on at the same price they paid for it.

Consumers are entitled to have the metering equipment tested by the municipality for a fee. If a dispute arises, consumers may have the metering equipment in dispute tested at their own cost by an independent testing authority and the result of the test will be binding on both the municipality and the consumer.

You can apply to have a municipal credit meter converted to a pre-paid meter. To do this your municipal account should be paid up to date or you must have a payment arrangement. There is a fee charged by the City of Tshwane for this conversion.

FURTHER READING

Electricity Regulation Act 4 of 2006
Department of Minerals and Energy (2003) *Electricity Basic Services Support Tariff (Free Basic Electricity) Policy:* http://www.energy.gov.za/files/policies/policy_electricity_freebasic_2003.pdf
City of Tshwane Electricity:
https://www.tshwane.gov.za/sites/Departments/Electricity/Pages/Electricity.aspx
City of Tshwane By-Laws: Electricity:
https://www.tshwane.gov.za/sites/business/Bylaws/Promulgated%20ByLaws%20Documents/bylaw_electricity.pdf
Department of Minerals and Energy: Electricity Basic Services Support Tariff:
https://www.cch.co.za/news/tenants-beware-ensure-you-are-paying-escom-municipality-electrical-tariffs-to-managing-agents/



5.4 DISCONNECTION OF WATER AND ELECTRICITY SERVICES

DISCONNECTION BY A MUNICIPALITY

In the Constitutional Court case of *Mkontwana v Nelson Mandela Metropolitan Municipality*, it was stated that 'Municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty.' Given this, basic services may not be cut off or restricted without the municipality following due process. I.e. a municipality must comply with its bylaws regarding disconnections and, in line with Section 156(3) of the Constitution, these must comply with relevant national legislation.

If water or electricity supplied by a municipality is not paid for, the municipality must give 14 days' written notice (a final demand) of termination of the supply of water and/or electricity to an occupant and also to the landlord/ landowner, if the occupant isn't the owner of the property. Failure to do so, outside of an emergency situation or necessary maintenance, amounts to an illegal disconnection.

When a municipality supplies electricity, it does so as a 'licensee' under the *Electricity Regulations Act* 4 of 2006. Section 21(2) of the *Electricity Regulations Act* states that; "A licensee may not discriminate between customers or classes of customers regarding access…except for objectively justifiable and identifiable differences approved by the Regulator." The Regulator is the National Energy Regulator of South Africa or NERSA.

Section 21(5) of the *Electricity Regulations Act* outlines the grounds on which a licensee may terminate the supply of electricity to a customer. These are:

- The customer is insolvent
- The customer has failed to honour [i.e. pay] or refused to enter into an agreement for the supply
- The customer has contravened a payment condition

In the Constitutional Court case *Joseph v City of Johannesburg* ('Joseph') the *Promotion of Administrative Justice Act* 3 of 2000 was applied to electricity disconnections by a municipality supplying electricity. The court ruled that a pre-termination notice for the disconnection of a person's electricity supply must contain:

- The date and time of the proposed disconnection
- The reason for the proposed disconnection
- The place at which the affected parties can challenge the basis of the proposed disconnection
- A minimum of 14 days pre-termination notice

The purpose of the 14 days' notice is to allow the person to respond to the municipality and raise any disputes as to the reasons put forward for the disconnection. Under Section 102(2) of the *Local Government: Municipal Systems Act*, if a dispute is lodged the municipality may not disconnect the service being disputed, provided that the individual's debt to the municipality does not exceed what the municipality claim is owed on the disputed service. In other words, the individual is not in arrears on other municipal charges that are not in dispute.

In the *Constitutional Court case City of Cape Town v Strumpher*, it was ruled that should a municipality cut off a resident's water supply, over which the resident had lodged a genuine dispute, without complying with its own dispute resolution procedures, then the resident was entitled to claim for reconnection using a spoliation order. A spoliation order is granted if one party illegally deprives another of their rights to property. If a spoliation order is granted, the *status quo* (situation before the illegal action) must be restored.

The exact requirements of municipalities regarding disputed service charges varies. Some municipalities require you to continue paying for the disputed service using the average payment over the three months prior to the disputed amount.

