

PARALEGAL MANUAL



WOMEN'S LEGAL CENTRE

Paralegal Manual

Paralegal Manual

First Edition

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Please note that all names used in examples in this manual are fictitious.

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Foreword: WLC director

The Women's Legal Centre (WLC) is a not-for-profit law centre that seeks to achieve equality for women, particularly black women, through impact-based litigation, the provision of free legal advice to women, legal support to advocacy campaigns by gender and other organisations, and training that ensures that people know and understand the impact of the judgements of the courts around women's rights. The WLC also provides legal advice to other non-governmental women's organisations nationally and in Africa. The WLC has won several precedent-setting cases that have improved women's access to justice in South Africa.

The WLC is staffed by attorneys and a legal adviser, who specialise in gender law and have extensive litigation experience. We are based in Cape Town and have satellite offices for free legal advice in Khayelitsha and the Eastern Cape.

The WLC has a vision of women in South Africa free from violence, empowered to ensure their own reproductive and health rights, free to own their own share of property, having a safe place to stay and empowered to work in a safe and equal environment.

The WLC has been at the forefront of legal reform in relation to women's equality since the South African Constitution came into effect, having won several precedent-setting cases since its inception.

We have successfully represented clients or assisted the courts as a friend of the court (by making submissions in relation to women's rights) in these ways:

- Challenging the City of Cape Town housing policy that women in Muslim marriages are not registered as co-owners of council houses (Solarie case).
- Declaring that testamentary trusts that exclude girls discriminate on the basis of gender (Bank of Exchange case).
- Challenging the discriminatory provisions of laws relating to intestate succession, thus enabling women married in monogamous Islamic marriages (Daniels case), polygynous Islamic marriages (Gabie-Hassam case) and Hindu marriages (Govender case) to inherit from their spouses;
- Challenging the interpretation of an "employee" in the Labour Relations Act that prevented sex workers from obtaining the necessary labour protections under labour legislation and the Constitution (Kylie case).
- Challenging the discriminatory remnants in the law that operated to exclude

women in polygynous customary marriages from claiming for loss of support on the death of their husbands (Gasa case).

- Challenging the provisions of the Recognition of Customary Marriages Act that discriminated unfairly between women married before and after the promulgation of that Act, in order to extend the remedies available to women married before the Act (Gumede case).
- Challenging the primogeniture rule of the customary law of succession, thus enabling girls to inherit from their fathers under customary law for the first time (Bhe case).
- Challenging the provisions that prevented women married in community of property from claiming damages when injured by their spouses in motor vehicle accidents (Van der Merwe case).
- Challenging the provisions in the law of prescription that prevented survivors of child sexual abuse from claiming damages (Van Zijl case).
- Developing the concept of sexual harassment as discrimination by case law (Ntsabo case) and related advocacy, resulting in stricter obligations on employers to ensure that the workplace is free from sexual harassment discrimination.
- Developing the common law so that a widow of a Muslim marriage can claim for damages for the loss of support following the unlawful death of her husband (Amod case).
- Holding the state as employer liable for sexual harassment by successfully suing the metro police on behalf of a woman employee who was constructively dismissed after reporting sexual harassment, and getting maximum compensation for her (Radebe case).
- Developing the State's duty of care in giving effect to women's rights to be free from violence (K v Minister of Safety and Security case), and defending the extension of this duty in relation to the vicarious liability of the state for police officers on stand-by duty who commit rapes (F v Minister of Safety and Security case).
- Defending legal challenges to the right to reproductive health care.
- Making submissions on the gendered nature of sexual violence where the Constitutional Court found that existing provisions for the protection of child

witnesses in sexual offences cases were not being adequately utilised and ordered the State to furnish a report on the implementation of existing witness protection measures to the Court (Mokoena case).

- Obtaining an order in the Equality Court that the assault of a lesbian woman is unfair discrimination on the grounds of gender and sexual orientation, and having the perpetrators charged criminally (Louw case).

In addition to these precedent-setting cases, over 10,000 women have received free legal advice and assistance. The WLC has supported NGOs and campaigns in all our focus areas, such as the Sexual Offences Act, hate crimes, customary marriages, sexual harassment, customary law, women's access to termination of pregnancy, maintenance, domestic violence legislation, inheritance and property laws, forced sterilisations and housing and eviction. At least 30,000 women, community workers and paralegals have received training. Thousands of booklets, newsletters and annual reports have been produced.

The WLC seeks to achieve its long-term goals through litigation. We have identified 5 strategic areas in which to litigate and conduct law reform:

- *Fair access to resources:* We will take up cases to ensure that on dissolution of partnerships, whether by death or separation, women receive a fair share of the assets of the partnership. This involves ensuring that all partnerships are legally recognised, irrespective of religion and custom.
- *Being free of violence:* We will take up cases that improve the access of women and girl children to state protection from gender-based violence, particularly rape and domestic violence, and increase protections for girl children from abuse in schools.
- *Having a safe place to stay:* We will take up cases that extend tenure to women in their own right and to prevent loss of tenure on dissolution of relationships.
- *Being able to work:* We will take up cases that extend employment protections to vulnerable groups, develop the law on sexual harassment in relation to farm and domestic workers, and ensure equal opportunities in the workplace.
- *Being well:* We will continue to defend legal challenges to the right to make choices around reproductive health, and to litigate to ensure that women have access to reproductive health care. We will take cases related to women's access to health care, and the intersection between HIV and AIDS and our other strategic focus areas.

In order to empower women through knowledge of their rights, the WLC also offers free legal advice to women. These women are assisted or referred to the relevant body, NGO or court for assistance. The bulk of the queries we receive involve the dissolution of partnerships, gender-based violence and maintenance.

In the long-term, we hope to contribute to capacitating the sector to be more effective in advocating for women's equality.

Our advocacy and training work focuses on providing support to other organisations and groups of organisations advocating for the advancement of rights of women in the WLC's focus areas. We assist these organisations by providing legal opinions, drafting and making submissions to parliament, presenting workshops, and drafting legislation, regulations and policies. We provide training in order to ensure the communication and implementation of gains won in court, and as a costs-recovery activity.

Finally, in order to work towards the transformation of the profession and broader society, we provide information, training and capacity-building services on a regional level. We also train candidate attorneys to ensure transformation of the profession, and seek to make submissions on the gender record of acting judges before they are appointed.

The WLC and SWEAT have partnered on the Sex Work Human Rights Defender Project since 2009. The WLC provides SWEAT with legal support in documenting human rights abuses and training and equipping sex workers to respond to human rights abuses. Strategic litigation arising out of the project is undertaken by the WLC with the aim of improving sex workers' access to their constitutional rights.

In order to successfully assist sex workers through outreach programmes, the WLC created the peer-based paralegal programme, comprised of sex workers who have been trained as paralegals.

This Paralegal Manual has been developed to provide peer-based paralegals with information, and practical skills to sex workers and the general public. The provision of paralegal services is intended to make access to justice more accessible for sex workers nationally.

This Paralegal Manual aims to provide detailed information and practical examples of legal remedies to assist paralegals when they give legal advice or assistance. The Paralegal Manual targets areas of the law that sex workers approached the WLC for legal advice, along with general legal knowledge that should assist paralegals when faced with related issues.

Acknowledgements

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We thank the Sex Worker Education and Advocacy Taskforce (SWEAT) and Sisonke for the opportunity to assist them with litigation relating to sex workers rights.

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We thank everyone who has contributed towards this project and this Paralegal Manual.



How to use this manual

Contents

- Overall manual themes: see *Summary contents* on page 1.
- Breakdown of manual topics: see *Detailed contents* on pages 2 to 12.

Helpful lists

- *Abbreviations and acronyms*: see page 19.
- *Useful words*: explaining key terms in easy language: see page 420.
- *Cases*: full reference to cases taken up by WLC and SWEAT, and other useful cases: see page 423.
- *Useful materials*: books and websites used in writing this manual, and for extra reading and research: see page 424.

Learning objectives

At the start of each chapter there is a list of *Learning objectives* – what you should know after reading and using the information in the chapter.

Symbols to guide you in the manual



Case study to show how an issue was taken up.



Example to explain a law or issue.



Questionnaire to fill in to help a client.



Tips to help you give advice or solve a problem.

Abbreviations and acronyms

AIDS	Acquired Immune Deficiency Syndrome
Anex	Activists Networking against the Exploitation of Children
ARVs	Antiretrovirals
BCA	Bargaining Council Agreements
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
CGE	Commission for Gender Equality
COIDA	Compensation for Occupational Injuries and Diseases Act
CPA	Criminal Procedure Act
DCS	Department of Community Safety
DPP	Director of Public Prosecutions
DSD	Department of Social Development
DVA	Domestic Violence Act
EEA	Employment Equity Act
ESTA	Extension of Security of Tenure Act
FAQs	Frequently asked questions
HIV	Human Immuno-deficiency Virus
HPCSA	Health Professions Council of South Africa
ID	Identity document
ILO	International Labour Organisation
IPID	Independent Police Investigative Directorate
JSC	Judicial Service Commission

LRA	Labour Relations Act
NIA	National Intelligence Agency
NIEHS	National Institute of Environmental Health Sciences
NGO	Non-government organisation
NPA	National Prosecuting Authority
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
POA	Power of Attorney
SAHRC	South African Human Rights Commission
SANC	South African Nursing Council
SANDF	South African National Defence Force
SAPS	South African Police Service
SARS	South African Revenue Service
SASSA	South African Social Security Agency
SCC	Small Claims Court
SOA	Sexual Offences Act
S/WDs	Sectoral/Wage Determinations
SWEAT	Sex Worker Education and Advocacy Taskforce
TB	Tuberculosis
TRC	Truth and Reconciliation Commission
UIF	Unemployment Insurance Fund
WLC	Women's Legal Centre

The role of the paralegal

Learning objectives

- To understand the concept of a 'paralegal'.
- To identify the role of a paralegal in the community.
- To understand who can be a paralegal, and the qualities and skills paralegals need.
- To understand the roles of paralegals and other community practitioners.
- To highlight key responsibilities of paralegals and a code of conduct for paralegal work.

1.1 Who is a paralegal?

Paralegals provide advice and assistance to members of their community. To do this, you are trained in basic law and human rights. As a paralegal, you are not a lawyer but someone who works in the legal profession assisting lawyers in all aspects of the practice of law.

A paralegal may therefore investigate and refer cases to attorneys or relevant bodies for them to deal with. A paralegal has basic knowledge of the law and its procedures, and has a broad understanding of conflict resolution.

Paralegals play leading and supportive roles in their communities. You become educators on the law and rights for people, and use your knowledge and experience to help people with legal issues and other problems.

1.2 Role of a paralegal

Paralegals can:

- Give legal advice.
- Educate people about their legal rights and how to enforce them.
- Write or distribute pamphlets, booklets and other resources to help educate people.
- Refer people to social and health services, and other helpful organisations.
- Refer people to attorneys where it is clear an attorney is necessary.
- Help prepare people for formal legal procedures, such as what to expect in a court case.
- Assist and prepare people to take labour problems to the Commission for Conciliation Mediation and Arbitration (CCMA).
- Run workshops to educate people about their rights.
- Act as a link between communities and attorneys, and assist with taking statements, interpreting and following up cases.
- Assist in making contact with the press and in publicising events and problems in a community.
- Help sort out problems in a community, and problems with authorities through mediation and negotiation.
- Help in the building and developing of community organisations.
- Build contacts with other paralegals, resources and organisations regionally and nationally.
- Provide court support for people taking on formal legal challenges.
- Mobilise and advise members of the community for collective action to solve the problems that they are faced with
- Act as mediators or conciliators to assist people to resolve their problems.

1.3 Qualities of a paralegal

A good paralegal should:

- Have good knowledge of laws and their enforcement.
- Be a person of good character who is respected within their community.
- Be committed to providing support to people searching for justice.
- Have excellent communication skills, including being a good listener.
- Be compassionate and sensitive.
- Be a person of integrity who is able to keep issues shared confidential.

1.4 Formal recognition of paralegals in the legal system

In South Africa, most disadvantaged people have struggled to have get access to the justice system and to claim their legal rights. Paralegals working in community advice offices, community organisations, legal aid clinics and lawyers' firms have for many years played a crucial role in helping many people get access to the law and their rights.

However, paralegals are still not formally recognised by the legal profession. The Legal Practice Bill of 2002 sets out how paralegals will become a part of the formal legal structures in South Africa. When this Bill becomes an Act and part of the law, paralegals will finally be properly recognised as part of the legal system.

Best practices for paralegals

Learning objectives

- To have a good attitude towards your clients.
- To develop a good working knowledge of relevant laws and procedures.
- To communicate well and use communication tools effectively.
- To be able to keep adequate and up-to-date client records and administration.
- To work effectively and efficiently with referral processes.

Introduction¹

This chapter will focus on your responsibilities as a paralegal, such as administrative work, keeping time sheets and working with clients. This chapter focuses on the best practices that you can use to manage your time, your workload and case management to ensure that you provide top quality services to your clients.

2.1 Attitude

- Understand that the problems of advice seekers are part of a bigger socio-economic problem which needs action at the individual and collective level.
- Be willing to work hard towards helping all advice seekers.
- Be dedicated and committed to your paralegal work.

¹ The contents in this section were adapted from the Paralegal Manual published by the Education and Training Unit and Black Sash, available from: <http://www.paralegaladvice.org.za/>.

- Understand the core values of the organisation you work for.
- Understand what it means to empower someone.
- Have a vision of a society based on respect for human rights.

2.2 Case-work knowledge

Know the information, questionnaires and forms in this manual and know how to work with them.

Make sure you are able to give information to advice seekers based on these laws:

- Our Constitution, especially its Bill of Rights.
- Compensation for Occupational Injuries and Diseases Act (COIDA).
- Labour Relations Act.
- Basic Conditions of Employment Act.
- Child Care Act.
- Employment Equity Act.
- Social Assistance Act and Regulations.
- Prevention of Family Violence Act.
- Maintenance Act.
- Customary Marriages Act.
- Divorce Act.
- Intestate Succession Act and Wills Act.
- Domestic Violence Act (DVA).
- Protection from Harassment Act.
- Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).
- Sexual Offences Act.

- Criminal Law Amendment (Sex Offences and Related Matters Amendment Act).

Understand these and be able to work with them:

- Socio-economic rights.
- Criminal law and procedure.
- Civil law and procedure.
- The problems experienced by rural advice seekers.
- State institutions and bodies supporting democracy, such as the South African Human Rights Commission, the Commission for Gender Equality and the Public Protector.
- Legal Aid South Africa.
- Insurance Organisations.
- The Pension Fund Adjudicator.
- The Commission for Conciliation, Mediation and Arbitration (CCMA).
- The Independent Police Investigative Directorate (IPID).
- Complaints procedures for Correctional Services and other sectors.
- Bargaining Councils relating to issues your advice centre deals with.
- Magistrate's Commission and public prosecutions appeal divisions.

Know how your office system works around:

- Administrative procedures.
- Budgets.
- The need for co-operation amongst staff.
- The need for honesty (see Chapter 3 on Ethics).

2.3 Interviewing and communication

Paralegals should be able to communicate effectively with different people and in different languages. As a paralegal, you need to know how to talk to clients so that you can get the facts of the case and provide accurate legal advice. Excellent communication skills will allow you to paint an accurate picture of your client's problems and the facts surrounding them.

Your paralegal interviewing and communication skills need to be strong to:

- Welcome people in a respectful manner.
- Give them undivided attention when they are telling their stories.
- Show empathy and understanding for their circumstances.
- Present advice seekers with options to solve their problems in language they can easily understand.
- Suggest action to deal with problems which is in the advice seeker's best interests and not what the paralegal thinks is best for them.
- Be tactful in listening to and dealing with problems.
- Be able to assess situations correctly to understand clearly what the real problem is.
- If nothing more can be done for an advice seeker, be able to communicate this to the person in a sensitive way.

2.4 Methods of communication

There are different ways of communicating with clients, attorneys and partner organisations:

- a) *Non-verbal communication:* we show this by our body language, such as our facial expressions, and the way we sit and use our hands.
- b) *Verbal communication:* when you speak to someone in person or on the telephone.
- c) *Written communication:* when you put your thoughts and views on paper and send it to the person by email, letter or fax.

Interviewing clients

As a paralegal, you will need to interview clients to get the full details about the human rights violation or other problem they have experienced. Often these interviews happen over the telephone or during outreach consultations.

T TIPS

Here is a guide you can use or adapt to introduce yourself when you talk or interview a client while doing outreach work in the community:

1. Introduction after leaving the van

Hi girls/guys, my name is [state your name]. I am a paralegal and I am here today to give you legal advice and help you with your problems. How is business today?

- If you are asked what a paralegal does, say: I give legal advice.

2. If the person says that they have a problem and want help

This is the form that I have to fill out in order to assist you. I need to get as much information as possible by filling out this form. If you don't have time, may I record your answer on this dictaphone? The information will be confidential unless you consent to use your information and name. [Refer to consent form]

- Can I share the information that you tell me with the authorities?
- Can I share the information that you tell me with the media?
- Can I share your name with any of these sources?
- Can I share your story with SWEAT to use for advocacy?
- Is it necessary for any of this information to stay confidential? Why? Until what time?

3. Ask questions about what problems the person has experienced while recording on the dictaphone

- Ask questions and provide legal advice.
- Refer to FAQs to answer common questions about parts of the questionnaire.
- Offer available remedies (solutions to problems), for example:
 - ~ Damages claims: make an appointment for formal statement and to get a Power of Attorney (POA).
 - ~ A complaint to a Station Commander: don't need to make an appointment, but get accurate information.
 - ~ A general complaint about police abuse: fill in an IPID form.
- Attach any documents

- 4. After providing legal advice, advise the person to come to SWEAT or other office, and give them your paralegal card with the phone number**
- Take the dictaphone and the questionnaire home where you can fully transcribe the answers from the dictaphone to the questionnaire. When you are finished, please rewind the tape to the beginning and return to the SWEAT or other office.
 - Send the completed questionnaire to the attorney.

2.5 Basic communication skills

Paralegals should have strong basic communication skills so that they can effectively consult with clients, give legal advice and conduct training sessions with larger groups of sex workers and other members of the community.

2.5.1 Public speaking and oral presentations

As a paralegal, you will need to speak publicly when they train people, educate the community or present at a meetings. When you participate in or host these sessions, you will have to think 'on your feet' and be able to respond accurately and effectively to questions and discussion.

2.5.2 Public speaking: 4 steps

T TIPS

If you follow these easy steps, you should be able to talk and present effectively on any topic:

STEP 1

- Introduction -

- a) Introduce the speaker to the audience.
- b) Introduce the topic with comfort and ease.
- c) Give a brief outline of the topic you will cover.

STEP 2

- Bridge introduction with main topic -

- a) Explain the value of the information that you are going to discuss.
- b) Give a summary of the main points you will present.

STEP 3

- Main points -

- a) This is when you communicate the key information to your audience.
- b) Organise this information neatly to allow the audience to follow you easily.
- c) Include facts, key issues, laws and how they will help, and your reasoning and approach to solving the problem.

STEP 4

- The closing -

- a) Wrap up the topic and give a short summary of your main points.
- b) Clearly propose recommendations or solutions.
- c) When you are finished, thank people for listening and ask for questions.

2.5.3 Reading and writing

As a paralegal, you will have to read this manual and, using the questionnaires in this manual, write down the facts of your client's case in a way that illustrates the true series of events.

You will also need to read notes and instructions from attorneys, research papers, emails and other documents carefully and you will have to make time to do this in the most effective way.

Case-recording skills need to be accurate and people must be able to read what has been written so that:

- Anyone can pick up the case, and understand and deal with the problem.
- It is clear what advice and action has been taken to respond to the client's situation.

2.5.4 Non-verbal communication

Paralegals must have excellent communication skills, including verbal, written and non-verbal communication skills.

Non-verbal communication is the process of creating meaning without spoken or written communication.

This is the message you give to a client or other listener through your appearance, your body language and posture, physical distance, facial expression, eye contact, and also through *paralinguistics* – by this we mean things like voice quality, speed of talking, tone of voice, loudness, inflexion and pitch.

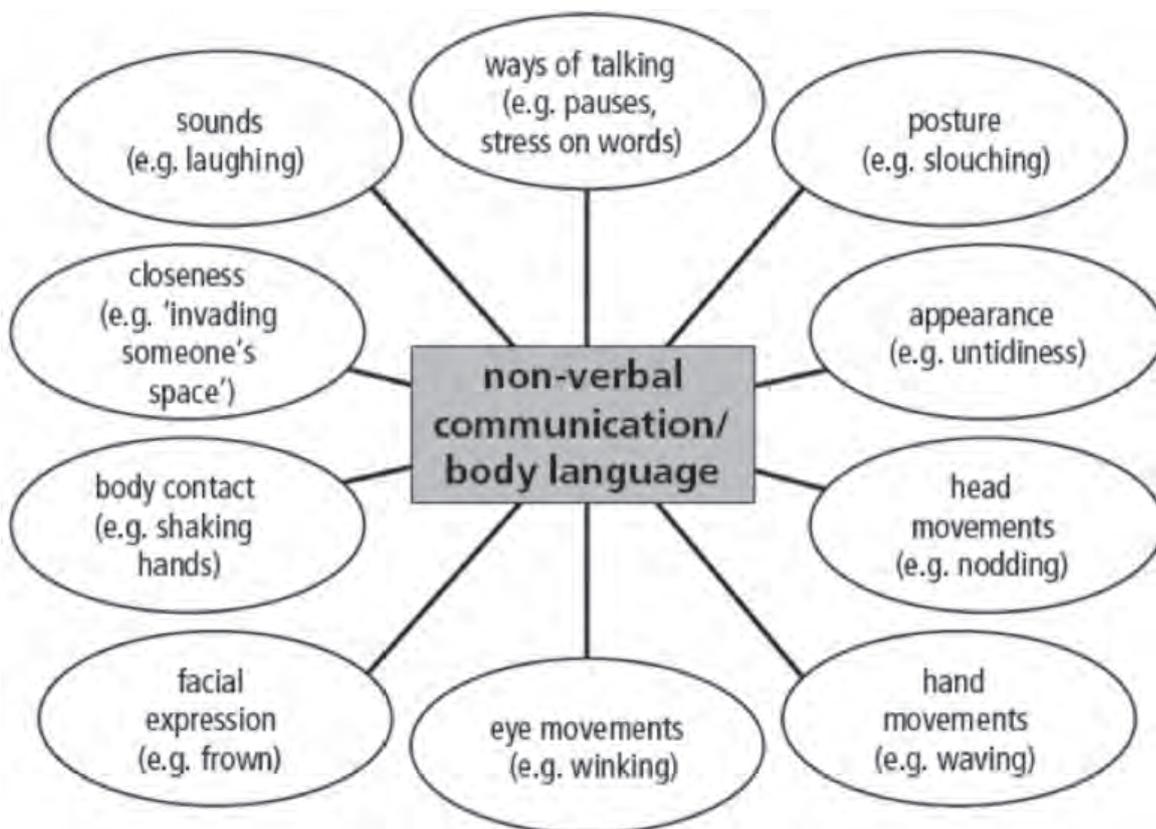


Figure 1: Body language²

² Image retrieved from: <http://verbalandnoncomm.blogspot.com/2011/02/non-verbal-communication-is-it-really.html>.

2.5.5 Telephone techniques³

The ability to communicate by telephone is a very important aspect of working as a paralegal. Knowing how to use the telephone in a professional manner will help you do your job more effectively.

T TIPS

1. Be prompt: answer within three rings. Callers do not like to be kept waiting.
2. If you are going to be away from your telephone for any length of time, remember to divert your calls so that the caller does not have to be passed around.
3. Answer with a smile – it comes across in your voice, making you sound friendly and positive.
4. Introduce the organisation you represent and yourself.
5. When making a call, make sure that it is a convenient time for the other person to receive it.
6. Show empathy – build an instant relationship with your caller by using a warm, friendly tone of voice.
7. Establish the needs of your caller immediately by asking “How can I help you?”
8. Use open questions [see below] to find out facts and information and also closed questions [see below] to clarify and check understanding.
9. If you can, answer the caller’s question promptly and efficiently. If you cannot help, tell them what you can do for them.
10. Use continuity noises to show the caller that you are listening. For example, “oh yes”, “I see” or “that’s right”.
11. Repeat names, telephone numbers and dates back to the caller to make sure that you have got them right.
12. Make notes, recording all necessary information.
13. Double check all vital information by reading back a summary of what was discussed over the telephone.
14. Instead of passing callers around, take their name, number and a brief message, reassure them that it will be passed on and the appropriate person will call them back.
15. Give the caller your full attention and do not engage in two conversations at the same time or read other things while you are talking.
16. Keep focused on the subject in hand and do not interrupt the caller with pointless questions.
17. Remember that both people involved in a call have the right to know who they are speaking to.
18. Agree any action that either you or the client will take.
19. Finish off your call on a positive note. Check that your caller has asked all the questions that they need to, and has all the information that they need.
20. Sign off properly. Although circumstances vary, this usually means confirming what will happen as a result of the call and thanking the other person for their time.

³ Information on telephone technique was taken from *NALA Manual for Paralegals and Legal Assistance*, “A General Skills and Litigation Guide for Today’s Professionals,” 5th Edition.



Different types of questions

Open questions

Open questions request information in a way that requires a fuller answer than a simple fact or a 'yes' or 'no'.

As a result of asking open questions, you should be able to gain enough information to give the caller a solution to a particular problem, or at least be in a better position to offer help.

E EXAMPLES

"How may I help you?"

"What information were you given by the police when you spoke with them yesterday?"

"Please tell me, what exactly happened and when?"

Specific questions

Specific questions help to clarify points. There are 2 types of specific questions: those requesting a piece of information, and those that simply need a 'yes' or 'no' answer.

E EXAMPLES

"Who did you speak to yesterday?"

"What is your daytime contact number?"

"Are you always contactable on this telephone number?"

Closed questions

This type of questions will usually produce a 'yes' or 'no' answer. They can be useful in the closing minutes of a conversation to confirm all the small details and to make sure that you have covered all that you need to.

E EXAMPLES

“Have you confirmed this information with x?”

“Is there any further information that you need from me now?”

Leading questions

These questions help to speed things up. Sometimes you will have to deal with people who find it difficult to make a final decision or to commit themselves to something. Leading questions should help your caller to confirm the information in an easy way.

E EXAMPLE

“So, would you agree to send the documents by Thursday?”

Taking messages

If someone calls asking for a person who is unavailable, explain this in a way that leaves a positive impression.

E EXAMPLE

“I’m sorry, Elizabeth is not available at the moment. My name is Sam Porter: may I help or take a message for you?”

Do not disclose information such as: “She’s out sick or on holiday”.

It is important to note down all the information that the person receiving the message will need. You must ensure you get this information from the caller. You should always ask for their name and phone number, and make a note of any other details that are relevant and will assist the person for whom the message has been taken.

E EXAMPLE

Here is an example of a note:

Message to: Elizabeth
Date: 2 February 2013
Time: 11h00
Message: Mrs X who can be reached at 0721234567 called and wanted to ask about the answer to the letter you sent to the Department.

If you cannot give the note to the recipient in person, always make sure that you follow up to make sure that they have received it and that it has not been overlooked or misplaced. You can also send an email to the person informing them of their message.

Dealing with abusive callers

There are various techniques to help you manage an offensive caller. One way is to recognise the varying nature of language: words only have the meanings we place on them. So we can sometimes screen out bad language by mentally replacing the term we are hearing with something we find inoffensive.

Another technique that can get a positive response from the caller is to ask him/her politely to stop using offensive language:

E EXAMPLE

“I’d really like to be able to help but I am having difficulty with the kind of language you are using. Could you please avoid using that kind of language?”

However, if this is unsuccessful, do not lose your composure. Just inform the caller that you are no longer able to deal with their problem and that you will get the attorney to call them to discuss it. Then hang up and refer the issue to the attorney.

2.5.6 Dictating equipment⁴

All paralegals should know how to use a dictaphone. The dictaphone is a mobile recording device which can be used to record meetings, testimonies and all important dictations that you need to transcribe afterwards. It will help you during outreach or consultation to save time and perform your tasks faster.

To keep track of what you record, it is useful to maintain an updated dictation log. The dictation log allows anyone in your office to identify the dictator, date, the type of case or topic, how many copies are needed, and the full names and addresses of all people involved in the case. It will also help to include in the log any special, technical or obscure words used in the dictation to help everyone understand the contents.

Here is an example of a dictation log:

Dictator:	Date:
	Tape/Side:
	Attorney:
	Client Matter/File No.:
	Deadline:
Subject:	
To:	CC:
Special Notes: (Names, Addresses, Technical Terms, etc.)	

Figure 2: Dictation log

2.5.7 Using the computer⁵

Computers can make a paralegal's job easier. As a paralegal, you will have to deal with large amounts of information. Using the computer can help you to gather and organise the data much faster than by using manual methods.

4 Information on dictaphoning was taken from *NALA Manual for Paralegals and Legal Assistance*, "A General Skills and Litigation Guide for Today's Professionals," 5th Edition.

5 CORNICK, M. (2012). *Using computers in the law office: advanced* / Matthew S. Cornick. Clifton Park, NY, Delmar Cengage Learning.

The Internet

The availability of the Internet can help the paralegal in sending and receiving electronic mail (email), sending instant messages, doing factual and legal research, accessing blogs and newspapers to gather information and communicate with groups of people and also get continuing education on different topics.

Electronic mail (email)⁶

Paralegals use email to exchange information and documents via the Internet with clients, attorneys, other paralegals, courts and many others in a manner that is quick, convenient and cost-effective.

View and treat work-related email messages as a memo file – they should be saved in whatever system the attorneys have set up. Ensure the email system is secure to avoid breaching client confidentiality.

TIPS

- When drafting emails, remember these are office documents, so avoid personal messages and comments.
- For easy reference, include any appropriate attorney, client and other work-related notes or reference numbers.
- Use proper spelling, grammar and punctuation: for example, avoid abbreviations such as 'lol' and 'btw' and emotions such as J.

General and factual research

Paralegals use the internet for a wide variety of research, including: conducting background information research on parties to cases, locating expert witnesses, and finding newspapers online, technical articles related to cases and case law.

Legal research

Many paralegals do legal research. Nowadays, legal research can be conducted for free using the internet. Sites such as LexisNexis and Saflii provide access to full texts of cases, acts and other relevant documents.

6 BOUCHOUX, D. (2010). *NALA Manual for Paralegals and Legal Assistants*. 146.

2.5.8 Written communication⁷

As a paralegal, writing will be a significant part of your day-to-day work. Paralegals spend a great amount of time drafting correspondence, reports, legal memos and pleadings. Through your writing, you have a significant impact on the outcome of all legal matters, including court cases.⁸

T TIPS

Here are some tips for concise and clear writing:

Brainstorming

Writing is easiest if you organise your thoughts before you start. Write down every idea you have on your topic, even loose thoughts in any order. This process will help you make connections and generate new ideas.

Write an introduction paragraph

Although you will probably re-write the introduction at a later stage, drafting an introductory paragraph will help you start thinking about how you are going to organise what you want to say.

Use outlines to organise your thoughts

Take your list of ideas and your opening paragraph and write a simple outline, checking off points from your 'ideas list' as you draft the outline. Once you are done with this, you will understand where the gaps in your list of ideas are.

Start writing

Now you are ready to write. You may think of new ideas to include, and because you have an outline, these additions need not crowd out the main points. Make sure you answer the questions *who*, *what*, *when* and *where* and keep your sentences short.

Proofread and re-write

Once you are finished with your first draft, read through it. Do a spell check and correct all spelling, grammar and punctuation mistakes. Be aware of the type of mistakes you tend to make (for example, writing "is not" instead of "isn't" so you can eliminate these. Make sure your message is being conveyed in clear language, and that you have used proper footnotes and references where these are needed by attorneys.

⁷ Information on written communication was taken from *NALA Manual for Paralegals and Legal Assistance*, "A General Skills and Litigation Guide for Today's Professionals," 5th Edition.

⁸ Schneeman, A. (2000). *Paralegal careers*. 185.



TIPS

Here are some more guidelines to help you structure what you write:

Structuring your work

A **clear overall structure** is essential.

Always have an **introduction** to give any relevant background information and letting your reader know what will follow in the rest of the text.

The **main body** of your work needs to be divided into **paragraphs**. Each paragraph should cover **one topic** only.

Each **paragraph** needs its own **structure**. It will have a **topic sentence** which tells the reader about the subject of the paragraph. The topic sentence is very often the first in the paragraph. It can be short. This means the reader will have a very clear idea of what the paragraph will be about. What follows in the rest of the paragraph is information expanding on the idea, giving necessary detail.

Remember that a **paragraph** should contain **more than one sentence** but should not be too long.

If you find you have written a very short paragraph of one or two sentences, check whether you need to **add extra information** to expand it OR whether it would be better to **include the information in another paragraph**.

Where it adds to the meaning of what you are writing, **use linking words** such as “firstly”, “in addition” and “however” to start your paragraphs. These help your reader as signposts indicating where your main points are leading.

It may help your reader to end a paragraph by **showing what will follow** in the next one, for example: “This has suggested that... and we will now propose an alternative view.”

A general **conclusion** is needed to round off your work. The reader is then certain of what your views are. The reasons for your views, based on appropriate sources, will have already been given in the main body of your work. If you realise you are introducing new ideas, stop and decide whether they are relevant. If they are, then think where they should fit in the main body rather than the conclusion.

In addition to basic writing skills, paralegals also have to become familiar with legal terminology and the basics of legal writing. *Some of the specific writing skills you will need as a paralegal include the ability to:*

- Use the appropriate office format and content in drafting client correspondence and legal documents.
- Write clear and concise inter-office memos to report legal research findings in an appropriate format.
- Adapt standardised forms found in form files or computer data bases.
- Use appropriate citations for sources and cross-references.

2.6.1 Keeping your own records

Paralegals must keep up-to-date client records and record all work done in file notes.

FILE NOTE

DATE:

TIME:

FROM:

RE:

Figure 4: File note

For more information on file notes, see 2.9 on page 50.

You should also record time spent on client queries, outreach, legal clinics and creative spaces. Recording your time will be easier if you do this immediately after the task is completed.

Outreach

Paralegals need to attend outreach sessions with partner organisations, and record time spent on outreach and all work done on your office form.

Paralegal Outreach Time Sheet

Name:

Month:

Date	Time	Area where you did outreach	How many sex workers did you see on outreach?	How many questionnaires did you complete?	How many questionnaires must you work on?	How many people did you refer?	What is the trend that you noticed on outreach

Figure 5: Outreach paralegal timesheet

The Outreach paralegal timesheet is important to capture all relevant outreach events and should be submitted weekly to your paralegal supervisor.

T TIPS

The key information needed is:

- **Date:** record the date that you attended the outreach session.
- **Time:** record the time spent on outreach, for example: 10h00 –14h00.
- **Area:** record the area where outreach was conducted. If it is outdoors, name the different suburbs that you visited. If it is an indoor outreach, list the area and the names of the brothels that you visited.
- **Number of sex workers consulted with:** you may come across a group of sex workers but none of them have legal issues that require you to complete a questionnaire. However you still provide them with information on rights, so you have to record how many sex workers you spoke to. The reason for this is that it is important to establish how many sex workers you are reaching during outreach sessions.
- **Number of follow-ups:** you should record the number of questionnaires that require work to be done. For instance, you may have completed 10 questionnaires, which means that you have consulted with 10 sex workers and given them legal advice. On some cases, you may need to do more work, such as assisting the sex worker with a complaint or court support, and that work will need to be recorded as a follow-up.

- **Number of referrals:** here you will record the number of people you referred to other partner organisations. For example, you completed 10 questionnaires, 5 require further work (follow-ups), 3 are completed (because you gave them legal advice, and the client will follow through on her own) and 2 you referred to other organisations for further assistance.
- **Trends:** Here you can note any trends that you pick up. For instance, it may come to your attention that in one particular area there is one specific client who is assaulting and robbing sex workers. You will record this information in the trends column, and notify your supervisor and the partner organisation as soon as possible.

Office timesheet

In addition to outreach, paralegals will be required to spend time in the office to conduct your follow-ups, consult with clients and brief the attorneys on cases. This time also has to be recorded on the above timesheet.

Work reports

Paralegals must consolidate all the time sheets monthly into your work report. The work report should be submitted monthly to your supervisor. The work report is designed based on the paralegal’s job description and the activities that you must complete every month.

Figure 6: Monthly paralegal work report

MONTHLY REPORT – Insert month:

Name:

Telephone Number:

KEY RESPONSIBILITIES	TARGETS	Progress
Legal advice : • give legal advice to sex workers • Five initial face to face, telephonic and sometimes written advice to sex workers on legal issues, making appropriate referrals where necessary. • Attend 6 outreach sessions a month	1. 25 client queries a month	
	2. 25 client consultations a month	
	3. Complete questionnaire	
	4. Follow – ups	
	5. Referrals	
	6. Query resolutions	
	7. Submit questionnaires to WLC along with follow up file notes and consultation notes	
	8. 6 outreach sessions a month attended	
Research: • Complete questionnaires after each	9. 25 questionnaires completed a month	

MONTHLY REPORT – Insert month:

Name:

Telephone Number:

KEY RESPONSIBILITIES	TARGETS	Progress
<p>Legal advice :</p> <ul style="list-style-type: none"> • give legal advice to sex workers • Five initial face to face, telephonic and sometimes written advice to sex workers on legal issues, making appropriate referrals where necessary. • Attend 6 outreach sessions a month 	1. 25 client queries a month	
	2. 25 client consultations a month	
	3. Complete questionnaire	
	4. Follow – ups	
	5. Referrals	
	6. Query resolutions	
	7. Submit questionnaires to WLC along with follow up file notes and consultation notes	
	8. 6 outreach sessions a month attended	
<p>Research:</p> <ul style="list-style-type: none"> • Complete questionnaires after each 	9. 25 questionnaires completed a month	
<p>Training</p> <ul style="list-style-type: none"> • Conduct 2 creative space training on human rights per month with SWEAT’s service users • Attend training with WLC once a month 	22. How many referrals did you receive?	
	23. Log of appointments made and successfully conducted.	
	24. 4 de – briefing sessions attended a month and sign register	
	25. Leave and claim forms submitted on time	
	26. 2 training workshops conducted at creative space per month	
	27. Evaluation forms completed	
	28. Attendance and active participation at WLC training once a month	
<p>Advocacy:</p> <ul style="list-style-type: none"> • Provide legal advice to organisations when requested and where it concerns sex worker rights • Represent the WLC at workshops, seminars, conferences, community groups and public functions 	29. Refer legal advice received from organisations to the attorney	
	30. Attendance at events on WLC request or with WLC approval	

Note on the work report

In the column ‘Key responsibilities’, you will find the activities that paralegals should be engaging in each month in accordance with their job descriptions.

‘Targets’ are the outcomes that you should strive for each month.

‘Progress’ allows you to state to what extent you reached the target and if not, why not.

2.7 Referral procedure

As a paralegal, you have to be able to refer advice seekers to appropriate structures when necessary. You should therefore know *when* and *where* should you refer advice seekers and *to whom* should to refer them. When you refer someone, you also have to be able to send a properly prepared report for delivery to the referral person.

You may also need to refer a client to another organisation or office. You should include a brief summary of the facts that the client presented to you and information on the remedy that the client would like.

Date : _____
The [name of organisation] has consulted with _____(Hereinafter referred to as the "Complainant").
The Complainant was referred to us by _____
Upon completion of our review, and in view of our mandate and our mission statement, we are of the opinion that your organisation may be more appropriate to deal with this case. We therefore refer the above complainant to your offices.
<hr/>
<u>ORGANISATION REFERRED TO:</u>
Name of organisation: _____
Contact Person: _____
Address: _____ _____
<hr/>
<u>REFERRED BY WLC :</u>
Name of Attorney /Paralegal: _____
Ref no: (if applicable) _____
Brief Description of complaint _____ _____ _____ _____ _____
Per: Attorney / Paralegal

Figure 8: General referral form

Paralegals often work within a network of partner organisations. It is important that the partner organisations are also aware of the type of legal issues that paralegals are presented with. The information might assist them in advocacy activities and media releases.

You can use the referral form below to keep your partner organisation up-to-date with the queries that you receive. If your organisation wishes to use this form, then you should complete this form and attach it to every questionnaire, and give a copy of the form to the partner organisation.

Describe the presenting issue.

We have consulted with the complainant on _____. Upon completion of our review and with our client's instructions and necessary consent, we refer this issue to you for the necessary assistance.

Name of paralegal _____ **Date** _____

Name of Service User _____ **Gender** F M T

Address _____

Alternative Address _____

Telephone: _____ **Alternative Telephone:** _____ **Indoor** **Outdoor**

FOR SWEAT		
Description	Yes	No
Use incident in the media		
Use incident story telling		
IUse incident in other advocacy initiatives		
Assistance in keeping in contact / finding client		

FOR TB/HIV CARE ASSOCIATION		
Description	Yes	No
Health Screen		
Assistance with doctor's appointment		
General Health Advice		

FOR HELPLINE		
Description	Yes	No
Counseling		
Referral		

FOR SISONKE		
Description	Yes	No
Mobilise to join Sisonke		
Support at the police station		
Support at a meeting with the Police when giving statement		
Support at a Clinic		

Figure 9: Referral to a partner organisation

2.8 Closing cases

Paralegals follow up with advice seekers to make sure that a case can be closed when the matter is resolved or the advice seeker does not need any further help.

2.9 Administration

TIPS

Some general administrative things to remember:

- As a paralegal, ensure your writing is clear for all to read.
- File all notes in order of date received.
- Clearly write the name of the person at the top of the file.
- Place files where others will know where to find them when they need information.
- Check all letters for spelling and grammar.
- Staple the fax record stapled to the faxed letter or other document.
- Complete file notes to record work done for a client.

For example, you may have completed a questionnaire with a client, and the client's case requires you to do a follow-up. This must be recorded in a file note, for example a note to call a clinic and make an appointment. So you will need to record when you called the clinic, what clinic you called, what you spoke about, and the result. Then you will have to record the fact that you passed the information back to the client. If more work is needed, you will diarise it for the date that it needs to be completed.

See our file note on page 43 above.

2.10 Using different remedies

Paralegals must be able to know what remedies to use to deal with different cases, for example: lodging a complaint with the police, making a criminal case.

2.11 Analysing trends in case work

Paralegals must be able to identify trends in the case work. This involves identifying the common problems of advice seekers, identify what is causing the problem and make the necessary interventions to deal with the problems.

2.12 Referring cases to court

Paralegals must:

- Understand the legal problem involved.
- Be able to identify good test cases that should be referred to the court and report these immediately to the attorney.
- Do as much work as possible on the case before referring it to an attorney.
- Record each advice seeker's personal history in the case.
- Keep a neat file of all the documentation.
- Maintain a record of all the work done on the file.
- Explain to the client what action will be taken and what the possible outcomes could be of the action.
- Frequently follow up the case with the attorney.

2.13 Meeting with other people and organisations

Paralegals cannot work in isolation. They should work in partnership with other organisations to ensure that we approach the client's needs holistically, in other words, in a way that covers all the needs of the client.

Paralegals should:

- Know who all the role players to contact around a given problem.
- Work with members of their respective organisations and within the organisation's strategy when planning a meeting.
- Inform people in their organisation of the meeting and who will be attending the meeting.
- Gather as much information as possible about the person or committee they are meeting with.
- Prepare in advance of the meeting.
- Decide on priorities in advance.

- Be on time for the meeting.
- Send a follow-up letter to the person thanking them for the meeting and summarising what was agreed.
- Do a report for their organisation.

2.14 How to run a training session⁹

Paralegals may be required to conduct training sessions with clients, stakeholders or partner organisations. *To be ready for the actual training, you will have to prepare:*

- The aim of your training and the topic that you will cover.
- The audience you wish to invite.
- The training schedule.
- Training materials like pamphlets and posters.
- The logistics, for example: venue, catering, amount of people who will attend, invitations.

On the day of your training, ensure that you have the training materials and your organisational material such as: attendance registers, agenda's and evaluation forms. If your organisation is providing a stipend to participants to cover their transport costs, ensure that when you hand them the money, that they complete the travel remittance form.

⁹ Section 2.14 on how to conduct training was obtained from *Training Today* available from: <http://trainingtoday.blr.com/employee-training-resources/How-Conduct-Effective-Training-Session>.

ATTENDANCE REGISTER:							
	NAME	SURNAME	ORGANISATION	DESIGNATION	E-MAIL/FAX NUMBER	TEL/CELL NUMBER	SIGNATURE
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9.							
10.							
11.							
12.							
13.							
14.							
15.							
16.							
17.							
18.							
19.							

Figure 10: Attendance register

REMITTANCE

NAME OF ORGANISATION

Date _____

I _____ (name of participant)
 acknowledge receipt of R _____ (amount
 granted) from [name of organisation) for the purpose of transport.

Signature of recipient Signature of Organisation staff member

Figure 11: Travel remittance form

Figure 12: Training evaluation form

WORKSHOP EVALUATION FORM

[name of organisation]

[name of workshop]

SECTION 1: GENERAL

1. Facilitator name:

2. Age: _____

3. Please tick:

Male	Female
------	--------

SECTION 2: RATING THE SESSION

When rating the session, please use the following scale:

1 = Not at all

2 = To a small extent

3 = To some extent

4 = Quite a lot

5 = Very much so

Please circle the number that best describes your opinion about the statement made.