To lodge a dispute with the City of Tshwane go to: https://www.tshwane.gov.za/sites/residents/DownloadForms/Pages/default.aspx

Disconnection by Private Persons (Landlords)

Where a lease provides for the supply of water, electricity or gas (expressed or implied), Section 12(1) of the *Rental Housing Act*'s Unfair Practice Regulations, 2008 state that a landlord/landowner or body corporate may only cut of these services:

1. In the event of an emergency
2. To conduct necessary maintenance work for which they must give reasonable notice and resume the service as soon as possible
3. With a court order

If the landlord/landowner cuts one of these services without a court order, it can be responded to with:

- A complaint laid with the Rental Housing Tribunal (which will seek to mediate a settlement agreement)
- A spoliation order from a court to restore the previous situation (particularly, if the motivation for the cutting of supply is to force the tenant to leave the property without applying to the court, i.e. unlawful 'constructive eviction')

Section 16(hA) of the *Rental Housing Act* states that any person who unlawfully locks out a tenant or shuts off the utilities to the rental housing property commits a criminal offence and can face fines or imprisonment. On this basis, a criminal charge could be laid against the landlord/landowner who disconnects services without a court order.

FURTHER READING

Local Government: *Municipal Systems Act* 32 of 2000
City of Cape Town v Marcel Mouzakis Strumpher (103/2011) [2012] ZASCA 54
Joseph and Others v City of Johannesburg and Others (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC) (9 October 2009).
Electricity Regulations Act 4 of 2006
Mkontwana v Nelson Mandela Metropolitan Municipality and Another [2004] (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC)
Unfair Practice Regulations, 2008 of the *Rental Housing Act* 50 of 1999:
https://www.sslr.co.za/wp-content/uploads/2020/12/UNFAIR-PRACTICES-REGULATIONS.pdf

5.5 THE INDIGENT POLICY FOR THE CITY OF TSHWANE

THE INDIGENT POLICY FOR THE CITY OF TSHWANE

The term "indigent" means "lacking the necessities of life". Sufficient water, basic sanitation, environmental health, basic energy, healthcare, housing, food and clothing are considered basic necessities for an individual to survive and anyone who does not have access to these goods and services is considered indigent.

The City of Tshwane provides the following free basic services for households registered with it as indigent:

- 12 kilolitres of water per month
- 100 kWh of electricity per month
- Dustbin for refuse removal
- 100% rebate on the value of the property (municipal rates or 'rent') and refuse removal.
- Writing off of arrears accumulated at registration.
- Provision and free connection of an electricity pre-paid meter

Registration Process

To register as an indigent, households must complete an indigent application form (and submit documentary proof) at a City of Tshwane office. A household can only be registered as indigent if it meets all of the following criteria:

- The total monthly household income (of all household members) does not exceed the joint amount of two state old-age pensions (R3,960 in 2022), excluding any child support grant and foster care grant
- The applicant is 18 years or older and a South African
- The applicant lives at the property for which they are applying – unless they are a legal guardian applying on behalf of a child-headed household
- The applicant must be a registered owner or municipal tenant
- You have a services account with the City of Tshwane

The following certified documents must be provided in order to register:

- Proof of income, or if you're unemployed, a sworn affidavit to that effect
- Identity Document and that of your spouse and dependants
- Latest municipal account
- Birth certificate of children and proof of their attendance at a school
- Proof of marital status

For information on the City of Tshwane's Indigent policy and how households can apply see: https://www.tshwane.gov.za/sites/Departments/Health-Department/Publications/Indigent%20Programme%20Brochure.pdf

FURTHER READING

City of Tshwane Indigent Programme:
http://www.tshwane.gov.za/sites/Departments/Health-Department/Publications/Indigent%20Programme%20Brochure.pdf
Department of Provincial and Local Government: National Policy Framework for Indigent Policies:
https://www.westerncape.gov.za/text/2012/11/national_framework_for_municipal_indigent_policies.pdf

5.6 MUNICIPAL RATES AND TAXES

MUNICIPAL RATES AND TAXES

Rates levied by the City of Tshwane Metropolitan Municipality on properties must be paid by their owners. Rates are levied on a monthly basis and payment of rates may be deferred only if the rates levied to an account are disputed.

Rates are a tax on the property and are separate from charges for services provided to the property (such as water, electricity, sewage, refuse removal etc.) The value of a property, for the purpose of setting rates are set every three years, when the 'valuation roll' is drawn up. The valuation roll sets the 'rateable value' of the property (which may not accurately reflect the market value of the property). The rates are then determined, using a formula, based on this rateable value, the category of the property, and the category of owner who may qualify for a rate rebate (or discount).

Section 8(2) of the *Municipal Property Rates Act*, determines the following categories of property in regard to rates:

- Residential properties
- Business and Commercial properties
- Industrial properties
- Municipal property (rateable)
- Municipal property (not rateable)
- State-owned properties
- Public Service Infrastructure
- Agricultural
- Agricultural vacant land
- Illegal use
- Multiple use properties
- Vacant land
- State Trust land

The City of Tshwane By-laws provide for rent rebates for certain categories of people. These rebates need to be applied for each year. The size of the rebate depends on the household income of the applicant. While registered indigent people are entitled to 100 percent rebate, other categories receive a rebate of between 10 and 60 percent depending on their household income. The categories who may receive a rebate are:

- Indigents (a 100 percent rebate)
- Pensioners, disability grantees and/or medically boarded persons
- Owners temporarily without income
- Owners of properties in areas that are affected by disaster or serious adverse social or economic conditions

Pensioners may receive a rates rebate. In order to qualify for a rebate applicants must be:

- The registered owner(s) of the property
- 60 years of age or older
- The property must have one dwelling which may not be sub-let. The property must be occupied only by the applicant and his or her spouse and dependants without income
- The property must be categorised as a residential property
- The applicant must submit proof of age and a valid identity document
- The applicant must submit proof of monthly household income from all sources which should not exceed R15,125 per month (as of 2021/2)
- The applicant's municipal account must be paid in full or there must be a payment arrangement

Disability grantees and/or medically boarded persons may receive a rebate subject to the same conditions as for a pensions, other than they need not be over 60 years of age, but they must provide:

- Proof of disability and/or certification by a medical officer of health

Resolution of disputes

In terms section 95(f) of the *Local Government: Municipal Systems Act*, a municipality must provide accessible mechanisms for people to query or verify accounts and metered consumption. They must also provide appeal procedures which provide prompt redress for inaccurate accounts. To lodge a query or complaint in the City of Tshwane send an email to customercare@tshwane.gov.za or contact the call centre on 012 358 9999.

A requester or complainant may also complete a 'request to resolve a dispute' form in which a full description of the amount or amounts involved and of the nature of the dispute, as well as the detailed reasons in support of the dispute can be written. Any documents supporting the dispute, query or verification must be attached to the form. Dispute forms can be found at: https://www.tshwane.gov.za/sites/residents/DownloadForms/Pages/default.aspx

The dispute or request will be considered by the City of Tshwane's administration within 21 days from the date of registration. However, the requester or complainant must themselves enquire as to the outcome of the decision.

Information regarding disputes can be obtained by emailing disputes@tshwane.gov.za, contacting 012 358 9191 or visiting 14th Floor, Isivuno Building, 143 Lilian Ngoyi Street, Pretoria.

FURTHER READING

Municipal Property Rates Act 6 of 2004
City of Tshwane By-laws: https://www.tshwane.gov.za/sites/business/Bylaws/Pages/Promulgated-By-Laws.aspx
City of Tshwane 'Property Rates By-laws and Policy.' Local Authority Notice 630 of 2021. *Provincial Gazette* No 201, 23 June 2021.