For example, if you learned a huge amount of new information during the workshop, you would circle 5 as below:

	Not at all	To a small extent	To some extent	Quite a lot	Very much so
Workshop					
I learned something new	1	2	3	4	5

	Not at all	To a small extent	To some extent	Quite a lot	Very much so
2.1. I learned something new	1	2	3	4	5
2.2. The session has changed the way I think	1	2	3	4	5
2.3. The facilitator was clear and I understood what he/she was saying	1	2	3	4	5
2.4. Most participants actively participated in the session	1	2	3	4	5

2.5. Please Identify three things that were useful for you today:

1.

2.

3.

2.6. Which part of today was the least useful to you? Why?

2.7. Any other comments:

THANK YOU

2.14.1 Techniques for successful training sessions

T TIPS

These 13 steps give you a basic foundation for a solid training session that runs efficiently and conveys the necessary information to meet the session's goals:

1. Tell trainees what you are going to cover. Introduce your session with a brief overview of the training topic's main points.
2. In your main presentation: explain key points, go over policies, demonstrate procedures and cover any other information trainees need to know.
3. Tell them what you told them. Conclude with a summary of your opening overview. Use repetition to help trainees grasp and retain information.
4. Always explain what trainees are going to see before you show a multimedia presentation. This guides trainees to know what to look for and what to remember.
5. Use as much hands-on training as possible. The most effective training uses all the senses to aid learning. Demonstrate teaching points practically to create greater understanding and knowledge of the topic.

6. Test frequently. Tests are most effective when students know they will be quizzed, because they'll pay close attention to the material. Testing is an objective way to determine whether training achieved its goals.
7. Always make eye contact with as many trainees as possible. Use people's names and try to get quieter participants to participate.
8. Involve trainees. For example, ask participants to share their experiences. Trainees often have valuable information to contribute and will get more out of sessions by hearing about other people's experiences. Hearing different voices also keeps sessions varied and interesting. Structure interaction time into all your sessions.
9. Repeat questions before answering them. This ensures that all participants know what the question is, so they can make sense of the answer.
10. Analyse the session as you go along. Always be on the lookout for what works best. When you discover a new technique or method that clicks with the group, note it on your training materials so it can be incorporated into the training outline to be used in future sessions.
11. Keep your session on track. Start on time and finish on time. Don't hold up the group waiting for late arrivers. Run the session according to the schedule and don't let side issues take over. Ask if there's enough interest to pursue a separate session on other relevant topics that come up.
12. Put yourself 'in their shoes'. Assess how much people can absorb and give frequent breaks, especially for half-day or all-day sessions.
13. Ask for feedback on the training session. Critiques work best when they are written and anonymous, unless a trainee volunteers to discuss his or her thoughts in person. Trainee input is vital for making the next session and the overall training programme more effective.

Your presentation can be improved by using some additional techniques. Although not essential to conveying information, these methods can make receiving data or instructions a much more enjoyable experience, which will keep trainees involved and help them retain more information.

Here are some extra techniques:

Make learning fun

Why? Trainees will not be enthusiastic if training sessions are dull. Few trainees remember complicated concepts or theories – they rather want to learn practical information. If they don't find the message entertaining, they won't retain it. So use different training methods to engage trainees in a variety of ways. Also work to alternate the pace of each session to keep trainees' interest level high.

Use humour

Humour helps to make a point more effectively instead of drowning trainees in

statistics. For example, tell a story about something embarrassing that happened to you or share a story about someone else (not one of the trainees).

Have attractive packaging

Use materials that are well-packaged and that communicate quality. Professional packaging is a powerful tool for making a good first impression.

Always encourage participation

Make the session lively by engaging participants in the learning process. In fact, try to spend close to 80% of training time on group participation. Encourage everyone in the training session to speak freely and openly, because this encourages powerful learning.

Build self-esteem

Trainees want to know what's in it for them. Create a 'win-win' environment by using the training programme to build the participants' self-worth and self-esteem.

T TIPS

A checklist to make sure everything is ready for your training session:

- Dress appropriately: assess your audience to figure out what to wear. You can match your manner of dress to your trainees or go slightly more professional.
- Arrive early: give yourself time to check last-minute arrangements and get yourself mentally geared up for the session.
- Check seating arrangements: make sure the set-up is ideal for the training style you want to use and have some extra chairs for any extra trainees.
- Check room temperature: adjust it for the number of people who will be in the room and the size of the space you will all be occupying.
- Check audio-visual hardware: do a last run-through to make sure everything is still running smoothly.
- Check electrical outlets: make sure all your connections are safe. Don't trail cords across walkways or overload surge protector strips.
- Check light switches: know which switches work which lights so you can achieve the ideal lighting for audio-visual materials and note-taking.
- Check window-darkening equipment: make sure blinds or shades are working properly.
- Check venue arrangements: make sure you have everything you need, including the training space for the entire time you need it.
- Lay out course materials. Decide whether to put handouts on a table for trainees to pick up on the way in or to put them on every seat.

Here is a checklist developed by SWEAT to help you tick off practical things like training materials, venue and catering:

Figure 13: Training day checklist

Training tools and materials checklist

Materials	
Pens	
Paper	
Registers	
Remittance Forms	
Pre-Post Assessment	
Evaluations forms	
Agendas	
Markers	
Spare paper	
Stickers	
Labels	
Laptop	
Safe sex brochures	
Condoms & Lube	
Goody Bags	

Venue	
Lights	
Electricity & Extension Cord	
Chairs	
Tables	
Bathrooms (working condition)	
Urn	

Tools	
Projector	
Flipchart	
Flipchart Paper	
Speakers	

Catering	
Tea	
Coffee	
Milk	
Sugar	
Juice	
Lunch	
Muffins/Scones/Croissants	
Glass	

Saucers	
Plates	
Venue is set up 30 min before registration	
Boiled Urn	
Serviettes	
Spoons/forks	
Black bags	

Transport & Reservations	
E-ticket	
Car hire/Shuttle	
Accommodation (incl Breakfast)	
Per Diems	

2.14.2 Qualities of effective trainers

What kind of person does it take to do the training? The best trainers have qualities that make them good at what they do. Check the list below for the qualities you already have and to see how you can improve.

Good trainers are:

Good communicators

They speak well, express their thoughts clearly and have an engaging presentation style.

Knowledgeable

They know their topic, understand all the concepts and can give details. They can answer questions thoroughly and at a level that trainees understand. If they cannot answer a question, they know exactly where to go to get the answer and they promise to do this as soon as possible.

Experienced

They know what they're talking about. They've been in the field doing what they teach in training.

Good with people

They enjoy working with people. They can engage groups of people and work with them to meet training goals.

Interested in learning

They recognise the value of learning in their own lives and want to help others learn. They find satisfaction in sharing with others the skills and knowledge they have acquired through hard work and persistence.

Patient

They understand that people learn in different ways and at different paces. They take the time to make sure each trainee understands what's going on and leaves a training session with improved skills and knowledge.

Open-minded

They respect other people's points of view and know that there are often many ways to achieve the same aims. They don't assume they know everything, but instead are willing to listen to and learn from trainees.

Creative

They bring their own curiosity and fresh ideas to the task of training. They create an environment that encourages learning and inspires trainees to reach beyond what they already know to explore new ideas and methods.

Well-prepared

They know their material, their aims and their plan of presentation. They ensure training equipment is in place and operational. They check all supplies and supporting materials are available in the right quantities.

Flexible

They are able to adjust their training plan to accommodate their audience and still meet all training aims.

Well-organised

Good trainers can handle several tasks at once. They know how to manage their time and their work.

2.14.3 Instructor-led training

This is still the most popular training method because of its personal interaction and flexibility.

T TIPS

Guidelines for getting the most out of learning:

- Outline training notes – don't read them.
- Design each part of the training to reinforce a training aim.
- Always use visual aids, such as overheads, flip charts or slides.
- Encourage trainees to participate by giving them note-taking guides and handouts to follow during the presentation.
- Break up the prepared presentation by inviting trainee feedback and telling stories to illustrate points.

2.14.4 How to use handouts

Well-designed handouts serve many useful functions in a training session, but only if they are well thought out and used appropriately.

T TIPS

Here's how to create helpful handouts and use them effectively:

- Make your handouts look professional by using quality paper and a good printer or high-quality copier. If you have the budget, use full-color handouts.
- Leave plenty of white space on handouts by keeping information simple and easy to understand. Give participants room to make notes.
- Use large type that is easy to read. Don't mix typefaces.
- Use bullets and borders to organise information and make points easy to follow.
- Use headings for important issues and questions.
- Use graphics whenever possible to illustrate important points.
- Use different colour paper for handouts on different topics.
- Number handouts for easy reference when going over them with participants.
- Wait until the end of the session to pass out handouts that you will not discuss in class to prevent distracting participants during the session.
- Remember: handouts support a presentation – they are not the presentation itself.

2.14.5 Using PowerPoint

PowerPoint presentations are one of the most popular and powerful training tools in use today. As with any tool, there's a right way and a wrong to use it – and the tool's effectiveness is linked to the way it is used.

TIPS

Getting the most out of PowerPoint presentations:

- Outline your presentation's main points and message before creating a single slide. Story comes first, then slides.
- Keep slides simple. Use only 3 to 5 bullets and one or 2 graphics on a slide.
- Keep animation to a minimum. Don't use it just because it's there. The software allows you to make text and images move, but this movement can actually distract people from retaining the points you're trying to make.
- Limit the number of slides to between 20 and 30. This is generally a comfortable amount of information to give out in an hour-long presentation. Fewer slides may not cover a topic adequately and more slides may cause information overload in trainees.
- Run your completed presentation a few times on your own computer to fix any problems. Also run it a few times on the computer you will be using in class to make sure it works smoothly on that machine.
- While running your presentation in the training room, figure out the best place to position yourself. Choose a spot that gives you easy access to advance slides *and* to be available to trainees who want your attention to ask questions or comment on a slide.
- When rehearsing your presentation, experiment with lighting in the room to make sure that slides are easily visible and that there's enough light for trainees to take notes.
- Begin each session by asking participants what they expect to learn before getting into the slide presentation. This establishes a connection between you and the audience before you outline the heart of the topic.

2.14.6 Training challenges

In an ideal world, training will always be successful. There are ways that training can go wrong. According to a 2001 strategic planning workshop on human capital sponsored by the National Institute of Environmental Health Sciences' Worker Education and Training Programme, there are several possible problems that can lead to less successful training programmes.

In parts 2.14.7 to 10, we cover some of what can go wrong, along with ways to make it right.

2.14.7 How trainers get burnout

- They get in a rut by always training the same topic.
- They get stuck through always using the same training methods.
- They are discouraged because of management's lack of support.

- Their hands are tied by an inadequate budget.
- They do not receive ongoing train-the-trainer instruction.
- They do not have proper materials or instruction for training across language barriers or cultural differences.
- They do not get into the field enough to customise their training beyond book learning.

2.14.8 How trainers can keep fresh

- Rotate trainers on different topics.
- Encourage using a variety of training methods.
- Promote your programme to management and get their verbal support and personal encouragement for trainers.
- Present a realistic and ambitious budget that provides for all your training needs.
- Encourage and provide for ongoing training and career development for trainers.
- Assess your training audience ahead of time and provide trainers with language-appropriate materials and cross-cultural information.
- Arrange for trainers to keep up to date on new methods and equipment.

2.14.9 Why training programmes fail

- No training goals are set.
- Training goals are not in line with organisational goals.
- No accountability measurements are set up for trainers or trainees.
- Training is regarded as a one-time event and not as an ongoing need.
- Little or no support is given from upper management.

2.14.10 How to make your training programme succeed

- Set specific training goals with a committee that includes top management.
- Align training goals directly with the organisation's strategic and financial goals.
- Set up an accountability system to measure the effectiveness of trainers and trainees – assess if trainers successfully communicate information and if trainees successfully apply what they've learned to improve their work.
- Design a training schedule that includes ongoing training, such as beginner, intermediate, advanced and refresher training. Incorporate this schedule into the organisation's calendar of events.
- Have a representative from upper management on your training committee to ensure that training is a key part of your organisation's present and future plans.

2.15 Preparing monitoring

This is a checklist to prepare you for monitoring public events or incidents like police conflict and community conflict.

TIPS

2.15.1 Knowledge

- What are your rights as a monitor, for example: when questioned by the police?
- What is the law, for example: on sex work?
- What procedures are there for making complains or taking up cases, for example: criminal cases, civil cases?
- Where the nearest police station and what is the name of the station commander?
- What is the background to the event, for example: is there a history of conflict between organisations in the area?
- What are the names of organisations in the area and who are the contact people in these?
- What are the names, addresses and numbers of services and resources you can refer to for help, for example: clinics, social services, legal aid, attorneys, newspapers.

2.15.2 Equipment

- Stationery.
- Checklists and incident sheets.
- Know-your-rights booklets.
- Contact numbers – for example, attorneys, doctors, police, organisations.
- Personal identification, for example: ID book.

2.15.3 Planning teamwork

- Briefing session – for example: to work out strategy, to answer queries of monitors.
- Role-playing difficult situations – for example: being confronted by the police.
- Setting up a communication network for your own organisation – for example: a coordinator, meeting-points.
- Having back-up people on stand-by to help and do follow-up work.
- Dividing up into pairs to work together.
- Discussing a code of conduct for your monitors.

Ethics

Learning objectives

- To understand that paralegals work closely with attorneys.
- To understand ethical issues when dealing with clients, such as confidentiality.
- To respect and follow a Code of Conduct that will ensure quality paralegal services will be provided to clients.

In this Chapter, we will discuss the *ethics* – the rules and values – that all paralegals should respect and follow. All attorneys are bound by a declaration of oath that they will uphold the law, honour human rights and assist the court.

Paralegals too should acknowledge their roles as people who have been placed in a responsible position to assist their community. They therefore have to be held accountable to ensure that they always provide quality services to their clients.

3.1 Duties paralegal may perform under supervision of an attorney¹⁰

Paralegals perform all tasks under the strict supervision of an attorney. When paralegals consult with clients, they should ensure that:

- The client understands that the paralegal is not an attorney.
- The attorney supervises the paralegal in the performance of all duties.
- The attorney remains overall responsible for the paralegal as a representative of the attorney.

¹⁰ Bouchoux, D. (2010). *NALA Manual for Paralegals and Legal Assistants*, Clifton Park, NY: Delmar Cengage Learning (5th ed.), 83-4.

3.2 Ethics in the work environment¹¹

Paralegals should always be mindful of the right of a client to confidentiality. The information that a client gives a paralegal is confidential and is protected by the attorney-client privilege. As a result, a paralegal may not disclose the information to other people.

When the work of a paralegal is directed, supervised, authorised and required by the attorney as part of the services provided to the client, it falls under the same work privilege and is protected by law.

Paralegals must ensure that:

- The consent form at the bottom of the human rights violations questionnaire is always completed.
- The consent form has been read to the client.
- The client understands what the consent form means.

The consent form should be completed before the client's information is shared with partner organisations.

TIPS

- Ensure you complete the consent form.
- When you consult, make sure no outside person is listening in on the conversation.
- Do not talk about your client to your friends or colleagues.

3.3 Adequate supervision by an attorney

Paralegals should at all times work under the supervision of an attorney. The attorney should:

- Delegate tasks to the paralegal.
- Supervise the manner in which the tasks are performed.
- Must merge the work of the paralegal into the attorney's final product.

¹¹ Bouchoux, D. (2010). *NALA Manual for Paralegals and Legal Assistants*, Clifton Park, NY: Delmar Cengage Learning (5th ed.), 83-4.

The attorney will maintain a direct relationship with the client.

Remember that attorneys will be responsible for the actions of the paralegals during the course and scope of their duties. This means that if paralegals give incorrect legal advice, breach privileges or do not follow quality standards, the attorney can be held liable and be reported to the Law Society of South Africa.

3.4 Code of Conduct¹²

It is important that paralegals adhere to a Code of Conduct so as to ensure that they always strive to provide high quality services to clients. This code guides paralegals in their work.

While it doesn't address every situation, the idea is that you follow the spirit of this code in your interactions with clients.

T TIPS

Civility

A paralegal shall be professional, courteous and civil and shall act in good faith with all people they work with.

Respect

The South African Constitution affirms that everyone has the right to dignity. Thus a paralegal should treat all his or her colleagues and clients with respect and dignity.

Independence

Paralegals must be impartial and independent when doing their work. You must not allow personal beliefs to affect the quality of work that you perform. When acting as a mediator, you should ensure that everyone understands that as paralegal you are not acting as a representative for either party but as a person assisting to resolve the issues in dispute.

Competence

A paralegal shall only take on cases that she or he is competent to handle. A paralegal is not a lawyer and you should not claim to be one or to indicate that you can handle legal representation in courts of law.

The work of paralegals may include but is not limited to:

- Legal advice and referral.
- Fact-finding and case follow-up with relevant authorities.

¹² This information was obtained from the Global Rights (2011), *Paralegal Training Manual: Promoting Access to Justice and Human Rights*, 12-14.

- Legal research, analysis and applying law to relevant facts.
- Drafting of simple court documents.
- Alternative dispute resolution (negotiation and mediation).
- Community sensitisation and training on human rights and the law.

Dishonesty and fraud

A paralegal shall not knowingly encourage or assist any dishonesty, fraud or crime. If you learn about any dishonesty, fraud or crime, you must report this to the relevant authorities. A paralegal should never obtain information through misrepresentation.

Confidentiality

A paralegal, shall at all times, hold in strict confidentiality all information that concerns cases of persons that you are working with. You should not disclose this information except when authorised by the client or required by law to do disclose. A paralegal must ask for the client's consent when dealing with any information to do with the client's case.

Undertakings

A paralegal shall fulfil every undertaking given and should not give an undertaking that cannot be fulfilled.

Discrimination

A paralegal shall respect the requirements of human rights laws and shall not discriminate or refuse to take on a case on any discriminatory grounds.

Outside interests

A paralegal who engages in other work besides paralegal work, shall not allow that other work or any other outside interest to jeopardise their integrity and competence. A paralegal must act to avoid any conflict of interest, including withdrawing from handling a case if circumstances demand this.

Payment

Under no circumstances should a paralegal charge fees or accept any money from clients for services rendered, even when this money is offered voluntarily because paralegal work is free. When there is need for payment of any money for services

such as medical examinations or court fees, the payment should be made directly between the client and the relevant authority. A paralegal should never handle any money on behalf of a client.

Officer of justice

A paralegal is an officer of justice. You should encourage public respect for the administration of justice. You should never act to delay or deny justice, or engage in acts that destroy public confidence in justice institutions. You should assist all persons in need to access justice and enjoy their human rights.

Collaborate and consult

Paralegals are encouraged to work together and to consult with relevant authorities so as to maintain good relations and improve the quality of their work. A paralegal is under duty to report any dishonesty that is done by other paralegals.

Accountability

As a paralegal, you are accountable for your own actions. The supervising attorney shall not take responsibility for the incompetence or inappropriate actions of a paralegal. Paralegals are strongly encouraged to respect and follow this Code of Conduct, as well as other professional standards.

As a paralegal, I hereby agree to respect this Code of Conduct and to abide by it at all times.

Signature: _____

Name: _____

Signed at: _____

on this day _____ of _____ 2 _____

Figure 14: Paralegal pledge to respect Code of Conduct

Documenting the human rights violations of sex workers

Learning objectives

- To know how to document all cases on the Human Rights Violations Questionnaire.
- To keep accurate and up-to-date records of clients.
- To know how to take a detailed statement from a client.
- To be able to convert information from the questionnaire into a statement for complaints and an affidavit for litigation.

It is important for paralegals to document the cases that clients present to them. One of ways you do this is by completing our HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE. This questionnaire, which covers all the areas of law in this manual, should be kept in the client's file.

4.1 The Human Rights Violations Questionnaire

4.1.1 How to take a statement

The statement is recorded in the Human Rights Violations Questionnaire. You will do all of your work on the case using the information you wrote down in the first statement and it is therefore very important for you to write down accurate and complete information.

Your client's statement is divided into 4 parts:

- Personal details, for example: name, age, home, work, contact number.

- Description of the problem.
- What advice you gave to the client.
- What action can be taken to help the client.

At the beginning of the questionnaire you will find this:

DATE: _____ NAME: _____

PROVINCE: _____ AREA: _____

Please insert the date that you have consulted with the client. In the 'name' section, add your name.

Also insert the province that the client is from and the area where you consulted with the client, for example: Western Cape (province) in Bellville (area).

Personal details

This part is vitally important because it covers all the personal details of your client:

1. Name/ the name you are known by (pseudonym)
(Optional): _____
2. Age (optional): _____
3. Telephone number or contact number you can be reached at (Optional): _____
4. Address: _____
5. Where do you work? _____
6. Please circle/tick–

Gender: Male	Female	
Transgender man	Transgender woman	
Indoor	Street-based	Both:
(explain) _____		

Brief explanation of the items needed:

1. **Name:** Here you write the name of your client. Record the client's name and surname as in their identity document (ID). You can also add their working name.
2. **Age:** To record the person's age and date of birth.
3. **Telephone number:** Write the client's telephone number well as a second number that the client can be contacted on.
4. **Address:** Record the address where the client lives and also a second address. If the attorney is unable to telephone the client, then the attorney will be able to send written letters to the client.
5. **Where do you work?** Write down the area where the client works, for example: Kenilworth or Cape Town CBD.
6. **Gender/Indoor/Street-based:** Please circle or tick your client's gender, and if your client works indoors (brothels, bars or hotels) or is street-based (obtain clients on the street). If you ticked 'both', add details.

Another way of getting information from your client is by taking a statement from her/him. You can also take the information that you collected in the Human Rights Violations Questionnaire and convert it into a statement.¹³ This is important, because if this is a case that the attorney will litigate on, you will have to convert the information from the questionnaire into a statement for the attorney, who will in turn convert it into an affidavit.

Description and details of the problem

The details you need will be different, depending on the problem the client faced.

T TIPS

In a complaint about the police, you will need:

- Exactly when and where the incident happened, including road names.
- Full details of the police officers, including their names.
- Exact details of treatment by the police and where the client was held, including conditions of cells.

¹³ Information on taking a statement and producing an affidavit was retrieved from the *ETU/Black Sash Paralegal Manual*.

- A description of exactly what the client was doing at the time of the arrest or complaint, so that we can see whether the police had reasonable grounds to approach, question or arrest your client.

Write down every detail. It is always better to include information even if you are not sure whether this information is important or not. It might be useful at a later stage.

Write down all the details of the problem in the correct date and time order that things happened. *For example:*

- On 16 December 2009 Sara was dismissed from her job.
- On 17 December she returned to get her notice pay.
- On 20 December she went to the union about her dismissal.

Advising the client

Tell the client what his or her rights are. You must then explain what steps can be taken to help the client. Then you must listen to your client to find out exactly what they want you to do. These are the 'instructions' that your client gives you.

For example, if your client was dismissed from a job, don't just take it for granted that she wants the job back, even if you feel that the dismissal was unfair. On the other hand, if your client says she only wants notice pay, this may be because she does not know anything about unfair dismissal and reinstatement. It is up to you to explain to your clients about all their rights, and then let them make their own choices.

If there is something that the client is not clear about, ask them to find out that information and bring it to you later.

Write down details of the advice that you gave and the 'instructions' that your client gave you.

Taking action to solve the problem

Discuss with your client what steps you will take to try and solve the problem:

- Make sure the client understands what you are going to do.
- Be realistic about how much you think you can do for your client and how long it will take to sort out the problem. Do not raise false hopes.
- You should then agree on how you are going to report back to your client. This could be by writing a letter to the client or the client coming back to you on a set date.

Write down everything that you do. For example, if you make a telephone call, write this down and what was said in the telephone call. Keep copies of all letters that you write for your client.

Keep copies of all documents in connection with your client's claim, for example: a UIF card in a complaint about UIF benefits, or the Instalment Sales Agreement in a problem with hire purchase. Do not write on original documents. Documents should be stapled to the statement of the client so that they do not get lost.

Figure 15: Example of a statement

E EXAMPLE

Statement

1. My name is Benjamin Ngwane. I am a 30 year old male living at 52 Indwe Road, Langa, Cape Town. I am unemployed.
2. On Monday 26 September 2002, at about 8 p.m. I was walking on my way home after visiting a friend. I was walking alone on the pavement past Kentucky Fried Chicken.
3. A group of men crossed the road and came towards me. I recognised one of them. His name is Patrick Xegwana. He lives a few streets away from me in Pele Street.
4. The group stopped me and Patrick Xegwana grabbed me by my shirt and asked me where I was going.
5. I tried to answer that I was going home but before I could finish, Patrick Xegwana slapped me on my left cheek with his left hand.
6. One of the other men assaulted me by punching me in the stomach and kicking me where I lay on the ground. He was wearing a dark blue overall which was very torn. He was also wearing glasses. I recognised this man's face although I do not know his name. I also don't know where he lives. He is about 30 years old. I would recognise him if I saw him again.
7. I think there were five men altogether. I do not know the names of any of them except for Patrick Xegwana, but I recognised all of their faces. I would recognise them if I saw them again.
8. They were all crowding around me while I was lying on the floor being assaulted by the man in the blue overall. One of the men had a gun and was poking it in my side. I was very scared and I didn't say anything to them. They did not say why they were assaulting me. They only told me that I must not come near their area again.
9. Everything was happening so quickly. The last thing I remember is a hard blow on my head.

10. I was dizzy at the time and only remember being picked up. I was looking around to see where the men were, but they were gone. One of the people helping me was a man called Vuyani. He telephoned the Langa Day Hospital. They sent an ambulance to come and fetch me.
11. In hospital I was treated for two broken ribs, severe bruising all over my body, and my eye was bleeding. I had to stay in hospital for 3 days. My hospital card number is 5487. I was treated by Dr Wyngaard.
12. I do not know if there were any witnesses to the assault on me. I do not know if Vuyani witnessed the whole assault on me.
13. I do not know why I was assaulted by the group. I feel that I have been wronged and I want to make a claim against the people who assaulted me.

Date on which the statement was taken: 28 September 2009

Name and address of person who took the statement:

Lawrence Ndlovu

c/o Langa Advice Office.

Cape Town telephone number of Langa Advice Office: (021) 642 0202.

4.1.2 Affidavits

An affidavit is a written statement which you swear is the truth. Another name for an affidavit is a sworn statement. You sign this statement (with your name, or X if you cannot write) in front of someone called a Commissioner of Oaths.

A Commissioner of Oaths can be a magistrate, postmaster, a bank manager, a lawyer, members of the South African Police Service (SAPS), and some priests and social workers.

For example, when you need to prove something (like your age to qualify for a pension) and you do not have any written proof that what you are saying is true, then you can put this information in an affidavit.

Usually the same information that is used for an ordinary statement will be used in an affidavit. All that happens is that a lawyer or paralegal will turn the statement into an affidavit by adding some formal words at the beginning and at the end of the statement.

How to draw up an affidavit

1. I _____ (name of person)
do hereby make oath and say:
 2. I am an adult _____ (male/female)
and I live at _____ (address)
 3. I am _____ (married /single)
(unemployed/employed at...)
- The statement _____ (fill in what you know is true)

DEPONENT

(the person making the statement is the deponent and must sign here but only in front of the Commissioner of Oaths) (then the Commissioner of Oaths fills this next part in:)

THUS SIGNED AND SWORN TO at _____ this _____ day of
_____ 2002 the Deponent having acknowledged:

1. That she/he has no objection to taking the oath.
2. She/he deems the oath binding on her/his conscience.
3. She/he understands the contents of this Affidavit and stated that same was all true and correct and uttered the words 'So help me God'.

COMMISSIONER OF OATHS

Commissioner of Oaths signs here after asking the deponent to swear with your hand in the air that you are telling the truth. The name and address of the Commissioner will be given here, and the office held by the Commissioner, for example: Postmaster.

Figure 16: Example of an affidavit

E EXAMPLE

Affidavit

1. I, Benjamin Ngwane, do hereby make oath and say:
2. I am an adult male and I live at Hostel number 52 Indwe Street, Langa, Cape Town.
3. I am unmarried. I am presently unemployed.
4. On Monday, 26 September 2002, at about 8 p.m. I was walking on my way home after visiting a friend. I was walking alone on the pavement past Kentucky Fried Chicken going in the direction of Hostel 52.

5. A group of men crossed the road and came towards me. I recognised one of them. His name is Patrick Xegwana. He lives in Pele Street.
6. The group stopped me and Patrick Xegwana grabbed me by my shirt and asked me where I was going.
7. I tried to answer that I was going home but before I could finish, Patrick Xegwana slapped me on my left cheek with his left hand.
8. One of the other men then assaulted me by punching me in the stomach and kicking me where I lay on the ground. He was wearing a dark blue overall which was very torn. He was also wearing glasses. I recognised this man's face although I do not know his name. I don't know where he lives. He was about 30 years old. I would recognise him if I saw him again.
9. I think there were five men altogether. I do not know the names of any of them except for Patrick Xegwana but I recognised all of their faces. I would recognise them if I saw them again.
10. They were all crowding around me while I was lying on the floor being assaulted by the man in the blue overall. One of the men had a gun and was poking it in my side. I was very scared and I didn't say anything to them. They did not say why they were assaulting me. They only told me that I must not come near their area again.
11. Everything happened so quickly. The last thing I recall is a hard blow on my head.
12. I was dizzy at the time and can only remember being picked up. I was looking around to see where the men were but they were gone. One of the people helping me was a man called Vuyani. He telephoned the Langa Day Hospital for an ambulance to come and fetch me. I stayed there until the ambulance arrived and took me to hospital.
13. At hospital I was treated for two broken ribs, severe bruises all over my body, and my eye was bleeding. I had to stay in hospital for 3 days. My hospital card number is 5489. I was treated by Dr Wyngaard.
14. I do not know if there were any witnesses to the assault on me. I do not know if Vuyani witnessed the whole assault on me.
15. I do not know why I was assaulted by the group.

BENJAMIN NGWANE

THUS SIGNED AND SWORN TO at LANGA this day of 30th September 2009 the Deponent having acknowledged:

1. That he/she has no objection to taking the oath.
2. He/she deems the oath binding on his/her conscience.
3. He/she understands the contents of this Affidavit and stated that same was all true and correct and uttered the words 'So help me God'.

COMMISSIONER OF OATHS

Introduction to the South African legal system

Learning objectives

- To know where we get our law from.
- To understand South Africa's court structures.
- To know which cases can be dealt with by different courts and the limits of each court.

South Africa became a constitutional democracy in 1994 – this means that the Constitution and the Bill of Rights are the supreme (highest) law of the country. The Constitution guarantees human rights to everyone in South Africa.

With these rights, come duties and responsibilities, and also penalties to ensure that laws are observed. If laws are not respected, then punishment follows. All our laws and rules can also be tested against the Constitution to see if they are fair.

5.1 Sources of South African law: Where do we get our law from?

South African law is made up of common law, customary law and statutory law.

Common law

Common law comes from the principles of Roman-Dutch Law, English law and customary Law. The history of South African law goes back to the time of the arrival

of Jan Van Riebeeck in South Africa (the Cape) in 1652 when the Dutch settlers brought their law from the Netherlands: Roman Dutch Law. Later on in the 1800 the English took over the Cape from the Dutch and they brought in English Law. Customary law was recorded and sometimes distorted by officials of the colonial and apartheid systems that followed.

Later on in 1910, South Africa became a union resulting in the joining of the 4 colonies: Cape, Natal, Transvaal and the Orange River Colony. The laws of the country were then made by the union government, not voted for by the people. In 1994 when South Africa became a democratic country, our Constitution became supreme to all law, and all law has to be in line with the Constitution.

Customary law

Customary law comes from indigenous cultures in South Africa. When Jan van Riebeeck came to the Cape, there was a legal system which was already in existence amongst the people in South Africa. It was just unwritten, passed on orally and was strongly connected to cultural practices and tradition. This customary law was only fully recognised in South Africa in 1994 when we became a democracy in South Africa. Our courts must also recognise and apply customary law as long as it is in line with the Constitution, especially its Bill of Rights.

Statutory law

Statutory law is law coming from Acts passed by Parliament. This law is published in the Government Gazette. The way in which the laws are carried out are written in Regulations under Acts of Parliament. Different provinces also have powers to pass laws only for their province, known as by-laws. Statutory law must also always be in line with the Constitution. If any part of an Act, Regulations or by-law is not in line with the Constitution, then the courts can declare those parts invalid.

5.2 The South African legal system

Under section 166 of the Constitution,¹⁴ the courts are:

- The Constitutional Court.
- The Supreme Court of Appeal;
- The High Courts, including any High Court that may be established by an Act of Parliament to hear appeals from the Magistrates' Courts.

¹⁴ The Constitution of the Republic of South Africa Act 108 of 1996.

- The Magistrates' Courts.
- Any other court established and recognised under an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts, for example: the Small Claims Court.

Of the courts above, the *superior courts* are the Constitutional Court, Supreme Court of Appeal and High Courts. The *inferior courts* are the Magistrates' Courts and other courts like the Small Claims Court. *The major difference between these classes of courts is:*

- The superior courts have an in-built (inherent) power to develop common law and they can make an order to fix a wrong or protect a right under the Constitution.
- The inferior courts do not have the power to make a ruling on the constitutionality of laws and the conduct of the President.
- In the superior courts, judges sit in as presiding officers, while the inferior courts have magistrates. Other courts like the Small Claims Court have Commissioners as presiding officers.
- There are different Acts of Parliament which control the functioning of each category of courts.

There are specialised courts which have the powers to deal with particular cases:

- The Land Claims Court: this court hears disputes about land and the land reform programme. Laws which control land matters are The Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Tenants Act) 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.
- The Labour Courts to hear disputes on labour issues. They are created under the Labour Relations Act 66 of 1995.
- The Competition Tribunal and Appeal Court to deal with cases under the Competition Act 89 of 1998.
- The Equality Courts: they hear disputes relating to unfair discrimination, hate speech and harassment.

The Small Claims Court

For disputes between individuals, where the claim is R12,000 or less, then the claims can be made in a Small Claims Court. These courts were created under the Small Claims Court Act 62 of 1984 to provide speedy and affordable access to justice for people who have small claims. Proceedings in these courts are simple so that people do not need expensive lawyers.

5.3 Administrative law and system

This is a branch of public law which controls the activities of bodies that exercise public powers or perform public functions, particularly the different organs of government.

Administrative law provides remedies to individuals affected by administrative decisions by government bodies where administrative power has not been properly exercised or certain duties have not been carried out – these decisions are what we call *administrative action*. The Promotion of Administrative Justice Act¹⁵ is aimed at making the administrative bodies effective and accountable to the people for their actions.

Section 33 of the Constitution¹⁶ says that administrative action must be reasonable, lawful and procedurally fair. It makes sure that people will have the right to request and receive written reasons whenever administrative action results in a negative impact on them.

Administrative action refers to the work of all government departments at national, provincial and local level. Whenever any of these administrations make a decision (or fail to take a decision) that affects a person's rights, they are doing an administrative action, for example: a decision on whether or not to award an old age pension or disability grant.

The Act deals only with administrative action or decisions that negatively affect a person's rights. Decisions that don't have a negative impact on a person aren't covered by the Act.

5.4 Jurisdiction

Jurisdiction refers to the power or authority of a legal entity/body to deal with and make rulings on legal cases and to administer justice within a defined geographical

15 Act 3 of 2000.

16 South African Constitution Act 108 of 1996.

area of responsibility. It is usually used to determine the extent of power that a legal body can exercise in a geographical area and on different issues.

Criminal jurisdiction¹⁷

In general, jurisdiction for sentences by District Magistrates' Courts (District Courts) is limited to an imprisonment of not more than 3 years or a fine up to R60,000.

A Regional Magistrate's Court (Regional Court) can impose a sentence of not more than 15 years' imprisonment or a fine up to R300,000.

Any person charged with any offence committed within any district or regional division may be tried either by the court of that district or by the court of that regional division.

Where it is uncertain in which of several jurisdictions an offence has been committed, it may be tried in any of those jurisdictions.

A District Court has jurisdiction over all offences except treason, murder and rape. A regional court has jurisdiction over all offences except treason. However, the High Court may try all offences.

Depending on the seriousness of the offence and the circumstances of the offender, the Directorate of Public Prosecutions (DPP) decides in which court a case will be heard. Prosecutions are usually dealt with in Magistrates' Courts, and judgment and sentence passed there.

Different sentences

These are the possible sentences for a convicted person:

- Imprisonment.
- Periodical imprisonment.
- Declaration as a habitual criminal (Regional Courts and High Courts).
- Committal to an institution established by law.
- A fine with or without imprisonment as an alternative, correctional supervision or a suspended sentence.
- Declaration as a dangerous criminal (Regional Courts and High Courts).

¹⁷ <http://www.info.gov.za/aboutgovt/justice/courts.htm>.

- A warning or caution.
- Discharge.

The sentencing of petty offenders to do community service as a condition of suspension, correctional supervision or postponement in appropriate circumstances, has become part of an alternative sentence to imprisonment.

Where a court convicts a person of any offence, the court may postpone the passing of sentence for a period up to 5 years, and release the convicted person on one or more conditions. The court can also pass sentence, but suspend it on certain conditions. Where a law sets out a minimum number of years as punishment, the court cannot postpone or suspend the sentence.

If the conditions of suspension or postponement are violated, the offender may be arrested and made to serve the sentence. Courts can further suspend the operation of the sentence if offenders prove that circumstances beyond their control, or another good and sufficient reason prevented them from following the conditions of their suspension.

Civil jurisdiction¹⁸

The area of civil jurisdiction of a Magistrate's Court is usually the district, sub-district or area for which the court was established.

The civil jurisdictional limits of Magistrates' Courts were increased for both *liquid* (money) and *illiquid* (non-money) claims to R100,000.

The jurisdiction of a Magistrate's Court is usually limited to cases in which the claim value does not exceed R100,000 where the action arises out of a liquid document or credit agreement, or R50,000 in all other cases.

Traditional courts may hear and determine civil claims arising from indigenous law and custom, brought before them by an African against another African within their area of jurisdiction.

5.5 Classification of law

The two main categories of South African law are:

- *Substantive law* is written law that defines rights and duties such as crimes and punishments in the criminal law, and civil rights and responsibilities in civil law.

¹⁸ <http://www.info.gov.za/aboutgovt/justice/courts.htm>.

Examples are contract law, criminal law and the law of delict.

- *Procedural law* covers the procedures and rules for administering and executing substantive law. Examples are the Magistrate's Court Rules and the High Court Rules, including things like filing of notices to court and the serving of court documents to opponents.

5.6 Structure of our courts

To access your rights to justice and to make a claim, you need to understand the structure of the court system. Each court handles different types of issues and the hierarchy of courts must be respected, in other words: in what order to use the different courts.

The *ordinary courts* dealing with general kinds of cases are:

- The Constitutional Court.
- The Supreme Court of Appeal.
- The High Courts.
- Magistrates' Courts.
 - ~ Regional Courts (criminal cases only).
 - ~ District Courts (criminal and civil cases).
- Small Claims Courts.
- Community Courts.
- Courts of Chief and Headmen.

Special courts deal with particular kinds of cases:

- Labour Appeal Court: appeals from the Labour Court.
- Labour Court: disputes under the Labour Relations Act.
- Land Claims Court: land claims and land tenure issues.
- Family Courts: all family-related issues, for example: divorce.
- Tax Courts.

- Water Tribunal.
- Equality Courts, for example: cases on unfair discrimination.

5.6.1 The Constitutional Court

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

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

5.6.2 The Supreme Court of Appeal

The Supreme Court of Appeal is in Bloemfontein. After the Constitutional Court, this is the highest court in South Africa. It only hears appeals from the High Courts. All cases in the Supreme Court of Appeal are heard by 3 to 5 judges.

Only the Constitutional Court and the Supreme Court of appeal itself can change a judgement made by the Supreme Court of Appeal. If Parliament does not like the way the Supreme Court of Appeal interpreted a law, then Parliament can change that law.

5.6.3 The High Courts

The High Courts of South Africa used to be called the 'Supreme Courts'. They listen to any case which is too serious for a Magistrate's Court or when a person or organisation goes to the court to appeal the decision of a Magistrate's Court. Cases of the High Court are listened to by one judge, but for cases on appeal, then at least 2 judges must hear the case.¹⁹

Sometimes if the case is about a very serious crime then a judge and 2 experienced people called 'assessors' (often retired advocates or magistrates), will listen to the case. Even if there are assessors, the judge does not have to listen to what they say, but they usually help the judge to make a decision.

The High Courts have jurisdiction over defined provincial areas. The decisions of the High Courts must be followed by Magistrates' Courts within their areas of jurisdiction.

¹⁹ http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.

They usually only hear civil matters involving more than R300,000 and serious criminal cases. They also hear any appeals or reviews from Magistrates' Courts within their jurisdiction. The High Court usually hears any case involving a person's status, for example: adoption, insolvency.

These are important officers in a High Court:

- *The Registrar of the High Court*

The functions of a Registrar are mainly administrative. The registrar also has semi-judicial duties, such as issuing civil summonses, warrants and subpoenas. The Registrar is also the Taxing Master for a particular High Court, who decides on legal costs that can be claimed for cases. Registrars also compile case lists, arrange available courts and keep records.

- *The Family Advocate*

The Family Advocate assists the parties to reach an agreement on disputed issues, especially custody, access and guardianship of children. If people are unable to reach an agreement, the Family Advocate evaluates their circumstances and the best interests of the child, and makes a recommendation to the court on custody, access or guardianship.²⁰

- *The Master of the High Court*

The Master's Branch serves the public around:

~ Deceased estates.

~ Liquidations (insolvent estates).

~ The registration of Trusts.

~ Tutors and Curators to look after the affairs of people.

~ Administration of the Guardian's Fund (for minors and mentally challenged people).

- *The Sheriff of the Court*

The Sheriff is an impartial and independent official appointed by the Minister of Justice and Constitutional Development who must serve or execute all documents issued by our courts. These include summonses, notices, warrants and court orders.

20 http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.

- *The Director of Public Prosecutions*

The Directors of the Public Prosecutions are responsible for all the criminal cases in their provinces and all the prosecutors are under their control.

The police bring information about a criminal case to the Director of Public Prosecutions or his/her prosecutors. The Director of Public Prosecutions or his/her representative prosecutor then decides whether there is a good reason to have a trial and whether there is enough information to prove in court that the person is guilty.

- *The State Attorney*

The State Attorney's Division of the Department of Justice functions like an ordinary firm of attorneys, except that its clients are the different departments of government and not private individuals. The State Attorney's main function is to protect the interests of the State by acting for all government departments and administrations in civil cases, and for officials sued in their official capacity.

Provincial Divisions of the High Court

There are at the moment 14 provincial divisions of the High Court in:

- Eastern Cape High Court (Bisho).
- Free State High Court (Bloemfontein).
- Western Cape High Court (Cape Town).
- KwaZulu-Natal High Court (Durban).
- Eastern Cape High Court (Grahamstown).
- South Gauteng High Court (Johannesburg).
- Northern Cape High Court (Kimberley).
- KwaZulu-Natal High Court (Pietermaritzburg).
- Eastern Cape High Court (Port Elizabeth).
- North Gauteng High Court (Pretoria).
- Limpopo High Court (Thohoyandou).
- Eastern Cape High Court (Mthatha).

- North West High Court (Mmabatho).
- Polokwane Circuit Court of the North Gauteng High Court, Pretoria.

5.6.4 Circuit Courts

Circuit Courts are also part of the High Court. They sit at least twice a year, moving around to serve more rural areas. They can be contacted through the High Court.²¹

5.6.5 Special Income Tax Courts

The Special Income Tax Courts sit at the High Court. They have a judge of the High Court assisted by an accountant of not less than 10 years' experience and a representative of the business community. This court deals with any disputes between a taxpayer and the South African Revenue Service, where the dispute involves an income tax assessment of more than R100,000. Appeals against its decisions are made directly to the Supreme Court of Appeal. Tax disputes around assessments of less than R100,000 go the Tax Board. The Tax Board is chaired by an attorney, advocate or accountant who works in the private sector and is appointed by the President to assist as Chairman of the Board.²²

5.6.6 Labour Courts and Labour Appeal Courts

The Labour Courts have the same status as a High Court. The Labour Courts decide on cases around labour disputes between an employer and employee, for example: an unfair labour practices for dismissing an employee without giving notice. The Labour Court can order an employer or employee or union to stop committing an unfair labour practice. It can give jobs back to employees who have lost their jobs unfairly. The Labour Appeal Court hears appeals against decisions in the Labour Court and this is the highest court for labour appeals.

5.6.7 Divorce Courts

Divorce Courts hear any cases relating to divorce. Previously there were 3 stand-alone divorce courts, the Central, North Eastern and Southern Divorce Courts, and they were designed to deal with less complicated divorces quickly and inexpensively. These courts were integrated into the 63 Regional Courts that share jurisdiction with their closest High Courts. This has led to greater access to courts to hear divorce cases. People can now choose the court that is closest to the area where they live to bring a divorce-related case.

21 http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.

22 http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.

The Southern Divorce Court is the divorce court that has jurisdiction in the Western Cape, and it has offices at the Family Court Centre in Cape Town and a satellite office in Mitchell's Plain. You can contact the Family Court Centre through the Cape Town Magistrate's Court.

5.6.8 Land Claims Court

The Land Claims Court specialises in dealing with disputes that arise out of South Africa's land reform laws: the Restitution of Land Rights Act of 1994, the Land Reform (Labour Tenants) Act of 1996 and the Extension of Security of Tenure Act of 1997.

The Land Claims Court has the same status as the High Courts. Any appeal against a decision of the Land Claims Court is made to the Supreme Court of Appeal, and if appropriate, to the Constitutional Court. The Land Claims Court has its main office in Randburg, although it can hold hearings in any part of the country if it thinks this will make it more accessible and it can conduct its proceedings in an informal way if this is appropriate.

5.6.9 The Magistrates' Courts

The Magistrates' Courts are the lower courts which deal with the less serious criminal and civil cases. They are divided into Regional Courts and District Courts.

Regional Courts deal only with criminal cases, while the District Courts hear criminal and civil cases.

Regional Courts handle more serious cases such as murder, rape, armed robbery and serious assault:

- Regional Courts can sentence a person who has been found guilty of offences that include murder or rape to imprisonment for life.
- They can sentence people who have been found guilty of certain offences such as armed robbery or stealing a motor vehicle to prison for a period up to 20 years.
- They can impose a maximum fine of R300,000.

The District Courts try less serious cases:

- District Courts cannot try cases of murder, treason, rape, terrorism, or sabotage.

- They can sentence a person to a maximum of 3 years in prison or a maximum fine of R100,000.
- They can hear civil cases when the claims are for less than R100,000.
- They cannot deal with certain matters, such as divorce, arguments about a person's will, and cases to decide if a person is mentally sane or not.

The most serious criminal matters are heard in the High Court. There are also a number of Magistrates' Courts that are specialised to be better able to deal with certain types of cases, for example: Children's Courts, Sexual Offences Courts.²³

5.6.10 Small Claims Courts

Small Claims Courts (SCC) have jurisdiction to hear any civil case involving less than R 12,000. But some cases cannot be taken to the Small Claims Court even if they are for R12,000 or less. *Examples of these claims are:*

- Divorce.
- Cases about a will.
- Malicious prosecution.
- Wrongful imprisonment.
- Seduction.
- Breach of promise to marry.
- Claims against the State (including a municipality or local government).
- Claims for damages for defamation.
- Claims around a person's mental capacity.

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

23 http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.

this court to claim against you.

There is no magistrate or judge in the SCC but the presiding officer is a Commissioner who is usually a practicing advocate or an attorney who acts as a commissioner free of charge. The Commissioner listens to both sides and asks all the questions, as you cannot use a lawyer in the Small Claims Court. Remember that you can get advice from a paralegal or a lawyer to prepare for an SCC case.

No appeal may be brought against the judgement or order of the Small Claims Courts. *Court proceedings may be referred to the High Court for review on 3 grounds:*

- Absence of jurisdiction by the court.
- Having an interest in the case, bias, malice or corruption by the Commissioner.
- Gross irregularities in the proceedings.

You can contact your nearest Small Claims Court through your nearest Magistrate's Court.²⁴

See Chapter 12 for more detail on the SCC.

5.6.11 Community Courts

Community Courts are similar to District Courts, but they only deal with petty crimes such as shoplifting cases, petty theft, petty gambling offences, petty traffic offences, drunkenness, drinking in public, riotous behaviour, failure to obey a lawful instruction of a police officer, various train-related offences, and common assault.

The Community Courts should also not be confused with the traditional courts in rural areas which assist in resolving less serious disputes. For example, there are three Community Courts that have been established in the Western Cape: Mitchell's Plain, Cape Town and Fezeka (Gugulethu).

Community Courts have a different approach, such as using diversion and alternative sentencing options as much as possible. The accused is assessed as soon as possible (usually within 48 hours of arrest) to decide on suitability for diversion from the criminal justice system. Legal Aid attorneys are available on request.

24 http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.

5.6.12 Equality Courts

Equality Courts have been set up to help someone who believes that they have suffered unfair discrimination, hate speech or harassment. These courts make sure that it is easy to bring the case to court to be finalised quickly.

Anyone can take a case to the Equality Court, even if you are not directly involved in what happened. This means a complaint to the court can be made against someone or an organisation you believe has failed to respect the rights of another person *around one of these grounds*:

- Race
- Pregnancy
- Ethnic or social origin
- Sexual orientation
- Disability
- Culture
- Birth
- HIV status or perceived status
- Family responsibility and status.
- Gender
- Marital status
- Colour of your skin
- Age
- Religion, conscience and belief
- Language
- Nationality
- Economic or social status

You can take your complaint to your nearest Equality Court. The establishment of the Equality Courts seeks to achieve the speedier processing of cases, with participation by the parties.²⁵ The Equality Courts have a wide range of remedies, for example: ordering an apology, educating the community, changing policies.

5.6.13 Child Justice Courts

The child justice system tries to make sure that children under 18 do not commit a crime. This can involve not going to court, but finding another way to understand and change the child. If a child is found guilty, the most important thing should be to try to find a way that makes sure they return to their community changed in a way that will make sure they will not repeat the crime.

The child justice system is also about protecting communities from children who do crime, for example: if a child is arrested, they must be assessed by a probation

25 http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.



officer before they appear in court. The probation officer investigates the child's circumstances to understand the child and what caused the crime.

The outcome can be for the case to go through a process different from the courts, for example: if found guilty, a child's sentence can be to do work for the community, paying back the person wronged, or being sent to a child or youth centre that focuses on changing children who have committed crimes and others. The idea is that sending a child to jail must be the last option and, if done, must be for the shortest time possible.

Remember:

- Anyone under 18 is a child.
- A child of 14 or younger cannot be sent to jail.
- Children of 10 and younger cannot commit a crime, as they are not expected to be able to tell the difference between wrong and right.²⁶

5.6.14 Maintenance Courts

The Maintenance Court is situated in the Magistrate's Court. Mothers or fathers, who do not get support for their children from the other parent, can go there to claim maintenance from that parent.

There is a Maintenance Officer at the Maintenance Court. The Maintenance Officer will help you to fill in the necessary forms, and an investigator can also be appointed to help you. You do not have to have an attorney to claim maintenance.

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

5.6.15 Sexual Offences Courts

Special Sexual Offences Courts have been set up across the country and the State is currently busy trying to increase their number. They are built to ensure that children and victims get the necessary care, respect and support at the court.

For example, there is a waiting room to make sure that a woman or a child who is a rape survivor does not come in contact with the person accused. Toys are also

²⁶ http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E.

available to make sure a relaxed atmosphere is created for a child. In some cases, television is used to make sure that evidence by the victim is given in a more comfortable way.

A new programme has made it easier for survivors to lay a charge by opening a case at a one-stop centre called a Thuthuzela Care Centre, which is at a hospital.

5.6.16 Children's Courts

Children's Courts have been established by the Children's Act 38 of 2005. The Children's Act was written after the government accepted the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

The aims of the Act include:

- Making sure that children are able to grow up safely and develop well, and where they are abused or neglected, that they will be helped to recover.
- Allowing children to have their say and participate in decisions that affect their lives.
- Valuing families and trying to ensure that they are protected and supported through programmes showing people how to become better parents or helping children to find another family or adults with which to stay.

The Act also provides for rules to ensure proper and safe after-care, crèches, drop in centres, and child and youth care centres; and for children to consent to their own adoption.²⁷

⋮ **Note:** for booklets with more information on the Children's Act: <http://www.centreforchildlaw.co.za/children/your-rights>.

You can approach the Children's Court for issues such as:

- The protection and well-being of a child.
- The care of or contact with a child.
- The paternity of a child.
- The support of a child.

²⁷ <http://www.centreforchildlaw.co.za/children/your-rights>.

- The provision of early childhood development services.
- Maltreatment, abuse, neglect, degradation or exploitation of a child.
- The temporary safe care of a child.
- Alternative care of a child.
- The adoption of a child, including an inter-country adoption.
- A child- and youth-care centre, a partial-care facility or a shelter or drop-in centre.
- Any other issues relating to the care, protection or well-being of a child provided for in this Act.²⁸

Every Magistrate’s Court in South Africa is a Children’s Court. This means that there are 737 Children’s Courts in the country.

5.6.17 Courts for Chiefs and Headmen

These courts have jurisdiction to hear certain cases on the same level as Magistrates’ Courts. They are designed to deal with customary issues under customary law. An authorised African headman or his deputy may decide cases using indigenous law and custom brought before him by an African against another African within his area of jurisdiction, for example: disputes over ownership of cattle or *lobola*.

These courts are commonly known as *Chiefs Courts*. A person with a claim has the right to choose whether to bring a claim in the Chief’s Court or in a Magistrate’s Court. Anyone who is not satisfied with the decision in a Chief’s Court can take their case to the Magistrates’ Courts.²⁹

Note

The Traditional Courts Bill is aimed at recognising the traditional court system, regulating the traditional courts, and enhancing customary law. The Bill also seeks to ensure that traditional courts function in line with our Constitution and Bill of Rights.

The Bill appoints traditional leaders as the presiding officers of the Traditional Courts. The traditional leaders have a vast amount of authority, which is equivalent to the powers of a presiding officer in other courts.

28 <http://www.justice.gov.za/vg/children/children-chp04.html>.

29 <http://www.justice.gov.za/vg/children/children-chp04.html>.

Traditional Courts can hear all disputes which arise within the court's jurisdiction except for cases which the Bill specifically says it cannot hear, for example: family or marriage law cases.

The representation of women within the Traditional Courts environment/space is very limited. According to the Bill, representation in the court can be by a man who does not have to be an attorney. The Bill affects all people in previous 'homeland' boundaries and probably means that you cannot go through a Magistrate's Court and bypass a Traditional Court if there is one in a particular area.

The Bill has been highly criticised by communities in rural areas, and by civil society and gender advocacy organisations, and it awaits further debate in Parliament and publicly.

5.7 Statutory bodies

In addition to the various courts within the South African legal system, there are statutory bodies established to give effect to certain Acts. These statutory bodies have the authority to adjudicate on or determine claims or disputes around various issues.

5.7.1 The Water Tribunal

Established under the South African National Water Act 36 of 1998, the Water Tribunal is an independent body with jurisdiction in all the provinces over water disputes. It has a Chairperson, a Deputy Chairperson, and additional members.

Members of the Water Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge. They are appointed by the Minister on the recommendation of the Judicial Service Commission, the body which chooses judges. The Water Tribunal replaced the Water Court in 1998. You can contact the Water Tribunal through the High Court.

5.7.2 The Truth and Reconciliation Commission

The Truth and Reconciliation Committee (TRC) was set up to deal with political crimes committed during the apartheid years. The Amnesty Committee had the power to grant amnesty (which means the perpetrator cannot be prosecuted) for politically-motivated crimes fully and truthfully confessed, under certain conditions.

The Human Rights Violation Committee decided on acts which were violations of human rights, based on statements made to the TRC. Once victims of gross human rights violations are identified, they were referred to the Reparation and Rehabilitation Committee, which decides on how to compensate victims. The work of the TRC

is almost complete. Those who were not granted amnesty by the TRC for crimes committed during apartheid can be prosecuted.³⁰

5.7.3 The Competition Tribunal

The Competition Tribunal was established under the Competitions Act 89 of 1998. *The main purpose of the Act is to maintain and promote competition through:*

- Providing consumers with competitive prices and product choices.
- Ensuring the promotion of employment and the production of social and economic welfare in the country.
- Ensuring that small and medium size business enterprises have a fair opportunity to participate in the economy.
- Ensuring the promotion of a greater spread of ownership to increase opportunities for historically disadvantaged persons.

The Act created a new framework of competition regulation and established 3 independent bodies: the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

The Competition Tribunal holds hearings for each case presented and its proceedings are always open to the public.

5.7.4 Companies Tribunal

The Companies Tribunal was established under the Companies Act 71 of 2008. The functions of the tribunal include deciding on applications brought under the Companies Act and serving as a forum for individuals to voluntarily resolve all disputes. All disputes heard within the forum are Companies Law related disputes as provided for in terms of the Companies Act.

5.7.5 The Rental Housing Tribunal

The Rental Housing Tribunal is based in each province and deals with all cases related to rental housing property under the Rental Housing Act 50 of 1999. The Tribunal is appointed by the Minister of Housing for each province in the country and aims to resolve all disputes between landlords and tenants speedily, efficiently and cost effectively.

<http://www.justice.gov.za/vg/children/children-chp04.html>.

The Tribunal has the power to hold mediations and to subpoena people to attend hearings. Any ruling made by the Tribunal is equivalent to a Magistrate's Court judgment. It can also impose a fine or imprisonment.

The Tribunal has the authority to deal with disputes, complaints or problems such as:

- Non-payment of rent.
- Refund of security deposits.
- Invasion of a tenant's privacy.
- Overcrowding in residential areas.
- Deciding if rentals are exploitative.
- Unlawful seizure of a tenant's possessions.
- Discrimination by a landlord against a possible tenant.
- Tenants making too much noise.
- Maintenance and repairs.
- Illegal lockouts and disconnection of services.

Introduction to human rights in South Africa

Learning objectives

- To understand every person has human rights.
- To know the rights in our Bill of Rights.
- To know how to exercise and claim rights through paralegals, laws and bodies set up to assist people.

6.1 Understanding human rights

Every person is entitled to certain rights, simply by the fact that they are a human being. They are human rights because they are things you are allowed to be, to do or to have. These rights are there for your protection against people who might want to harm or hurt you. They are also there to help us get along with each other and live in peace.

Figure 17: Key rights in our Constitution's Bill of Rights

We list the human rights we enjoy from our Constitution's Bill of Rights:

BILL OF RIGHTS Section	RIGHT	WHAT DOES THIS MEAN FOR SEX WORKERS?
S9	Equality Everyone is equal before the law and has equal benefit and protection of the law.	Sex workers should be treated equally and may not be unfairly discriminated against. Laws that exist to protect all citizens should also protect sex workers.

S10	Human dignity Everyone has inherent dignity and the right to have their dignity respected and protected.	No persons or institution may insult you or take away your self-respect by words or actions.
S12	Freedom and security of the person Everyone has the right to be free and not to be tortured or treated in a cruel, inhuman or degrading way.	You may not be arrested without a good reason. You cannot be treated badly whilst in police custody.
S14	Right to privacy Everyone has the right to privacy.	You have the right to keep your HIV or AIDS status to yourself. No person or institution may force you to tell them your HIV status or take an HIV test.
S16	Freedom of expression Everyone has the right to freedom of expression which includes the right to give or receive information or ideas.	You have the right to express your views on issues as long as they do not hurt another person.
S18	Freedom of association Everyone has the right to freedom of association.	You have the right to join clubs, groups or organisations, and may not be forcefully separated from people.
S21	Freedom of movement and residence Everyone has the right to move about freely, to live in or leave the country and to live anywhere within the country.	You may move around the country as you wish, and may not be forced to move to a separate place away from society.
S22	Freedom of trade, occupation and profession Everyone has the right to choose their work freely.	You may choose what kind of work you wish to do.
S23	Labour relations Everyone has the right to fair labour practices.	You may not be unfairly discriminated against at work.
S24	Environment Everyone has the right to an environment that is not harmful to their health or well-being.	You have the right to live in a clean environment and everyone including the government has a responsibility to protect and preserve the environment for future generations.

<p>S26</p>	<p>Right to housing</p> <p>Everyone has the right to access adequate housing. No one may be evicted from their home or have their home demolished without a court order.</p>	<p>You may not be refused a subsidy or loan to buy a house because you are a sex worker. It is unlawful to be evicted from your home because of the kind of work you do.</p>
<p>S27</p>	<p>Right to healthcare, food, water and social security</p> <p>No one may be refused emergency medical treatment. Everyone has the right to access health care services such as reproductive care as well as social security benefits which include appropriate social assistance if they are incapable of supporting themselves and their dependents.</p>	<p>Hospitals or medical people may not refuse to treat you.</p>
<p>S29</p>	<p>Right to education</p> <p>Everyone has the right to basic education, which includes adult basic education.</p>	<p>A school may not refuse to educate you or your child because you are a sex worker.</p>
<p>S32</p>	<p>Access to information</p> <p>Everyone has the right to see information held by someone which would be needed to enable such a person to exercise or protect their rights.</p>	<p>If you feel your rights are being violated in any way, for example in terms of an employment policy, you may ask to see the policy and may then challenge it in court. This is the same for other places or institutions.</p>
<p>S33</p>	<p>Just administrative action</p> <p>Everyone whose right has been negatively affected by administrative action has the right to be given written reasons, such as reasons for the delay in the action.</p>	<p>If you feel you are being refused a social service for unfair or unjust reasons, you may demand to see the reasons and decide whether you wish to challenge the decisions.</p>
<p>S35</p>	<p>Arrested, detained or accused people</p> <p>Everyone who is detained including convicted prisoners has the right to conditions of detention which respect his/her right to dignity</p>	<p>Prisoners may not be treated in an unfair or undignified manner because they are sex workers.</p>

6.2 Access to justice as a human right and remedies for rights violations

Our Constitution says that the fundamental rights of all South Africans will be protected and respected. These rights are listed in the Bill of Rights along with the circumstances when it may be permissible to limit these rights. Various government bodies and institutions have been set up to ensure that rights are protected.

If your rights have been violated, you can report the case to one of these bodies:

- The South African Human Rights Commission.
- The Independent Police Investigative Directorate.
- The Public Protector.
- The Commission for Conciliation, Mediation and Arbitration.
- The Commission on Gender Equality.

6.3 South African Human Rights Commission

The South African Human Rights Commission (SAHRC) will help you if any of your rights in the Bill of Rights have been violated or abused.

To lodge a complaint you need to complete the SAHRC's online complaint form. The SAHRC will usually not be able to help you where:

- Your case does not involve a violation of a right in the Bill of Rights.
- Your problem happened before 27 April 1994.
- Your case is a criminal case and you need a lawyer – here you should call Legal Aid South Africa on 021 426 4126 or visit their offices at your closest Magistrate's Court.
- You have been convicted of a crime and you want to appeal.

For more information, contact:

7th Floor, ABSA Building, 132 Adderley Street, Cape Town, 8000

Tel: 021 426 2277

Fax: 021 426 2875.

6.4 Independent Police Investigative Directorate

If your rights have been violated by the police, you should contact the Independent Police Investigative Directorate (IPID).

To lodge a complaint, fill in the complaint form completely and correctly. If you are unsure about any aspect of the complaint reporting process, please follow their guidelines.

You can e-mail your complaint to complaints@ipid.gov.za or fax it to 021 949 3196.

For more information, contact:

Postal Address: Private Bag X 43, Bellville, 7535

Physical Address: 1st Floor, Fintrust Building, Corner Petrusa and Mazzur Street, Bellville, 7530

Tel: 021 941 4800

Fax: 021 949 3196

complaints@ipid.gov.za.

6.5 Public Protector

If you want to complain about a member of a government department, you should contact the Public Protector.

Anyone can complain to the Public Protector, who will then investigate the complaint. If the Public Protector finds that the complaint is justified, they will do whatever possible to find a solution to the problem, which includes recommending changes to the system.

If you have been unable to solve the problem by talking to the official and their supervisor, you should write to the Public Protector.

T TIPS

This information should be in the letter:

- The nature of your complaint.
- The background and history of the complaint.
- The reasons why you feel the complaint should be investigated by the Public Protector.
- The steps you have taken to solve the problem yourself.
- Specific details, such as names of officials and dates.
- Copies of any correspondence between you and the officials.
- Your contact details.

In some cases, the Public Protector may ask for a statement under oath before investigating.

If you need help with the complaint, you can phone the Public Protector's Office. There are trained staff members who will listen to a complaint, big or small, and conduct investigations.

For more information, contact:

Postal Address: Western Cape Regional Office, PO Box 712, Cape Town, 8000

Physical Address: 4th Floor, 51 Wale Street/Bree Street, Cape Town

Tel: 021 423 8644

Fax: 012 423 8708.

6.6 Commission for Conciliation, Mediation and Arbitration

If your employer has violated your rights, you should contact the Commission for Conciliation, Mediation and Arbitration (CCMA) after you have tried to sort the case at work. The CCMA will conciliate workplace disputes and arbitrate disputes that remain unresolved after conciliation.

For more information contact:

Postal Address: Private Bag X9167, Cape Town, 8000

Physical Address: 78 Darling Street, Cape Town

Tel: 021 469 0111

Fax: 021 465 7193/7

E-mail: ctn@ccma.org.za.

6.7 Commission on Gender Equality

If you are unfairly discriminated against or treated badly because of your sex, gender or sexual orientation, you should contact the Commission on Gender Equality (CGE) or lodge a complaint online. When making a complaint, you should try to provide as much information as possible. Complaints are strictly confidential.

For more information, contact:

Physical Address: 5th Floor ABSA Building, 132 Adderley Street,
Cape Town, 8001

Tel: 021 426 4080/3

Fax: 021 424 0549.

Law and administration of justice

Learning objectives

- To know we inherited our laws from different sources
- To understand how our judiciary and legal system work.
- To understand the role and function of the police is to assist and protect people and property.

7.1 Sources of law

As mentioned in Chapter 5, *the sources of South African common law are:*

Roman-Dutch law: this is the law which was introduced in South Africa in 1652 after the arrival of Jan Van Riebeeck when Dutch settlers brought their law from the Netherlands.

English law: when the British took over from the rule of the Dutch, they brought English Law.

Customary law: before both the Dutch and the British arrived in the Cape, South Africans had already established their own law and rules, based on culture and tradition.

Our statutory law comes from Acts and Regulations written and approved by Parliament – the Legislature. The Executive has the duty to enforce the law written by the Legislature. The President, Ministers and government departments are all part of the Executive.

7.2 The Judiciary

The Judiciary is the third, independent arm of government, which is made up of judges and magistrates who sit in courts. The Judiciary is mainly responsible for the interpretation of the law in South Africa. The structure of the South African Judiciary system is carefully defined under section 8 of the Constitution.³¹

This section guarantees the independence of the courts: this means that the courts should make fair rules without any influence from the other arms of government. Chapter 2 of the Constitution³² protects the right of every person to have the right to a dispute or trial heard by a fair, impartial and independent court.

The Judiciary consists of:

- The Chief Justice of South Africa: the head of the Constitutional Court.
- The Deputy Chief Justice.
- Other Constitutional Court judges.
- The President, Deputy President and other judges in the Supreme Court of Appeal.
- Judge President, Deputy Judge President and other judges of each High Court in the country.
- Regional and District Magistrates of the Magistrates' Courts.
- The judges of other courts established by the Acts of Parliament.

The appointment of most members of the Judiciary is done by the President in consultation with a body called the Judicial Service Commission (JSC) and other political leaders. The JSC is appointed under the Constitution to advise the national government on any matter relating to the judiciary or the administration of justice.

There is also a single National Prosecuting Authority (NPA) that is responsible for the institution of criminal proceedings on behalf of the State. It is led by the Director of Public Prosecutions (DPP).

Under the Constitution, laws passed by Parliament should ensure that the NPA performs its functions without fear, favour or prejudice.

31 Constitution of South Africa Act 108 of 1996.

32 Constitution: section 34.

7.3 The role and function of the police

Security services in South Africa fall under chapter 11³³ of the Constitution which lists the governing principles of national security, including the South African Police Service (SAPS).

Section 198(1) says that national security must resolve South African as individuals and as a nation, to live as equals, to live in peace and harmony to be free from fear and want to seek a better life.

Section 205(3) says that the aim of the police is to prevent, combat and investigate crime, to maintain public order and secure the inhabitants of South Africa and their property, and to uphold and enforce the law.

The police thus have a constitutional mandate and duty to ensure that public peace is maintained, and that the law is enforced and upheld.

7.3.1 The South African Police Services Act

Under the South Africa Police Services Act 68 of 1995, a member of the police shall exercise powers and perform duties and responsibilities required by the law. A police member can be called to act as a prosecutor or appear in a case before a magistrate or any other lower court in South Africa as a representative of the State.

These are some of the rules governing the police:

- Police performing official duties are allowed by law to use reasonable force necessary to carry out their duties.
- The law sets out when police are allowed to search a person, place or vehicle without a search warrant, and to seize an article which could be an instrument for commission of an offence, as long as police provide people whose rights are or have been affected by the search or seizure with a copy of the written authorisation.
- Police can take all necessary steps to combat crime where there may be a reasonable suspicion of an offence committed, guided by the Criminal Procedure Act 51 of 1977.
- As a representative of the State, police are meant to ensure at all times that peace is maintained and the law is upheld.

33 Constitution of South Africa Act 108 of 1996.

7.3.2 Complaints against the police

A complaint against a police member relating to their duty can be addressed to the Station Commander of the police station the member belongs to. The members report to the Station Commander, who must assist with any complaint about the conduct of a police member in the execution of their duty.

You must record full details of the incident, including dates and name of the police member you may have a complaint against.

7.3.3 Metropolitan police: Example of Cape Metro Police

As a paralegal, you may also have to deal with complaints about the behaviour of metropolitan police. Here we will discuss the Cape Metro Police as an example of metro police nationally.

The South African Police Services Act provides for the establishment of Municipal/ Metropolitan Police Departments in South Africa. The Cape Metro Police are established under Cape Provincial Gazette 5786 of 2001. The Cape Metro Police Department is a local government initiative created to provide critical support to the SAPS.

The Metro Police Mission says that it is dedicated to providing equitable, accessible and sustainable policing services to the community in partnership with the SAPS and other stake holders. This is meant to be achieved by applying the principles of good governance, investment in excellence, and the fair and just enforcement of the rule of law.

Here is a brief explanation of the functioning of the different units of the Cape Metro Police:

Crime Prevention

- Conducts regular 'stops and searches'.
- Patrols in accordance to crime threats and patterns.
- Executes search warrants.
- Conducts joint operations targeting known drug houses.
- Carries out joint operations with SAPS in areas identified as high risk areas.
- Maintains high levels of visibility in targeted crime areas and 'hot spot' areas.

By-law enforcement

This unit focuses on the detection of petty crimes, including by-law and other minor offences. The unit also ensures enforcement of the city by-laws aimed at reducing general anti-social behaviour, such as drinking on beaches, urinating in public and use of abusive language.

Traffic enforcement

This unit focuses on controlling traffic and the flow of vehicles on public roads, and ensures public road laws are obeyed.

The easiest way to tell the difference between the SAPS and the Metro Police is to take note of their different uniforms.

Sex workers

Learning objectives

- To understand that sex work is currently illegal in South Africa.
- To realise that, as a result of the criminalisation of sex work, sex workers experience a wide range of human rights violations.
- To be sensitive in the language used around sex work, such as not using the derogatory term 'prostitute'.

Introduction

Sex workers' criminal status in society increases vulnerability to violence in a number of ways. Sex workers around the world continue to be murdered at rates higher than the general population. In some places, standardised mortality rates for sex workers are 6 times rates seen in the general population.³⁴

Since they are mostly female, sex workers remain particularly vulnerable to all crimes of violence against women. The incidence of physical violence, including rape, is higher among sex workers than among the general population. Violence is linked with social stigma: sex workers are often named, shamed and labelled as immoral, abhorrent and a threat to society. They are a popularly 'accepted' target of hate crime, in other words: people feel justified in harassing and abusing them.

Sex workers often function as a target for people to express their hatred. At the same time, people often feel justified in their violence and have no sense of accountability.³⁵ In some situations, an internalised sense of helplessness sends sex workers the message that their life does not matter. This type of discrimination produces

34 SWEAT submission to the South African Law Reform Commission, 27.

35 SWEAT submission to the South African Law Reform Commission, 27.

disempowerment.³⁶

The human rights abuse of sex workers in South Africa is alarming and demands urgent attention:

- Sex workers suffer systematic and regular violence and rape. In Cape Town alone, 37% of ‘street-based’ and 20% of brothel-based sex workers are subject to violence that they cannot report to the police.
- These unreported crimes include verbal abuse, refusal to pay and being robbed, threats of physical assault and rape.
- Most sex workers are extremely reluctant to report the crimes committed against others to the police, partially because in many cases, police officers are themselves perpetrators.
- Although many sex workers report abuse by the police³⁷, the role and behaviour of the police contributes towards a generalised scepticism from sex workers around resorting to the police for help and redress.

8.1 The words we use: ‘Sex worker’ and ‘prostitution’

The words we use to talk about people, and about what people do, can reinforce discrimination and abuse. Words such as ‘prostitution’ and ‘prostitute’ bear intense social stigma. This is one reason why many people involved in prostitution, and groups fighting for human rights, prefer to use the terms ‘sex work’ and ‘sex worker’ instead.

Naturally, only changing terminology is insufficient to eliminate the deep-seated stigma sex workers are confronted with on a systematic basis. The transformation needed is much wider. Nevertheless, *it is important to use language sensitively:*

- The terms ‘sex work’ and ‘sex worker’ emphasise the fact that this is work and as such sex workers should be entitled to the same rights and protections workers in other sectors enjoy.
- We use the term ‘sex worker’ instead of ‘prostitute’ out of respect for the dignity and human rights of the people who exchange sexual services for money or other things of value.

36 SWEAT submission to the South African Law Reform Commission, 27.

37 SWEAT submission to the South African Law Reform Commission, 27.

- The term ‘sex work’ is broader than ‘prostitution’, as it includes other activities such as stripping, phone sex lines and pornography. Many of the activities that are ‘sex work’ are illegal in South Africa.³⁸
- Sometimes we use the term ‘prostitution’ or ‘unlawful carnal intercourse’ because these are used in the legislation that criminalises sex work.

8.2 What is sex work?

Sex work is the exchange of sexual services for money. In the Sexual Offences Act 23 of 1957 it is described as ‘unlawful carnal intercourse’. This is defined as “carnal intercourse otherwise than between husband and wife” for reward. A reward can be in money or in kind.

In this manual, we use the term ‘sex work’ which means ‘adult commercial sex work. This comes from the definition developed by a regional UNAIDS workshop on sex work in West and Central Africa (Abidjan, Cote d’Ivoire, 21 – 24 March 2000):

“Sex work is any agreement between two or more persons in which the objective is exclusively limited to the sexual act and ends with that, and which involves preliminary negotiations for a price.”³⁹

8.3 Is sex work legal?

In South Africa, sex work is criminalised, with both the sex worker and the client committing criminal offences.

The Sexual Offences Act currently prohibits the act of having sex for reward [section 20(1) (aA)]. This section only targets the sex worker and not the client.

The new Criminal Law (Sexual Offences) Amendment Act 32 of 2007 now also criminalises the act of buying sex (section 11).

38 Canadian HIV/AIDS Legal Network, *Sex, work, rights, Changing Canada’s criminal laws to protect sex workers’ health and human rights* 2, 200.5.

39 “*Maybe it will be better once the this World Cup has passed*”, UNFPA, Research Findings regarding the impact of the 2010 Soccer World Cup on Sex Work in South Africa, 9.

When your client is a sex worker

Learning objectives

- To appreciate that sex workers respond more positively if you use the term 'sex worker'.
- To be empathetic, patient and understanding when consulting with sex workers.
- To try to always be available to clients but never to promise outcomes that you will not be able to deliver.

9.1 How to approach a sex worker as your paralegal client

T TIPS

As sex workers face a lot of stigma, here are some guidelines to keep in mind when your client is a sex worker:

Don't use the word 'prostitute'

The term 'prostitute' has a negative meaning and reinforces the stigma attached to sex work. You may find that often sex workers may refer to themselves as prostitutes because often they may identify with the social stigma. We find that if we refer to them as sex workers, they respond more positively during the consultation.

Trauma

You have to acknowledge that sex workers has experienced many traumatic situations during their work and therefore it may be difficult to obtain the necessary information promptly. Therefore consultations may take longer than usual, so you will have to be more patient than usual. Remember, that she may also have been sent from pillar to post, and you may be her last resort to access justice.

Trust

Often sex workers do not trust anyone who is linked with the law, perceived to be in authority or part of government structures. Building a trusting relationship with a client may take a few months. It is important to reassure her that everything that is mentioned during the consultation is confidential.

Never promise anything more than you can deliver

If you promise more than you can deliver, it will cause much more harm to your client than usual. It takes a long time for sex workers to access any form of legal assistance and because of their distrust of the legal system, you may never see her again. It is important to always inform clients of the limitations and difficulties that may arise when claiming their human rights. Also always inform her that there might be delays in the process too.

Information on basic human rights

Remember that the client may not be aware of what her basic human rights are and therefore may find it difficult to give you clear instructions. It is important that you are aware that you may have to repeat the same thing more than once, and therefore you have to exercise patience.

9.2 Guidelines to interview a person who may have been trafficked

T TIPS

Here are some guidelines when you interview a person who may have been trafficked:

Conduct interview

- Realise that identifying the 'victim' is not easy.
- Appreciate that 'victims' may not speak your language.
- Understand that a trafficked person may not see themselves as a 'victim'.
- Be aware of the fear of traffickers.
- Understand that trafficked people may not trust others, especially police where legal status is uncertain.
- Trafficked people are likely to suffer from Post-Traumatic Stress Disorder (PTSD).

Note

- *Post-traumatic Stress Disorder* (PTSD) is the term used to refer to the range of symptoms, including anxiety, fear, sadness and disconnection that emerge after a traumatic experience. People with PTSD feel like their painful memories will never go away and that they will not feel normal again.
- For more information on trafficking, please see Chapter 17.

Guiding principles

- Do no harm.
- Know your subject and assess the risks.
- Do not make promises that you cannot fulfil.
- Select and prepare interpreters carefully.
- Do not judge the 'victim'.
- Ensure anonymity and confidentiality.
- Avoid immediate deportation of victims.
- Listen and respect each victim's circumstances.
- Do not re-traumatise.
- Be prepared for emergency intervention.
- Put information collected to good use.

Recruitment questions

- How he/she came into contact with recruiter?
- What type of job was promised or expected?
- Was money paid to the recruiter?
- Was the individual trafficked by force out of the country to the final destination?

Transportation questions

- Who paid for the travel expenses or free taxis?
- Were any borders crossed illegally or openly?
- Was documentation used?
- Who is in possession of those documents now?
- Was there a transit destination?

Exploitation questions

- What activity is the person involved in?
- For how long after they arrived?
- Was the person coerced into this work?
- Did they receive payment?
- What were the working conditions?
- Was there debt bondage?
- Do they have freedom of choice and movement?

Look for further corroborative evidence

- Passports.
- Documentation.
- Ticket stubs.
- Fake contracts.
- Diary of letters written by the 'victim'.

Guidelines for interviewing minors

- Dedicate adequate time for discussions.
- Use appropriate language.
- Ensure the child understands the purpose of the interview, her right not to participate, and her right to end the interview at any time.
- Begin with open-ended questions.
- Close the interview in a way that will reassure the child.
- Never carry out an interview if it will put the child victim in any danger.
- Ensure no one is watching or listening.

- Ensure the interviewing environment is safe, secure and comfortable.
- Ensure confidentiality of the child victim.
- Give the child your name.
- Do not make promises you cannot keep.
- Give the child a list of services, names of NGOs and names of reliable contacts.

Guardianship

- Appointed immediately after child has been identified as a 'victim' of trafficking.
- Guardian looks after the best interests of the child.
- Guardian should stay with the child until the end of the reintegration process.
- Guardian needs to receive special training to care for the child.

Provide information

- It is important to provide the person with options, so they can make decisions about their health and future. Ensure that they have understand all the options available along with services provided, for example:
 - ~ Option 1: Remain in South Africa for 2 weeks and receive assistance.
 - ~ Option 2: Receive assisted voluntary return.
 - ~ Option 3: Participate in a police investigation in return for a 3-month stay.

Possession of fraudulent documents

- Person is in possession of legal documents that are fraudulent or that have been fraudulently obtained. Avoid deportation and arrest: immigration officers should give trafficking victims legal status in the country in cases where they must cooperate in a police investigation.
- There is a non-renewable suspension period where victims are willing to cooperate with law enforcement and prosecuting authorities.

Laws governing sex workers

Learning objectives

- To know that sex work, the sex worker and the client are criminalised in South African national laws.
- To know that municipal by-laws also criminalise sex work
- To realise that police often do not know or say the correct laws.

10.1 National laws affecting sex work

10.1.1 The Constitution

These are the rights that every human being automatically qualifies for at birth. They cannot be denied because of the colour of one's skin, religion, age or other personal factors. We are all equally entitled to our human rights without unfair discrimination. All the rights of people in South Africa are listed in the Bill of Rights in the South African Constitution Act 106 of 1998. *The Constitution also covers:*

- The social values that the country believes in.
- The structures of government.
- The powers and authority of government and government bodies.
- The relationship between government and people in South Africa.
- Aspects of the relationships between people in South Africa.

Section 2 of the Constitution states that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

Section 9: Right to equality

Section 9 of the Constitution says that every person is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) states that the State may not *unfairly discriminate* directly or indirectly against anyone based on 17 grounds.

Section 9(5) states that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. The right to ‘equal protection before the law’ means people have a right to the same opportunities and to have equal access to resources, which would allow them to be equal in the future.

T TIPS

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

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

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

These questions are:

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

Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 creates a general prohibition against unfair discrimination and says what grounds of discrimination are against the law in different sectors of society including: in employment, education, health care, land, housing and accommodation, insurance, pensions, services, associations and partnerships, clubs, professions and the media.

In addition, the Act defines each sector and says what forms of discrimination are not allowed in each of these sectors. If someone is charged with unfair discrimination, it is up to the person who is doing the discriminating (not the person discriminated against) to prove that the discrimination was reasonable and justifiable.

The courts will decide if an action was unfair by looking at how the action affected the person bringing the claim. Finally, the Act also says how people who have been discriminated against can be compensated for this.

Equality Courts

There are Equality Courts in all the provinces which can hear cases of discrimination and have powers to conciliate and mediate, grant interdicts, order payment of damages or order a person to make an apology. The Equality Courts are based at the High Courts.

CASE STUDY

Jordan case

The appellants in this case were a brothel owner, a brothel employee and a sex worker. They were all convicted in the Magistrate's Court for contravening the Sexual Offences Act of 1957. They appealed to the High Court, in which they argued that the relevant provisions were unconstitutional.

The High Court found that the section of the Act which criminalises carnal intercourse for reward (the 'prostitution' provision) was unconstitutional, but dismissed the appeal around the sections of the Act which criminalise keeping or managing a brothel.

The appellants appealed to the Constitutional Court and argued that the brothel provisions should be found to be unconstitutional. They also argued that the High Court order invalidating the prostitution provision should be confirmed.

The Constitutional Court agreed with the High Court's finding that the brothel provisions are valid. But the judges were divided on the prostitution provisions. However, all the judges conclude that the prostitution provision does not infringe the rights to human dignity, economic activity, and that if it does limit privacy, the limitation is justifiable.

The majority of the Constitutional Court judges decided that the section criminalises male and female sex workers and is therefore not directly discriminatory; nor does it constitute indirect discrimination because there is a difference between the person who conducts business as a sex worker and a client. Also, under the common law and statute the customer is liable to prosecution as an accomplice.

The minority judges of the Constitutional Court decided that the prostitution provisions constitutes unfair discrimination: by making the sex worker the primary offender and regarding the customer as the accomplice, the law reinforces sexual double standards and perpetuates gender stereotypes in a manner impermissible in a society committed to advancing gender equality.

It is the difference between the treatment of patrons and prostitutes that causes the constitutional complaint; and it is that unfair, discriminatory treatment which must be justified. In the light of the fact that the state did not seek to argue that there was an important purpose served by the discriminatory impact of the provision, and in the light of our conclusion that the provision furthers harmful sexual stereotypes, they were not persuaded that the discrimination is justifiable as intended by section 33.

In their view, therefore, the provision is inconsistent with the Constitution in this respect. They proposed that the declaration of invalidity of section 20(1)(aA) be suspended for a period of 30 months to enable Parliament to correct the defect.

The court therefore confirmed the constitutionality of the brothel provisions and by a majority refused to confirm the High Court order invalidating the prostitution provision.

Section 10: Right to human dignity

Section 10 says that everyone has inherent dignity and also the right to have their dignity respected and protected. This provision protects accused persons, complainants, witnesses and convicted persons. It also protects people who are treated badly by the police.

Section 12: Right to freedom and security of the person

Section 12(1) sets out that everyone has the right to freedom and security of the person, which includes the right:

- Not to be deprived of freedom arbitrarily or without just cause.
- Not to be detained without trial.
- To be free from all forms of violence from either public or private sources.
- Not to be tortured in any way.
- Not to be treated or punished in a cruel, inhuman or degrading way.

Section 13: Slavery, servitude and forced labour

Section 13 says that no one may be subjected to slavery, servitude or forced labour.

Section 14: Right to privacy

Section 14 protects everyone's right to privacy, which includes the right not to have their person or home searched. This right affects the rules that should be followed when the police search you or your property.

Section 34: Right to access to the courts

This section says that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before a court, or where appropriate, another independent tribunal or forum.

Section 35: Arrested, detained and accused persons

This section covers the rights of arrested, detained and accused people, such as:

- The right to be brought to court as soon as reasonably possible, but not later than 48 hours after the arrest.

- The right to be informed of the reason for their arrest and detention.
- The right to be released from detention if the interests of justice allow this.

10.1.2 Sexual Offences Act

Sex work is currently criminalised in South Africa. It is an offence to sell sex, buy sex, and to engage in certain sex work-related behaviour. In 1957, various laws regulating sexual acts or relations were repealed and re-enacted in a consolidated Immorality Act 23 of 1957.

This Act, subsequently renamed the Sexual Offences Act 23 of 1957 (SOA), is still in force and contains the current provisions regulating various aspects of sex work. The SOA penalises sex work, the keeping of brothels, and the procurement of women as sex workers, soliciting by sex workers, and living off the earnings of sex work.

The SOA as it stands is a very difficult law to prosecute under and requires intensive and intrusive police methods such as entrapment to secure a conviction. The indoor industry is rarely targeted, except when the brothel tends to become too high profile or there are community complaints. In these cases, entrapment procedures are used.⁴⁰

In this detailed part of the chapter, we will list each provision that criminalises sex work and we will discuss what the section intends to do, as well as the elements of the crime:

Section 20

Section 20(1)(aA) is the primary prohibition against sex work which provides that any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward⁴¹ commits an offence.

Section 20(1)(aA) effectively prohibits the core function of the sex worker's work, but it does not penalise "being" a sex worker. A person cannot therefore be arrested for being known to the police as a sex worker – there has to be at least a reasonable suspicion that he/she had engaged in sexual intercourse or had performed an indecent act for reward (at a specified time with a specified person).

40 "Maybe it will be better once the this World Cup has passed", UNFPA, Research Findings regarding the impact of the 2010 Soccer World Cup on Sex Work in South Africa, 27.

41 "Maybe it will be better once the this World Cup has passed", UNFPA, Research Findings regarding the impact of the 2010 Soccer World Cup on Sex Work in South Africa, 27.

The elements that have to exist in order to be considered guilty of contravening this section are:

- The person must have had unlawful carnal intercourse, which is defined as sexual intercourse (but excludes sex between a husband and wife).
- There must have been a reward: the reward could be financial or in kind.
- This act of the unlawful carnal intercourse must have been intentional.
- There must be reasonable suspicion that the person engaged in sexual intercourse or had performed an indecent act for reward.

See more on section 20 on page 140.

Section 2

- Section 2 of the Sexual Offences Act of 1957 says:

“Any person who keeps a brothel shall be guilty of an offence”.

- Section 1 describes a brothel as:

“Any house or place kept or used for purposes of sex work or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose.”

- A place is further defined as:

“Any field, enclosure, space, vehicle, or boat or any part thereof.”

- A house is defined as:

“Includes a dwelling –house, building, room, out-house, shed or tent or any part thereof”.

- As a result, the house or place will be considered a brothel if it is used with the intent to conduct unlawful carnal intercourse or for indecent acts.
- Therefore a person can only be charged for committing this offence if he or she knowingly used the house or place for unlawful carnal intercourse or for indecent acts in a manner in which they receive a reward, either financial or in kind.

- This section is aimed at persons who intentionally and knowingly use their house or place as a residence for unlawful carnal intercourse and indecent acts to take place, for example, brothel owners.
- Section 22 says that, on conviction for contravening this section, the person will be liable to imprisonment for a period up to 3 years without a fine of up to R6,000 in addition to the imprisonment.

Section 3

- Section 3 of this Act says:

“The following persons shall for the purposes of section 2 be deemed to keep a brothel:

- a) Any person who resides in a brothel unless he or she proves that he or she was ignorant of the character of the house or place;
 - b) Any person who manages or assists in the management of the brothel;
 - c) Any person who knowingly receives the whole or any part share of any moneys taken in a brothel;
 - d) Any person who, being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
 - e) Any person who, being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;
 - f) Any person found in a brothel who refuses to disclose the name and identity of the keep or manager thereof;
 - g) Any person whose spouse keeps or resides in or manages or assists in the management of a brothel unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive the whole or any share of the moneys taken therein.”
- This section is aimed at people who manage and own brothels, and therefore the section provides circumstances in which people will be deemed to have kept a brothel.

We will discuss each subsection in more detail below:

Subsection (a) of section 3

Subsection (a) is aimed at persons who reside in a brothel. If a person is charged with contravening this subsection, you will have to prove that you were unaware that in the house or place, unlawful carnal intercourse and acts of an indecent nature were being conducted for reward.