06 WHERE TO FIND HELP

LEGAL ASSISTANCE

Lawyers for Human Rights

Pretoria Office Address:	Kutlwanong Democracy Centre, 357 Visagie Street, Pretoria
Tel:	012 320 2943 / 064 647 4719
Johannesburg Office Address:	4th Floor Southpoint Corner Building, 87 De Korte Street, Braamfontein
Tel:	011 339 1960 / 066 076 8845
Durban Office Address:	Room S104, Diakonia Centre, 20th Diakonia Avenue
Tel:	031 301 0531 / 078 315 1269
Musina Office Address:	18 Watson Avenue, Musina
Tel:	015 534 2203 / 076 766 7782
Email:	info@lhr.org.za
Website:	https://www.lhr.org.za

Rental Housing Tribunal

Address:	Tshwane House, 1st Floor, East Wing, Block B, Pretoria
Tel:	012 358 8852 / 012 358 1359
Website:	https://www.tshwane.gov.za/sites/Departments/Housing-and-Human-Settlement/Pages/Gauteng-Housing-Rental-Tribunal-Operations.aspx

Legal Aid South Africa

Address:	Locarno House, 4th Floor, 317 Francis Baard Street, Pretoria
Tel:	012 304 0576
Website:	https://legal-aid.co.za/

University of Pretoria Law Clinic

Address:	Lynwood Road, Hatfield, Pretoria
Tel:	012 420 4155 / 012 420 2366
Website:	https://www.up.ac.za/up-law-clinic-home-page

UNISA Law Clinic

Address:	Thutong Building, Joubert & Justice Mahomed Streets, Pretoria
Tel:	012 481 2954/5
Email:	LawClinic@unisa.ac.za
Website:	https://www.unisa.ac.za/sites/corporate/default/Colleges/Law/Schools-departments-centres-&-institute/Unit/Unisa-Law-Clinic

Law Society Pro bono

Tel:	012 338 5800
Email:	probono@lsnp.org.za
Website:	https://www.lssa.org.za/pro-bono/

South African Human Rights Commission

Address:	Braampark 3, 33 Hoofd Street, Braamfontein
Email for Gauteng:	GautengComplaints@sahrc.org.za
Tel:	011 877 3600 / 082 059 6520 (you can send WhatsApp messages)
Website:	https://www.sahrc.org.za/

OTHER INSTITUTIONS

Deeds Office

Address:	Merino Building, 140 Pretorius St, Pretoria
Tel:	012 338 7000
Website:	https://www.deeds.gov.za/

Master of the High Court (Pretoria)

Address:	SALU Building, 316 Thabo Sehume Street, Pretoria
Tel:	012 339 3333 / 7700 / 7807
Help line:	012 315 1207.
Email:	chiefmaster@justice.gov.za

City of Tshwane

City of Tshwane Call Centre:	012 358 9999
Toll-free number (call centre):	080 111 1556
Environmental Health Services:	012 358 4656 / 012 358 2111

Email queries:

Customer care queries:	customercare@tshwane.gov.za
Potholes:	pothole@tshwane.gov.za
Meter readings:	meterrecords@tshwane.gov.za
Street lights:	streetlights@tshwane.gov.za
Traffic lights:	trafficsignalfaults@tshwane.gov.za
Water leaks:	waterleaks@tshwane.gov.za
Quality of drinking water:	water@tshwane.gov.za
Electricity enquiries:	electricity@tshwane.gov.za
E-Tshwane (on-line self-service platform):	https://www.e-tshwane.co.za
Environmental health services:	ehonestop@tshwane.gov.za
Website:	https://www.tshwane.gov.za

National Credit Regulator

Address:	127 15th Rd, Randjespark, Johannesburg
Tel:	0860 627 627
Email:	info@ncr.org.za / complaints@ncr.org.za
Website:	https://www.ncr.org.za/

The Public Protector

Address:	Hillcrest Office Park, 175 Lunnon Street, Brooklyn, Pretoria
Tel:	012 366 7112
Email:	customerservice@pprotect.org
Website:	http://www.pprotect.org/

Contact Details:

DURBAN OFFICE

Address: Room S104 Diakonia Centre

20 Diakonia Avenue, Albert Park, Durban

Tel: +27 31 301 0531

PRETORIA OFFICE

Address: 357 Visagie Street

Pretoria Central

Tel: +27 12 320 2943

JOHANNESBURG OFFICE

Address: 4th Floor South Point Corner Building

87 De Korte Street, Braamfontein

Tel: +27 11 339 1960

MUSINA OFFICE

Address: 18 Watson Avenue, Musina

Tel: +27 15 534 2203

LHR_SA

LawyersForHumanRights

www.lhr.org.za