Subsection (b) of section 3

Subsection (b) is aimed at the managers of the brothel. If you oversee the general business, books clients and assists in the running of the brothel in any way, you will be guilty of an offence.

Subsection (c) of section 3

Subsection (c) is aimed at people who accept money in the brothel. This could be the managers or staff, for example: A, who is the manager, can be charged for committing this offence, as well as the sex worker who works in the brothel and who accepts the money. This subsection is also aimed at people who may not be in the brothel to accept the money, but receive a share of the income of the business.

Subsection (d) of section 3

Subsection (d) says that it is an offence if an occupier or tenant of a house or place allows unlawful carnal intercourse and indecent acts for reward to occur on the premises. In order to be convicted under this section, the State will have to prove that you are either a tenant (living on the premises), or knowingly allowed the house or place to be used as a brothel.

We assume that this section could extend to persons mentioned on a lease agreement, and then the onus lies on that person to prove that he/she did not know that the house or place was being used as a brothel.

Subsection (e) of section 3

Subsection (e) extends the prohibition further by stating that owners of premises (houses or places) who use it as a brothel, or rent out the premises with the knowledge that it will be used as a brothel, will also be guilty of the offence of “keeping a brothel”.

'Owner' is defined in section 1 as:

"Includes any person who lets or sub – lets or permits the occupation of any house or place whether in his own right or that of another".

In order to be guilty of contravening this section, the State will have to prove that the owner knew that the house or place is being kept as a brothel.

Subsection (f) of section 3

Subsection (f) is aimed at staff or clients in the brothel. It says that it is an offence to refuse to disclose the identities of the owners or managers of the brothel to the relevant authorities. This section uses the presumption that the staff and clients know the true identity of the owners and managers. If you are accused of contravening this section, the onus is on you to prove to the State that you did not know who the owner or manager is.

Subsection (g) of section 3

Subsection (g) is extended to spouses of managers or owners of brothels. This section says that spouses who are aware that their partner manages or assists in the daily management of a brothel will be guilty of an offence.

To defend a charge of contravening this section, the onus is on the spouse to prove that he/she did not know that the spouse managed or assisted in the daily management of a brothel. You will also have to prove to the court that you did not receive any money or shares of money that was received as income in the brothel.

Section 5

Section 5 says:

"Any contract to let any house or place to be kept or used as a brothel shall be null and void."

Therefore any lease agreement entered into wherein the premises are leased for the purposes of a brothel will not be accepted. For example: A enters into a lease agreement with B wherein B agrees that A can use the premises as a brothel. If A does not pay the rent, B will have no redress because the contract of lease is null and void, which means that it does not exist and it cannot be enforced.

Section 6

This section says:

“Any contract of letting and hiring of any house or place which subsequently to the making of such contract becomes a brothel shall as from the date of such event be determined and become null and void.”

E EXAMPLE

This means that, if B rents out his property to A and later A converts the premises into a brothel, then from the date that A converted the premises into a brothel, the contract of lease will no longer exist and it will not be enforceable.

However, the section further says:

“Upon proof by the owner of his ignorance that the house or place was so kept or used, he shall be entitled to recover the rent up to the date upon which he became aware that the house or place was being kept or used as a brothel.”

Therefore, B will be able to recover any rent that A owes up until the date that he discovered the house was being used as a brothel.

Section 7

Section 7 says:

“The owner of any house or place kept or used as a brothel shall be entitled to apply to the magistrate of the district in which such house or place is situated for the summary ejection of any person who may be keeping or using such house or place as a brothel and such magistrate shall be entitled after enquiry to order the summary ejection of such person.”

This means that if the owner of the premises becomes aware that the tenant or occupier is using the house or place as a brothel, he/she may apply to the Magistrate’s Court in the area where the house is situated to evict the tenant from the premises.

The magistrate will have to hold an enquiry and therefore both parties have to appear before the court.

E EXAMPLE

For example, if B becomes aware the A has been using the property in Sea Point as a brothel, B can apply to the Cape Town Magistrate's Court for an order to evict the A.

Section 8

Section 8 says:

“If it appears to any magistrate on sworn information laid before him by not less than two householders of good repute that any house or place in the vicinity of the dwellings of such house-holders is being kept or used as a brothel or on similar information upon oath laid before him by any police officer not below the rank of sergeant, or by welfare officer employed by a department of State responsible for Health and Welfare, a local authority or a welfare organisation registered under the National Welfare Act, 1978 (Act 100 of 1978), the magistrate may –

(a) issue a warrant for the arrest if the person alleged to be the keeper of such brothel; or

(b) issue a warrant authorising any police officer not below the rank of sergeant –

(i) to enter at any time and within such period as shall be stated in such warrant, such house or place for the purpose of ascertaining the name and identity of the keeper of such house or place;

(ii) to interrogate, and to demand the name and address of any person found in or upon such house or place; and

(iii) to demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.”

Section 8 also says that if *at least 2* complaints have been received from reputable persons living within the vicinity of a house or place that is suspected of being a brothel, that the police may apply to a magistrate for a warrant to arrest the person who is deemed to keep a brothel or a warrant to search the premises.

Section 8 further states that anyone who is found in the house or place when the police conduct a search and who is asked for his or her personal details, and who either provides the incorrect information or refuses to give the information of the manager or owner, and/or refuses to hand over any information in the form of books or receipt to the officers, will be guilty of an offence and upon conviction will be liable to a fine up to R1000 and if they don't pay, to imprisonment for a period up to 6 months.

Section 10

Section 10 deals with "procuring" persons. *Procuring* in this section means to recruit persons to have unlawful carnal intercourse or conduct indecent acts for reward, and says:

"Any person who –

- (a) Procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
- (b) Inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
- (c) Procures or attempts to procure any female to become a common prostitute; or
- (d) Procures or attempts to procure any female to become an inmate of a brothel; or
- (e) Applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female, shall he guilty of an offence."

Subsection (a) says that anyone who recruits a woman to have unlawful carnal intercourse or in any way assists someone who does so will be guilty of an offence.

E EXAMPLE

For example, if A tells B that she should have sexual intercourse with C for reward and in doing this A assists by booking the hotel and by putting B in contact with C.

“Inveigle’ in subsection (b) means that the procurer deceived the female to work in the brothel. This section also makes provision for procurers who enticed women to work in the brothel. *This section creates 2 offences:*

- It is an offence to obtain female to work in the brothel. For example, it is an offence if A deceives B and B ends up working in the brothel.
- It is an offence to conceal any female from authorities in the brothel. For example, it is an offence if C keeps B hidden from authorities and the public by keeping her in the brothel.

Subsection (c) says that it is an offence to recruit women to work in the brothel to provide sexual intercourse for reward.

Subsection (d) states that it is an offence to recruit women to live in the brothel.

Subsection (e) says that it is an offence to give the female alcohol or drugs in order to overpower her so that the procurer or a third party can have unlawful carnal intercourse with her.

Section 12

Section 12 provides that it is an offence to detain any female against her will with the intention that another male can have unlawful carnal intercourse with her, or keep her against her will in a brothel:

“Any person who takes or detains any female against her will – (a) to or in or upon any house or place with the intent that she may be unlawfully carnally known by any male, whether a particular male or not; (b) to or in a brothel, shall be guilty of an offence.”

In order to be found guilty of contravening this section, the accused must have committed an act wherein he detains the woman in a way that she does not have a choice but to stay there.

Subsection 3 states that the accused will be deemed to have detained the female without her free will if he holds any of her personal clothing or property with the intention of keeping her at the house or place:

“Any person shall be deemed to detain a female in or upon any house or place or in a brothel if, with the intent to compel or induce her to remain in or upon such house or place or in such brothel, such person withholds from her any wearing apparel or other property to the possession of which she is entitled or which has been lent or supplied to her by such person or

for the purposes of prostitution; and any such female shall be justified in taking away such wearing apparel as is necessary to enable her to leave such house or place or brothel.”

Section 12 A

It seems that section 12A is aimed at persons who assist third parties to conduct unlawful sexual intercourse or indecent acts with women:

“Any person who, with intent or while he reasonably out to have foreseen the possibility that any person, who is 18 years or older, may have unlawful carnal intercourse, or commit and act of indecency, with any other person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, who is 18 years or older, shall be guilty of an offence.”

E EXAMPLE

If A assists B in obtaining clients, or communicating with clients with the intention that B can have sexual intercourse or commit an act of indecency for reward.

If you are convicted for contravening this section, the penalty is imprisonment for a period up to 5 years.

Section 17

This section states that any person who manages, owns, occupies or assists with regards to a particular premises and knowingly allows a third party to use the premises to commit any offence that is listed in the Act, shall be guilty of an offence. If you are convicted for contravening this section, the penalty is imprisonment for a period up to 6 years with or without a fine up to R12,000. It says:

“Any person who being the owner or occupier of any house or place or having or acting or assisting in the management or control thereof knowingly permits the use of such house or place for the purpose of any offence against any provision of this Act, shall be guilty of an offence.”

Section 19

Section 19(1) makes it is an offence to solicit third parties or clients in order to have unlawful carnal intercourse or to commit an indecent act for reward. This

section does not allow sex workers to advertise their services. It says:

“Any person who entices, solicits or importunes in any public place for immoral purposes, shall be guilty of an offence.”

If you are convicted for contravening this section, the penalty is a fine up to R4,000 or imprisonment for a period up to 2 years, or both the fine and imprisonment.

Section 19 (2) says that it is an offence to wilfully and openly dress in an indecent manner in the public view. *Public view* in this section refers to any door or window or within view of any public street or in any area where the public may have access. If you are convicted for contravening this section, the penalty is a fine up to R4,000 or imprisonment for a period up to 2 years, or both the fine and imprisonment.

This section is similar to the crime of “flashing” listed in Section 9 of the 2007 Sexual Offence Act, which states:

“A person (A) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (C) or not, exposes or displays or causes the exposure or display of the genital organs.”

E EXAMPLE

For example, A cannot wear her underwear and stand in a window or door that is overlooking a street or pavement where the public will see her. She will also not be allowed to wear only her underwear in any public area, for example: a street, or any place where the public may have access, for example: a park or parking area.

Section 20

Section 20(1)(a) says that it is an offence for someone to knowingly live wholly or in part on the earnings of sex work, or in the public or in private to receive commission by a third party who received sexual intercourse or committed an indecent act with a female.

If you are convicted for contravening this section, the penalty is imprisonment for a period up to 3 years with or without a fine up to R6,000 in addition to the imprisonment.

compensation to B or to a third person (“C”) –

(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or

(b) by committing a sexual act with B,

Is guilty of engaging the sexual services of a person 18 years or older.”⁴²

10.1.4 Municipal by-laws

What are municipal by-laws?

Municipal by-laws are a set of rules passed by the council of a municipality to regulate issues they have the power to administer within the area of jurisdiction of the municipality.

A municipality gets powers to pass a by-law from our Constitution, which gives listed powers to local government. Just like the national and provincial laws, municipal by-laws must also be obeyed.

The main functions of by-laws are to ensure that each city is orderly to live and work in. By-laws range from regulating sex workers to the keeping of animals and poultry.

How do you find municipal by-laws?

To find a comprehensive list of the by-laws of each municipality, you can research the area you are looking for on Google and it will draw up a list of all the municipal by-laws you need. You can also use Saffii if you know the specific municipal by-law you need, and the database will take you directly to the desired by-law.

⁴² Engaging in child prostitution is a separate offence in the Sexual Offences Amendment Act which forms part of the comprehensive offence of sexual exploitation of a child. Section 17 of the Act creates an offence of sexual exploitation of a child which criminalises all role-players engaging in child prostitution. It gives effect to the Commission’s recommendations in its Report on Sexual Offences (2002) on child prostitution. The key recommendations were that:

- A complete ban should be placed on child prostitution and that anyone involved in the sexual exploitation of a child should face severe criminal sanction.
- The child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted.

E EXAMPLE

Example of municipal by-laws: Western Cape

In the Western Cape, municipal by-laws have articles regulating sex workers.

Article 2

“Article 2(1) - No person, excluding a peace officer or any other official or person acting in terms of the law, shall-

(a) when in a public place-

(i) intentionally block or interfere with the safe or free passage of a pedestrian or motor vehicle; or

(ii) intentionally touch or cause physical contact with another person, or his or her property, without that person’s consent;

2(2) Any person who blocks, occupies or reserves a public parking space, or begs, stands, sits or lies in a public place shall immediately cease to do so when directed by a peace officer or member of the Cape Town Metropolitan Police Department.

3(f) perform any sexual act;

3(g) appear in the nude or expose his or her genitalia, except where designated by the City as areas where nudity is permitted, provide that this shall not apply to children below the age of seven;

3(j) solicit or importune any person for the purpose of prostitution or immorality.”

A public place and public road is defined as:

“ ‘Public place’ means-

(a) a public road;

(b) any parking area, square, park, recreation ground, sports ground, sanitary lane, open space, beach, shopping centre on municipal land, unused or vacant municipal land or cemetery which has-

(i) in connection with any subdivision or layout of land into erven, lots or plots, been provided, reserved or set apart for use by the public or the

owners or occupiers of such erven, lots or plots, whether or not it is shown on a general plan, plan of subdivision or diagram;

(ii) at any time been dedicated to the public;

(iii) been used without interruption by the public for a period of at least thirty years expiring after 31 December 1959; or

(iv) at any time been declared or rendered as such by the City or other competent authority; or

(c) a public transportation motor vehicle,

(d) but will not include public land that has been leased or otherwise alienated by the City.”

“Public road’ means any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access, and includes-

(a) the verge of any such road, street or thoroughfare;

(b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and

(c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare.”

Article 23

“(1) Any person who contravenes or fails to comply with any provision of this By-law or disobeys any instruction by a peace officer or a member of the Cape Town Metropolitan Police Department, enforcing this By-law, shall be guilty of an offence and with the exception of a contravention of sections 2(3) (g), (h), (i), (j) and (k), where there is a maximum penalty as provided for in analogous national legislation, be liable to a fine or imprisonment for a period not exceeding six months, or to both a fine and such imprisonment.

(2) Any person who contravenes sections 2 (3) (g), (h), (i), (j) or (k) shall be liable to a fine as the court may deem fit to impose or to imprisonment as the court may deem fit to impose or to both a fine and imprisonment, not exceeding the maximum penalty as provided for in analogous national legislation. Where there is no maximum penalty as provided for in analogous national legislation

the maximum penalty provided for in subsection (l) applies.

(3) A court convicting a person of an offence under this By-law may impose alternative sentencing in place of a fine or imprisonment.”

In other areas, you have to approach the local municipality and ask them for a copy of their by-laws so that you can make yourself familiar with the sections that the police use to fine sex workers.

Application of municipal by-laws

Often municipal by-laws⁴³ are used to arrest sex workers instead of the Sexual Offences Act because of the difficulties involved in proving the elements of the offences in the SOA, particularly in relation to the client.

In the by-laws, a person is only guilty of section 2(2) if he/she is actually obstructing traffic. Therefore a person should not be arrested, charged or fined for contravening section 2(2) if they have not actually committed this act as defined in the by-laws. The only way to convict the client is by entrapment or if the sex worker testifies against him. Sex workers would be unlikely to testify against their clients as they would also be implicating themselves.

The most common by-laws used are those dealing with loitering, drunken behaviour and soliciting for the purposes of prostitution. In many cases, sex workers have not committed the offence in question.

Even where the sex worker is guilty of the offence, the by-laws set out procedures relating to the arrest of a person that has allegedly violated the by-law:

- The correct response would be to give you a written notice to stop the offending

43 Regulation 2 of the Western Cape By-Laws PG 6469 of 28 September 2007 says: “No person, excluding a peace officer or any other official or person acting in terms of the law, shall –

a) when in a public place –

(i) intentionally block or interfere with the safe passage or free passage of a pedestrian or motor vehicle; or

(ii) intentionally touch or cause physical contact with another person, or his property, without that person’s consent.”

Regulation 2(3)(f) says: “No person shall in a public place , perform any sexual act. ”

Regulation 2(3)(j) says: “No person shall in a public place, solicit or importune any person for the purpose of position or immorality.”

Section 12 of the City of Johannesburg Metropolitan Municipality’s Road and Miscellaneous By – Laws, states the following in relation to loitering: “No person may –

(a) lie, sit stand, congregate, loiter or walk, or otherwise act, on any public road in any manner that may obstruct traffic;

(b) jostle or loiter at or within twenty metres of the entrance of any place of public worship during the time of divine service or during an assembly at the place of worship or departure from such place of the congregation so as to obstruct or annoy any person going to, attending at, or leaving such place of worship.”

activity and only if you do not obey the notice, can you be fined or given a notice to appear in court.

- The remedy that is available to you as a person who has been fined is that you will receive an opportunity to make representations if you feel that the fine was incorrectly levied against you (similar to the current system for traffic fines).
- Where a fine has not been paid after it becomes due, arrest would be allowed only as a last resort if necessary to be able to secure your attendance in court. In most cases, a summons would be sufficient to ensure attendance in court.⁴⁴

10.1.5 Business Act

The Business Act 71 of 1991's main aim is to ensure that every business is registered with the necessary municipal council and government department.

The law governing brothels is in section 2(3) of the Business Act:

“No person shall, with effect from the date specified in a notice under subsection (1) in respect of a specific licensing authority, carry on any business in that area of that licensing authority –

(a) unless, in the case of a business referred to in item 1(1) or 2 of schedule 1 he is the holder of an apposite licence issued to him by the licensing authority in respect of the business premises concerned,

(b) Unless, in the case of a business referred to in item 3(1) of Schedule 1, he is the holder of a hawker's licence issued to him by the licensing authority;

(c) Contrary to a condition.”

This means that you cannot conduct a business without the necessary licences. Sex work is currently illegal and therefore no licence exists in order to operate a brothel.

In reality, many brothels have licences to conduct a massage parlour or escort agency and when they are raided they often get a fine under section 2(3) for not operating a business in accordance with the licence.

The penalty for contravening this section is listed in section 5(1): if found guilty, you are liable on conviction to a fine up to R1,000 or imprisonment for a period up to 3 months.

⁴⁴ Memorandum to Gauteng Premier Nomvula Mkanyane and the MEC for Community Safety from Tswaranang Legal Advocacy Centre, the Women's Legal Centre and Others, 2009.

T TIPS

The procedure to get a licence is:

- Go to the City of Cape Town to obtain the necessary forms.
- Before you can submit an application, you will have to get a zoning certificate, which will state whether you can have the business in the area.
- Take an ID and get an SAPS police clearance certificate, which costs R20.
- Once the zoning is approved, and you submit the application, then it will be forwarded to the municipal sub-council which will decide.

10.2 Our national laws within the international human rights framework

The current legal position is not in line with the international treaties that South Africa has signed and ratified. The reform of the law in relation to sex work is a priority for this reason. Further, the existing legal framework is also unacceptably liable to police discretion and encourages police corruption, due to the spin-offs, for example: bribes and demands of sex.

In reality in South Africa, the sex work industry is left largely undisturbed by the police and law enforcement. The majority of interventions are based on responses to public and community complaints. When this happens, the targets are the most visible elements: street-based or outdoor sex workers.

10.3 International documents and human rights affecting sex work

Human rights are set out in many international documents:

- When a country *ratifies* a document, it agrees to be bound by the rules in the document and makes the document a part of its own laws.
- If a country has signed but not ratified a document, it means it supports the rules in the document and promises not to commit acts which would defeat the purpose of that document. It can mean the country plans to go through a process to ratify the document later.

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

- 1948 Universal Declaration of Human Rights (not legally binding on

governments, but it has moral and political authority in international communities)

~ South Africa has not signed nor ratified it.

- 1953 Convention on the Political Rights of Women

~ South Africa has signed it.

- 1957 Convention on the Nationality of Married Women

~ South Africa has signed it.

- 1966 International Covenant on Economic Social and Cultural Rights

~ South Africa has signed but not ratified it.

- 1966 International Covenant on Civil and Political Rights

~ South Africa has signed but not ratified it.

- 1966 International Convention on the Elimination of All Forms of Racial Discrimination

~ South Africa has signed but not ratified it.

- 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

~ South Africa has signed and ratified it.

- 1981 African Charter on Human and People's Rights

~ South Africa has signed and ratified it.

- 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

~ South African has signed but not ratified it.

- 1989 Convention on the Rights of the Child

~ South Africa has signed and ratified it.

- 1996 International Labour Organisation Conventions:
Convention Concerning Forced or Compulsory Labour
Convention Concerning the Abolition of Forced Labour
Convention Concerning Discrimination in Respect of Employment Occupation

~ South Africa has signed and ratified these.

Criminal procedure

Learning objectives

- To understand the difference between criminal and civil proceedings.
- To understand the proceedings of a criminal trial and the functioning of the criminal justice system.
- To provide a step-by-step guide to assisting a client in a criminal case.
- To know how to collect information through the HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: POLICE HARASSMENT AND ABUSE.

Introduction

Now we understand the structure of our court system. The next step is to know the difference between criminal and civil procedures. Chapter 11 will explain the criminal procedure, while chapter 12 focuses on civil procedure. For each procedure, the available legal remedies will be explained.

Criminal procedure is a step-by-step process which moves along according to a set of legal rules. Each step must be in line with the law and the rights of all people listed in the Constitution.

Everyone is presumed innocent until properly convicted in a court of law. In order to prove someone's guilt, the prosecution must prove that the accused is guilty *beyond a reasonable doubt*. This means that the responsibility to prove that the accused is guilty lies with the prosecution. There is also a rule that an accused may never be forced to testify: she/he has the right to remain silent.

11.1 How does the criminal justice system work?

The South African criminal justice system has 5 main parts:

1. The South African Police Service, which is responsible to investigate crime and is involved in crime prevention strategies
2. The National Prosecuting Authority is a State body. A prosecutor is someone who brings the case against someone who is accused of breaking the law. A prosecutor guides the police to collect the right evidence, presents this in the court, and argues the case. The prosecutor decides whether to prosecute or not. The prosecutor helps the court to make a just verdict and impose a fair sentence.
3. At each court you will find a presiding officer – a magistrate or a judge – who decides, after hearing evidence from both parties, if the accused is guilty or not. The presiding officer also has to make a decision on what sentence should be given to someone who is found guilty of breaking the law.
4. The prison system consists of many correctional services officers – also called ‘prison wardens’. Their job is to ensure that the prisoners carry out their sentences, and are rehabilitated while in prison or on correctional supervision.
5. The Department of Social Development has two important roles – one as a probation officer and the other as social worker:
 - ~ The probation officer’s mandate is to ensure that convicted people carry out their correctional supervision sentence correctly.
 - ~ Social workers are responsible to provide social services for the poor and vulnerable.

Steps to make the Criminal Justice System work:

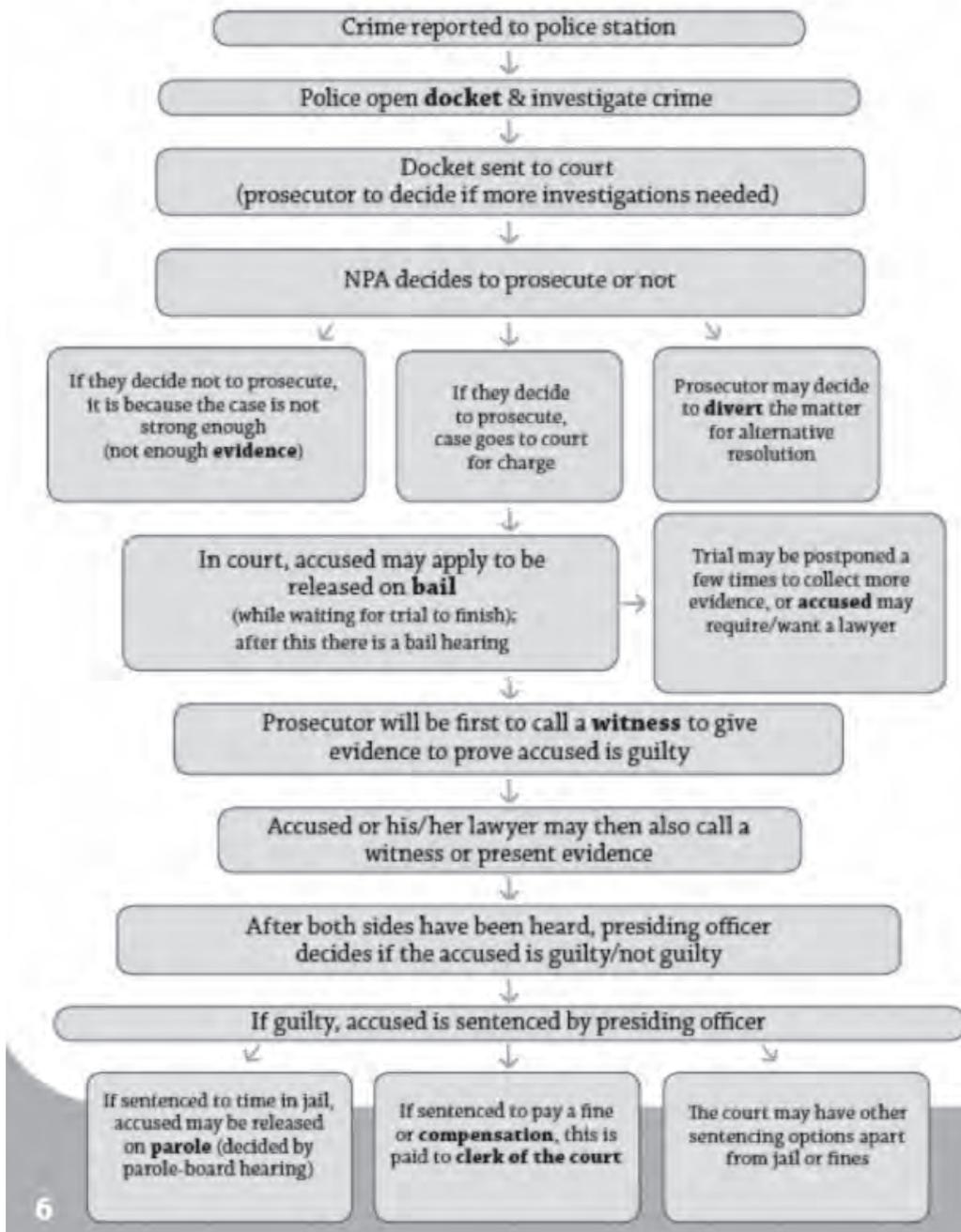


Figure 18: Criminal justice system⁴⁵

Note

- When you consult with clients who state that their query involves the police, you will complete the HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: POLICE HARASSMENT AND ABUSE below.
- If your clients have questions on the content of the questionnaire, you can refer to the document 'Frequently asked questions' to find answers (see page 162).

⁴⁵ Diagram retrieved from the NPA website available from: <http://www.npa.gov.za/ReadContent460.aspx>.

**Q 11.2 HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE:
POLICE HARASSMENT AND ABUSE**

.....
Human Rights Violations Questionnaire

POLICE HARASSMENT/ABUSE

DATE: _____ **NAME:** _____

PROVINCE: _____ **AREA:** _____

SWEAT and the Women’s Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be gathering the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym)
(Optional): _____

2. Age(optional): _____

3. Telephone no/ contact number you can be reached at (Optional): _____

4. Address: _____

5. Where do you work? _____

6. Please circle/tick–

Gender:

Male

Female

Transgender man

Transgender woman

Indoor

Street-based

Both: (explain) _____

About the incident:

7. **Date:** _____

8. **Time:** _____

9. **Place** (Give street names if you can): _____

10. **Please circle:** I was arrested/fined/harassed by:

Metro Police SAPS I don't know

11. **What were you doing at the time of the incident?** (e.g. working on the street, shopping, travelling)

12. **What is the name of the officer who approached you?**

13. **What did s/he look like?**

Eye Colour	
Hair Colour	
Complexion	
Height	
Build	
Any other features	

14. **Describe the police officer's rank: how many stars or stripes?**

Uniform	
Stars	
Stripes	
Sergeant / Colonel	
Any other features	

15. Describe the police van.

Type of vehicle	
Colour of vehicle	
Number plate	
Any other features	

16. Were you told you were being arrested/fined/harassed?

Yes	No
-----	----

17. If yes, what were you arrested/fined/harassed for?

SOA of 1957 e.g. brothel, soliciting	
SOA of 2007 e.g. prostitution	
Municipal By law – e.g. loitering, nuisance	
Business Act e.g. business licence	
Other	

18. Did the police officer search you?

Did h/she search you on the street?	
Did h/she ask you?	
Were you searched by person of same sex?	
Other	

19. Did the police find condoms on you?

How many condoms?	
What did they say about the condoms?	
Did they destroy the condoms?	
Did they confiscate the condoms?	
Other?	

20. Did the police officer read you your rights before arresting you?

Yes	No
-----	----

21. Which police station were you taken to?

22. Did the officer take you straight to the police station?

Yes	No
-----	----

23. If no, how long did it take before you were taken to the police station?

Where did you drive around	
Hours	
Minutes	
Other	

24. What happened between your arrest and arriving at the police station?

Verbal Assault?	
Physical Assault?	
Sexual Assault?	
Bribery? Money or free sex	
Other?	

Any other information? _____

25. What happened when you arrived at the police station? How were you treated? What did they say or do?

26. Did the police take your finger prints at the police station?

Yes	No
-----	----

27. Did they take photos of you?

Yes	No
-----	----

28. If yes, did they charge you before or after they took pictures and/or your fingerprints?

Charged me BEFORE	Charged me AFTER
Pictures/ fingerprints	Pictures/ fingerprints

29. Did you see your picture on a wall in the police station? Where? Please explain.

Yes/No _____

30. Did you see the pictures of other sex workers in the police station? Where? Please explain.

Yes/No _____

31. Did you need a doctor while you were in the police cells?

Yes	No
-----	----

32. Did you ask to see a doctor (to get medical attention)?

Yes	No
-----	----

33. If yes, did they provide you with medical attention?

Yes	No
-----	----

34. Please explain what happened:

35. Were you on any medication which you needed during your detainment?

Yes	No
-----	----

36. Were you able to get your medication? Explain what happened:

37. If the police did not give you your medication or allow you to get it from your family/friends, did you get sick after you were released? Please explain.

Yes/No: _____

38. Were you allowed to make a call during your detention? Who did you call and what happened. Please explain in full.

39. Were you physically or verbally assaulted during detention, or other? Please explain in full.

40. Were you given the chance to pay a fine?

Yes	No
-----	----

41. If yes, how much? _____

42. If yes, did you pay it?

Yes	No
-----	----

43. If yes, what happened when you wanted to pay?

44. If no, why were you unable to pay it?

45. How long were you held for? On what days of the week?

46. When were you released?

47. How were you fed and given water?

Yes/No: _____

48. How clean was the cell you were held in? How many people were in it with you?

People?	
Cell Wet	
Toilet not working and dirty	
Blankets?	
Mattresses?	
Other?	

49. Were you allowed to have family or friends to visit you? To give you food or clothes?

Yes	No
-----	----

50. Did the police take any of your belongings before putting you in the cell? What items? Did you get all your things back?

Yes	No
-----	----

51. Did you get a receipt?

Yes	No
-----	----

52. Were you taken to court?

Yes	No
-----	----

53. How many hours/days after you were detained were you taken to court?

54. Which court were you taken to?

55. Did you appear in front of the magistrate?

Yes	No
-----	----

If yes, what did the magistrate say?

56. What happened after you appeared before the Magistrate?

57. Was your case completed? Explain.

DOCUMENTATION

Please list the documents that you were given from the time you were approached by the police officer until you were released. We would like to put these in your file

e.g. "Written Notice to Appear in Court" or "Notice Of Rights"

1. Fine: _____

2. Notice to appear in court: _____

3. Receipt for property: _____

4. Other: _____

How do you want us to help you? What do you want to do (legal remedies)?

Damages for unlawful arrest	
Complaint to Station Commander	
Complaint to IPID	
Assistance with a charge	
Other?	

Plan of action

WLC: _____

SWEAT: _____

*****Attach any additional case notes.***

Please give details of any advice you gave to the client (Paralegal/Attorney advice):

Assent / Confidentiality



Does the source give his/her assent to share the information (with the authorities, the media)? _____

Can the source's name be used? _____

Can we forward your story to SWEAT to be used for advocacy?

Is it necessary for any information to be confidential? Why? Until when?

End of Questionnaire

11.2.1 Explanation of the questionnaire: Frequently asked questions

Often clients may ask you about the relevance of some the questions in the HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE from page 152 onwards.

T TIPS

Here are some answers to guide you:

Frequently asked questions (FAQs) for paralegals during outreach

Note:

Q – is the question

A – is the answer

The number in brackets (1) – is the question number in the questionnaire.

Q: Why do you need to share my information with people? (1)

A: It is necessary to share the information you provide us with the police so that they can find out which officer did this to you and discipline or charge them accordingly. SWEAT would like to know the information in order to advocate on your behalf and sex workers in general. The lawyers need your consent so that they can file a case or complaint with the police on your behalf. It is completely up to you how much information you want to share. If you do not give me permission to share your information, then everything between us will be confidential.

Q: Do I have to give the police officers my name? (7-12)

A: Generally yes, but only if the police officer follows procedure. If you ask the police officer to show you their ID card and they refuse, then you do not have to share your name and details. Under the Criminal Procedure Act, a police officer can ask you for your name and ID if they suspect you of a crime and/or have the power to arrest you and/or think you may have evidence regarding a crime. If you don't provide the officer with your full name and address, they have the power to arrest you. They can also arrest you if they think you are giving them a wrong name. They can hold you for up to 12 hours while they verify your name.

Q: Why are you asking me about the police uniform? You should know what they wear? (14)

A: As you know SAPS wear all blue and metro police wear blue and brown. The reason why we are asking about the uniform is so that we are sure that we know whether it was SAPS or metro police that harassed you.

Q: What happens if I give the police officers a wrong name? (7-12)

A: It is a criminal offence under the Criminal Procedure Act to give an officer a false name and/or address or to refuse to give your details. You could be fined up to R300 or imprisoned for up to 3 months. However, if you request that an officer show you his or her ID card and they refuse, you do not have to give them your details.

Q: Does a police officer have to tell me his name and/or show me his identity card? (13)

A: A police officer cannot refuse to give you their name or show you their ID card. You should always ask the officer to show you an identity card. If they refuse, you do not need to give them any of your details.

Q: Why is it important that I give you the officer's description? (13)

A: We need to be able to identify him or her in order to take legal action. If you don't know the officer's name, please describe their physical features like eye colour, hair colour, skin colour or height.

Q: Why do you need a description if you have the name of the officer on the fine? (13-15)

A: Because the officer who wrote the fine could be different from the arresting officer. It is important because the police department has a roster of who is supposed to work when and with whom, so if we give them a description this will help them figure out who was working when and if they were doing the wrong thing.

Q: Why are you asking me if I was told why I was being arrested/fined/harassed? (16)

A: The reason for your arrest must be explained to you. If you were not informed of the reason for the arrest or the fine, then it is in breach of your human rights, your constitutional rights under section 35 and the Criminal Procedure Act.

Q: Why does it matter how the police searched me? (18)

A: If the police search you, then it must be done in a way that is dignified, in a private area, by a person who is of the same gender and the search must be done with your permission unless they have already arrested you. If these things were not done when you were searched, then the police have violated your constitutional rights.

Q: Can I deny the police the right to search me? (18)

A: You have a right to be informed for the reason of the search. If they do not arrest you and you do not give your consent to the search, then they cannot search you unless they have reasonable basis for suspecting you of committing a crime or having evidence on you related to a crime. If you are arrested, then the police can search you without your permission, but they must still follow procedure or else it is unlawful. It is important that we have as much information as possible about the search so that we can figure out if it was unlawful.

Q: Do they need a warrant to search me? (18)

A: No, they do not. They can search you if they have reasonable grounds to suspect that you have committed an offence, they suspect you have drugs on you or that you have evidence on you that is related to a crime. If you have not been arrested, they will need your consent to conduct a search but they do not need consent if they arrest you.

Q: Why are you asking me about condoms? (19)

A: It is your right to carry condoms and protect your health. Police cannot arrest you for carrying condoms or use the fact that you are carrying condoms as evidence that you were illegally performing sex work. The Constitution protects your right to freedom from unfair discrimination and your right to life, security and access to health services.

Q: Why does it matter that the police read me my rights? (20)

A: Section 35 of the Constitution protects your right to not be arrested without being informed of your rights in a way that you understand.

Q: What are the rights they should have read me? (20)

A: They are supposed to read you the notice of rights and you are expected to sign when and only when you have fully understood those rights. You should not sign until your rights have been read to you in a language that you understand. The rights are from section 35 of the Constitution and include the right to remain silent and the consequences of not remaining silent. The police are also not allowed to make you confess to anything that may hurt your case in the future. For example, they cannot force you to tell them you were waiting for clients and/or that you are a sex worker.

Q: What if I signed the form but I didn't understand it? (20)

A: It is okay – it will not damage your case. You must just explain what happened and the reason that you signed. Reasons you signed could be you were forced to by the officers or you were told that you would be taken into custody if you didn't sign. It very important that you tell us who exactly forced you or bribed you into signing, so that we can explain why you signed the form without understanding your rights.

Q: Do the police have to take me straight to the police station? How long can they drive me around in the van? (22-23)

A: Section 50 of the Criminal Procedure Act and the Constitution give you the right to be taken immediately to the police station as soon as possible. This means that the police should not be driving around with you.

Q: What happens if the officer said derogatory things to me? (24)

A: The officers are violating your constitutional rights. Here we want to know if the police officers called you names, for example, we often hear with gay people that the police call them "moffies": this is a derogatory name and the person can challenge the police because police officers must treat you with respect and with dignity. We can take your case to the Equality Court and possibly get money damages for you. That is why it is important that you tell us everything that you remember them saying to you.

Q: What happens if the officers physically or sexually assaulted me? (24)

A: The officer who did that to you has committed a criminal offence and we can prosecute him or her criminally as well possibly bringing a case or complaint against the police station. If you think you may have been raped, you should go to the doctor immediately. This will help you protect your health and assist us in gathering the information we need to bring a criminal charge.

Q: Why do you want to know about what happened when I arrived at the police station? (25)

A: Because that way we can know if your rights have been violated. For example, under the Constitution and the Criminal Procedure Act the police officers must treat you with respect and dignity. They must inform you as soon as possible of the reason for your detention, your right to legal representation and your right to start the bail process.

Q: Why do you want to know about if the police took my fingerprints and/or pictures? (26-27)

A: Because section 37 of the Criminal Procedure Act says that the police cannot take your fingerprints or take pictures of you until after you are charged.

Q: Why do you want to know if I saw any pictures on the wall in the police station? (29-30)

A: Because the Criminal Procedure Act says that police cannot publish your picture without your consent unless they have permission from a magistrate. Section 37 of the Act also says if you are found not guilty or the charges are dismissed, then they must destroy your picture. We need to know if you saw your picture so that we can figure out if your rights have been violated.

Q: Why is it important whether I got medical attention while I was detained? (31-37)

A: Under section 12 of the Criminal Procedure Act, section 349.2 of the SAPS Standing Orders and the National Health Act, while you are in police custody if you are ill or injured, you must be visited and treated as often as necessary by a medical officer and receive the medical services and medicines you need. If you did not receive the medical attention you needed while you were detained, then your rights were violated.

Q: Am I allowed to make a phone call? (38)

A: Yes, from the moment you are detained and/or charged, you have a constitutional right to make a phone call to contact a legal adviser. Section 35 of the Constitution also gives you the right to communicate and be visited by your spouse or partner, close family, religious counsellor and medical provider. If they don't allow you to make a phone call, then it is a breach of your constitutional right.

Q: I was told that I can't call a cell phone from the police station: is that true? (38)

A: No, it is your constitutional right to make a call to a legal advisor, spouse, family, religious counsellor or doctor on any type of phone, including a cell phone.

Q: Why do you need to know about the fine? (40-44)

A: Because if the police arrest you, the purpose of the arrest is to take you to court. But if they only gave you a fine, then the arrest was unnecessary and therefore unlawful. If you paid the fine, you need to get a receipt. If not, the police probably stole the money.

Q: Even if they give me a receipt for my fine, what does that mean? (40-44)

A: It mainly shows that you were in police custody. The police are supposed to record you in all of their books to create a record of your detention, which prevents police misconduct like stealing the money you paid for your fine. The books that the police have are:

- Pocket book – here they are supposed to record what they see when they patrol.
- Occurrence Book – here they must record when they have arrested someone.
- Custody Register – here they must list the people they have detained.
- Pepper Spray and Gun Book – in these books they must record when and where they used their gun and/or pepper spray gun.

Q: Why does it matter how long I was held for? (45)

A: Section 35 of the Constitution says the police cannot keep you in detention longer than 48 hours without taking you to court. However, if you are detained over a weekend or a holiday, they can keep you until the courts reopen. If they keep you longer, then they are breaching your constitutional rights.

Q: How long can the police hold me? (45)

A: Section 35 of the Constitution says you must be taken to court or be released within 48 hours. However, if you are detained over a weekend or a holiday, the police can keep you until the courts reopen.

Q: I was arrested at night and released in the morning, were the police supposed to feed me and give me water? (47)

A: Yes, no matter what the time you are brought to the police station, you must be given food and water. The law says that you must be fed, but does not say what kind of food you get. However, the food must be edible and consistent with the officer's duty to treat you with dignity.

Q: Is the cell in which I am held and the bedding that I am given required to be clean? (48)

A: Yes, you must be placed in a clean cell with clean bedding and supplies. The SAPS Standing Orders (G) 361 says that the cell you are held in must be clean and have enough light and fresh air.

Q: Am I allowed to have visitors? (49)

A: Yes, section 35 of the Constitution says you must be allowed to receive a visit from your spouse or partner, family, your religious counsellor, your doctor and your legal representative.

Q: Do the police have to take me to court? (52-53)

A: Under the Constitution, the police have to either take you to court within 48 hours or release you. We are interested in knowing if they didn't take you to court because it shows that the police most likely intended to unlawfully harass you.

Q: What happens if I was taken to court and then released without seeing a magistrate? (55)

A: If you were taken to court and your fingerprints were taken, but you were released without seeing a magistrate, then we have to further investigate what happened with your case. It is possible that the police did not have enough evidence against you and that you were unlawfully detained. We may be able to lay a case or file a complaint for unlawful arrest and/or detention.

Q: What are my rights in court? (55-57)

A: Your rights in court are listed in sections 34 and 35 of the Constitution, which say that everyone has the right to a fair trial. This includes your right to be informed in detail of the charge against you, time to prepare your defence, to have your trial conducted in a proper court in a timely manner, to have an attorney who is paid for by the State if you cannot afford one, to be presumed innocent, to not incriminate yourself and to have the court proceedings conducted in a language that you understand.

When you appear before a magistrate, there should be a Legal Aid officer ready to represent you, if there is not the magistrate should ask you if you need a lawyer and one will be organised for you. The magistrate should ask you whether you can afford the bail that is set by the court.

Q: The court didn't ask me about bail, what does that mean? (55-57)

A: The magistrate must ask you if you can afford the bail. Under the Constitution and the Criminal Procedure Act, the magistrate must consider whether you can afford the bail.

Q: What is bail? (55-57)

A: Bail is the amount of money that you, or someone on your behalf, will pay the court to allow you to be released from police custody before your trial. It is meant to make sure that you attend all the hearings related to your case and follow all of the conditions the court sets on you related to your bail. If you do not appear on your court date or violate any of the conditions, the court will keep this money and issue a warrant for your arrest to make sure you appear in court. If you appear on your court date and follow all the conditions of your bail, then the money will be returned to you at the end of the trial whether you are found guilty or not.

Q: What will happen if I don't go to my court date? (57)

A: A warrant for your arrest will be issued and you will be arrested. It is important that you go to court to make sure your rights are protected and that you are not arrested and find yourself in more legal trouble. There are people available who can attend your court date with you who are familiar with the process such as a paralegal like me or an attorney if your case requires it.

11.3 Approach by a police officer

The police have the power to ask you questions:

- They can ask you to produce your ID.
- The police can question you at any time without arresting you.
- The police may ask you to give your full name and address if they:
- Suspect you of committing a crime.

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

T TIPS

- You can ask the police officer to show you his/her identity card: if the police officer refuses, you do not need to give your details.
- If the officer gives you his/her details, then you must give your information. If you do not, it is a criminal offence.
- If the police officer asks you other questions, you have the right not to answer. It is your right to say that you will only answer these questions with an attorney present. The police can ask you at that point to go to the police station: you do not need to go unless they arrest you.
- If a police officer does not show his badge, it is a violation of a station order. You can lodge a complaint with the Station Commander. See 11.9 on page 198 for further details about this type of complaint.

CASE STUDY

A sex worker was standing with her friends and talking. A group of police officers came to them and asked them: "What are you doing"? They say: "We are talking". Then the police officer says get into the van.

1. Can the sex worker ask to see the identity card of the police officer?
2. What are her/his rights?
3. What legal remedy is available to her?

Answer:

1. This arrest is not lawful because the police did not follow the proper procedures for an arrest. The police officer did not explain to her why she was being arrested and the police officer did not take her immediately to the police station.
2. Her rights are in section 35(1) of the Constitution:
"Everyone who is arrested for allegedly committing an offence has the right –
 - (a) To remain silent;
 - (b) To be informed promptly –
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d) to be brought before a court as soon as reasonably possible, but not later than –
 - (i) 48 hours after the arrest; or
 - (ii) The end of the first court day after the expiry of the 48 hours or on a day which is not ordinary court day;
 - (e) At the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - (f) To be released from detention if the interests of justice permit, subject to reasonable conditions."
3. She can bring a civil damages claim against the Minister of Police.

11.4 Searching by a police officer

You have the right to keep your body and property private. But sometimes the police need to collect evidence against criminals, so they are allowed to search you. They can take things from you. This is called seizing. There are 2 ways of searching and seizing property. *Below we will discuss:*

- Searching with a search warrant in 11.4.1.
- Searching without a search warrant in 11.4.2.

11.4.1 Search with a search warrant

Searching with a search warrant happens when the police get permission to search:

- The search warrant is usually signed by a magistrate.
- The warrant must describe the place to be searched and the things that the police may seize.
- The police must carry out the search during the day, unless the warrant says that they can search at night.
- The police can only search the people and the places that are set out in the warrant.
- You have the right to demand to see the search warrant.

11.4.2 Search without a search warrant

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

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

The police can use force to enter premises if you refuse to allow them in. A policeman can only search a male person and he may not search a woman.

CASE STUDY

Searching for condoms and using condoms as evidence

We noted that police officers often search sex workers for condoms, and if they have condoms in their possession, they use it as evidence that she has committed or attempted to commit an offence. This practice is unlawful.

SWEAT, Sisonke and WLC participated in a 7-country research study to illustrate the way in which the police use condoms as evidence against sex workers and the effects that it has on sex workers' rights to health and to access health services. *The key finding of this research are:*

- Police confiscate and destroy sex workers' condoms, putting sex workers and their clients' health at risk.
- Police give condom possession as a good reason to detain or arrest people on charges related to sex work.
- Police harass and abuse sex workers who carry condoms and use the threat of arrest on the grounds of condom possession to extort and exploit them.
- Some sex workers choose not to carry condoms because they fear police harassment and detention.
- Police harass and arrest outreach workers, limiting their ability to distribute and educate sex workers about safer sex practices.

While some sex workers report that they have stopped carrying condoms or sometimes choose not to carry condoms out of fear of getting in trouble with the police, many sex workers continue to carry condoms in an effort to protect their health and the health of their sexual partners despite the risk of police harassment.⁴⁶

Sex workers' testimony in the 6 countries revealed a pattern of police abuse that typically involved profiling a sex worker based on his/ her appearance or previous involvement in sex work, stopping and searching the sex worker, and treating condoms discovered during the search as contraband.⁴⁷ Police routinely question sex workers about condom possession and confiscate condoms, sometimes throwing them in the trash or destroying them. These actions are often accompanied by acts of violence and abuse of power by police.

In South Africa, a 37-year old female sex worker reported that she had been harassed by police "uncountable times" for doing sex work. Recalling a notable run in with the police, she said, "Two years ago I was strolling on Milnerton beach. Cops asked me if I had condoms. I replied 'yes' and he made me give them to him and said I wasn't permitted to carry condoms."⁴⁸

46 Acacia author of "Criminalising Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe", Open Society Foundations, 2012, can be accessed on <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>

47 Above note, 10.

48 Above note, 11.

Police mention condom possession as justification for the detention or arrest of suspected sex workers. Police use the threat of arrest on the grounds of condom possession to extort sex workers and sexually exploit them. Officers from SAPS searched a 34-year old female sex worker and raped her after finding her in possession of condoms. The sex worker said: “I had sex with two police [officers] against my will. I was threatened that I would be sentenced so I had sex with them.”⁴⁹

In Cape Town, SWEAT has recorded a number of cases when the SAPS harassed outreach workers who handed out condoms and safer sex materials to sex workers. The outreach workers reported that the police were hostile towards them and accused them of promoting sex work because they distribute condoms and related materials. Police often keep outreach workers under surveillance and tail them in order to identify and target sex workers.

Similar examples of interference and harassment have been reported to SWEAT by outreach workers offering health services to sex workers in the TB/HIV mobile clinic. Sex workers are discouraged from approaching the mobile clinic for TB and HIV testing or counselling by the presence of a police van following them, or are targeted by the police after making use of the health services.

The police practice of shadowing outreach workers in order to target sex workers for detention and abuse has a chilling effect on the relationship between sex workers and outreach workers,⁵⁰ and potentially life-threatening repercussions on sex workers' health. This practice makes outreach ineffective and can lead to situations in which outreach programmes function to endanger sex workers and it might lead to sex workers not trusting outreach workers. A sex worker said:

“They did not tell me why I was being arrested. They said that SWEAT can't do anything, and if they see and the other girls then they will lock us up for prostitution.”

By hindering sex worker's ability to carry and use condoms, police actions increase sex workers' risk of exposure to HIV and other sexually transmitted infections, as well as unwanted pregnancies, compromising sex workers' health and the health of their sexual partners. Sex workers whose condoms are taken by police are more likely to have unprotected sex and to be at risk of HIV.

Individual sex workers who were interviewed for this study said that they had unprotected sex after police took away or destroyed their condoms and, in one case, tested positive for HIV as an apparent direct consequence.

A copy of this research can be found at: <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>.

49 Above note, 15.

50 Above note, 22.

What can you do?

If a police search is not carried out in a dignified manner or by a person of the opposite sex, a sex worker can claim damages. For further information on how the damages should be claimed, please see Chapter 12: Civil procedure.

11.4.3 Arrest by a police officer

Under the Constitution, arrested persons have these rights:

- The right to remain silent.
- The right to an attorney.
- The right to appear in court within 48 hours of being arrested.
- The right not to be forced to make a confession.
- The right to be told what you are being arrested for.
- The right to communicate with and be visited by family, clergy and a medical practitioner.
- The right to be held in decent conditions.

Bail, called *police bail*, can be given by the police without having to go to court to ask for bail.

11.4.4 Lawful arrest

There are 4 things the police must do to make an arrest lawful:

- 1. The arrest must have been properly authorised with a warrant. If you are arrested without a warrant, conditions must be followed.**

Sometimes the police ask sex workers to go with them to the police station without saying that they are arresting you. If you go with them voluntarily, then the police will not have to arrest you. Every person has a right not to go with the police unless they arrest you.

What are the conditions to arrest without a warrant?

Section 35 of our Constitution sets out the rights of arrested, detained and accused persons, such as

- The right to be brought to court as soon as reasonably possible, but not later than 48 hours after the arrest.
- The right to be informed of the reason for their arrest and detention.
- The right to be released from detention if the interests of justice allow this.

Our courts have been very clear that the right to personal liberty is unquestionably one of the most fundamental rights that a person has a right to claim. The courts have repeatedly pointed out that arrest is drastic and may have far-reaching consequences for the detainee.

Accordingly, the police are only allowed to violate your constitutional rights when affecting arrest to the extent that they are acting within the provisions of the Criminal Procedure Act of 1977.

Section 40 of the Criminal Procedure Act provides for the arrest of a person without a warrant of arrest. Section 40(1) says that the police may only arrest any person without a warrant:

- a. “Who commits or attempts to commit any offence in his presence;
- b. Whom he reasonably suspects of having committed an offence referred to in Schedule 1;
- c. Who has escaped or who attempts to escape lawful custody;
- d. Who has in his possession a housebreaking or car-breaking instrument and can’t account for such possession;
- e. Who is found in possession of property suspected to be stolen;
- f. Who is found at any place by night in circumstances which afford reasonable grounds for believing that such a person committed or is about to commit an offence;
- g. Who is suspected of having committed a drug or arms-related offence;
- h. Who wilfully obstructs him in the execution of his duty;
- i. Who is reasonably suspected of having failed to observe any condition imposed in postponing or suspending a sentence;
- j. Who is reasonably suspected of having failed to pay any fine or part thereof on a date fixed by court;
- k. Who is reasonably suspected of having committed an act of domestic violence which constitutes an offence in respect of which violence is an element.”

Where any of the offences set out in section 40(1) are present and justify an arrest without a warrant, the person arrested should be charged for that particular offence.

2. The police must have physical control over you when they arrest you.

This means the police must make sure that you as the sex worker can't get away. If you do not try to run away, the police do not have to use force to control you. But if you do try to run away, the police can use reasonable force to keep control of you – in other words, they can use only as much force as is necessary.

3. The police officer must inform you of the reasons for the arrest.

This means the police must tell you what offence they think you have committed.

But if the police catch you while you are committing an offence, they do not have to give you details about why they are arresting you, because you already know why.

4. The police officer must take the arrested person to the appropriate authorities as soon as possible.

This means that the police officer must take you as the sex worker as soon as possible to the nearest police station. If the arrest was made with an arrest warrant, then the police officer must take you as soon as possible to the place set out in the warrant.

11.4.5 Unlawful arrest

E EXAMPLES

Here are some examples of unlawful arrest:

- If there was no good reason to suspect that you committed an offence.
- If the purpose of the arrest was not to charge you but just to scare you.
- If the police officer did not tell you that you were under arrest.
- If you were not caught while committing an offence.
- If the arrest is to solicit a bribe or intimidate you into doing something.

CASE STUDY

Unlawful arrest

A police officer arrests a sex worker. He does not tell her why he is arresting her. She gets into the van, but then he drives around with her in the car for 2 hours before he takes her to the police station. When she gets to the police station, they just throw her into the cell. They do not charge her.

1. Is this a lawful arrest?
2. What are her rights?
3. What legal remedy is available to her?

Answer

1. The police assaulted her. Ask her for the circumstances surrounding the arrest, for example: was she trying to run away? Did she resist arrest? Was she being a danger to the police officer? If not, then the actions by the police amount to assault to do grievous bodily harm. This is a serious offence. Advise her to go to a doctor so that a J88 form can be completed to detail her injuries. Then refer the case to the Independent Police Investigative Directorate to investigate.
2. She has the rights of an arrested person, including the right to receive medical care while in detention.
3. The legal remedies available are to report the assault to the IPID and to refer the case of unlawful arrest to an attorney to sue the Minister of Police, claiming damages relating to injuries and non-assistance with medical treatment.

11.4.6 Arrest with a warrant

A warrant for the arrest of a person is a written order directing that the person described in the warrant can be arrested by a peace officer for an offence that he/she may have committed. The offence must be named on the warrant, and the police have to ensure that the arrested person appears in court as soon as possible.

Issuing a warrant of arrest

A magistrate or justice of the peace may issue a warrant for the arrest of a person upon the written application of a Director of Public Prosecutions, a public prosecutor or a police officer. *This application must:*

- Set out the offence alleged to have been committed.
- Allege that the offence was committed within the area of jurisdiction of the magistrate or peace officer.

- State that, based on information taken under oath from witnesses, there is a reasonable suspicion that the person has committed the offence.

A warrant may be issued on any day, and remains in force until it is cancelled by the person who issued it or until it is *executed* (carried out). Warrants are valid in all other districts throughout South Africa.⁵¹

Executing a warrant of arrest

Under section 44 of the Criminal Procedure Act, a warrant of arrest is executed by a peace officer. A peace officer includes a magistrate, justice of the peace, police official, member of correctional services and certain persons declared by the Minister of Justice to be peace officers for listed purposes.

When there is a valid warrant of arrest, and the police official is in plain clothes when she/he arrests the person, the arrest will still be valid as long as the police official produced the warrant to the arrested person.⁵²

11.4.7 Arrest without a warrant

T TIPS

Under section 40 of the Criminal Procedure Act, a peace officer may, without a warrant, arrest:

- Any person who commits or attempts to commit any offence in his/her presence.
- Any person who he/she reasonably suspects of having committed an offence referred to in the First Schedule (to the Act), except for the offence of escaping from lawful custody.
- Any person who has escaped or who attempts to escape from lawful custody. A 'reasonable suspicion' that a person has escaped is not sufficient for an arrest under this provision. The person who makes this arrest must know that the person he/she arrests has escaped from lawful custody.
- Any person who has in her/his possession any housebreaking implement or car-breaking implement, and who is unable to account for this possession to the satisfaction of the police officer.
- Any person who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to the property.

⁵¹ Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe & Van Rooyen, *Criminal Procedure Handbook*, 97.

⁵² Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe & Van Rooyen, *Criminal Procedure Handbook*, 97.

- Any person who is found at any place at night in circumstances which give reasonable grounds for believing that the person has committed or is about to commit an offence. The purpose of this arrest is to enable the peace officer to conduct an investigation to find out whether the person has in fact committed the offence. If it appears that no offence has been committed, then the person can be released.
- Any person who is reasonably suspected of being or having been in unlawful possession of stock or produce relating to the theft of stock or produce.
- Any person who is reasonably suspected of committing or having committed an offence under any law governing the making, supply, possession or conveying of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms of ammunition.
- Any person found in a gambling house or at a gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance.
- Any person who obstructs the officer in the execution of her/his duty.
- Any person who has been involved in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been involved in any act committed outside South Africa, which if committed in South Africa, would have been punishable as an offence, and for which he is, under any law relating to extradition of fugitive offenders, liable to be arrested or detained in custody in South Africa.
- Any person who is reasonably suspected of being a prohibited immigrant in South Africa in contravention of any law regulating entry into or residence in South Africa.
- Any person who is reasonably suspected of being a deserter from the South African National Defence Force (SANDF).
- Any person who is reasonably suspected of not observing any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under the Act. The purpose of this arrest is to bring the person before the court to enable the court to determine whether the sentence should be carried out.
- Any person who fails to surrender him/herself to periodic imprisonment.
- Any person who is suspected of having committed an act of domestic violence.

Thus the police officer does not need to have a warrant to arrest a sex worker, but must still meet the requirements explained above in the point about arrest without warrant.⁵³

11.4.8 Can a police officer use force to arrest?

Section 49 of the Criminal Procedure Act states: when the police make a lawful arrest, they can use force if you try to fight or run away. The law says that the amount of force must be just enough to stop you fighting or running away. It further says that the force must be reasonable.

⁵³ Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe & Van Rooyen, *Criminal Procedure Handbook*, 97, 98-101.

E EXAMPLES

Here are some examples of the unlawful use of force:

- If the arrest itself is unlawful, any force that the police use is unlawful.
- If you did not try to fight or run away, and the police used force in making the arrest.
- If the police used more force than necessary.
- If the police pepper sprays a sex worker when she is in the police van.
- If the sex worker did not hurt the police officer and he physically assaults her.

C CASE STUDY

Unlawful force

A sex worker comes to you to say that she was assaulted and beaten by a police officer while he was arresting her. She was not formally charged and she did not appear in court. Her injuries were very bad, and they did not allow her to see a doctor.

1. What would you advise?
2. What are her rights?
3. What remedies are available to her?

Answer

1. The police officer committed a crime by physically assaulting her. Ask her for the circumstances surrounding the arrest, for example: was she trying to run away or did she resist arrest? If not, then the actions by the police are an assault to do grievous bodily harm. Advise her to go to a doctor so that a J88 form can be completed listing her injuries. Refer the case to the Independent Police Investigative Directorate to investigate. Also advise that when a person is arrested, that they should be informed of the reasons for arrest. If good reasons are not given, the arrest is unlawful.
2. She has all the rights of an arrested person under section 35 of the Constitution, and the right to freedom and to be free from bodily injury.
3. She should bring a criminal charge at the police station, report the case to the IPID and sue the Minister of Police for unlawful arrest and wrongful detention.

11.5 Step-by-step process when a sex worker is arrested

Imagine you may get a call from a sex worker to say that she has been arrested and is currently in custody. You can either assist her on the phone or try and go to the police station to get police bail for her.

11.5.1 Rights of arrested persons

- You have the right to remain silent.
- You have the right to an attorney.
- You have a right to appear in court within 48 hours of being arrested.
- You have a right not to be forced to make a confession.
- You have a right to be told what you are being arrested for.
- You have the right to communicate with and be visited by family, clergy, and a medical practitioner.
- You have a right to be held in decent conditions.

11.5.2 Assisting a sex worker on the phone

T TIPS

1. Get full personal details. Name, surname, telephone number and address.
2. Get the facts. Get full information on what happened.
3. Advise her on her rights.
4. Once you have received the facts, advise her on the remedies:
 - ~ If she was arrested unlawfully – then she can sue for unlawful arrest.
 - ~ If she was assaulted, she can bring a criminal charge.
 - ~ If she was treated badly and detained in a filthy cell and if the arrest was unlawful, she can lodge a complaint with the IPID and the Station Commander.
5. Advise that she can ask for police bail and a notice to appear in court. She must tell the Station Commander:
 - ~ She will not run away.
 - ~ She does have a valid address (give them the address if you have to).
 - ~ She will not be a danger to others.
 - ~ She will not commit any further crimes.
 - ~ She will not intimidate witnesses.
6. If she gets police bail, then advise her to consult with an attorney as soon as possible.
7. If she does not get police bail and they say that they are going to take her to court, then advise her to ask for Legal Aid when she appears in court.

11.5.3 Assisting a sex worker at the police station

TIPS

1. Speak to a police officer at the charge office.
2. Identify yourself and state the reason for your visit.
3. Ask if you can consult with the sex worker. If they allow you to consult with the sex worker, then:
 - ~ Obtain full personal information.
 - ~ Complete our questionnaire.
4. If you do not have time to complete the questionnaire:
 - ~ Get full personal information, so that you can complete the questionnaire later.
 - ~ Then ask her to give you a brief summary of what has happened so that you can figure out if it was an unlawful arrest.
 - ~ Ask for the full details or description of the police officers.
 - ~ Get information on any assaults/ verbal assaults/bad treatment by the police.
 - ~ Write down the conditions of the cell.
 - ~ Advise her of her rights.
 - ~ Advise her of the lawful and unlawful arrest.
5. See if the sex worker needs medical attention – if yes, notify a police officer. Record who you spoke to, what they said and if they actually assisted the sex worker with medical attention.
6. Once you have consulted with her and you have enough information, then ask to speak to the Station Commander. If they say that the Station Commander is not there, then ask to speak to a Deputy or someone with authority.
7. If they let you speak to someone, ask for *police bail*. Say:
 - ~ We would like to request police bail for my client.
 - ~ Say that you can confirm that:
 - ~ She will not run away.
 - ~ She does have a valid address (give them the address if you have to).
 - ~ She will not be a danger to others.
 - ~ She will not commit any further crimes.
 - ~ She will not intimidate witnesses.
 - ~ Ask if she can get free police bail with a notice to appear in court.
8. If they give her free police bail with a notice to appear in court, take the notice and explain to her that if she does not appear in court on that day then they are going to issue a warrant of arrest. On the day in court an attorney will assist her.

9. Advise her of the legal remedies available to her:
 - ~ If she was arrested unlawfully, she can sue for unlawful arrest.
 - ~ If she was assaulted, she can make a criminal charge.
 - ~ If she was treated badly and detained in a filthy cell and if the arrest was unlawful, you can lodge a complaint with the IPID and the Station Commander.
10. Arrange a date for a consultation with WLC so that we can assist her further.

11.6 Detention by a police officer

11.6.1 Police Standing Orders on conditions in police cells and the treatment of arrested persons

The policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police says what Station Commanders must do about:

- Conditions in custody.
- Legal rights to visits.
- Care of special groups of people.
- Providing bedding, food and clothing.

Medical attention

Standing Order (G) 341 and 349 states that police officers must take all reasonable steps to ensure that you see a doctor if you need medical attention.

Conditions of cell

Section 35 of the Constitution sets out the rights of arrested and detained persons, including in section 35(2)(e) a right to humane conditions of detention. This principle is reflected in the SAPS Policy on the Prevention of Torture and the Treatment of Persons in Custody of South African Police which formed the basis of the SAPS Standing Order dealing with conditions of detention.

Section 13(2) of the Standing Order (G) 361 lists some of the conditions to meet the standard of humane detention:

- The number of people in a police cell must be reasonable.

- Blankets and mattresses of reasonable standard must be provided and be in good condition.
- A standard of cleanliness must be maintained.
- You must have adequate light and ventilation.
- You must get a mattress and blanket, and a chair or bench.
- Your cell must be clean and sanitary and if the cells are unoccupied, the windows must be left open.

Officers checking up on the cells

Standing Order (G) 361.6 says that a police officer must check up on detainees every hour.

11.6.2 Lawless practices

The reality is that sex workers are seldom prosecuted, and are more likely to be arrested, harassed and then released. In a recent Cape High Court judgement,⁵⁴ the court interdicted the police from arresting sex workers in order to harass them. To our knowledge, no client has been prosecuted under the amended law.

The continued arrest of sex workers when they have not committed the acts for which they have received fines for indicates a practice of abusing the law to deliberately persecute a specific group of people. This practice violates the right to be equal before the law and amounts to *unfair discrimination*.

Sex workers further complain of the violation of their Constitutional rights to be informed promptly of the reason for being detained, to choose and consult with a legal practitioner, to challenge the lawfulness of the detention, to communicate with or be visited by family or a doctor, and to conditions of detention that are consistent with human dignity.

These practices of unlawfulness by the police must be addressed. When individual police officers perpetrate crimes against sex workers such a rape, assault and robbery, the State should be held accountable and liable for these actions.

54 SWEAT v The Minister of Safety & Security & 7 Others: Judgement delivered in the Cape High Court on 20 April 2009.

11.7 First remedy when unlawfully arrested: Criminal charge

11.7.1 How to lay a criminal charge

A client can complain that a police officer violated the laws of arrest and detention by assaulting her physically, verbally or sexually, stealing her property or committing any other criminal offence against her. In this case, she can claim civil damages for unlawful arrest or unlawful detention. This is a civil claim, so this will be discussed in Chapter 12: Civil Procedure.

When the action of the police officer amounts to a criminal offence, a sex worker can lay a criminal charge against that police officer. We now explain how a sex worker can make a criminal charge.

Report at the charge office

Go to the charge office at the nearest police station to make a complaint. You may want to go with a friend or someone like a priest, teacher or social worker to help you.

The police must take a statement from you:

- You must be very careful what you say because you have to swear under oath that you are speaking the truth.
- Do not sign your statement if you are not happy with the way the police wrote it down. Ask to change it before you sign.
- It is not up to the police in the charge office to decide whether a complaint is serious enough to be investigated. They have to take a statement from anyone who comes into the police station to make a complaint.

⋮
⋮
⋮
⋮
⋮

Note

After you have made your statement, ask for a copy of it before you leave the charge-office. You have the right to get a copy.

Get the police case reference number

Ask for the police reference number. This is the police register number where they are supposed to keep a record of all complaints made at the charge office. This is your proof that you reported the crime to the police. The reference number is also called an OB number (Occurrence Book number) or VB-nommer (Voorvalleboeknommer) in Afrikaans.

Go to a doctor: J88 medical report

If you want to lay a charge, you will need to go to the doctor for an examination. You have to go as soon as possible before the marks and bruises disappear. Go to your own doctor or to a government doctor (called a *district surgeon*).

If you are injured and you need medical treatment, the police will ask you to get a medical report form filled in. This form is called a 'J88 medical report'. Your own doctor or the district surgeon can fill this form in. Then you must take the filled-in form back to the police in the charge office.

⋮ **Note**

⋮ If you can, make a copy of the filled-in J88 form and keep this copy for yourself.

A case docket is opened

After you make a statement to the police, they must open a case docket, and investigate a criminal charge against the person or people who committed a crime against you.

These are the next steps:

- The police officer will refer the case to the prosecutor, who will then decide if the State will prosecute the case.
- Once the prosecutor decides to prosecute and the perpetrator can be identified, then he/she will be arrested.
- Your client (the *complainant*) usually receives a subpoena stating the date and time that she/he must be present at court. Sometimes when your client was present at court at the previous hearing and warned to be in court on the next date and time, he/she will not get a formal subpoena.
- Your client must be present at every court appearance – if not, there is a good chance the charges will be withdrawn against the police because the complainant is absent.

CASE STUDY

Alleged rape by police officer

A sex worker tells you she was raped an hour ago by a police officer.

1. What would you advise her?
2. What remedies are available to her?

Answer

1. Advise her not to remove her clothing or to bath. Take her directly to a doctor to complete the rape kit and the J88 form.
2. Then go straight to the IPID so that they can investigate the case. They will first take your client's statement and will keep the J88 on file. If she does not have a name for the police officer, they will hold an ID parade. She has to be able to identify the perpetrator (the person responsible for the alleged rape).

Note

Even if a police officer asks the sex worker for sexual favours in exchange for release, it will still be rape and the same procedure should follow.

Thereafter, the court process will follow as described opposite.

11.7.2 Court process

This happens where the sex worker is criminally prosecuted after an arrest. This means that the case has been referred to the prosecutor and the prosecutor has decided that there is a reasonable case against the sex worker.

11.7.3 First day in court

If a sex worker is arrested, she must appear in court within 48 hours of the arrest. Often sex workers are arrested on a Friday night and she has to stay in police custody until Monday morning. This poses many problems for herself and her family members, especially if she has children at home.

In reality, when sex workers are arrested on a Friday evening, they only appear in court on Monday morning. Appearing in court on a Monday morning is still within the 48 hours. They have to wait until the Monday morning because the courts are closed over the weekend.

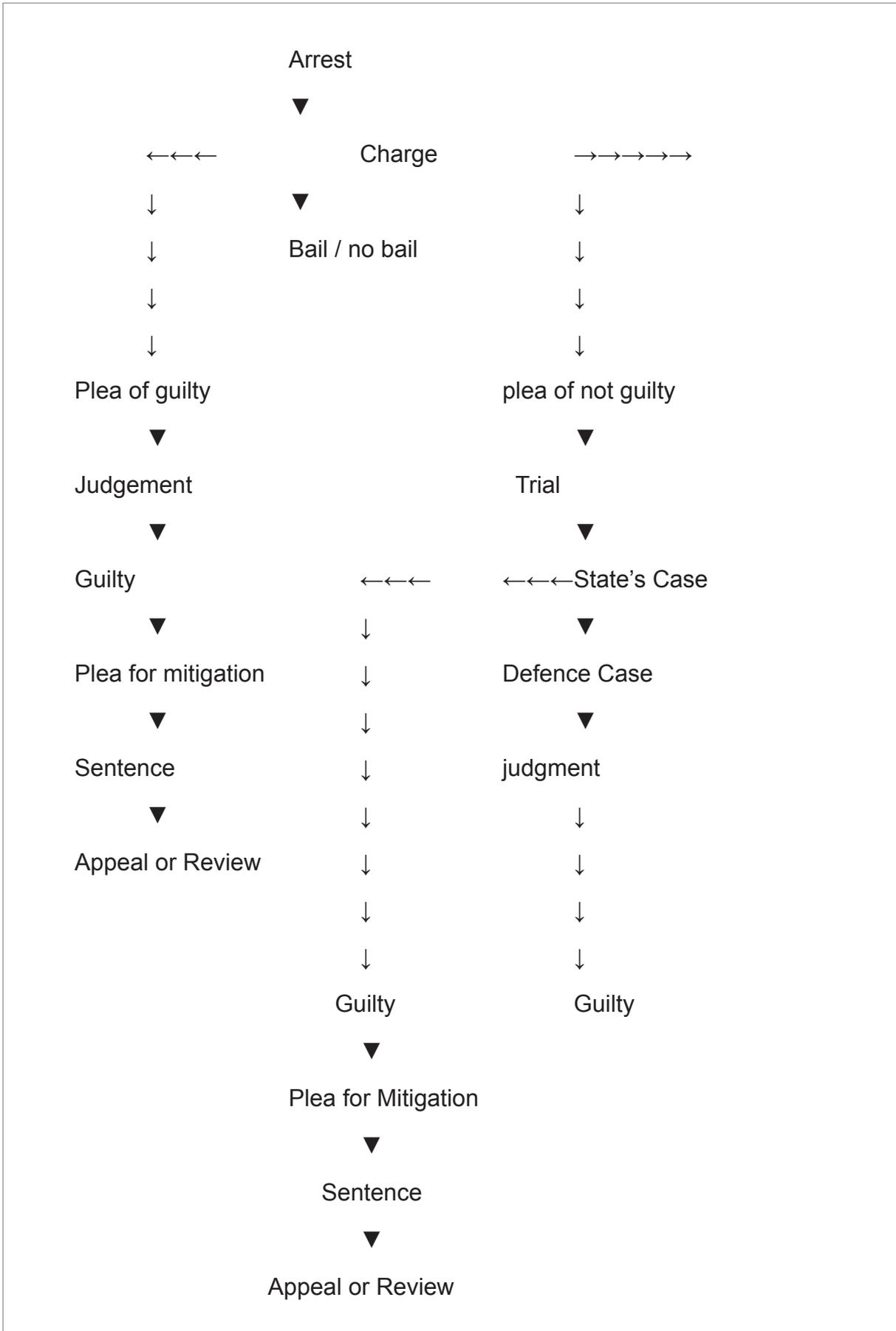


Figure 19: Steps in a criminal case

Opening steps in court:

- When the prosecutor calls your name as the accused, you go to the stand at the front of the court. The Prosecutor will start by telling the Magistrate what the charge is for example: “The accused stands before us today, because she has been arrested for soliciting a male on the 29 November 2011 at 10 pm on Voortrekker Road for the purposes of engaging in unlawful carnal intercourse”.
- Then the prosecutor will ask you if you would like to appoint your own attorney or if you would like Legal Aid. There is a Legal Aid officer in every court and they will be there to take on your case immediately.
- Then the Legal Aid Officer will come to you and will ask you if you plead ‘guilty’ or ‘not guilty’.
- Do not plead ‘guilty’ unless you are sure that:
 - ~ You did what the prosecutor says you have done, and
 - ~ You did not have a good reason to do what you have done.
- You will plead ‘not guilty’ if:
 - ~ You did not commit the crime, or
 - ~ You did what people said you have done, but you had a good reason for doing it – this reason will then be used in your defence.

The Legal Aid Officer will tell the court what the plea is and then the case will be postponed. If you are not happy with the Legal Aid Officer, you can contact Legal Aid South Africa.

If you have pleaded guilty, the attorney will complete a plea with you, and then the magistrate will proceed to sentencing. If you have pleaded not guilty, you will have an opportunity to request that the court release you on bail.

11.7.4 Bail

On the first day in court after you have pleaded, the magistrate will ask the prosecutor about bail. The magistrate will have to decide whether or not to release you on bail. *You can be released in one of these 3 ways:*

- Into the care of your parents or guardian if you are under 18.
- With a warning to appear in court on a certain date.
- On bail.

Bail money is paid to the court or to the police. Bail money must be paid in cash and whoever pays the bail must ensure that they receive a receipt. If you appear at all the court hearings, and at the end of the trial, you will get the bail money back.

⋮ **Note**

⋮ When clients do not have money, they need to speak up in court and tell the magistrate
⋮ or their attorney that they cannot afford it.
⋮

There are 3 types of bail: police bail, bail agreed by prosecutor or court bail.

Police bail

You can ask the police for bail as soon as you have been arrested and taken to the police station. If they agree, they will decide how much bail you must pay and you must pay this in cash. The police cannot grant bail if you were arrested for a serious crime, such as murder, rape or robbery.

Bail agreed by the prosecutor

For some crimes, a prosecutor can agree to bail. You must ask the police to telephone the duty prosecutor to check whether you can get bail. Or your attorney can speak to the prosecutor to see if they will agree to bail without having to apply for bail in court.

Court bail

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

When you ask for bail you must convince the magistrate that:

- You will not run away.
- You have a valid address.
- You are not a danger to other people.
- You will not commit any other crimes.
- You will not intimidate witnesses.

If you have pleaded not guilty and the court has allowed you out on bail, the case may be postponed for the further investigation. Once the investigation is complete, the case will be postponed for trial.

⋮ **Note**

⋮ It may be possible to bring an action for damages if the police refuse to release an
⋮ accused on bail on malicious grounds, or where the police officer authorised to give bail
⋮ simply refused.
⋮

11.7.5 Trial

After the investigation is complete and the sex worker's attorney has received a copy of the police docket (with all the statements and evidence), the trial will start.

The State will present its case

The prosecutor will present the State's case to the magistrate to show that you are guilty. They will call witnesses to give evidence to prove beyond a reasonable doubt that the accused is guilty of the offence. Your attorney will have an opportunity to cross-examine the witnesses. The prosecutor will then be able to re-examine the witnesses. Then the State will close its case.

Discharge

If there is not enough evidence against you, your attorney can ask the court for a discharge. This means you ask the court to set you free. If the court does not agree on a discharge, the case will continue.

The case in your defence

Your attorney will have opportunity to present your case to the court. You will be able to call witness. You can be a witness. The prosecutor cross-examines your witnesses, and then you will have an opportunity to re-examine the witness.

Argument

The prosecutor will then sum up their case and give reasons why you should be guilty. Your attorney will also be able to summarise your defence case.

Judgement

The magistrate will give judgment after considering all the evidence that has been presented, and then say whether you are guilty or not guilty. In order to be found not guilty, your attorney must convince the magistrate that there is a reasonable doubt that you could not have committed the offence.

Sentencing

If you are found guilty, the court will have to impose a sentence. The prosecutor will give *aggravating* reasons to the court in order to justify the sentence the State wants.

Your attorney will try to give *mitigating* reasons why you should not get a harsh sentence. *These can include:*

- You are sorry for what you did.
- You did something to correct the wrong.
- You are under 18 years.
- This is your first offence.
- Many people depend on you (if you are the bread winner in the family).
- You have young children.
- You might lose your job.
- You have other responsibilities, for example: you look after an aging parent.
- Imprisonment will be bad for you, for example: for your health.

Appeal or review

You will have an opportunity to appeal or review:

- Your attorney may be able to appeal your conviction or sentence.
- Your attorney may be able to review the case because procedures were not correctly followed.

11.8 Second remedy when unlawfully arrested: Independent Police Investigative Directorate

If a sex worker is assaulted, verbally assaulted, badly treated or unlawfully arrested by a police officer, you can assist her/him in completing a complaint at the Independent Police Investigative Directorate (IPID) and the Department of Police.

The IPID is the regulatory body watching over the police – the IPID is supposed to ‘police the police’. Whenever a client has experienced a human rights violation, the case can be referred to the IPID to investigate the complaint. For this to succeed, it is vital for your client to be able to identify the police officers or the police van, or at least give an accurate description of one of the police officers.

11.8.1 How to refer a complaint to the IPID

The IPID has a form that has to be completed when you refer the case. The form is shown below. Also remember that the client must provide accurate contact information so that the investigating officer can contact her/him for further information on the complaint.

T TIPS

You will have to assist the sex worker in completing the form. *These sections must be completed:*

Section 5 – Write down her full details.

Section 7 – Write down her address.

Section 8 – Write down her contact details.

Section 9 – Write down her ID number. If she does not remember her ID, then she can write down her date of birth.

Section 10 – Write down what area she lives in, for example: Gugulethu, Woodstock.

Section 11 – Write down the directions to her house.

Section 13 – Write down her occupation. If the client does not want to disclose that she is a sex worker, then you do not have to include this information. If the client is a peer educator for SWEAT, you can write that down.

Section 14 – Write down directions to the workplace. If the client agrees to write that she is a sex worker, then you can include what area she usually works in, for example: Voortrekker Road, Parow.

Section 15 – Write down the work address.

Complainant Details (includes third party complaints)			
Role in the case	<input type="checkbox"/> Complainant <input type="checkbox"/> Third Party		
ID Number		Passport Number	
Title		First Name	
Middle Name		Surname	
Landline		Mobile	
Fax		Email	
Nationality		Gender	<input type="checkbox"/> Male <input type="checkbox"/> Female
Disabled status			
Address			
Country		City	
Suburb		Postal Code	
Preferred contact Method (E.g. E-mail, SMS, Post)			
Victim Details			
Passport Number			
First Name		Middle Name	
Surname			
Gender	<input type="checkbox"/> Male <input type="checkbox"/> Female	Race	
Age			
Service Member's Details			
Identified	<input type="checkbox"/> Yes <input type="checkbox"/> No	Rank	
Persal Number		ID Number	
Initials			
First Name		Middle Name	
Surname			
Gender	<input type="checkbox"/> Male <input type="checkbox"/> Female	Race	
Duty Station		Duty Station Unit	
Identified	<input type="checkbox"/> Yes <input type="checkbox"/> No	Rank	
Persal Number		ID Number	
Initials			
First Name		Middle Name	
Surname			
Gender	<input type="checkbox"/> Male <input type="checkbox"/> Female	Race	
Duty Station		Duty Station Unit	
Identified	<input type="checkbox"/> Yes <input type="checkbox"/> No	Rank	
Persal Number		ID Number	

Initials			
First Name		Middle Name	
Surname			
Gender	<input type="checkbox"/> Male <input type="checkbox"/> Female	Race	
Duty Station		Duty Station Unit	
Contact Number			
On Duty	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Vehicle Registration Number			
Details of Witnesses to Incident			
Title		First Name	
Middle Name		Surname	
Landline		Mobile	
Title		First Name	
Middle Name		Last Name	
Landline		Mobile	
Title		First Name	
Middle Name		Surname	
Landline		Mobile	
Title		First Name	
Middle Name		Surname	
Landline		Mobile	

COMPLAINANT'S FULL NAMES:

COMPLAINANT'S SIGNATURE:

DATE:

11.8.2 How to report to the Department of Police

In order to lodge a complaint with the Department of Police, you will have to complete our questionnaire. Then you will have to convert the information into a statement.



T TIPS

You will need this information for the statement:

- Full personal details.
- Full contact details.
- Date of incident.
- Time of incident.
- Exact location of where the incident took place.
- Details or description of the perpetrator (the police member responsible).
- Details of the vehicle that the perpetrator used.
- Full details of the background to the incident and what exactly happened.
- Full details of the extent of the injuries sustained.

11.9 Third remedy when unlawfully arrested: Complaint to Station Commander

If the perpetrator is a police officer, you can also lodge a complaint with the Station Commander. If you do this, you need to send in a letter and attach a statement.

By completing our HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: POLICE HARASSMENT AND ABUSE, you should be able to get the information you need for the statement you will attach to your letter to the Station Commander.

T TIPS

These are the details you will need for that statement:

- Full personal details of your client.
- Client's full contact details.
- Date of incident.
- Time of incident.
- Exact location of where the incident took place.
- Details or description of the perpetrator (police member responsible).
- Details of the vehicle that the perpetrator used.
- Full details of exactly what happened before and during the incident.
- Full details of the extent of the injuries sustained.

15 March 2011

Musina Police Station

No 8 Geldenhuys Street

Musina

Attention: Station Commander [name of officer]

Per Fax: 015 5347410

Dear Colonel [name of officer]

COMPLAINT ON BEHALF OF (name of client)

We write on behalf of (name of client).

She instructs us that on the 10th March 2011 at or around 12pm, she approached the Musina Police Station to lodge a charge of assault against a police officer.

She instructs further that there were three (3) police officers in the charge office, two (2) females and one (1) male police officer. Our client instructs that she reported the assault to the male police officer. The assault occurred on the 4 March 2011 at or around 11 am, outside the ABSA Building which is situate next to the Limpopo River Lodge. Ten (10) police officers and six (6) soldiers confronted our client and her friends and proceeded to beat her with a shambok.

She instructs that the police officers at the charge officer refused to assist her be opening up the charge of assault, and instead reprimanded her for being a Zimbabwean and humiliated her.

Accordingly, we request that you assist (name of client) who can be contacted on (insert telephone number)

Your assistance in this matter will be greatly appreciated.

Yours faithfully,

Figure 21: Example of complaint letter to Station Commander

CASE STUDY

Struggling to bring a charge at the police station

A sex worker goes to the police station to make a criminal charge. When she tells the police officer her problem, the police officer laughs at her and tells her to go away.

1. What are her human rights?
2. What can she do to lodge a complaint?

Answer

1. Everyone has the constitutional right to equal protection and access to justice. This means that sex workers also have the right to lay charges against people who have harmed them.
2. If a police officer refuses to open a charge for her, she can:
 - ~ Go to a different police station.
 - ~ Report the incident to the IPID.
 - ~ Make a complaint with the Station Commander.

11.9.1 Harassment by a police officer

Sex workers often complain that the police follow them while they work and chase them away from the area where they meet their clients. They also complain that they receive many fines from police officers for things that they did not do. For example: a sex worker complains that the police officer gave her a fine for loitering, when she was in her hotel room and not on the street. This is called *harassment*.

11.9.1.1 Option 1: Lodge a complaint with the IPID (see 11.8 on page 193 above for details).

11.9.1.2 Option 2: Lodge a complaint with the Station Commander (see 11.9 on page 198 above for details).

11.9.1.3 Option 3: Interdict the police

An *interdict* is a powerful legal weapon to stop unlawful behaviour or to force a government body to do something. The Tswaranang Legal Advocacy Centre and the Women's Legal Centre have experience of using an interdict to stop the police from harassing sex workers.

In Cape Town, SWEAT received numerous complaints regarding the police harassing sex workers. They decided to challenge the harassment and a number of sex workers participated in this case. *Here is a description of how the case was taken up and how an interdict was used as a legal option:*

CASE STUDY

The Sex Worker Education and Advocacy Task Force v The Minister of Safety and Security and Others

Facts

Cape Town and Cape Metropolitan area police arrest outdoor sex workers with the knowledge that they would not be prosecuted.

Argument

SWEAT applied for an order that interdicts or restrains the Cape Town Police and S.A. Cape Metropolitan area police from arresting sex workers when they have no intention to prosecute them in court, or where they arrest sex workers to harass, punish and intimidate them or for any other ulterior purpose not sanctioned by law. SWEAT also requested from the respondents to do everything necessary to prevent these arrests.

The Cape Town Police and S.A. Cape Metropolitan area police argued against the interdict, saying that they carry out arrests of sex workers as part of their crime prevention duties and that the failure to prosecute the arrested people lies with the National Prosecuting Authority.

Judgement

In April 2009, the Court gave an order stopping the Cape Town Police and the S.A. Cape Metropolitan area police from arresting sex workers for any purpose other than prosecution, and in particular while knowing that no prosecution would follow.

Unlawful arrests

Arrests made without legitimate purpose are unlawful. The purpose of an arrest must be to bring the suspect before a court of law to face prosecution. The burden of proof that the arrest was lawful is with the arrestor. The Court held that the arrestor in this case knew with the high degree of probability that there would be no prosecution, hence making the arrest unlawful.

Enough evidence of harassment for an interdict

An unlawful arrest is a constitutional issue because it is an infringement of the arrested person's rights to dignity and freedom under Sections 10 and 12 of the Constitution. To grant an interdict, the injury (in this case unlawful arrests) must be a continuing one. The Court concluded that the past infringement of rights constituted evidence that arrests of sex workers without the lawful purpose would probably continue in the future.

Therefore, the Court granted an interdict and an order restraining Cape Town City Police and the S.A. Police in the Cape Metropolitan area from arresting sex workers for a purpose other than to bring the persons arrested before a court of law, particularly while knowing that no prosecution would follow.

Meaning of judgement

This means that the police are not allowed to harass sex workers and arrest them to scare them. If the police arrest sex workers, they must have the intention to bring them to court.

CASE STUDY

Challenging a fine

A sex worker comes to you and says that she received a fine from the police. She did not pay the fine yet.

1. What would you advise her?
2. What are her rights and remedies?

Answer

1. Advise her that she cannot receive a fine if she did not commit the offence. Look at the offence written on the fine and ask her questions to establish whether or not she committed the offence.
2. She has the right to contest the fine in court if she is not guilty. If she is guilty, but she is unable to pay the amount she can ask for a reduction.

11.9.1.4 Option 4: Contest the fine in court

Many sex workers complain that they often receive fines when they are harassed by police officers. NGOs have received many complaints that the police often fine sex workers for loitering.

In our discussion on the municipal by-laws, you will see what the definition of *loitering* is. It means that a person cannot sit, lie or stand in a manner that obstructs traffic on the street or on the pavement. It also means that no person is allowed to touch another without consent.

Note

- The municipal by-laws say that a police officer should first warn the person that they are committing an offence and that if they continue, the police officer can give them a fine or a notice to appear in court.
- This makes it possible to go to court to contest fines that sex workers receive.

C CASE STUDY

Police harassment for loitering

A sex worker and a group of friends are walking down the road to another friend's house. They decide to stop at a park to smoke a cigarette. While they are sitting there, a police officer arrests them for loitering.

1. Is this the correct charge?
2. What remedies are available to her?

Answer

1. She has the right to contest this fine, as she was not loitering according to municipal law.
2. She can complain to the IPID and the Station Commander.

C CASE STUDY

Charge of loitering

A sex worker is sleeping in her hotel room, when a group of police officers storm into her bedroom and tell her she is loitering. She tells them she lives there, but they arrest her for loitering and take her to the police station. At the police station, they say that she can pay a fine or stay in jail.

1. Is this the correct charge?
2. What remedies is available to her?

Answer

1. She has the right to contest this fine, as she was not loitering. You cannot 'loiter' in a private space: loitering is to do with obstructing traffic or pedestrians in the street. If this is in the Western Cape, remember: there is no legally sound by-law for 'loitering'. If it was someone walking in the street, the police should use a by-law relating to preventing a nuisance in the street or another public place.
2. She can complain to the IPID and the Station Commander.

11.10 Summary: Paralegal steps when a sex worker is assaulted

You may have to help clients who reported that they have been physically or sexually assaulted by the police or other people.

11.10.1 What is physical assault?

Physical assault is intentional physical contact with another person without their consent. For example: beating with fists, a sjambok, kicks, pushing and grabbing.

11.10.2 What is sexual assault?

Sexual assault is an assault of a sexual nature without the person's consent. It can be verbal, visual, or anything that forces a person to join in unwanted sexual contact or attention. For example: rape, touching, kissing.

11.10.3 Step-by-step process

T TIPS

1. Get full personal details: name, surname, telephone number and address.
2. Inform her that she should not wash or change her clothes until she has been properly examined.
3. Get the full facts: you will need information on:
 - ~ When it happened.
 - ~ Exactly where it happened.
 - ~ Identification of the perpetrator or a description of the perpetrator.
4. Once you have received the facts, advise her on the remedies: she can bring a criminal charge against the person responsible for the assault.
5. If she agrees to lay a charge, advise her to report to the police station closest to her as soon as possible. Go with her if she does not want to go alone:
 - ~ She needs to go to the charge office and tell them that she would like to open up a charge of assault or sexual assault.
 - ~ If the police officer at the police station refuses to assist her then:
 - ~ Ask for the Station Commander. If they do not want to assist you by referring you to the Station Commander, then note who you spoke to and what they said. You will need this later.
 - ~ If no-one at that police station wants to assist, then go to another police station.
 - ~ If the perpetrator is a police officer, it may be a good idea to go to another police station anyway to avoid seeing him.
6. If the police assist by opening a case, then they will give her a J88 form. Take this to the doctor, so that she can be examined.
7. Once the J88 is completed, she has to take it back to the police station.
8. When the police open the case, take note of who is taking her statement and the case number.

9. Ask the police officer for a copy of the statement and the contact details of the investigating officer who is going to investigate the case.
10. Explain the court process to your client.
11. If it is a police officer who is the perpetrator, advise her that she can also lodge a complaint at the IPID and with the Station Commander.
12. Arrange a date for a consultation with WLC so that we can assist her further.

C CASE STUDY

Police abuse of power

A policeman steals a sex worker's money and tells her to have sex with him.

1. What are her human rights?
2. What remedies are available to her?

Answer

1. In this case, the police officer has abused his powers. Asking the sex worker for sexual favours in exchange for release is unlawful. Police officers are also not allowed to steal money from people. She has a right to equal protection and access to the law, and to her bodily integrity and dignity.
2. She can lay criminal charges of theft or robbery (if he physically grabbed the money), and rape or attempted rape. She can also complain to the IPID and to the Station Commander.

Note

Remember that when a client tells you that she has experienced harassment or abuse from the police, you must complete our HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: POLICE HARASSMENT AND ABUSE on page 152.

Civil procedure

Learning objectives

- To understand civil procedure and its different remedies.
- To know how to work with the different procedures for bringing civil claims in various courts or making applications to other bodies.

Introduction

Chapter 11 focused on criminal procedure and its available legal remedies. This chapter will look into civil procedure and its available legal remedies.

Civil law is the set of rules that govern your private relationships with other people. The State does not take sides in a dispute between people. For example, civil law deals with cases such as marriage and divorce, if someone owes you money, rent agreements, evictions, injuries to people and disputes over a hire-purchase agreement.

A civil case is usually brought by a person (called the *plaintiff*) who feels wronged by another person (called the *defendant*). If the plaintiff wins the case, the court usually orders the defendant to pay compensation (money). Sometimes the court orders a defendant to do, or to stop doing, something, for example: to stop damaging the plaintiff's property.

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

12.1 Prescription periods

All claims fall away (*prescribe*) after a certain period of time (*prescription period*). In

other words, you will lose your right to claim against another person if you wait too long to make the claim.

If you are helping someone with a case, it is very important that you do not delay in taking follow-up action and that you advise the person immediately of the time- limits. The Prescription Act 68 of 1969 says that all civil claims prescribe 3 years from the date of the incident.

E EXAMPLES

Examples of prescription periods:

- A motor vehicle insurance claim form must be sent in within 2 years from the date of the accident.
- If you have been unfairly dismissed and wish to apply for reinstatement, the application for reinstatement must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) within 30 days of the unfair dismissal.
- For claims against the State, the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 says you must give notice of your intention to bring legal action against a government department within 6 months from the date of the incident. If you do not give notice within 6 months, then you have to give good reasons for the delay in applying for *condonation*. This means that you ask the court to allow you to continue with the claim even though it has officially prescribed.

12.2 Preparation for a civil claim

T TIPS

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

1. Draw up a detailed statement about what happened.
2. Collect evidence to support the case: for example: take pictures of injuries, go to a doctor for treatment and a medical certificate, and get the names, addresses and statements of witnesses who saw the incident.
3. Take the statement and evidence to an attorney.
4. Make a criminal case at the same time if the act against you is also a crime.

12.3 Steps in a civil claim in the Magistrate's Court

The aim in a civil claim is for the plaintiff to prove to the court that his/her case is 'more likely' than the case of the defendant. In court this is called proving a case *on a*

balance of probabilities. This is different from the criminal case, where the State has to prove guilt ‘beyond a reasonable doubt’.

We will now go through the steps involved in civil claims:

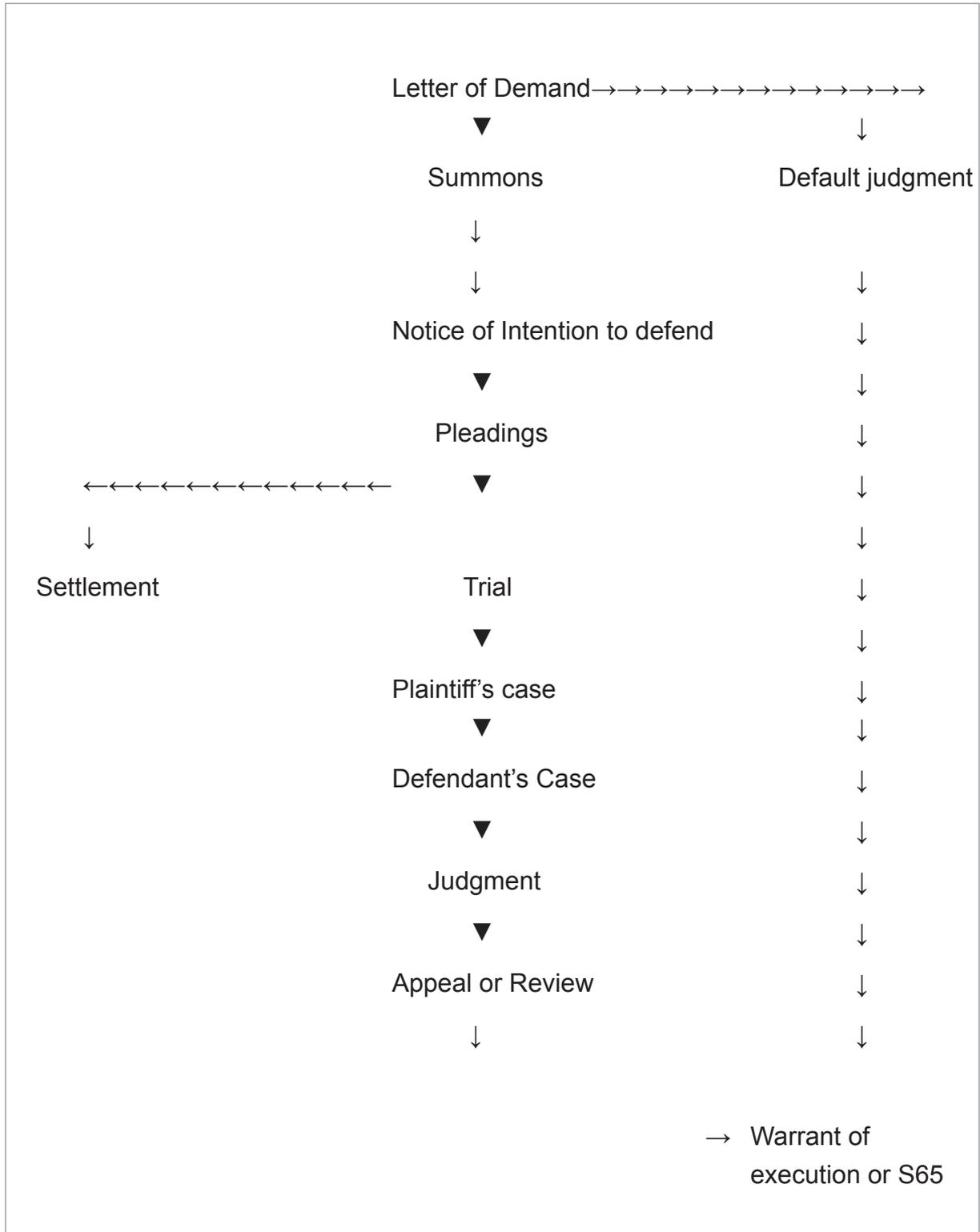


Figure 22: Summary of steps in a civil claim in a magistrate’s court

12.3.1 Letter of demand

The plaintiff's attorneys write a letter to the defendant. This letter states what the plaintiff wants, and gives the defendant a certain number of days to do it. It is a warning that the plaintiff plans to take the other person to court unless the defendant agrees to his/her demands.

12.3.2 Issuing a summons

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

The defendant can answer the summons in one of these ways:

- Admit to owing the money and pay immediately.
- Try to settle the case by reaching an agreement with the other side after discussing it with the plaintiff's attorney.
- Defend the claim: complete the form called a Notice of Intention to Defend at the back of the summons and return it to the court within 10 days.

12.3.3 Default judgement

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

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

12.3.4 The defence

If the defendant wants to defend the case in court, then he/ she must fill in a form called a Notice of Intention to Defend on a form at the back of the summons. It gives the reasons why the defendant does not want to pay what the plaintiff claims in the summons. The form must be stamped at the court. Then a copy is given to the plaintiff's attorneys.

12.3.5 Pleadings

The legal documents in a civil claim are called pleadings. These pleadings are difficult to understand and are written according to the rules of each court. At any time during the pleadings stage, the defendant can decide to settle the case. In other words, both sides can reach an agreement without the magistrate or judge having to decide the case. The aim of *settling* a case is usually to save both sides time and money. If the case is not settled this way, then it will go to court.

12.3.6 The trial

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

12.3.7 Judgement

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

12.3.8 Review or appeal

The plaintiff or defendant can apply for an appeal or review, if he/she is not satisfied with the outcome of the case or the way in which the proceedings were conducted.

12.3.9 Costs

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

12.3.10 Enforcing a civil judgement

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

12.3.11 Paying instalments

If the defendant cannot pay the sum of money all at once, he/she can offer to pay it off in instalments.

12.3.12 Warrant of Execution

If the defendant still does not pay after the judgement has been given, the plaintiff can ask the court to issue a Warrant of Execution:

- This is a court order for the Sheriff of the Court can go to the defendant's home and list the items owned by him/ her like a television and fridge, and use these to pay off the debt. This is called *attaching* the property. The Sheriff of the Court can also attach the whole house if necessary.
- The court attaches the defendant's property because this is the only way it can force the defendant to pay the judgement costs and any other amounts the defendant owes.
- The Sheriff of the Court then takes the attached property and sells it. The amount of the judgement plus legal costs is then paid to the plaintiff from what is made at the sale. If anything is left over, it will be paid back to the defendant.
- If the defendant does not have enough property which can be sold to pay off the plaintiff's claim, the plaintiff can ask the court to look into the defendant's financial position. The court can then order the defendant to pay a certain amount from his/her employer and send it to the plaintiff. If the defendant refuses to obey this court order, she/ he can be arrested for *contempt of court*.

12.4 Small Claims Court

The Small Claims Court (SCC) is a civil court with simpler procedures for bringing smaller civil claims.

12.4.1 Cases you can take to the Small Claims Court

- You bought a second-hand tape player which stops working after the first month. You can claim against the seller.
- You are assaulted and have to have treatment for your wounds. You can claim against the person who assaulted you for pain and suffering, lost wages and medical costs.
- You paid someone to do work for you and they did not do it properly. You can claim your money back from them.

E EXAMPLES

Action for repayment of monies lent

The plaintiff has lent money to the defendant and the defendant has not paid during the time agreed or after demand by the plaintiff. The money owed can be up to R12,000.

Action for the delivery of movable or immovable property

The defendant has bought property from the plaintiff and has not paid for it. The plaintiff can sue the defendant for property sold and delivered up to R12,000, for example: furniture or a small piece of land.

Action against an occupier of a property

The defend rents the plaintiff's property and is in arrears with payments up to R12,000.

Actions arising from liquid documents

The plaintiff has a claim of up to R12,000 against the defendant based on a document such as an acknowledgement of a debt, a mortgage bond, a promissory note or a cheque.

Actions arising from credit agreements

The plaintiff provides credit facilities to the defendant who has not paid instalments under a credit agreement: the arrears can be up to R12,000.

Actions for damages

The plaintiff sues the defendant for damages arising from a motor vehicle accident where the damage to the plaintiff's car is up to R12,000.

12.4.2 Which Small Claims Court?

There are many SCCs in different provinces and areas. Your claim will be heard in the SCC for the area where the defendant lives or where the cause of action arose. *Cause of action* means the reason for your claim or what caused your claim.

E EXAMPLE

You are out with a client and you are parked in Sea Point. After you have provided him with services, the client assaults you and you have many wounds. The client told you that he lives in Wynberg, and you live in Khayelithsa. The cause of action arose in Sea Point and the defendant's address is Wynberg. So which court can you use? You can either use Wynberg Court or Cape Town Court (for Sea Point).

12.4.3 Small Claims Court steps

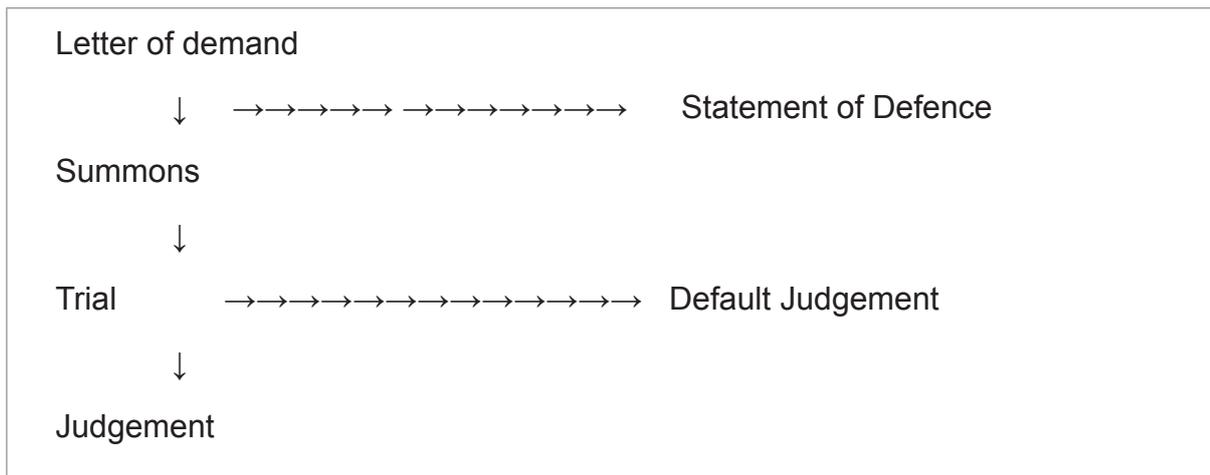


Figure 23: Steps in a Small Claims Court

12.4.4 Letter of demand

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

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

The letter of demand must be in duplicate. *There are 3 ways to deliver the letter:*

- **Send it by registered post:** Keep the registration slip and contact the post office by phoning the toll-free number on the registration slip. If the defendant received the letter, the post office will inform you of the date of the receipt, and you calculate the 14 working days, starting from the first working day after receipt of the letter. If the defendant does not collect your letter, the letter will be returned to you by the post office unclaimed after a full month. You should collect the unclaimed letter at the post office after a full month.
- **Hand-deliver the original copy of the letter to the defendant yourself:** If you hand deliver the letter, the defendant must sign your copy of it as acknowledgment of receipt. Keep this signed copy in a safe place. If the defendant refuses to sign your copy, or refuses delivery, go to the nearest police station to sign an affidavit to say that you delivered the letter to the defendant, but he/she refused to sign acknowledgment or refused delivery.

- **Take the letter to the Sheriff:** Go to the Sheriff of the Court in the area where the defendant lives and give the Sheriff your letter for hand-delivery. This will cost a small fee.



the doj & cd
Department
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

LETTER OF DEMAND (S29)

SMALL CLAIMS COURT

BY REGISTERED POST:

TO: FROM:

Postal Address
.....
.....
.....

Sir / Madam

DEMAND: SECTION 29 OF THE SMALL CLAIMS COURT ACT, 1984

I hereby claim from you

.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

Unless you comply with this demand within 14 (fourteen) days after receipt of this letter, summons will be issued against you in the Small Claims Court.

Your's faithfully

.....
PRINT NAME PLAINTIFF'S SIGNATURE

Figure 24: Small Claims Court letter of demand

12.4.5 Issuing the summons

If the defendant receives your letter, but does not pay after 14 days, you should return to the Clerk of the Small Claims Court with your registration slip and the copy of your letter. *Next steps:*

- The Clerk will then issue you with a summons, which will have a court date on it. You must immediately take the summons to the Sheriff to serve on the defendant. You can claim this cost back from the defendant, in addition to your claim.
- The Sheriff will inform you with a Sheriff's Return of Service whether or not they were able to serve the summons. If the sheriff is unable to serve the summons, for example, if the defendant has moved to another address, then the sheriff will inform you of the reason. The Clerk of the Court will tell you what the next steps will be.
- The summons gives the defendant 10 days to pay your claim. It also gives a date after the 10 days when the defendant must appear in the SCC if the claim is not settled. You will also have to appear in court on the day referred to in the summons.

CASE STUDY

Claiming for money?

A sex worker goes with a client to do business. After they do business, the client refuses to pay her. And then when she asks for the money, the client beats her.

1. What can she do?
2. Can she claim for the money?

Answer

1. She can lay a criminal charge of assault against her client.
2. She cannot sue the client for the money because the contract that they entered into is illegal under South African law.

Figure 25: Small Claims Court summons form

J141E (81/808188)


REPUBLIC OF SOUTH AFRICA

Issued by Case No.
..... Date

Clerk of the Small Claims Court

No. 1 SUMMONS COMMENCING ACTION

Name and address of plaintiff

.....

.....

.....

.....

.....
Signature of Plaintiff

In the Small Claims Court for the District of

held at

Between Plaintiff
and Defendant
..... (gender and if female also marital state)

TO

.....

.....

.....

.....

1. You are hereby summoned to appear personally before this court on the
day of year at h to admit or deny your liability
for the undermentioned claim.

2. If you deny liability, you may at any time before the trial deliver to the clerk of the court at
..... address a written statement
setting out the nature of your defence and the particulars upon which it is based and a copy of the statement must then
be delivered to the plaintiff.



3. Particulars of claim:

Plaintiff's claim is for-

(a) payment of the sum/balance of R of
.....
.....
.....
.....
.....

(b) (i) for arrears of ,rent due in respect of the defendant's tenancy of
.....

<i>Date</i>	<i>Period</i>	<i>Amount R</i>
.....
.....
.....
.....

and

(ii) for ejectment,
Particulars
.....
.....

(c) Notice of *abandonment of part of claim / deduction the admitted debt.

Take notice that the plaintiff hereby *abandons the undermentioned part of the claim/deducts the admitted debt set up by him in this summons.

Particulars
.....
.....
.....

Dated at this day of year

.....
Plaintiff

- 4. (a) Take notice that if you fail to appear in Court on the trial date after a summons has been served on you, judgment may be obtained against you by the plaintiff unless you have previously admitted liability to the plaintiff.
- (b) Money payable in terms of a judgment or order of court shall be paid directly to the judgment creditor.
- (c) If you admit the claim and wish to consent to judgment or wish to undertake to pay the claim in installments or otherwise you may approach the plaintiff.



5. Take notice that you and all other persons are hereby interdicted from removing or causing or suffering to be removed any of the furniture or effects in or on the premises described in the particulars of claim endorsed hereon which, are subject to the plaintiff's hypothec for rent until an order relative thereto shall have been made by the court.

6. *Notice.*

If any person against whom a judgment for the payment of money has been given or an order for the payment of money in installments has been made fails to satisfy the judgment or order –

- (a) such judgment or order may be enforced against movables and, if the movables are found to be insufficient then against the immovables of the party against whom the judgment or order has been issued;
- (b) execution may be taken against the whole judgment debt and costs which have not yet been paid in default of an installment being paid;
- (c) such a person is liable to notify the judgment creditor fully and correctly, within 14 days after he has changed his place of residence, business or employment of his new place of residence, business or employment;
- (d) and if he has let it be known that he is not in a position to comply with the judgment, the court may in chambers institute an investigation into the judgment debtor's financial position and his ability to pay the judgment debt and costs.

7. The Messenger's fees are R

8. *Consent to judgment:*

I admit that I am liable to the plaintiff as alleged in this summons (or to the amount of R and costs to date) and I accordingly consent to judgment.

Dated at this day of year

.....
Date

.....
Defendant

*** Delete which is not applicable**

12.4.6 The trial

At the trial, the SCC Commissioner (who is usually an attorney) presides over the case. The Commissioner explains court procedure to both sides and asks all the questions. You can only ask your opponent questions when the Commissioner says that you can. If you do not understand English or Afrikaans, you can ask for an interpreter, for example, into isiXhosa. You should ask for this before the day of the case so an interpreter can be organised.



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

Changing the claim

At any time before the case, you can ask the Small Claims Court Commissioner to change some of the details in any of the documents. Or you can ask the court to stop the claim altogether. The Commissioner will allow any changes which he/ she decides are reasonable.

12.4.7 Judgement

After hearing all the evidence, the Commissioner will decide on a balance of probabilities which party he/she believes is right. This is the same as in other civil cases. The Commissioner does not have to listen to all the witnesses if he/she thinks it is not necessary.

There are 3 possible judgements that the Commissioner can give:

- **Judgement in favour of the claimant (also called the plaintiff):** the loser cannot appeal and has 10 working days to pay the claim, which includes the refund of the Sheriff's fees to the claimant.
- **Judgment in favour of the defendant:** this means that the claimant has lost his/her case. The claimant may not appeal against this judgement.
- **Absolution from the instance:** this ruling is given if the Commissioner cannot decide which side to believe: it means the case is left undecided.

12.5 Remedy when unlawfully arrested: Civil claim

A sex worker can make a civil claim for unlawful arrest or unlawful detention. She can claim compensation money for pain and suffering and any medical costs. This is a different procedure from bringing a criminal charge.

12.5.1 How to make a claim unlawful arrest and detention

T TIPS

When you come across a problem like this as a paralegal, find out:

- Did the police inform your client that she is under arrest?
- Did the police have a warrant of arrest?
- When she got to the police station, did they inform her of the charge?
- Did the police read her rights in the Notice of Rights or inform her of her rights in a language that she understands?
- When she was detained, were the cell, blankets and mattresses clean?
- While she was detained, was she allowed to make a phone call?
- Was she allowed to speak to an attorney?
- How long was she detained for?
- Did she appear in court?
- Was she allowed to get bail?
- What was the outcome of the court appearance?

Note: If your client answers NO to even ONE of these questions, then the arrest is unlawful and she/he can bring a civil action against the Minister of Police for unlawful arrest and wrongful detention.

When you advise sex workers of this remedy, it is important to inform them that a damages claim is an action proceeding: she/he will have to stand up in court to *testify* (give evidence) about what happened.

Different kinds of damages claims

You can advise your client that she can sue for damages for things like:

- *Breach of her right to freedom* because it was taken from her for no good reason. Ask her if she has proof of her detention, for example, a property slip or a copy of the Notice of Rights. If she has no proof, you can ask the State to provide this when you ask them for documents before the case goes to court.
- *Contumelia* (physical, verbal or sexual assault): she must be able to describe what happened and the identity of the police officer who assaulted her. If she is unable to provide the identity of the police officer, you may find a name on the Notice of Rights, or ask her to at least describe what he looked like.
- *Inconvenience and discomfort* (bad conditions of the cell): again ask for details of the conditions she experienced.

12.5.2 Steps when bringing an action against the Minister

If a police officer committed a crime during the course and scope of their duties, the sex worker can sue the Minister of Police. She/he will have to consult with an attorney to assist with the claim. The reason why the claim is made against the Minister is because the Minister is the police officer's employer and is therefore *liable* (responsible) for his actions.

Notice

You have to give notice to the Minister within 6 months after the unlawful arrest. The notice is given under section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

In this notice, you will set out the contents of the claim and demand the money within 30 days. If the Minister does not pay within 30 days, you will have to go to court to continue with the claim.

Figure 26: Notice to Minister

25 November 2011

Minister of Police
Mr Nathi Mthethwa
Wachthuis, 7th Floor
231 Pretorius Street
PRETORIA 0001

PER REGISTERED MAIL

National Commissioner of the
South African Police
Wachthuis, 7th Floor
225 Pretorius Street
PRETORIA 0001

PER REGISTERED MAIL

Dear Minister and National Commissioner

**NOTICE OF LEGAL PROCEEDINGS IN TERMS OF SECTION 3(1)(A) OF THE
INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF
STATE ACT 40 OF 2002**

We act for (insert name of client), ("our client").

1. Our client instructs that on the 02 June 2011 at (include address) she was arrested without a warrant, where after she was taken to (name of police station) Police Station. Our client was detained until approximately 19h00 on the 02 June 2011, when she was released. (Here one has to set out the reasons why you are suing the police. One has to give a summary of the facts)

2. We attach a copy of a Notice of Rights issued to our client. It is annexed hereto as Annexure "1".
3. You are hereby given notice in term of Section 3(1)(A) of the Institution of Legal Proceedings Against Certain Organs State Act 40 of 2002 ("the Act") of our client's intention to bring a civil claim against the Minister of Police ("the Minister") for damages arising out of an unlawful arrest and detention.
4. As a result of the unlawful arrest and detention of our client, she has sustained damages in the amount of R100 000.
5. Accordingly we are instructed to demand, as we hereby do, payment of the sum of R100 000 within 30 days of your receipt of this letter, failing which action will be instituted against you for inter alia, wrongful arrest and detention.
6. Our client reserves her right to apply for condonation in terms of Section 3(4) of the Act in the event of this notice being delivered out of time. Our client further reserves her right to raise any alternative and/or additional claim(s) that may be necessary for purposes of instituting the action.
7. In consideration of the nature and extent of our client's claim and the fact that this matter is in the public interest due to its human rights implications, we request, in the event that you do not comply with our demand as stated above, that you kindly furnish us with your consent to proceed with instituting this claim by no later than 09 January 2011.

Yours faithfully,

Summons

If you did not receive the money within 30 days, then an attorney has to issue a summons with Particulars of Claim. The *Particulars of Claim* will list the client's story. This is why is it important that you obtain as much information as possible from the client, because the client's statement will be converted into the Particulars of Claim.

T TIPS

This is the key information that you need to put into your client's statement:

- Full name of client.
- Contact details and address.
- Client's background: includes where she comes from and when she started working as a sex worker.
- Full details of the event: date, time, street name, what the officers told her, what she said when she responded, and full details or description of the police officers.
- Full details of her drive to the police station – how the police got her into the van. Did they assault her? Did they swear at her?
- Full details of what happened at the police station – did they inform her of her rights? Did they inform her of the reasons for her arrest? Did they take pictures of her? Did they take her fingerprints? Did she sign any documents? Can she name or describe the documents that she signed? Did they allow her to make a phone call?
- Did she go to court, and what happened at court.

Pleadings

After the summons is issued, the State Attorney will have to send a Notice of Intention to Defend. After this is done, pleadings go back and forth. These documents will list the story of what happened, and the State will respond to explain why they think it did not happen in the way the sex worker has described it.

When pleadings are sent, this is an opportunity for the sex worker's attorney to ask the State to submit a *discovery* affidavit – in this the State has to go through the Occurrence Book and Custody Register to check if the sex worker was in fact detained. Your attorney can ask the State to produce copies of the relevant pages.

Close of pleadings

After the pleadings have been finalised, the case will be put on the court roll. Once it goes to court, the normal procedures of giving evidence, cross-examination and re-examination will follow.

Figure 27: Combined Summons

BOX 679

COMBINED SUMMONS
In the High Court of South Africa
(Western Cape High Court Cape Town)

Case No.

In the matter between:

NAME SURNAME	First Plaintiff
NAME SURNAME	Second Plaintiff
NAME SURNAME	Third Plaintiff
NAME SURNAME	Fourth Plaintiff
NAME SURNAME	Fifth Plaintiff
NAME SURNAME	Sixth Plaintiff

and

COMMISSIONER OF POLICE	First Defendant
MINISTER OF POLICE	Second Defendant

TO THE SHERIFF OR HIS DEPUTY:

INFORM **NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE (FIRST DEFENDANT)** care of the State Attorney, 22 Long Street, Cape Town.

NATIONAL MINISTER OF POLICE (SECOND DEFENDANT)
care of the State Attorney, 22 Long Street, Cape Town.

(hereinafter called the **DEFENDANTS**) that

NAME SURNAME, an adult female sex worker with her workplace in Voortrekker Road, Bellville, **WESTERN CAPE**.

NAME SURNAME, an adult female sex worker residing at no ABC, KTC, Nyanga, **WESTERN CAPE**.

NAME SURNAME, an adult female sex worker residing at DEF, Gugulethu, **WESTERN CAPE**.

NAME SURNAME, a homeless adult female sex worker with her workplace in Voortrekker Road, Bellville, **WESTERN CAPE**.

NAME SURNAME known as GHI, an adult female sex worker with her residential address at JKL, Gugulethu, **WESTERN CAPE**.

NAME SURNAME, an adult female sex worker with her residential address at Malawi Camp, Airport, Bishop Lavis, **WESTERN CAPE**.

(hereinafter called the **PLAINTIFFS**),

hereby institutes action against **DEFENDANTS** in which action the **PLAINTIFFS** claims the relief and on the grounds set out in the particulars annexed hereto.

INFORM the DEFENDANTS further that if **DEFENDANTS** dispute the claim and wish to defend the action, the **DEFENDANTS** shall-

- (i) within **20 [TWENTY]** days of the service upon **the DEFENDANTS** of this summons, file with the Registrar of this Court at Keerom Street, CAPE TOWN notice of **DEFENDANTS'** intention to defend and serve a copy thereof on the **PLAINTIFF'S** Attorneys, which notice shall give an address (not being a post office box or poste restante) in terms of Rule 19(3) for the service upon the **DEFENDANTS** of all notices and documents in the action;
- (ii) thereafter, and within **(20) TWENTY** days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the PLAINTIFF a Plea, Exception, Notice to strike out, with or without a counterclaim.

INFORM the DEFENDANTS further that if the **DEFENDANTS** fail to file and serve notice as aforesaid, Judgment as claimed may be given against the **DEFENDANTS** without further notice to the **DEFENDANTS**, or if having filed and served such notice, the **DEFENDANTS** fail to plead, except, make application to strike out or counterclaim, Judgment may be given against the **DEFENDANTS**.

AND immediately thereafter serve on the **DEFENDANTS** a copy of this Summons and return same to the Registrar with whatsoever you have done thereupon.

DATED at CAPE TOWN this day of AUGUST 2012.

PER:
NAME of ATTORNEY
(an attorney with the right to appear
in the High Court and certified as

**such in terms of Section 4(1) of Act
62 of 1995)**

Attorney for Plaintiff

[ADDRESS]

[TELEPHONE NUMBER]

[EMAIL]

Figure 28: Particulars of Claim

PARTICULARS OF CLAIM

1. The plaintiff is STU, a major female peer educator at the Sex Worker Education and Advocacy Taskforce (SWEAT), resident at VWX, Khayelitsha, who was born on YZZ.
2. The defendant is the MINISTER OF POLICE, cited in his official capacity as the Minister of State responsible for the conduct of affairs of the South African Police Service and who accepts service of all process at care of the State Attorney 4th Floor, 2 Long Street, Cape Town, Province of the Western Cape.
3. The whole cause of action arose within the jurisdiction of the above honourable court.
4. The police officers referred to herein were at all material times acting within the course and scope of their duty as such, or in the defendant's interests.
5. The plaintiff has complied with the provisions of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, No 40 of 2002.

CLAIM A

6. On or about Saturday, 27 March 2010, at about 02h00 at or near Voortrekker Road, Parow, the plaintiff was arrested without a warrant, by three (3) police officers whose full and further particulars are unknown to the plaintiff.
7. In effecting the arrest, one of the police officers assaulted the plaintiff by trying to push the plaintiff into the police van.
8. Another one of the officers assaulted the plaintiff by beating her with his hands and attempting to cut her jacket with a knife.

9. Thereafter the plaintiff was detained at the instance of the aforementioned police officers, as follows:

9.1. in a vehicle en route to the Parow Police Station; and

9.2. at the Parow Police Station until she was released from custody on or about 28 March 2010 at or about 13h00.

10. The plaintiff was detained in conditions not consistent with human dignity.

11. As a result of being so arrested and detained the plaintiff suffered the following harm:

11.1. deprivation of liberty;

11.2. inconvenience and discomfort;

11.3. contumelia

12. As a result of the harm referred to above the plaintiff suffered the following damages:

12.1. deprivation of liberty.....R40 000

12.2. inconvenience and discomfort..... R20 000

12.3. contumelia..... R20 000

TOTAL R80 000

CLAIM B

13. On or about Saturday, 18 May 2010, at about 03h30 at or near Voortrekker Road, Parow, the plaintiff was arrested without a warrant, by a group of police officers whose full and further particulars are unknown to the plaintiff.

14. While the police officers were arresting the plaintiff, one of the police officers, named [insert police officer's name] pepper - sprayed her.

15. Thereafter the plaintiff was detained at the instance of the aforementioned police officers, as follows:

15.1. in a vehicle en route to the Bellville Police Station; and

15.2. at the Belville Police Station until she was released from custody on or about 19 May 2010 at or about 09h00.

16. Our client was detained in conditions not consistent with human dignity.

17. As a result of being so arrested and detained the plaintiff suffered the following harm:

17.1. deprivation of liberty

17.2. inconvenience and discomfort

17.3. contumelia

18. As a result of the harm referred to above the plaintiff suffered the following damages:

18.1. deprivation of liberty.....R40 000

18.2. inconvenience and discomfort.....R15 000

18.3. contumelia..... R10 000

TOTAL R65 000

CLAIM C

19. On or about Saturday, 23 June 2010, at about 10h50 pm at or near Voortrekker Road, Parow, the plaintiff was arrested without a warrant by a group of police officers whose full and further particulars are unknown to the plaintiff.

20. Thereafter the plaintiff was detained at the instance of the aforementioned police officers, as follows:

20.1. in a vehicle en route to the Parow Police Station; and

20.2. at the Parow Police Station until she was released from custody on or about 23 June 2010 at or about 09h00.

21. Our client was detained in conditions not consistent with human dignity.

22. As a result of being so arrested and detained the plaintiff suffered the following harm:

- 22.1. deprivation of liberty;
- 22.2. inconvenience and discomfort;
- 22.3. contumelia

23. As a result of the harm referred to above the plaintiff suffered the following damages:

23.1. deprivation of liberty.....	R20 000
23.2. inconvenience and discomfort.....	R10 000
23.3. contumelia.....	R10 000
TOTAL	R40 000

24. In the premises the defendant is liable to the plaintiff as set out above.

WHEREFORE the plaintiff claims:

- (a) Payment of the sum of R165 000.00;
- (b) Interests on the aforesaid sums at the rate of 15.5% per annum, from date of institution of proceedings to date of payment in terms of Section 2A of the Prescribed Rate of Interest Act, 1975;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

Domestic violence and harassment

Learning objectives

- To understand what conduct is domestic violence or harassment.
- To know how to use the remedies available against domestic violence and harassment.
- To know how to get a protection order for your client against domestic violence or harassment.

The WLC and SWEAT have been monitoring the human rights abuses of sex workers, and through this research have found that sex workers have reported incidents of domestic violence and harassment by their partners.

The purpose of this section is to provide you with information on what acts amount to domestic violence or harassment, and which remedies are available against domestic violence or harassment. We will discuss the procedure to get a protection order against the perpetrator in detail.

⋮ **Note:** When a client approaches you with a complaint about domestic violence, you must fill in our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: DOMESTIC ABUSE on the following pages.

HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE

DOMESTIC ABUSE

DATE: _____ NAME: _____

PROVINCE: _____ AREA: _____

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym)

(Optional): _____

2. Age

(optional): _____

3. Telephone no/ contact number you can be reached at (Optional): _____

4. Address: _____

5. Where do you work? _____

6. Please circle/tick-

Gender: Male Female Transgender man Transgender woman

Indoor Street-based Both:

(explain) _____

7. Are you married to the perpetrator?

Yes	No
-----	----

8. Do you have children together?

Yes	No
-----	----

9. How long have you been together? _____

10. What is the nature of the abuse? *Please tick the appropriate one.*

Physical abuse	
Verbal Abuse	
Sexual Abuse	
Emotional Abuse	
Financial Abuse	
Psychological Abuse	
Other	

11. Have you ever made a case before?

Yes	No
-----	----

12. Details: _____

13. Do you currently have a protection order?

Yes	No
-----	----

14. Would you like to apply for a protection order?

Yes	No
-----	----

15. Are you currently at risk of ongoing abuse?

Yes	No
-----	----

16. Do you require us to assist you with:

Laying a charge	
Obtaining a protection order	
Women's shelter	
Medical services	
Counseling	
Other	

17. What legal remedies are you seeking?

Attach any additional case notes.

*Paralegal
advice*

Assent / Confidentiality

Does the source give his/her assent to share the information (with the authorities, the media)?

Can the source's name be used?

Can we forward your story to SWEAT to be used for advocacy?

Is it necessary for any information to be confidential? Why? Until when?

13.1 Domestic Violence Act

The Domestic Violence Act says:

- A person can be charged and convicted with marital rape whether they are married according to civil, customary or religious law.
- When police arrive at a scene of domestic violence, they must inform victims that they have a right to ask for police assistance to protect themselves and their children. Police are allowed to seize firearms and other weapons.
- Victims can ask police to help them find a place of safety and for help to move them there.
- Police have to tell victims how to get a protection order.
- The Act gives police the right to arrest an abuser at the scene of an incident of domestic violence without a warrant of arrest, if the police reasonably suspect that the abuser has committed an offence involving physical violence.

T TIPS

In the Act, domestic violence includes:

- Physical abuse.
- Sexual abuse.
- Emotional and psychological abuse.
- Intimidation.
- Harassment.
- Stalking (where someone follows you around, or hangs around your home, or keeps contacting you, when this is unwelcome to you and you find it threatening).
- Damage to property.
- Entering a person's home without consent where people do not share the same home.
- Any other controlling or abusive behaviour that harms or may cause harm to a person.

13.2 Getting a protection order

The Domestic Violence Act allows anyone to apply for a protection order against their abuser.

If a sex worker decides to apply for a protection order, she/he can be in any of these relationships:

- Man and wife married according to civil, customary or religious law.
- Gay or lesbian couple (married in a civil union or unmarried).
- People living together who are not married.
- People who are engaged.
- People who are dating.
- People who share the same home (for example: housemates, boarding schools, university residences).
- Family members of the abused person.
- Parents of a child or people responsible for a child.
- A child under 21 without the help of a parent or guardian.

- Any person, including a health service provider, police officer, social worker, teacher, neighbour, friend, relative, minister, who has a material interest (not just being a busybody) in a child's well being.

T TIPS

Procedure for getting a protection order

- As a person applying for a protection order, you can go to a Magistrate's Court or a High Court. It must be in the court close to where you live or where the abuser lives, but in practice you can go to any court.
- You go to the Clerk of the Civil Court and ask for the forms and complete them. Get help if you need it.
- Try to get two supporting affidavits from other people who have witnessed the abuse.
- When you return the forms and any supporting affidavits to the Clerk of the Court, the Clerk will send them to the magistrate.
- The magistrate will decide if the harm is imminent (immediate and serious), and will then issue an *interim* (temporary) protection order with a warrant of arrest.
- The defendant will receive a summons with a return court date, and a hearing will be held for both parties to voice their views to the court. If the applicant is successful, the magistrate will issue a final protection order with a suspended warrant of arrest.

Depending on the facts, the magistrate can make any of these orders:

- The police to go and take away any dangerous weapons from the abuser.
- A police officer to go with you to collect your things.
- The abuser to move out of the home.
- The abuser to continue paying the rent or bond to provide housing for you.
- The abuser to pay money to help you survive.

If the abuser does not obey the protection order⁵⁵, the applicant must inform the police officers, and they will arrest him. Then he will appear in court for disobeying the order, which is a criminal offence.

⁵⁵ Please find the application for a protection order form on the: www.justice.gov.za/forms/dva/dva_form_06.pdf.



REPUBLIC OF SOUTH AFRICA
FORM 6
 [Regulation 8(a)]
PROTECTION ORDER

SECTION 6 OF THE DOMESTIC VIOLENCE ACT, 1998 (ACT NO. 116 OF 1998)
(This form must be completed if an interim protection order was issued in terms of section 5(2))

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF _____

HELD AT _____ APPLICATION NO. _____ / _____

In the matter between:

APPLICANT: _____
 (*Id.No./Date of Birth: _____)

AND

RESPONDENT: _____
 (*Id.No./Date of Birth: _____)

Whereas the Applicant successfully applied for a protection order which was issued on the day of, and **after** considering the facts of the matter;

The Court orders that the attached interim protection order be :

- 1.*Confirmed;
- 2.*Amended as follows: _____

 _____; or
- 3.*Set Aside.

A copy of this order and interim protection order, as well as the warrant of arrest for the Respondent must be forwarded to the Police Station.

Dated at _____ this ____ day of _____ year _____.

MAGISTRATE _____
DATE

*Delete whichever is not applicable
 Department of Justice and Constitutional Development

Figure 29: Protection order form under the Domestic Violence Act



13.3 Protection from harassment

On 27 April 2013, the Protection from Harassment Act 17 of 2011 came into operation. *The Act aims to:*

- Provide for issuing protection orders against harassment.
- Give people who are harassed an effective remedy.

13.3.1 What is harassment under the Protection from Harassment Act?⁵⁶

Under the Act, there are different kinds of harassment:

- **Direct or indirect harassment:** conduct that causes harm or makes the person complaining of harassment (the *complainant*) reasonably believe that harm may be caused.

E EXAMPLES

- Watching, pursuing or accosting the complainant or someone in a close relationship with the complainant such as a spouse or family member.
 - Loitering outside or near the building or place where the complainant or related person lives, works, studies or happens to be.
- **Harassment by communication aimed at the complainant**, including:
 - ~ Verbal communication.
 - ~ Electronic communication that causes harm or makes the complainant feel in danger of being harmed.
 - ~ Written communication, such as letters, packages and e-mails.
 - **Sexual harassment:** “any unwelcome sexual attention from a person who knows or who reasonably know that such attention is unwelcome.”

⁵⁶ Article drafted by Louise Bick, Pro Bono head at Werksmans Attorneys <http://www.skills-universe.com/profiles/blogs/how-the-new-protection-from-harassment-act-protects-you>.

E EXAMPLES

- Unwelcome behaviour, suggestions, messages or remarks of a sexual nature that have the effect of “offending, intimidating or humiliating” the complainant or a person who has a close relationship with the complainant.
- Promises of reward for fulfilling a sexual request or punishment for refusing a sexual request.

So we can see that harm under the Act includes an extremely wide range of categories: mental, psychological, physical and economic harm.

13.3.2 Who is protected from harassment?

Anyone who believes they are being harassed by another person can apply for a protection order under the Protection from Harassment Act.

E EXAMPLES

- A child under 18, or a person on behalf of a child, may apply for a protection order. This can be done without the assistance of the child’s parents.
- If a person is not able to apply for a protection order for him/herself, another person who has a real interest in the well being of the person experiencing the harassment can apply for a protection order on that person’s behalf, for example: protecting people with disabilities.
- A person wishing to get a protection order for harassment does not have to prove the existence of a domestic relationship, for example: a marriage, family or sexual relationship.
- The Protection from Harassment Act does not stop you from applying for a protection order if you are in a domestic relationship – this means that you can choose to get a protection order under the Protection from Harassment Act instead of the Domestic Violence Act.
- If someone is harassing you electronically over the internet or by email, and as a result you don’t know who they are, the Act allows the court to request details of this person from the electronic communications service provider. Or the court can order an investigation by the police into the name and address of the person who is harassing you.

13.3.3 What protection from harassment is available?

The Protection from Harassment Act allows for a special process where an initial court order is made without the immediate knowledge of the person who is harassing the complainant, based only on the complainant's side of the story:

- The court must be satisfied that there is clear evidence that the complainant is being or may be harassed, and that harm is or may be suffered if the protection order isn't granted immediately.
- The court will set a future date for the person against whom the protection order is brought to oppose the interim protection order being made a final court order.
- The court can prohibit a person from engaging in or attempting to engage in harassment or enlisting the help of another person to engage in harassment or committing any act listed in the protection order.
- Together with granting a protection order, the court can issue a warrant of arrest. Then, if the person disobeys the protection order by continuing to harass you, the police may immediately arrest that person.
- Not obeying a final protection order is a criminal offence and the person may be liable on conviction to a fine or imprisonment for up to 5 years.

Where do you go to get a protection order?

You can apply to:

- Any Magistrate's Court where you live or work, or
- Any Magistrate's Court where the person who is causing the harassment lives or works, or
- Any Magistrate's Court at the place where the harassment took place.

How do you apply for a protection order?

T TIPS

You apply for a protection order is by completing an application form:

- As the complainant, you set out reasons why a protection from harassment order is needed and you list full details of all incidents of harassment.
- You can include specific acts committed by the person causing the harassment to be listed in the protection order.
- You can request the court to add any additional conditions necessary to protect you, and provide for your safety and well being.
- You can ask that your physical home or work address should be left out of the protection order given to the perpetrator to further protect you.

Under the Employment Equity Act, the harassment of an employee is a form of unfair discrimination and section 10(6) of the EEA provides remedies for survivors of sexual harassment in the workplace. As a result of the Protection from Harassment Act, it will now be possible for an employee to get (in addition to the provisions of the EEA) a protection order against an abusive employer or colleague.⁵⁷



Note

All Protection from Harassment Act forms are available at http://www.justice.gov.za/forms/form_pha.html.

Here is the form for applying for a protection order from harassment:

⁵⁷ Written by Jan du Toit, who can be contacted at jand@labourguide.co.za.



Figure 30: Protection order form under the Protection from Harassment Act]

1

FORM 2
[Regulation 3]
APPLICATION FOR PROTECTION ORDER
SECTION 2(1) OF THE PROTECTION FROM HARASSMENT ACT, 2011 (ACT NO. 17 OF 2011)

In the Magistrate's Court for the District of

Application number:20.....

Name of complainant:

This form is to be lodged with the clerk of the court

Is the complainant in possession of or in the process of applying for a protection order against harassment or stalking as provided for in the Domestic Violence Act, 1998 (Act No. 116 of 1998).	Yes	No
---	-----	----

PART A : APPLICATION

(*Delete whichever is not applicable)

1. PARTICULARS OF COMPLAINANT

Surname:	
Full names:	
Identity number:	
Date of birth:	
Home or temporary address:	
Home/contact telephone number/s:	
Work address:	
Work telephone number:	
Occupation:	

***3. PARTICULARS OF RELATED PERSON/S AFFECTED BY HARASSMENT (A RELATED PERSON IS ANY MEMBER OF THE FAMILY OR HOUSEHOLD OF A COMPLAINANT, OR ANY OTHER PERSON IN CLOSE RELATIONSHIP TO THE COMPLAINANT):**

Name:	Age:	Relationship to complainant:

4. INFORMATION REGARDING ACTS OF HARASSMENT

(Take note:

- (a) Supporting affidavits by persons who have knowledge of the matter concerned may accompany this application and must be annexed as an annexure to this form.*
- (b) If reference is made to any documents, photographs, recordings, videos etc. —*
 - (i) the original thereof must at all times be kept by the complainant for purposes of submitting it as evidence in this application and a subsequent hearing that may take place;*
 - (ii) copies of documents and photographs may be attached to this form as an annexure; and*
 - (iii) copies of audio and video recordings may also be attached to this form as an annexure if it is furnished on a CD, DVD or other computer readable device and in a computer readable format and sealed in an envelope.)*
- (c) TAKE NOTE: All annexures to this document must be —*
 - (i) numbered alphabetically starting with "A"; and*
 - (ii) listed under paragraph 10, below.*

5. PARTICULARS OF RESPONDENT (PERSON RESPONSIBLE FOR HARASSMENT OF THE COMPLAINANT OR RELATED PERSON):

***5.1 To be completed where the respondent is known to the complainant:**

Surname:	
Full names:	
Home address:	
Address where respondent can likely be found:	
Telephone number: Facsimile number: E-mail address: Cellular phone number:	
Work address:	
Work telephone number:	
Occupation:	

***5.2 To be completed where respondent is unknown to the complainant and uses electronic communications to harass complainant:**

The name of the service provider which provides a service to the complainant or related person over which the harassing communication was received (for example XYD Internet service provider which provides an internet service to the complainant/related person who is the owner/user of the computer which received a harassing e-mail):	
The electronic communications identity number associated with the aforementioned service to which the harassing communication was sent (for example the Internet Protocol (IP) address assigned to the computer of the complainant/related person or cellular phone number or telephone number which received the harassing communication):	
The electronic communications identity number from where the harassing communication originated, where available (for example the e-mail	

address and/or IP address accompanying the harassing electronic communication or a web-address which contains harassing content or cellular phone number from which the harassing communication originated):	
Date, time and duration of harassing communication, if applicable (for example the complainant received a harassing cellular phone call on 12 December 2012 at 12h00 which lasted 12 minutes):	

***5.3 To be completed where respondent is unknown to the complainant and physically harasses the complainant:**

Will you be able to identify the respondent:	Yes	No
--	-----	----

(a) Description of respondent:

.....

(b) Location where respondent can probably be found:

.....

(c) Any other information that might assist the South African Police Service in tracing the respondent:

.....

(d) (i) Did the complainant or related person make a statement under oath or affirmation at a police station that he or she intends to apply for a protection order against harassment against a person whose name and address are unknown to the complainant: *Yes/*no.

(ii) If the answer under paragraph (d)(i) is yes, please state the following particulars

7. TERMS OF PROTECTION ORDER

The court is requested to —

7.1 prohibit the respondent from —

***7.1.1 engaging in or attempting to engage in harassment of the complainant;**

***7.1.2 engaging in or attempting to engage in harassment of the related persons whose particulars are provided in paragraph 3, above;**

***7.1.2 enlisting the help of another person to engage in harassment of the *complainant/*related person;**

***7.1.3 committing any of the following act/s:**

(a)

(b)

(c)

***7.2 impose the following additional conditions that are necessary to protect and to provide for the safety and well-being of the *complainant/* related person:**

(a)

(b)

(c)

***7.3 order (mark appropriate space and complete where necessary):**

*(a)	That a member of the South African Police Service is to seize the following weapon(s)	
*(b)	That a member of the South African Police Service is to accompany the complainant or related person to the following residence:	
 to supervise the collection of the complainant's or related person's personal property set out in paragraph 8, below.	
*(c)	That the station commander of the police station must investigate the matter with the view to instituting a criminal prosecution against the respondent.	

***8. PERSONAL PROPERTY**

<i>Property description:</i>	<i>Grounds on which property is considered to be personal property:</i>	<i>Address where property is kept:</i>

9. POLICE STATION WHERE BREACH OF PROTECTION ORDER WILL LIKELY BE REPORTED

I am likely to report a breach of the protection order at the

 Police Station.

10. INDEX OF ANNEXURES TO THIS FORM

Mark each Annexure alphabetically, starting with "Annexure A", and attach it to this form.	Give short description of Annexure, for example "statement of witness X", "CD with photographs".

WARNING:

- * It is a criminal offence to make a false statement in an affidavit for the application for a protection order.
- * The court may make an order as to costs against a party if it is satisfied that the party in question has acted frivolously, vexatiously or unreasonably.

.....
 *Signature/*thumb print /*mark of *complainant/*person who applies for a protection order on behalf of the complainant

.....
 DATE

PART B : CERTIFICATION

I certify that before administering the *oath / * taking the affirmation I asked the Deponent the following questions and noted *her/his answers in *her/*his presence as indicated below:-

- (a) Do you know and understand the contents of the above declaration?
Answer:
- (b) Do you have any objection to taking the prescribed oath?
Answer:.....
- (c) Do you consider the prescribed oath to be binding on your conscience?
Answer:

I certify that the Deponent has acknowledged that *she/*he knows and understands the contents of this declaration which was *sworn to / *affirmed before me, and the Deponent's *signature / *thumb print / *mark was placed thereon in my presence.

Dated at this day of 20.....

Justice of the Peace / Commissioner of Oaths

Full Names:

Designation:

Area for which appointed:

Business Address:

To be completed by the clerk of the court

PART C:

1. I,, the clerk of the above-mentioned court, received the application for a protection order on (date): (time):

2. I have completed the attached acknowledgement of receipt and handed it to the person who lodged this application for a protection order.

PART D:

The application for a protection order was submitted to (name and surname of magistrate): on

(date):..... (time):

Signature of clerk of the court:





Acknowledgement of receipt of application for a protection order by clerk of the court

(Take note: This acknowledgement of receipt must be handed to the person who lodges the application with the clerk of the court)

Application number:20.....

Name of complainant:

I,, the clerk of the Magistrate's Court for the District of, hereby acknowledges receipt of the application for a protection order against harassment.

Signature of clerk of the court:

Date: Time:



HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE

HEALTH

DATE: _____ NAME: _____

PROVINCE: _____ AREA: _____

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym)
 (Optional): _____
2. Age(optional): _____
3. Telephone no/ contact number you can be reached at (Optional): _____
4. Address: _____
5. Where do you work? _____
6. Please circle/tick-
 Gender: Male Female Transgender man Transgender woman
 Indoor Street-based Both:
 (explain) _____
7. What hospital / clinic did you go to:

8. What is the issue:

9. How were you treated by the hospital / clinic staff:

10. Did they give you the medication that you need?

11. Any other issue relating to the access to health care that you would like to raise

12. What legal remedies are you seeking? _____

13. Plan of action

WLC: _____

SWEAT: _____

Attach any additional case notes.

Paralegal Advice

Assent / Confidentiality

Does the source give his/her assent to share the information (with the authorities, the media)?

Can the source's name be used?

Can we forward your story to SWEAT to be used for advocacy?

Is it necessary for any information to be confidential? Why? Until when?

Experiences of sex workers with health and welfare services

Sex workers have limited access to health and welfare services because they are afraid that, if they seek these services and disclose their occupation, they will be arrested or unfairly discriminated against.

This forces the sex work industry underground making it very difficult for health service providers to properly serve sex workers:

- Sex workers have reported situations where health care officials refuse treatment, provide inadequate treatment and make very abusive remarks when discovering or even suspecting the person is a sex worker. Decriminalising sex work would greatly assist sex workers to access health services without being afraid to disclose their occupation.
- Sex workers do not have proper working conditions and therefore many are vulnerable to HIV and AIDS. Most sex workers work in unhealthy and unregulated conditions, where there is little or no promotion of safer sex, where the manager encourages a high turnover of clients and provides little or no control over clients' behaviour.⁵⁸
- Sex workers with HIV or AIDS complain that they are treated badly at hospitals and clinics. Sometimes medical staff refuse to treat patients who have HIV

58 UNAIDS Guidance Note: HIV and Sex Work, 2007 at 2.

or AIDS. People also complain that information about their illness is not kept confidential. UNAIDS suggest that decriminalisation is a necessary step to addressing HIV vulnerability amongst sex workers.⁵⁹

Our work in WLC and SWEAT confirms that many sex workers have poor access to adequate health services and HIV prevention measures, post-exposure prophylaxis after rape, emergency contraception, management of sexually transmitted infections, drug treatment, and other harm reduction services. Sex workers face many barriers in accessing their health needs such as unfair discrimination and constant harassment from law enforcement officials.

Sex workers can bring civil and criminal claims, if their health and medical rights have been violated. Therefore these rights will be explained below.

14.1 Confidentiality

Confidentiality means that doctors, nurses, psychologists, dentists and other health care workers have a moral and legal duty to keep all information about patients confidential.

Any information about the patient's illness or treatment cannot be given to another person unless:

- The patient *consents* (agrees) to this.
- The information is about the illness or treatment of a child – then health workers can tell others but only with the permission of the child's parent or guardian.
- The patient is dead – then the doctor must get permission from the *next-of-kin* (the person's closest family).

59 UNAIDS Global Reference Group on HIV, AIDS and Human Rights, 2003.

C CASE STUDY

Confidentiality

In the well-known McGeary case, the Supreme Court of Appeal said that a doctor cannot tell other doctors about the HIV status of a patient without the patient's consent.

McGeary applied for a life assurance policy. The insurance company told him to have an HIV test before they could approve his application. The doctor got the results of the HIV test and told McGeary that he was HIV positive.

The next day the doctor played golf with another doctor and a dentist. During the game they discussed AIDS and McGeary's doctor told the other two that McGeary was HIV positive.

The news of McGeary's condition spread around the small community. McGeary began a civil claim to get compensation from his doctor for breaking his rights to confidentiality. The Court said the doctor had to pay McGeary compensation for not respecting his right to confidentiality.

14.1.1 Some rules about confidentiality

T TIPS

Telling other health care workers

A health care worker must get a patient's permission before giving any of the patient's medical information to another health care worker or to another health care centre.

Telling a patient's sexual partner

A health care worker may not tell the patient's sexual partner that the patient has HIV, unless the partner appears to be at risk because the patient refuses to practise safer sex. The health care worker must counsel the patient on the need to tell their sexual partner and to practise safer sex. The health care worker must then warn the patient that if he/she does not tell their sexual partner or practise safer sex, then the health care worker will have to tell the partner about the person's HIV status.

Telling a court

A court can order a health care worker to give them confidential information.

CASE STUDY

Confidentiality

A sex worker goes to the clinic for HIV testing. The nurse, who tells her that she is HIV positive, is a friend of her family. The nurse tells other friends she is living with HIV: what rights and remedies does she have?

Answer: The sex worker has a right to confidentiality around her HIV status. She can make a complaint to the South African Nursing Council, and also bring a civil claim against the nurse and the clinic.

14.1.2 Confidentiality and openness

HIV and AIDS are not openly discussed mainly because many people living with HIV fear stigma (negative attitudes) and unfair discrimination if they tell people. Communities need to be educated about HIV and the supportive role they can play in the lives of people living with HIV.

In this way people may be encouraged to be more open about their HIV status and to get the health support they need. Some people choose to be open about their HIV status to some people, such as family and close friends, but this does not mean they lose their right to confidentiality with a doctor, nurse, health care worker or employer. A person's right to privacy and confidentiality must always be respected.

14.1.3 Remedies if a health care worker abuses your right to confidentiality

You can complain to the Health Professions Council of South Africa (HPCSA) or the South African Nursing Council (SANC). You can also make a civil claim for damages (compensation) against the health care worker, hospital or clinic, or any member of the public who has abused your rights.

14.2 HIV testing and informed consent

Everyone has the right to make their own decisions about their body, so no patient can be given medical treatment without their consent.

Consenting to medical treatment has 2 parts to it:

- Having the information you need to agree to have an HIV test or get medical treatment (understanding), and
- Giving permission for the HIV test or medical treatment (agreeing).

E EXAMPLE

Thami is a care-giver in a children's home. The matron informs him that all staff in the hospital must have a Hepatitis B test.

Thami agrees to this, but the hospital does an HIV test too, saying it saves time and money to do both tests at the same time. The matron tells Thami he is HIV positive. Thami is furious because he only gave permission for the Hepatitis B test.

The matron did not have a right to do the HIV test. She should have discussed it with Thami first and got his consent.

With an HIV test, you must know what the test is, why it is being done and what the result will mean for you before you agree to the blood sample being taken. This is called *pre-test counselling*.

After the HIV test results have been received, you must be counselled again to

help you understand and accept the effect that an HIV negative or HIV positive result will have on your life. This is called *post-test counselling*.

14.2.1 General rules about HIV testing and consent

Remember:

- You can give verbal or written consent to have an HIV test.
- If you go to hospital, you cannot be tested for HIV without your consent.

14.2.2 Exceptions to the rule of informed consent

T TIPS

These are the exceptions to the rule that a person must give their consent to treatment or an operation:

- If a patient needs emergency treatment.
- HIV and other testing done on blood donations.
- Mentally ill patients: the mental hospital must get permission from one of these people: the patient's spouse, parent, child (if the child is 21 or older), brother or sister.
- HIV tests are routinely done on the blood of all pregnant women for health research, but the name of the woman is not attached to the blood sample, so no one knows whose blood it is.

14.2.3 Who can give consent?

Adults who are of sound and sober mind can give consent to medical treatment. Children of 14 or older can also give their own consent to medical treatment.

14.2.4 What can you do if an HIV test was done without your consent?

If an HIV test was done without consent, your rights have been abused. You can complain to the Health Professions Council of South Africa (HPCSA) or the South African National Nursing Council (SANC). You can also bring a civil claim for invasion of privacy, and a criminal charge of assault against the health care worker or the person they were acting on behalf of (for example: the clinic, an employer).

CASE STUDY

Workplace HIV testing without consent

In the case of A v South African Airways (SAA), in the Johannesburg Labour Court, A had applied for a job with SAA as a cabin attendant. He was asked to sign a consent form for an HIV test, but the test was not explained to him.

'A' was therefore tested without informed consent and without any pre- or post-test counseling.

SAA admitted that they had not followed the rules on HIV testing and informed consent. The court ordered them to pay compensation to A.

14.3 The right to health care and medical treatment

Everyone has the right of access to health care services and medical treatment, including access to affordable medicines and proper medical care.

The right to access to health care services includes the right to proper care from a health care worker. *This means it is against the law for a health care worker to:*

- Refuse to treat a person who is living with HIV.
- Treat people with HIV differently to other patients.

The right to health care includes providing medical treatment to people in need. The government has committed itself to making antiretroviral (ARV) treatment available to all people who need ARVs and the roll-out of treatment should be available in all provinces. A sex worker or anyone person who wants to receive ARVs must be

medically certified by a State doctor at a public clinic or by your own private doctor.

14.3.1 Remedies if your right to health care and medical treatment has been refused

If a hospital or clinic refuses to treat someone living with HIV, they can be reported to the Department of Health, the Public Protector or the South African Human Rights Commission. The case can also be taken to the High Court, which can review and cancel the hospital's decision to refuse to provide treatment.

Family law

Learning objectives

- To understanding family law issues.
- To know the law relating to divorce and the legal consequences of divorce, including the impact on children.
- To know the law around maintenance and custody.

This chapter addresses issues related to the family of a sex worker, such as divorce, maintenance and custody.

Note

If a client approaches you with a family law-related issue, please complete our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: FAMILY on the following pages.



HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE

FAMILY LAW MATTERS

DATE: _____

NAME: _____

PROVINCE: _____

AREA: _____

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym)

(Optional): _____

2. Age(optional): _____

3. Telephone no/ contact number you can be reached at (Optional): _____

4. Address: _____

5. Where do you

work? _____

6. Please circle/tick-

Gender: Male Female Transgender man Transgender woman

Indoor Street-based Both:

(explain) _____

Divorce

7. Does he know that you are a sex worker?

Yes	No
-----	----

8. Is he using the fact that you are a sex worker against you?

Yes	No
-----	----

9. Explain the reasons for the breakdown of the marriage. _____

10. Was he ever abusive towards you?

Yes	No
-----	----

If yes please fill out 6.5 domestic abuse section of this form.

11. Do you have children together?

Yes	No
-----	----

12. Children's details. Age/names/where are they living: _____

13. Was he ever abusive towards the children?

Yes	No
-----	----

If yes please fill in section on children below

14. Is he fighting for custody of the children?

Yes	No
-----	----

15. His contact details:

Name: _____

ID Nr: _____

Home address: _____

Work details: _____

16. When were you married? _____

17. How long have you been separated? _____

18. Are you married in community of property, anti-nuptial contract, accrual or customary/religious?

19. What legal remedies are you seeking? _____

Children

20. Please select from list. Please tick the appropriate box.

Issues of child abuse	
Underage sex work	
Child custody <i>If custody please refer to divorce section above.</i>	
Other	

21. Is this involving you own children?

Yes	No
-----	----

22. If not your own children please provide details of whose children are involved. ____

23. Has this matter been reported to any child welfare organisation?

Yes	No
-----	----

24. What legal remedies are you seeking? _____

25. Plan of action

WLC: _____

SWEAT: _____

Assent / Confidentiality

Does the source give his/her assent to share the information (with the authorities, the media)?

Can the source's name be used?.....

Can we forward your story to SWEAT to be used for advocacy?

.....

Is it necessary for any information to be confidential? Why? Until when?

15.1 Grounds for divorce

Irretrievable breakdown of the marriage

This means the couple can no longer live together. Both partners (or at least one partner) must prove to the court that the marriage broke down so badly that there is no reasonable chance of getting back together.

E EXAMPLES

Examples of evidence the court will accept as proof of irretrievable breakdown:

- The couple have not lived together as spouses for a period of time.
- One partner had sexual intercourse with somebody else and because of this the other partner finds it impossible to continue living together as spouses.
- One partner is in prison after being declared a 'habitual criminal' – this means he/she keeps committing crimes and, because of this, was sentenced to 10 to 15 years in prison.
- One partner deserted the other.
- One partner abused the other, for example: the husband keeps assaulting the wife.
- One partner is an alcoholic or a drug addict.
- The partners no longer love each other – they may be too different or they married when they were too young.
- One of the partners finds it impossible to live together as spouses for any other reason.

Mental illness or unconsciousness

The person wanting the divorce must show the court that the other spouse was admitted to or detained in a mental institution. The person must also show that the spouse has been in the institution for at least 2 years and that the doctors do not think he/she can be cured.

A person can also get a divorce if the other spouse is permanently unconscious. The spouse must have been unconscious for at least 6 months, and the doctor must see no hope of recovery.

15.2 African Customary Marriage

What is a customary marriage?

A customary marriage is one according to the traditional customs and culture of South Africa's indigenous people.

Are customary marriages legally recognised?

In terms of the Recognition of the Customary Marriages Act of 1998, Parliament provided for the legal recognition and protection of customary marriages. This Act came into effect on the 15 November 2000. If a couple got married before this law was passed, the marriage will still have legal recognition and protection if it complies with the customary law and was still in existence after the implementation of the Act. If the person's spouse died or they got divorced before the Act came into force, the marriage will not be protected by this Act. Monogamous customary marriages are automatically in community of property unless the parties do a contract stating otherwise.

What are the requirements for entering into a customary marriage in terms of the Act?

There are 3 conditions for a customary marriage to be legally valid. First, both parties must be over the age of 18 years. Second, they must both agree to be married under customary law. Third, their marriage must be celebrated according to the prevailing customary law of their community.

What does this Act say about polygynous marriages?

The Act does make provision for a man to enter into multiple marriages. The Act stipulates that in the event that a man wishes to enter into a polygynous marriage he has to apply to the court for permission. In his application he must set out the property systems for all of his wives.

How to end a customary marriage

Customary marriages can only end if there is a court order:

- The grounds for divorce for civil marriages are now the same for customary marriages. In other words, if the court agrees that there has been an 'irretrievable breakdown' of the marriage, then it will agree to dissolve the marriage.
- The spouses are free to settle on any terms they choose, but the court will make an order on the custody and guardianship of any minor children.

- The court may also make an order for maintenance to be paid, taking into account any arrangement that may have been made under customary law.

Under the customary agreement between the spouses, the wife's family may have to return at least part of the *lobola* (money or cattle paid for a bride) to the husband's family. If the husband publicly rejects his wife for no reason at all, he will not get any lobola back. But if the husband has what is considered a just reason to reject his wife, he may ask for the lobola back.

A husband may be considered to have good reason for rejecting his wife if she neglects her duties in the home, or neglects her children, or denies him sexual intercourse. If the wife sometimes sleeps with another man, this may not be considered enough reason for a man to reject her, but continual unfaithfulness may be considered a good reason for ending the union.

A wife may be considered to have good reason for deserting her husband if he accuses her falsely of witchcraft, or ill-treats her unreasonably or abandons her.

Ending a Muslim or Hindu marriage

If a man and woman were married by an imam in the Muslim religion, or a priest in the Hindu religion, but they did not also have a civil marriage, the law says they were not lawfully married. So they don't need to use the court if they want to get divorced.

Our courts partly recognise Muslim marriages, so for example a Muslim wife can claim from the husband's estate as his spouse.

There is a draft bill before Parliament that will be used to recognise religious marriages.

15.3 Divorce procedure

When a couple get divorced, they must make a number of arrangements. *The most important arrangements the couple must make are:*

- Custody of the children.
- Access to the children.
- Maintenance of the children.
- Maintenance for one partner, often the wife.
- Dividing up the family property.

Custody and maintenance of children are the most important things to arrange. A court will not let a couple get divorced until it is sure that there are satisfactory arrangements for the children. A social worker called a Family Advocate assists the court to sort out the children. The court must decide which parent will have custody of the children and who will be responsible for the maintenance of the children. The court also decides in what way and how often the other parent can see the children, called access to the children.

15.4 Custody of the children

Custody means care of the children. The law says that children must always have an adult to look after them. The court always thinks hardest about the interests of the children, not just the interests or wishes of the parents:

- If the parents can't agree on who should have custody of the children, then the court looks to see which parent can best look after the children.
- Often the court asks welfare officers to talk to the parents and then give the court a report. Usually the court gives custody to the mother, especially if the children are very small.

Family Advocate

The court can also ask the Family Advocate to hold an enquiry to see what would be in the best interests of the children who are under 21. The Family Advocate could look at guardianship, custody and custody rights.

There is a Family Advocate's office in each division of the High Court (where divorces are heard). The Family Advocate holds an enquiry and makes a recommendation and report to the court. If the parties don't settle the matter out of court, then the Family Advocate also goes to court to represent the interests of the children.

One of the parents can also ask the Family Advocate to hold an enquiry. For example, the husband sues for divorce and asks for custody of the children. But the wife also wants custody. Then either of them can complete an 'Annexure B' form which asks the Family Advocate to enquire into the problem.

You can get an 'Annexure B' form from the Registrar of the High Court, a lawyer, Legal Aid or from the Family Advocate. The Family Advocate does not charge the parent for holding the enquiry.

Application for interim custody

- If the woman wants custody of the children while the divorce is happening, she can make an application for interim custody. This means she asks the court to give her custody in the meantime, until the divorce court decides. It will help if she can prove to the court that her husband is bad to the children.
- If the woman is really worried that the children are suffering, she can make an *urgent application for interim custody*. She asks the court to give the children to her quickly.
- Sometimes when the mother and father are getting divorced, the father may try to steal the children from the mother. He may demand to see the children, and then refuse to let them go back to their mother. If this happens, the woman can also make an *urgent application for interim custody* to make her husband give the children back to her.

After the divorce, if the court said the mother must have custody, the father may still try to take the children away from her. Then she can ask the court for an *interdict*. This is an order to force the father to give the children back to her, and not to steal them again.

The final divorce order can also be taken to a police station. The police may then help the parent who has custody of the children.

In African, Hindu and Muslim customary marriages, the wife usually takes custody of the children. According to African customary law, the father usually remains the children's natural guardian. The children of Hindu and Muslim marriages are still regarded as illegitimate, so the mother is also the natural guardian. Under civil law, the father still has a duty to support his children.

15.5 Access to the children

The court usually gives the parent who does *not have custody* the right to visit the children. This is called access to the children. The court usually gives the parent who does not get custody a 'right of reasonable access' to the children. *Reasonable access* usually means that the children spend every second weekend and every second long and short school holidays with the parent who does not have custody.

If the parent asking for custody does not think the other parent should have 'reasonable access' to the children, he/ she can ask that the access be restricted. The parent with custody of the children must give good reasons why access should

be restricted, for example: that the parent abuses the children or has a serious drinking problem and will not look after the children.

If the father gets access, this does not mean that he has the right to see the children in the mother's home.

15.6 Maintenance of the children

Although maintenance for the children is paid to the parent who has custody, maintenance is a right which the children have, not either one of the parents. Parents have a duty to support their children, including children who are currently illegitimate such as children of Hindu or Muslim customary marriages.

When the court gives one parent custody, it usually also makes a maintenance order. The court usually orders the father to pay maintenance for the children. This is because the father is usually the breadwinner in the family. But the mother must also use her own money to help bring up the children if she can.

Sometimes a husband does not pay maintenance for his wife and children, even though the court said he must pay. Then the wife can go to the Maintenance Court for an order against her ex-husband. This order will force him to pay maintenance. It is a criminal offence not to pay.

15.7 Maintenance for the wife

In a marriage, both partners have a duty to support each other and any children. It is often the woman who takes care of the home and children more than the man. So the wife often cannot earn as much as the husband. Then the husband has a duty to support the wife and children with money to buy the things they need.

If they get divorced, the wife can claim maintenance for herself from the husband, at least until she finds a decent job:

- She should always claim this money at the time of the divorce. Otherwise she will not be able to claim anything from her ex-husband in future.
- The wife and the husband can agree on what amount he will pay her. Or if they cannot agree, she should tell the court what amount she wants. If the court agrees that the wife should get maintenance, then the court will order the man to pay.
- The woman can always ask the court to increase the amount later, if her needs change.

- If the wife earns more than the husband, he can apply for maintenance from her at the time of the divorce.

Because Hindu or Muslim marriages are not fully recognised as legal marriages at the moment, the wife has no legal status to claim support after divorce. However the WLC recently litigated the Prague case, where a woman married under Hindu rites received spousal maintenance after divorce.

15.8 How to get maintenance through the Maintenance Court

Imagine a woman was married for 7 years and has two children aged 4 and 7. She would like to claim maintenance from the father of the children. How can she claim maintenance?

15.8.1 What does the law say?

Both parents have a legal duty to support their children, including illegitimate children. This duty of support ends when the children become independent, for example: when they marry or when they become self-supporting. One parent can apply to the Maintenance Court for the other parent to pay support for their children. Once there is a court order instructing a parent to pay child support, it is a criminal offence not to pay.

For children up to the age of 14 you can also apply to the Department of Social Development (DSD – represented by the South African Social Security Agency (SASSA) for a Child Support Grant if you comply with the means test.

There are special Maintenance Courts at every Magistrate's Court. Maintenance clerks working in these courts help people who want to apply for maintenance and also deal with applications to get more or to pay less maintenance.

15.8.2 What can you do?

Check when applications can be made at the Maintenance Court, as some Maintenance Offices are only open on some days of the week.

TIPS

These are the steps you must follow:

- Go to the Maintenance Office at the Maintenance Court in your area.
- Take with you:
 - ~ The name and address of the father, as well as details of where he works.
 - ~ Photographs of the father (if available) so that the court can identify him.
 - ~ If you were married and are now divorced, a copy of the divorce order.
 - ~ Proof of your income (like a wage slip or your UIF blue card if you are unemployed).
 - ~ Your papers, receipts and accounts, showing all the things you must pay every month.
- The maintenance officer sends a letter, called a summons, to the father asking him to come to the maintenance office on a certain date.
- On the date, you and the father must go to the office. You must try to agree on how much the father must pay for his children.
- The maintenance officer will work out with you all the things you must pay for every month, how much money you earn and how much money the father earns. Then you can see how much you need from the father.
- It is important to get the court to make an order to do a paternity test if the father denies that he is the father.
- If you agree on how much the father must pay for his children, the maintenance officer will get both of you to sign a paper called an 'order of court'. This states how much, when and where it must be paid.
- If you do not agree, then the officer will say your case must go to the Maintenance Court on a certain date. The court will warn both parties verbally of the date that they must appear in court.

The court hearing

If the father does not come to court on the date that he was supposed to, and he has been properly informed, you can ask that a *default order* is made in his absence. Often the court issues a warrant for his arrest instead of giving a default order. It is better for you to get a default order: otherwise there is more delay in getting the maintenance.

If the father seems to have disappeared, then the court can order any person who knows where he is to come to the court and tell them where he is. It is the responsibility of the State to trace the father. However this can very difficult. It may be an idea to claim maintenance from the grandparents, as this sometimes brings the father out of hiding.

At the maintenance enquiry:

- The magistrate listens to both parties and finds out how much their income and expenses are every month.
- The magistrate then decides how much the father must pay for his children. The magistrate makes this amount an order of court, in writing. This is called a *maintenance order*.
- Then the father must pay that amount every week or month to the maintenance office or into the mother's bank account.
- The court can also order a stop order to be put on the person's account without their consent.
- If the father is out of work, he will not have to pay maintenance straight away. The magistrate will tell him that he has a certain time, say 3 months, to look for work. He will be given a form to be signed by employers he has approached if they do not give him a job. The enquiry will then be postponed to a future date.
- Once he has work, an enquiry will be held and the magistrate will make an order. But if the father stays out of work a long time, and doesn't look hard to find work, the magistrate might send him to jail for not paying support. If the father stays out of work a long time, you can try claiming maintenance from the grandparents, as they have a duty of support towards their grandchildren if the parents can't support the children.

15.9 Dividing up the family property

T TIPS

If the couple were married in community of property

The joint estate is divided into two equal halves. One half belongs to each spouse. If they cannot agree about how to share the property, the court must decide. The court may order one partner to forfeit his/her benefits from the marriage.

Non-Africans married before 1 November 1984 out of community of property

Each partner keeps his/her own property. They also take any property which the antenuptial contract says they must get. If they cannot agree about how to share the property, again the court must decide. The court can give the wife extra money if she helped to bring up the children or supported the husband in other ways.

Africans married before 2 December 1988 out of community without an ante-nuptial contract

Each partner keeps his/her own property. If they cannot agree about how to share it, the court decides.

Non-Africans married after 1 November 1984 and Africans married after 2 December 1988 out of community of property with an antenuptial contract which keeps in the accrual system

Each partner keeps his/her own property which they brought into the marriage. Any increase during the marriage in the value of either partner's property is shared equally between them.

Non-Africans married after 1 November 1984 and Africans married after 2 December 1988 out of community of property with an antenuptial contract which excludes the accrual system

Each partner keeps his/her own property. They also take any property which the antenuptial contract says they must get. If they cannot agree about how to share the property, the court decides.

15.10 Housing

A big problem for women is that they might lose their houses when they divorce. There are some things women can do to make sure that they and their children have a place to stay

Bought houses

If the wife and the husband buy a house, it is a good idea to have the house put in the wife's name too.

Usually the house is bought and registered in the husband's name. This is a problem, because then most people think that he has a right to keep it if the couple divorce.

But this is not true. If you and your husband bought a house, and you were married in community of property, then you have a right to half of the property of the marriage.

If you are getting a divorce and you will have to look after the children, then you can ask that the house be given to you in the divorce. The father must make sure his children are properly cared for, so the judge will often give the house to the wife.

If your husband keeps the house, you can ask that he pays you out half the value of the house. Or you can ask him to sell the house and give you half the profits.

Rented houses

If two married people rent a house, the house is usually rented in the husband's name. If you are renting a house and you get divorced, you can ask your landlord to put the house in your name. The landlord will want to make sure that you have enough money to pay the rent, for example: that you have a job.

If you are renting from a local council, it is a good idea to get the house put into your name. Often after a divorce or separation, a woman does not want to live in the same house, because her ex-husband or ex-boyfriend knows where it is and still thinks he has a right to be there.

It is important that the woman keeps the house, because once she has a house in her name, she can apply to the council to swap the house with someone else who wants a different house. If she does not have a house in her name, then she has nothing to use in a swap.



Note

After all the above information on divorce is explained, they can go to the Legal Aid Board for assistance with divorce, or they can go to the Southern Divorce Court (if in the Western Cape).

Labour law

Learning objectives

- To understand labour law from the perspective of a sex worker.
- To know the key laws protecting employees in South Africa.
- To know how to enforce workers' rights and remedies under labour law.

This section covers key laws in South Africa which directly affect the working conditions of employees, and disputes in the workplace and ways of resolving these, for example: sex workers working in brothels.

Laws about terms and conditions of employment

- Basic Conditions of Employment Act 75 of 1997 (BCEA).
- Occupational Health and Safety Act 85 of 1993.

Laws on disputes and ways of settling disputes

- Labour Relations Act 66 of 1995 (LRA).
- Employment Equity Act 55 of 1998.

Note

If a client comes to you with a labour-related problem, please fill in our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: LABOUR on the following pages.



HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE

LABOUR MATTERS

DATE: _____ NAME: _____

PROVINCE: _____ AREA: _____

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym)

(Optional): _____

2. Age(optional): _____

3. Telephone no/ contact number you can be reached at (Optional): _____

4. Address: _____

5. Where do you work? _____

6. Please circle/tick-

Gender: Male Female Transgender man Transgender woman

Indoor Street-based Both:

(explain) _____

7. Do you have a problem with the manager or owner?

Yes	No
-----	----

8. What is the employer's name? _____

9. What is the employer's businesses name? _____

10. What is the employer's business address? _____

11. What is the employer's contact details?

Landline: _____

Cellphone: _____

Address: _____

Email: _____

Fax: _____

12. What is the nature of the dispute? Please tick the appropriate one.

Unfair Dismissal	
Organisation rights	
Changes to the conditions of employment	
Collective agreements	
Unfair labour practice	
Mutual interest	
Severance pay	
Disclosure of information	
Refusal to bargain	
Unfair discrimination	
Other?	

13. Summarise the facts of the dispute _____

14. What date did the incident occur? _____

15. What area did the dispute occur in? _____

16. Did the employer follow any internal procedures?

Yes/no _____

DISMISSAL – if it was a dismissal, please complete this section too.

17. When did you start working at the company? _____

18. How were you informed of the dismissal?

Orally	
In writing	
other	

19. What was the reason for dismissal?

Misconduct	
Incapacity	
Operational requirements	
Unknown	
Constructive	
Other	

20. Please tell us why the dismissal was procedurally unfair? Eg, not notice given

21. Please tell us why the reason that the employer gave was unfair? Eg not enough bookings

22. What legal remedies are you seeking?

CCMA	
In house mediation	
Compensation	

23. Plan of action

WLC: _____

SWEAT: _____

Assent / Confidentiality

Does the source give his/her assent to share the information (with the authorities, the media)?

Can the source's name be used?

Can we forward your story to SWEAT to be used for advocacy?

Is it necessary for any information to be confidential? Why? Until when?

As a paralegal, you will come across many sex workers who work in a brothel. Sex workers who work in brothels are employees and the brothel owners are the employers. Employees who work in a brothel have the same rights as any other employee to decent working conditions and fair treatment. The fact that sex work is against the law does not mean that brothel owners don't have to follow labour laws either.

The basic rights of workers are set out in Section 23 of the Constitution. It says that:

1. *Everyone has the right to fair labour practices.*
2. *Every worker has the right –*
 - (a) *to form and join a trade union;*
 - (b) *to participate in the activities and programmes of a trade union; and*
 - (c) *to strike.*

16.1 The contract of employment

If you agree to work for someone, and that person agrees to pay you for this work, then you and the employer have a **contract of employment**. You are called the *employee*.

Express and implied terms of a contract

The type of work that you must do, hours of work, wages and a place to live can all be part of your agreement with your employer. These are called *conditions of employment*. They are *express* terms of the contract.

Sometimes you and the employer may not talk about some conditions of employment, for example: taking annual leave. If it is the custom for all employees to take annual leave, then you can also take annual leave. This is part of your contract, even if you did not talk about it. These are *implied* terms of the contract.

Verbal and written contracts

The law says that a contract does not have to be in writing. If two people speak and they agree about the contract, then this contract is called a *verbal* contract. A verbal contract is also legal and enforceable.

A *written* contract is better. If all the conditions of the contract are written on a piece of paper, and the employer signs the paper, then you have proof of what was agreed.

Section 29 of the Basic Conditions of Employment Act 75 of 1997 says that, except for employees working less than 24 hours per month and employers who employ less than 5 people, the employer must give employees certain particulars *in writing* about the job.

TIPS

Giving details about a job includes:

- A description of the job.
- The hours that the employee will be expected to work.
- Ordinary and overtime rates of payment, including payment in kind (for example, accommodation) and its value.
- Any deductions to be made.
- How much leave the employee will get.
- The notice period.
- The name and address of the employer.
- The date of payment.

⋮ **Note:** If an employee can't read, the particulars must be explained in a language the employee understands.

If you have a contract, but you do not do the thing that was agreed, then you break the contract. The law says that if one person breaks a contract, then the other person can use the law to force that person to do what was agreed. Breaking a contract is also called a *breach of contract*.

Contracts in line with accepted standards

A contract of employment must be in line with terms and conditions of employment in:

- The Basic Conditions of Employment Act (BCEA), or
- Collective agreement, or
- Sectoral determination (depending on what the employee is covered by), and
- Any other laws which protect employees such as the Labour Relations Act and the Occupational Health and Safety Act.

If a contract breaks any of these protective laws, it is not enforceable unless the conditions are more favourable to the employee.

If an employee is covered by the BCEA, terms and conditions of employment in the BCEA override those in any contract of employment which are less favourable to the employee than those in the BCEA. In other words, the contract cannot be less favourable to the employee than the conditions laid down in the law.

16.1.1 How to use a contract of employment

If the employer breaks a contract of employment, then an employee can sue the employer in a civil court case for breach of contract:

- It is easier to prove that an employer broke a contract of employment if the contract is in writing.
- If the contract is verbal, it is better to have witnesses. If you don't have witnesses, then it is the employee's word against the employer's word.

The employee always has a right to at least the terms and conditions in the Basic Conditions of Employment Act (BCEA). If the breach of contract goes against a term or condition in the BCEA, then an employee can go to the Department of Labour

and lay a complaint. The Department will issue a Compliance Order which tells the employer to comply with the BCEA. This is a much easier and cheaper way to deal with problems that fall under the BCEA.

16.1.2 Changing the contract

An employer can change the contract even if the employee does not agree to the changes. But a change in a contract is like a new contract. To change the contract, the employer must give notice of the change to the employee and must negotiate the new terms and conditions with the employee.

If the employer and employee/s cannot agree about the changes in the contract, then the employer may go ahead and introduce the changes. If the employee then just accepts the new conditions and goes on working, then the new conditions become part of the contract.

If the employee does not agree to the changes, then he/she can:

- Refer a dispute to the CCMA or Bargaining Council under section 64(4) of the Labour Relations Act. The employee can ask the CCMA to issue a notice to instruct the employer to restore the terms and conditions which were there before the change took place. The employer must obey this notice within 48 hours of receiving it.
- Refuse to accept the changes. If the employer then dismisses the employee, it is an *automatically unfair dismissal*.
- Choose to stop working for the employer. If the employee was forced to resign rather than be forced to accept the changes, it may be an automatically unfair dismissal.

16.2 Laws about terms and conditions of employment

Terms and conditions of employment may be covered by:

- Centralised collective agreements, like Bargaining Council Agreements, under the Labour Relations Act 66 of 1995.
- Sectoral determinations under the BCEA, or Wage Determinations under the Wage Act.
- Special exceptions to centralised collective agreements, sectoral determinations, or the BCEA, made by the Minister of Labour (called deregulation).

- Workplace-based collective agreements under the BCEA.
- An individual agreement between a worker and employer (the contract of employment).
- Basic Conditions of Employment Act.

The Merchant Shipping Act covers conditions of employment for employees who are at sea within South Africa's territorial waters while members of the South African National Defence Force, the National Intelligence Agency, and the South African Secret Service are covered by different laws. The Occupational Health and Safety Act gives employees rights to health and safety at work.

16.3 Wage regulating measures

Collective agreements, Bargaining Council Agreements (BCAs), Wage Determinations and sectoral determinations (S/WDs), which regulate terms and conditions of employment, are commonly called *wage regulating measures*.

They include different conditions of employment for different employees in different sectors. For example, all these agreements and determinations talk about a period of notice, but in one wage determination the notice period may be one week, while in another it may be two weeks.

T TIPS

Here is a list of the more common aspects relating to conditions of employment which appear in all wage regulating measures:

- **Area and scope:** defines the geographical area the BCA or S/WD covers, and describes the type of work included in the BCA or S/WD.
- **Definitions:** defines the different categories of employees, including casual employees.
- **Remuneration:** describes minimum wages for different categories of employees and includes monies received by the employee excluding things like bonuses to assist employees.
- **Payment of remuneration:** how employees should be paid their wages.
- **Deductions** from an employee's wage.
- **Hours of work and pay:** this includes public holidays and Sunday.
- **Annual leave and sick leave.**
- **Piece work and commission work:** *Piece-work* means that an employee is paid for the number of items produced and not for the hours worked.
- **Termination of contract of employment:** how much notice an employer must give.

- **Prohibition of employment:** for example: pregnant women and children may not be allowed to do certain work.
- **Dispute resolution:** the Labour Relations Act allows employees and employers to collectively agree to dispute resolution procedures that differ from those in the Act.

If there are any particular terms or conditions of employment that are not specified by a Bargaining Council Agreement or a sectoral determination, then those terms or conditions of employment in the Basic Conditions of Employment Act will apply to employees.

16.4 How do you know which law applies to a worker?

All employees will fall under one of the above laws about conditions of employment. Many employees fall under more than one of these laws.

The laws work in order of priority. For example, if a Bargaining Council Agreement (or other centralised collective agreement) covers the work done by an employee, then that Agreement applies to that employee. If there is no Bargaining Council Agreement, then you must see whether a sectorial determination or Wage Determination applies. If no Bargaining Council Agreement or S/WD applies, then the BCEA will apply, unless they are specifically excluded by the BCEA.

An individual contract of employment may override the Basic Conditions of Employment Act provided it is definitely more advantageous for the employee and provided it does not affect certain 'core' rights which are identified in the Basic Conditions of Employment Act.

16.5 Basic Conditions of Employment Act

All employees are covered by the BCEA except:

- Members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.
- Unpaid voluntary employees who do work for a charitable organisation.
- Employees who work for an employer for less than 24 hours a month.
- Employees on vessels at sea where the Merchant Shipping Act of 1951 is the law.
- Special provisions for companies employing fewer than 10 employees.

16.5.1 Prohibited employment

Child labour

- Children below 15 may not be required or permitted to work.
- Children between 15 and 18 may not perform work that places their well-being, education, or physical and mental health at risk.

The Department of Labour and state prosecutor will be primarily responsible for enforcing the rules about child labour. To employ children is a criminal offence.

Forced labour

No-one may force employees to work (for example: an employee was unfairly dismissed and was also not paid leave pay). This is a criminal offence.

16.5.2 Enforcement of the Basic Conditions of Employment Act

The Department of Labour is responsible for enforcing the BCEA. The Department appoints inspectors who have wide powers to make sure employers obey the Act.

An employee whose employer is not obeying the BCEA can complain to the Department of Labour (not the CCMA):

- A labour inspector will investigate. If the inspector decides the employer is breaking the law, they will try to get a written promise from the employer to obey the BCEA.
- The inspector may issue a 'Compliance Order' to employers who do not obey the BCEA.
- If the employer ignores the compliance order, the Department of Labour must refer the case to the Labour Court to force the employer to obey. Employers can also appeal against compliance orders to the Director General of Labour or the Labour Court.

If an employee and employer are in a dispute about a matter covered by the Labour Relations Act and they are busy trying to resolve the dispute at the CCMA, then the CCMA can also order the employer to pay money that is owed to the employee as part of the employee's BCEA rights.

For example, if a dismissal is being contested at the CCMA, the CCMA will be able to order an employer to pay outstanding money owed to the employee. The law is made

like this just to simplify procedures and to avoid the case having to go to both the Department of Labour and the CCMA, or the courts.

The Department of Labour will only make a criminal case against an employer for employment of child labour.

Note

Employees can also make their own civil case in the Magistrate's Court and the Small Claims Court to get money that is owing to them.

16.5.3 Summary of Basic Conditions of Employment Act conditions of employment

T TIPS

Working times and pay

- The maximum working hours are 45 hours a week for ordinary pay.
- The maximum length of a working day is 9 hours if the worker works a 5-day week, but 8 hours a day if the worker works a 6-day week.
- Where the working week is squashed into fewer days, then shifts of longer hours may be introduced with the employee's consent. For example, an employee can agree to work shifts of 12 hours over 4 working days.
- Overtime is voluntary. No worker may work more than 10 hours of overtime a week.
- Overtime must be paid for each hour of overtime worked, at a rate of one and a half times the worker's ordinary hourly wage.
- No employee may work more than 12 hours in any day (including overtime on that day).

Even though overtime is voluntary, if the employee agreed in the original contract to work overtime when necessary, then this overtime must be worked. If the employee refuses to work overtime then she/he is in breach of the contract and the employer can take disciplinary action against the employee.

An employer, who is employing less than 10 employees, only needs to pay overtime at 'time and a third' of the normal wage. The employer can also agree with the employee to work up to 15 hours overtime during a week instead of the normal ten hours.

- Payment for Sunday work must be the greater of:
 - ~ Double the normal hourly rate for the amount of Sunday hours worked, or
 - ~ One full-day's pay.

If it is normally part of a worker's job to work on a Sunday, then s/he must be paid at a rate of time and a half his/her normal hourly rate.

- Employees should be paid for public holidays which fall on a day that they normally would have worked, even though they will be off and not working on the public holiday. A worker can agree to work on a public holiday, but this is voluntary.
- If a worker does agree to work on a public holiday, they must get a normal working day off in exchange or they must be paid double the normal hourly rate for the amount of hours worked on the public holiday. Where a public holiday falls on a Sunday, the following Monday, is regarded as a public holiday.

16.5.4 Deductions

Deductions from wages (except those required by law) are not permitted without the written consent of the worker.

The deductions required by law which an employer makes from the wages of a worker are:

- Unemployment Insurance Fund (UIF).
- SITE (tax).
- Any deduction ordered by a court.

The lawful deductions an employer can make from the wages of a worker, if the worker instructs the employer in writing to make the deduction are:

- Trade union subscriptions.
- Medical aid contributions.
- Pension or provident fund.
- Money to pay back a housing loan or other loan from the employer.
- Money for food and accommodation.
- For loss or damages at work, as long as the employee has been given a hearing to explain the facts.

The amount that can be deducted can be equal to (but not more than) 25% of the normal wage to offset losses.

E EXAMPLES

Often employers make unlawful deductions from workers' wages, for example:

- The employer says there were shortages in a till and the worker has to pay back the shortages.
- The worker breaks something at work.
- The worker owes the employer money, but did not agree that the amount owing should be deducted.
- The worker is off sick and the employer deducts money for the days not worked.
- The worker is absent from work without leave (permission to take annual, family responsibility or maternity leave, or being sick).

If an employer wants to deduct a fine from a worker's wage, to compensate the employer for loss or damage, the employer can only deduct the fine if:

- The loss/damage happened during the 'course and scope of employment'.
- The worker was at fault.
- A fair hearing was held to give the worker a chance to state her/his case.
- The employer does not deduct more than the actual value of the loss or damage.
- The total amount deducted is no more than 25% of the employee's wages.
- The employer gives consent in writing.

16.5.5 Daily and weekly rest periods

- No employee's hours of work may be spread over more than 12 hours a day. ('Spread over' means from the start of work to the end of work, including any breaks for meals or rest and any overtime.)
- A rest period of 1 hour is required after every 5 hours worked. This can be reduced to 30 minutes, if the employee and employer agree in writing.
- Every employee has a right to a daily rest period of 12 hours from the end of work on one day to the start of work on the following day. This rest period can

be reduced to 10 hours if an employee lives on the premises and gets a meal break of at least 3 hours (this may be relevant to domestic workers, caretakers and farmworkers).

- Every employee has a right to a weekly rest period of 36 continuous hours. For many employees, this is over the weekend.
- An agreement in writing between the employer and employee may reduce the meal interval to not less than 30 minutes or do away with a meal interval if the employee works less than 6 hours on a day.
- The agreement can also provide for a rest period of at least 60 consecutive hours (hours in a row) every 2 weeks.

16.5.6 Leave

Leave can be annual (yearly) leave, sick leave, maternity leave, family responsibility leave or unpaid leave.

Annual leave

- Every employee has a right to 21 consecutive days paid leave a year. This is the equivalent of 3 weeks' time off.
- The employee has a right to take 21 days all in one go, but can choose to use the annual leave to take occasional days off work. The employer then deducts these days of occasional leave that an employee took during the year from the annual leave.
- Annual leave must be taken within 6 months of the end of an annual leave cycle (a year's work).
- If the employee is off work on any other kind of leave, these days do not count as part of annual leave. Another way of saying this is that annual leave cannot be taken at the same time as sick leave, family responsibility leave or maternity leave.
- If the leave period covers a public holiday, then the public holiday does not count as part of the employee's leave. Paid public holidays are: 1 January New Year's Day, 21 March Human Rights Day, Good Friday, Family Day, 27 April Freedom Day, 1 May Employees' Day, 16 June Youth Day, 9 August National Women's Day, 24 September Heritage Day, 16 December Day of Reconciliation, 25 December Christmas Day, 26 December Day of Goodwill.

- Annual leave cannot be taken at the same time as the notice period.
- Leave pay is not a bonus on top of normal pay. It simply means that an employee gets a holiday every year, and gets normal pay for those days. If an employee doesn't take leave, or all the leave, the employer will not pay out leave pay instead of leave.
- If an employee leaves a job without having taken all the leave that is due to them, the employee must be paid for the days of leave that they have not taken. This is called *pro rata* leave pay.

Sick leave

- A permanent employee has a right to paid sick leave of 30 days over any 3-year cycle (36 days if the employee works a 6-day week).
- During the first 6 months that an employee works for an employer, she/ he gets 1 day paid sick leave for every 26 days worked.
- Once all these paid sick leave days are used up, the employer does not have to pay the employee when he/she is off sick.
- An employee who works more than 24 hours during any month earns 1 day's leave for every 26 days worked.
- Seasonal or temporary employees have a right to 1 day's sick leave for every 26 days worked over the first 6-month cycle.
- Employees who are sick for more than 2 days may be required to produce a doctor's certificate. If an employee lives on the premises and it is difficult for them to get to a doctor (for example, in rural areas), the employee does not have to produce a certificate unless the employer gives the employee reasonable assistance to get the certificate.
- Sick leave pay is not a bonus on top of normal pay. It simply means that if an employee is genuinely sick and has to take time off work, the employer must pay the employee up to a certain number of days. For example, if a waitress in a restaurant only took 3 days sick leave this year, the employer does not owe her the money for the remaining sick leave days at the end of the year.

Family responsibility leave

Every employee with more than 4 months' service with an employer, and who works on more than 4 days a week, has a right to 3 days paid family responsibility leave a

year. This can be taken if a direct family member dies, or when a child is born or is ill. A total of 3 days is allocated for this kind of leave and not 3 days for each event.

Maternity leave

Women employees have a right to 4 months unpaid maternity leave. During this time, the employee may draw maternity benefits from the Unemployment Insurance Fund.

16.5.7 Unpaid leave

An employer may agree to let an employee take extra days of annual leave, or the employee may be sick for longer than the paid sick leave. Then the employer does not have to pay the employee for these days.

16.5.8 Absent without leave

If an employee takes leave without getting permission from the employer and is not sick, the employer does not have to pay the employee for the time taken off.

If the employee takes off many days in a row without permission (normally more than 4 consecutive days), or often takes time off without permission, the employer may presume that the employee has deserted (left without giving notice) his/her employment.

The employer may employ someone else to do the job. In this case the employer does not give the employee notice. But if the worker returns, fair dismissal rules must be followed.

16.5.9 Notice

- During the first 6 months of employment, employees have a right to at least 1 weeks' notice of the termination of their services.
- After the first 6 months, but during the first year of employment, employees have a right to 2 weeks' notice.
- If they have worked for more than 1 year, employees have a right to 4 weeks' notice.
- If an employment contract has a longer period of notice than the BCEA, the longer notice must be given.
- Notice works both ways: if an employee resigns without giving the employer the correct amount of notice, for example 1 week, the employer can claim 1 week's pay from the employee.

- Notice must be in writing.
- Neither the employer nor the employee can give notice while the employee is on annual leave.

16.6 Employment Equity Act

The Employment Equity Act 55 of 1998 (EEA) aims to create an environment of equality and non-discrimination in the workplace.

T TIPS

The EEA sets out grounds for non-discrimination in the workplace including:

- | | |
|----------------------|-------------------------|
| • Race | • Gender |
| • Sex | • Pregnancy |
| • Marital status | • Ethnic origin |
| • Social origin | • Colour |
| • Sexual orientation | • Age |
| • Disability | • Religion |
| • Conscience | • Belief |
| • Culture | • Language |
| • Birth | • Family responsibility |
| • HIV status | • Political opinion. |

Note: The EEA includes 3 grounds for non-discrimination that are not included in the Constitution or the Equality Act:

- Family responsibility
- HIV status
- Political opinion.

An employee can refer a case to the Labour Court if you believe that an employer is unfairly discriminating against you on any of the above grounds in order to:

- Demote or not promote you.
- Block you from having access to training and development.
- Make an unfair distribution of employee benefits to you.

The EEA also sets out regulations on *affirmative action* in the workplace to create equal opportunities for all employees and for people applying for jobs:

- An employer who employs over 50 people or has a turnover of over a certain amount, must take steps to include and advance, previously disadvantaged groups (black people, women and the disabled) in their workforce.
- When a company makes new appointments or promotes staff, it must give 'preferential treatment' to properly qualified people who are from one of these previously disadvantaged groups. In other words, formal qualifications or relevant experience are not the only reasons for deciding whether a person is suitable for a job or not.

The EEA covers everyone except the South African National Defence Force (SANDF), the National Intelligence Agency (NIA) and Secret Services.

16.7 Disputes and ways of settling disputes

What is a dispute?

A dispute is any serious disagreement between two parties. For example, there could be a dispute over a problem of discipline in the workplace, over complaints (also called 'grievances') which employees have, or over dismissals. There can also be disputes over wages and other working conditions.

Disputes of interest

You can have a *dispute about making new rights*: for example, employees wanting to get paid higher wages, or the employer brings in a new pension fund scheme that employees must belong to. These disputes are also called *disputes of interest*.

Disputes of interest are often handled by a union and are the subject of negotiation and possible industrial action (strike action) where agreement cannot be reached. The Labour Relations Act (LRA) describes structures and processes which can be used to resolve disputes of interest. The Act also governs the procedures for taking industrial action.

Disputes of right

There are also *disputes over rights which already exist* in a contract, a law, an agreement or in custom and practice. These kinds of disputes are called *disputes of right*.

Disputes of right usually involve an unfair dismissal (for example retrenching employees without consulting with the employees) or unfair discrimination or an unfair labour practice (such as 'removal of benefits'). The LRA sets out how disputes over rights in the workplace must be handled and the Employment Equity Act sets out how discrimination will be dealt with in the workplace.

A dispute of right can also happen when an employer or employee doesn't obey a term or condition of a wage regulating measure, for example: the Basic Conditions of Employment Act, a Bargaining Council Agreement (or other collective agreement), Wage Determination, sectoral determination, or a Ministerial exemption.

An example of a dispute of right is where an employer doesn't pay an employee the correct leave pay. Enforcement and disputes about terms and conditions of employment that fall under these laws should be dealt with by the relevant Bargaining Council or the Department of Labour.

16.7.1 Remedies for disputes of interest

The LRA sets out structures and processes which can be used to resolve disputes of interest. The outcome of disputes of interest will depend on the relative strength of employees and employers. Each party may use different strategies to win what they want.

Employees can take **industrial action over disputes of interest**, like strikes, work stoppages and go-slows once they have followed prescribed dispute procedures. Employees cannot strike over disputes of rights under the LRA (for example: unfair labour practices and unfair dismissals).

The LRA governs the procedures that must be followed before industrial action can be taken by employees or by the employer.

16.7.2 Remedies for disputes of right

Where there is no bargaining council

If it is a dispute about enforcing a right under the BCEA, collective agreement under the BCEA, a sectoral determination or a Wage Determination or the Occupational Health and Safety Act, then a complaint can be sent to the Department of Labour. The complaint can include a request for a 'Compliance Order' which is issued by an inspector of the Department.

If it is a matter of **enforcing** a right or a **dispute of rights** under the Labour Relations Act (for example, an alleged unfair dismissal) where no bargaining council exists in that sector, then the case should be referred to the CCMA for conciliation.

If conciliation fails, then refer the dispute to arbitration within 30 days of receiving the certificate of failed conciliation from the CCMA. The CCMA will hear disputes over a BCEA issue if it is related to a case which is being arbitrated by the CCMA, for example: a claim of unfair dismissal is before the CCMA together with a claim for unpaid leave pay.

Where there is a bargaining council

If it is a dispute of rights under a Bargaining Council Agreement, then the problem should be referred to the Bargaining Council for enforcement or conciliation. If conciliation fails, then refer the dispute to arbitration within 30 days of receiving the certificate of failed conciliation from the Bargaining Council.

16.8 The Labour Relations Act

The LRA (Act 66 of 1995) governs how employers and employees should deal with each other. It is not about terms and conditions of employment.

It deals with rights of individuals around fairness, bargaining and dispute resolution, and rights and obligations of trade unions.

16.8.1 What does the Labour Relations Act cover?

Except for members of the SANDF, the National Intelligence Agency and Secret Service, all employees are covered by the LRA, including farmworkers, domestic workers and public sector employees, such as teachers, nurses and police.

An independent contractor is not defined as an 'employee' and is therefore excluded from the LRA and BCEA provisions.

The LRA covers issues like:

- Rights of employees to form and join a union.
- Rights of employers to form and join an employers' organisation.
- The rights of trade unions in the workplace.
- Collective bargaining.
- Bargaining Councils and Statutory Councils.
- The establishment of workplace forums, which allow employees to participate in management decisions at work.

- What are fair and unfair labour practices?
- Procedures that must be followed for dismissals to be fair.
- Dispute resolution structures and procedures, including the CCMA.
- Industrial action.

16.8.2 Unfair labour practices

What is an unfair labour practice?

The LRA prohibits unfair labour practices.

E EXAMPLES

An *unfair labour practice* is any unfair act or omission at the workplace, involving for example:

- Unfair conduct of an employer relating to the promotion or demotion or probation of an employee.
- Unfair conduct relating to the provision of training of an employee.
- Unfair conduct relating to the provision of benefits for (example, pension, medical aid) to an employee.
- Unfair disciplinary action against an employee short of a dismissal, for example: a final written warning or unfair suspension.
- The refusal to reinstate or re-employ a former employee, for example: a retrenchment.

References to unfair discrimination against an employee in the LRA have been transferred to the Employment Equity Act 55 of 1998 (EEA) so 'unfair discrimination' is no longer defined as an unfair labour practice in the LRA. The EEA lists the grounds for non-discrimination in the workplace and describes the steps that a person can take if they believe they have been unfairly discriminated against on any of the listed grounds.

Remedies against unfair labour practices

Disputes over alleged unfair labour practices must be referred within 90 days of the alleged unfair labour practice being committed (or of the employee becoming aware of the Unfair Labour Practice) to the CCMA or Bargaining Council.

16.9 Dismissals

16.9.1 What is a dismissal?

A dismissal means that an employer terminates a contract of employment with or without notice.

Dismissal with notice

With notice means the employer tells the employee to leave work after working for the required term of notice as set out in the contract of employment. The employee gets paid for the time he/she worked, plus any leave pay (if this is owing).

Where notice is to be paid, the notice pay must be what is set out as notice in the contract of employment, for example: 1 week's pay instead of 1 week's notice. The payment must include the value of payment in kind if this applies to a particular sector. Employees must therefore get wages for the hours worked, plus any leave pay, plus payment instead of notice.

Dismissal without notice

Without notice means the employee leaves immediately and is paid out instead of getting notice (called *payment in lieu of notice*). Dismissal without notice is called *summary dismissal*. While summary dismissal might take place where an employee is guilty of a very serious act (for example, theft), it will still be unfair procedurally if a fair hearing has not been held before the dismissal.

If the employee has been summarily dismissed (with fair reasons and following a fair hearing), the employee has to leave immediately. Then the employer does not have to make any payment in lieu of notice.

E EXAMPLES

Here are examples of different kinds of dismissals:

- A contract employee whose fixed-term contract is suddenly ended or renewed on less favourable terms, where the employee expected the contract to be renewed because it has often been renewed before or because an expectation exists that the employment will be ongoing.
- A woman who is not taken back into her job after her maternity leave.
- An employer dismisses a number of employees for some reason (for example, for being on strike) and offers to re-employ some but not all.
- An employee who was forced to walk out or resign because the employer made the working environment impossible to tolerate.
- The employee leaves his/her work (with notice or without notice) because a new employer has taken over the business and is not paying the employee the same wages and conditions of work which he/she enjoyed before.
- Employees have been retrenched. The employer must pay the employee severance pay of at least 1 week's remuneration for every full year that the employee worked for the employer. The payment must include the value of payment in kind. The employee must get wages for the hours worked, plus any leave pay, plus notice or payment in lieu of notice, plus severance pay.

Employees in these circumstances of these examples above have a right to fair dismissal reasons and fair dismissal procedures under the LRA. An employee could claim unfair dismissal through the CCMA or relevant Bargaining Council.

16.9.2 Automatically unfair dismissals

T TIPS

The dismissal is automatically unfair if the worker is dismissed for:

- Exercising any of the rights given by the LRA or participating in proceedings under the Act.
- Taking part in lawful union activities.
- Taking part in a legal strike or other industrial action or protest action.
- Refusing to do the work of someone who was on strike.
- Being pregnant or any reason related to pregnancy.
- Refusing to accept a change in working conditions.
- Reasons that are due to arbitrary (unfair) discrimination

- A reason related to a transfer following a merger of the company with another organisation.
- Where the employee is dismissed following a disclosure made by her/him under the Disclosure of Information Act.

16.9.3 When is a dismissal fair or unfair?

The LRA has a Code of Good Practice for Dismissals that employers must follow. *The 'fairness' of dismissal is decided in 2 ways:*

- Substantive fairness (good reason for dismissal?).
- Procedural fairness (correct procedure followed?).

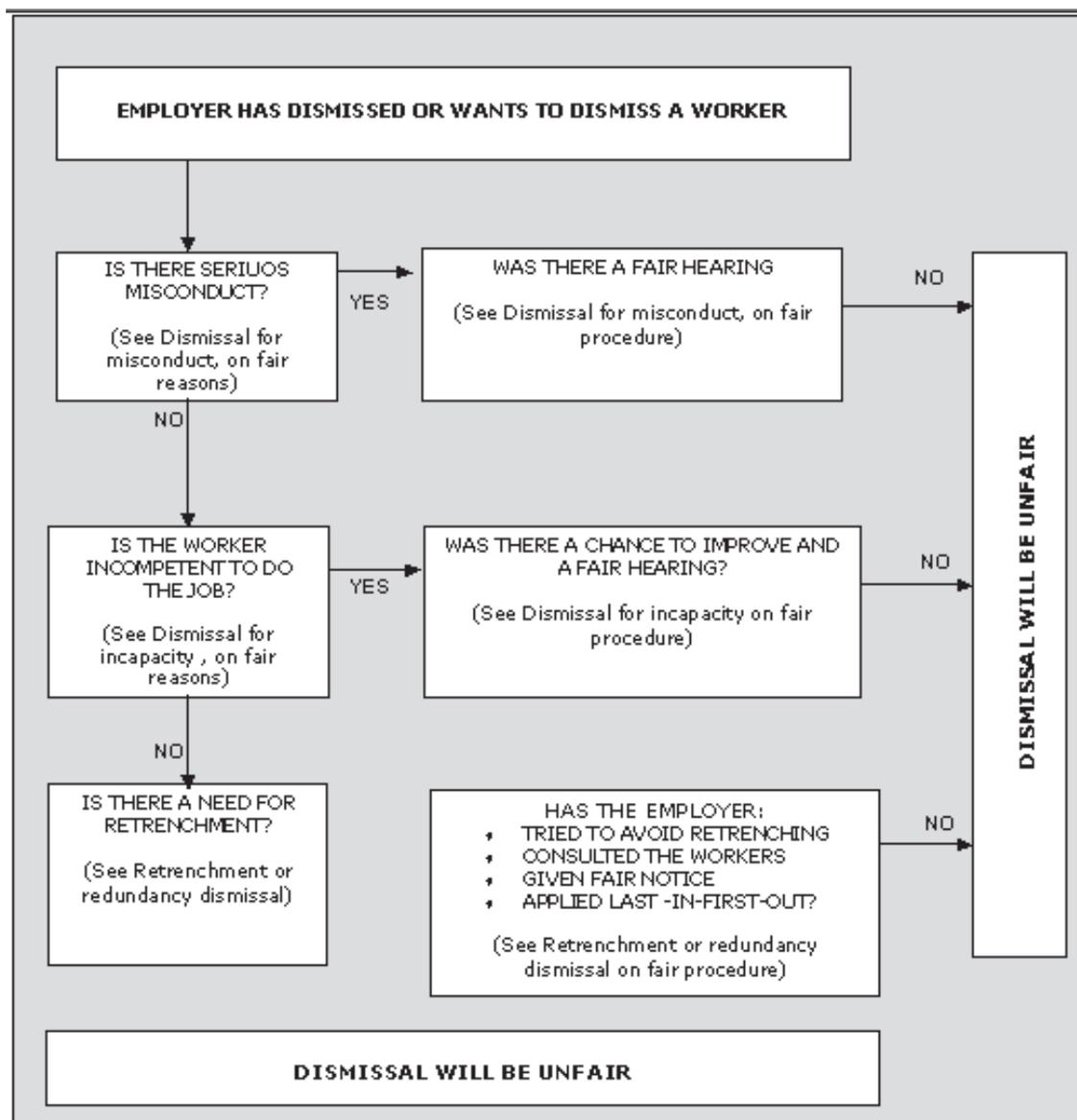


Figure 31: Unfair dismissal

16.9.4 Dismissal for misconduct

Fair reasons

Employers should introduce clear rules of conduct that are known to all workers. Some rules may be so well established or obvious that everyone can be expected to know them, for example: that violence at work is not acceptable.

TIPS

Dismissals for misconduct will only be fair if:

- The employee broke a rule of conduct in the workplace.
- The rule was reasonable and necessary.
- The employee knew of the rule or should have known of the rule.
- The employer applied the rule consistently (there are no other employees who have been allowed to get away with this misconduct).
- It is appropriate to dismiss the employee for this reason, rather than taking disciplinary action or imposing a lesser penalty, such as a final warning.

For minor mistakes the employer must use informal advice. Corrective or progressive discipline must be used for misconduct. The aim of corrective discipline is to correct the employee and help him/ her overcome the problem. Progressive discipline can get stronger every time the employee repeats the misconduct.

Employees should not be dismissed for a first offence, unless it is very serious, such as:

- Gross insubordination or dishonesty.
- Intentional damage to the employer's property.
- Putting others' safety at risk.
- Physical assault of a co-employee.

Employees can be dismissed for misconduct if they go on strike without following the procedures. The employer must contact a trade union official and tell the official of the planned dismissals, and try to give employees an ultimatum (final warning) with enough time to consider the ultimatum.

Before deciding to dismiss the employee for misconduct, the employer must consider:

- The employee's circumstances (for example: length of service, previous disciplinary record, personal circumstances).
- The nature of the job.
- The circumstances in which the misconduct took place.

Fair procedure

Employers must keep records for each employee, which say what offences an employee committed, what disciplinary action was taken and why the action was taken.

If there is repeated misconduct, the employer must give the employee warnings. A final warning for repeated misconduct or serious misconduct must be given in writing.

T TIPS

There must be a fair hearing:

- If the employee is a shop steward, the employer must first inform or consult the union.
- The employee must know in advance what the charges are.
- The employee must be given enough time to prepare for a hearing.
- The employee must be present at the hearing and be allowed to state his/her case.
- The employee must be allowed to be represented at the hearing by a shop steward or co-employee.
- The employee must be allowed to see documents and cross-examine evidence used against him/ her.
- The employer should bring all witnesses against the worker to the hearing. The worker should have a chance to cross-examine witnesses called against him/her.
- The employee should be allowed to call witnesses.
- The employee must be given reasons for any decisions taken.

Sometimes, if the employer has only a very small business she/he will not be expected to meet all these requirements.

16.9.5 Dismissal for incapacity

Fair reasons

A dismissal for incapacity can be for:

- Poor work performance.
- Physical disability or ill health.
- Incompatibility (with job or other workers).

T TIPS

When deciding whether a dismissal for incapacity was fair or not, these questions must be considered:

- Did the employee fail to work to a required standard?
- Was the employee aware of the standard?
- Was the employee given a fair chance to meet the standard?
- Was dismissal the appropriate outcome for failing to meet the standard?
- Is the incapacity serious and is an improvement likely?
- Could the employee be accommodated in an alternative position if one is available?

Fair procedure

Dismissals for poor performance will only be fair if the employer:

- Has given the employee proper training, instructions, evaluation, guidance and advice.
- Assessed the employee's performance over a reasonable period of time.
- Investigated the reasons for continued poor performance.
- Investigated ways of solving the problem without resorting to dismissal.
- Gave the employee a chance to be heard before deciding to dismiss.
- Considered employing the employee in an alternate and appropriate position if one was available.

- The dismissal is unfair merely because the employer failed to follow a fair procedure, but there was a good reason for dismissal.

The employee can get up to 12 months' wages as compensation for an unfair dismissal. If it was an automatically unfair dismissal, the employee could get up to 24 months' wages as compensation.

16.9.7 Disputes under the Labour Relations Act

The Labour Relations Act sets out the procedures to be followed to resolve disputes over unfair labour practices and unfair dismissals.

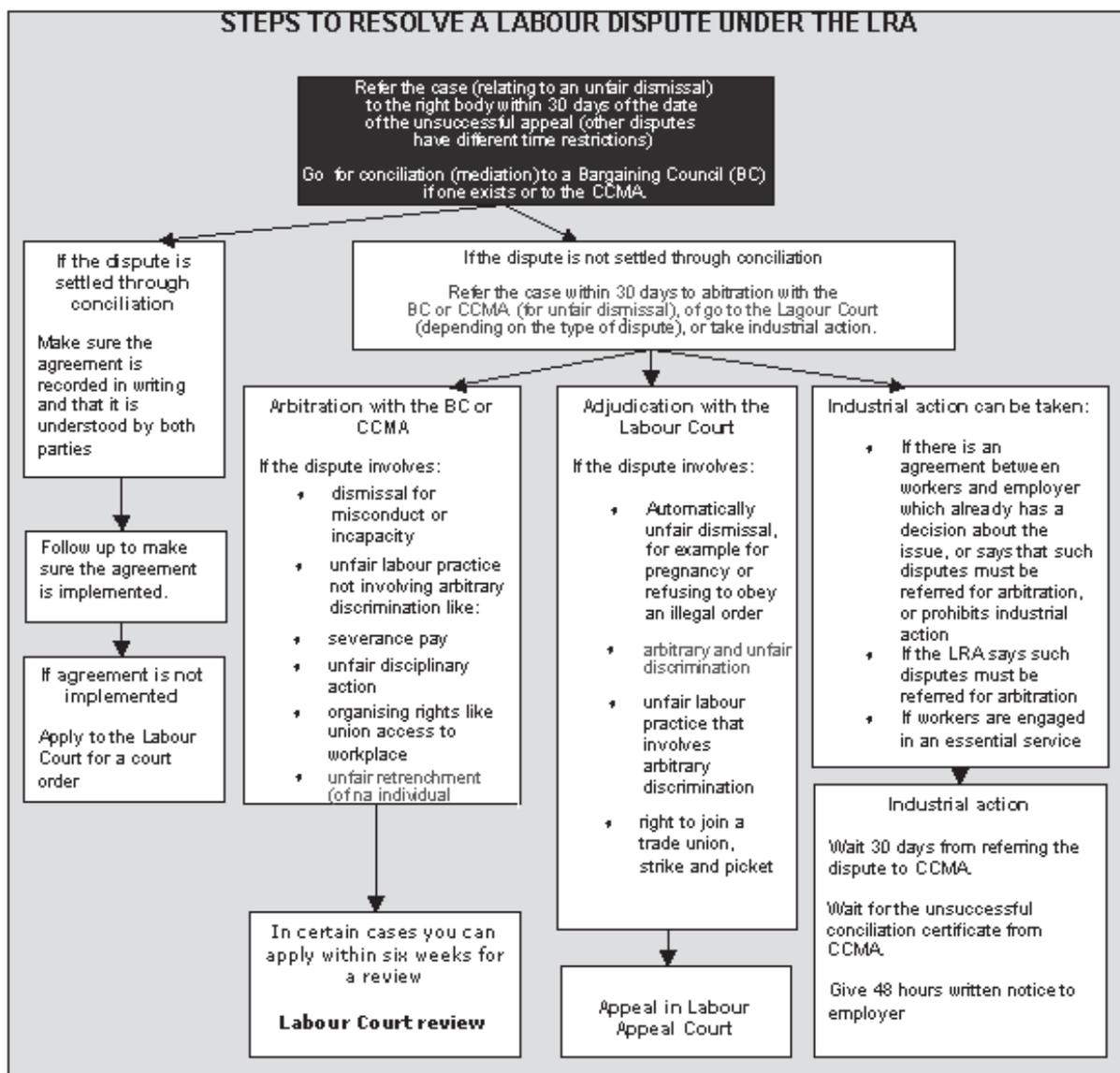


Figure 32: LRA steps to resolve disputes

16.10 Conciliation by the CCMA or Bargaining Council

What is conciliation?

Conciliation is a process to bring the two sides in a dispute together after they have reached a deadlock. 'Deadlock' means that after trying to negotiate, they still can't solve the problem. In conciliation, an independent and neutral third party is used to mediate between the two sides. Under the Labour Relations Act, the mediator is a commissioner from the CCMA or Bargaining Council.

How to refer the dispute to the right body

Find out whether there is a Bargaining Council covering the sector that the employee works in. If there is a Bargaining Council, phone that Council and find out the steps you should take to refer the case for conciliation.

T TIPS

If there is no Bargaining Council, the dispute must be referred to the Commission for CCMA for conciliation:

- Fill in form LRA 7.11.
- Send a copy of the form to the employer, by fax, registered mail or personal delivery.
- Send a copy to the CCMA, by fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example: a fax transmission slip, registered mail slip or affidavit confirming personal delivery.

If the employee does not want conciliation and arbitration to take place on the same day with the same commissioner, he/she must note this in the appropriate space on the dispute form.

16.10.1 Applying for condonation

If more than 30 days have passed since the dismissal (or 90 days if it is an unfair labour practice) took place, you will have to apply for *condonation*, which is like an extension of the deadline. If a Bargaining Council will deal with the case, ask the Council how to apply for condonation. If the CCMA will deal with the case, you can apply for condonation on form LRA 7.11, or the CCMA will ask you to fill in condonation forms if you didn't do it on form LRA 7.11.

Condonation may be granted if you are able to give good reasons for being late with the application. *When you apply for condonation you should focus on:*

- The 'degree of lateness' of your application (how many days/weeks/months late is it).
- The prejudice to the parties.
- The likelihood of success of your case.
- The amount of 'public interest' there is in your case going ahead.
- Application for condonation must be in the form of an affidavit.

16.10.2 The conciliation meeting

The commissioner will arrange a venue and time for the conciliation, and will inform both parties. At the conciliation meeting, the commissioner meets with the 2 sides to the dispute to find ways to settle the dispute to everyone's satisfaction. The meeting is conducted in an informal way and the commissioner can meet the parties together or separately, as often as is needed. The commissioner has the power to subpoena any person to attend the meeting.

The commissioner must try to resolve the dispute within 30 days of it being referred to the CCMA or Bargaining Council. The employee/s and employer are free to agree to any solution to settle the dispute at a conciliation meeting.

A certificate will be issued by the commissioner at the end of the meeting to say whether the dispute has been settled or not.

16.10.3 Who can represent employees and employers in a conciliation meeting?

Employees can be represented by a co-employee, a trade union office bearer or official, or a lawyer.

Note: Paralegals may not represent employees in conciliation proceedings. The paralegal can ask to be present and can advise the employee during the meeting. If the employer objects to the paralegal being there, the employee can ask for a break to consult with the paralegal before making any final decisions.

The employer can be represented by an employee of the business (like the Human Resources Manager) or by a representative of an employers' organisation, but not an attorney if the case concerns misconduct or incapacity dismissal.

16.10.4 Successful conciliation

If the conciliation is successful, an agreement is reached which both parties must follow. If they do, the case is resolved and ends here.

What happens if the conciliation agreement is not respected?

If either party breaks the agreement, the other party may apply to the Labour Court to have the agreement made into a court order.

T TIPS

These are the steps to follow:

- Get the application forms from the Registrar of the Court and fill them in.
- Attach a copy of the agreement and an affidavit to the application. The affidavit must state:
 - ~ When the dispute was referred for conciliation.
 - ~ When the conciliation meeting was held.
 - ~ When the agreement was made.
 - ~ What happened after the agreement was made.
 - ~ Whether demands have been made.
 - ~ Whether the worker has kept his/her part of the agreement.
- Serve the application on the employer.
- File the application and proof that you have served notice on the employer, with the Registrar of the Court.

16.10.5 Unsuccessful conciliation

If the 2 sides cannot reach an agreement, or the employer refuses to attend the conciliation meeting, the commissioner will issue a certificate stating that the case has not been resolved. The certificate will be sent to both parties by the commissioner's office.

Either party can then refer the case for arbitration at the CCMA or adjudication at the Labour Court, depending on the nature of the dispute.

Disputes over these issues are referred to the CCMA or Bargaining Council for arbitration:

- Unfair labour practices that do not involve discrimination.
- Dismissals for acts of misconduct (the employer says the employee did something wrong).

- Dismissals for incapacity (the employer says the employee can't do the work properly).
- Severance pay.
- Disputes concerning organisational rights for a trade union.
- Alleged unfair retrenchment where the retrenchment involved an individual employee.
- Breach of a collective agreement.
- Disputes over these matters are referred to the *Labour Court for adjudication*:
- Disputes that involve unfair discrimination.
- Retrenchments.
- Automatically unfair dismissals.

If the parties believe that it is going to be too expensive to take the matter to the Labour Court, they can agree to have the case arbitrated by the CCMA or Bargaining Council, even if the case falls within the jurisdiction of the Labour Court.

16.11 Arbitration by the CCMA or Bargaining Council

16.11.1 What is arbitration?

Arbitration means the two sides (or parties to the dispute) agree to use a third party to settle a dispute. A third party is someone who is not from the union or employer's side. The arbitrator acts as judge to decide the dispute. Arbitration is usually used to settle *disputes of right* (in other words, disputes about rights that already exist).

Under the LRA, the arbitrator is a commissioner from the CCMA or Bargaining Council. After hearing what both sides have to say, the commissioner can make a ruling that is legally binding and must be accepted by both parties.

16.11.2 How to refer a case for arbitration

If there is a Bargaining Council which regulates the sector that the parties work in, the case must be resolved according to the rules of that Council. Contact the relevant Council to find out what to do if the worker wants to refer the cases to arbitration. In some cases, even though there is a Bargaining Council, the arbitration may be done by the CCMA.

T TIPS

To refer the matter to the CCMA for arbitration:

- Fill in form LRA 7.143.
- Send a copy of the form to the employer, by fax, registered mail or personal delivery.
- Send a copy to the CCMA, by fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example: a fax transmission slip, registered mail slip, or affidavit confirming personal delivery.

16.11.3 The arbitration hearing

The CCMA or Bargaining Council will appoint a commissioner to arbitrate, will set the time and venue, and inform both parties. The arbitration hearing is relatively informal and the commissioner will encourage the parties to focus on the real merits of their cases, and to avoid legal technicalities.

After hearing evidence from both sides under oath, the commissioner can make a ruling that is legally binding and must be accepted by both parties. If the commissioner decides that the employer was wrong, the commissioner can order the employer to take certain steps or to pay compensation.

16.11.4 Who can represent employees and employers in arbitration?

Employees can only be represented by another employee, a lawyer where the case does not involve misconduct or incapacity dismissal, a union official or a union office bearer. Employers can only be represented by a lawyer where the dispute is not a misconduct or incapacity dismissal, an employee of the business, or a representative from an employers' organisation.

In cases involving dismissal for misconduct or incapacity, lawyers are not allowed unless the commissioner specifically allows this.

16.11.5 Arbitration appeals

There is no appeal against an arbitration award. *But either side may request the Labour Court to review the arbitrator's decision, if they think:*

- The arbitrator went beyond her/his powers.
- There was something legally wrong in the proceedings.

- The arbitrator did not consider relevant issues in accordance with the law.

They must ask for a review within 6 weeks of receiving the arbitration decision.

16.12 Adjudication by the Labour Court

16.12.1 What is adjudication?

Adjudication is a formal court judgement that is legally binding on all parties. The Labour Courts are set up under the LRA and are based at the High Court in each province. High Court judges and lawyers with labour law experience staff the Labour Court. The Labour Court has the same status as the High Court.

16.12.2 How to refer a case for adjudication

If a case goes to the Labour Court for a court judgement (adjudication), phone the Registrar of the nearest Labour Court to get the necessary referral forms. The judge will hear evidence from both sides and make a judgement.

16.12.3 Who can represent employees and employers in a Labour Court case?

Employees and employers can be represented by a lawyer in Labour Court cases. Legal Aid may be granted to pay for the employee's lawyer.

16.12.4 Adjudication appeals

A Labour Appeal Court can hear appeals, and has the same status as the Supreme Court of Appeal. If either side does not agree with the decisions of the Labour Court, they can appeal to the Labour Appeal Court.

CASE STUDY

Dismissal at a brothel

A sex worker works at a brothel. The manager says that she must have 10 clients a day, that she cannot choose her clients, that she is not allowed to have leave days, and that she will be fined if she does not obey the manager. The sex worker is very unhappy, and disobeys the manager. Then the manager dismisses the sex worker. What are her labour rights? What remedy is available to her?.

Answer: She has the right to fair labour practices under the Constitution and protection from all the other labour laws. She can also refer the case to the CCMA for conciliation (see the CCMA conciliation referral form on the following pages).

Figure 33: CCMA conciliation form

<p>LRA Form 7.11 Labour Relations Act 1995 Sections 133, 135, 191(1) and 191(5A)</p>	<p>PART A REFERRING A DISPUTE TO THE CCMA FOR CONCILIATION (INCLUDING CON-ARB)</p>	 CCMA			
<p style="text-align: center;">READ THIS FIRST</p> <div style="text-align: center;">  </div> <p>WHAT IS THE PURPOSE OF THIS FORM?</p> <p>This form enables a person or organisation to refer a dispute to the CCMA for conciliation and con-arb.</p> <p>WHO FILLS IN THIS FORM?</p> <p>Employer, employee, union or employers' organisation.</p> <p>WHERE DOES THIS FORM GO?</p> <p>The Registrar, Provincial Office of the CCMA in the province where the dispute arose. See details on this page</p> <p>WHAT WILL HAPPEN WHEN THIS FORM IS SUBMITTED?</p> <p>When you refer the dispute to the CCMA, it will appoint a commissioner who must attempt to resolve the dispute within 30 days.</p> <p>OTHER INSTITUTIONS</p> <p>Please note that if you are covered by a bargaining council, a statutory council or an accredited agency you may have to take the dispute to that council or agency.</p> <p>You may also need to deal with the dispute in terms of a private procedure if one applies.</p> <p>If in doubt contact the CCMA for assistance.</p> <p>FURTHER INSTRUCTIONS</p> <p>A copy of this form must be served on the other party.</p> <p>Proof that a copy of this form has been served on the other party must be supplied by attaching:</p> <ul style="list-style-type: none"> ▪ A copy of a registered slip from the Post Office; ▪ A copy of a signed receipt if hand delivered; ▪ A signed statement confirming service by the person delivering the form; ▪ A copy of a fax confirmation slip; or ▪ Any other satisfactory proof of service. 	<p>PROVINCIAL OFFICES OF THE CCMA</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 33%; vertical-align: top;"> <p>CCMA EASTERN CAPE – East London 6 Oxford Street EAST LONDON Private Bag X9068, EAST LONDON, 5200 Tel: (043) 743-0826 Fax: (043) 743-0810 Email: PE@ccma.org.za</p> <p>CCMA EASTERN CAPE – Port Elizabeth CCMA House, 107 Govan Mbeki Avenue PORT ELIZABETH Private Bag X22500, PORT ELIZABETH, 6000 Tel: (041) 505-4300 Fax: (041) 586-4585 Email: PE@ccma.org.za</p> <p>CCMA FREE STATE CCMA House, Cnr Elizabeth & Westburger Streets BLOEMFONTEIN Private Bag X20705, BLOEMFONTEIN, 9300 Tel: (051) 505-4400 Fax: (051) 448-4468/9 Email: BLM@ccma.org.za</p> <p>CCMA GAUTENG – Johannesburg Regional Office 127 Fox Street JOHANNESBURG Private Bag X94, MARSHALLTOWN, 2107 Tel: (011) 220-5000 Fax: (011) 220-5101 / 02/03/04/05 / 0861 392 262 Email: Johannesburg@ccma.org.za</p> <p>CCMA GAUTENG – Tshwane (Pretoria) Metro Park Building, 351 Schoeman Street PRETORIA Private Bag X176, PRETORIA, 0001 Tel: (012) 392-9700 Fax: (012) 392-9701/2 Email: Pretoria@ccma.org.za</p> <p>CCMA KWAZULU-NATAL – Durban Embassy Building, 199 Smith Street DURBAN Private Bag X54363, DURBAN, 4000 Tel: (031) 362-2300 Fax: (031) 368-7387 / 7407 Email: KZN@ccma.org.za</p> <p>CCMA KWAZULU-NATAL – Pietermaritzburg Gallwey House, Gallwey Lane PIETERMARITZBURG PO Box 72, PIETERMARITZBURG, 3200 Tel: (033) 345-9249 / 9271 Fax: (033) 345-9790 Email: KZN@ccma.org.za</p> </td> <td style="width: 33%; vertical-align: top;"> <p>CCMA KWAZULU-NATAL – Richards Bay First Floor, Promenade Building, Cnr Tassel Berry & Lira Link Streets RICHARDS BAY Private Bag X1026, RICHARDS BAY, 3900 Tel: (035) 789-0357 Fax: (035) 789-7148 Email: KZN@ccma.org.za</p> <p>CCMA LIMPOPO CCMA House, 104 Hans van Rensburg Street POLOKWANE Private Bag X9512, POLOKWANE, 0700 Tel: (015) 297-5010 Fax: (015) 297-1649 Email: PTB@ccma.org.za</p> <p>CCMA MPUMALANGA CCMA House, Diedericks Street WITBANK Private Bag X7290, WITBANK, 1035 Tel: (013) 656-2800 Fax: (013) 656-2885/6 Email: WTB@ccma.org.za</p> <p>CCMA NORTHERN CAPE CCMA House, 5-13 Compound Street KIMBERLEY Private Bag X6100, KIMBERLEY, 8300 Tel: (053) 831-6780 Fax: (053) 831-5948 Email: KMB@ccma.org.za</p> <p>CCMA NORTH WEST - Klerksdorp CCMA House, 47 Siddle Street KLERKSDORP Private Bag X5004, KLERKSDORP, 2570 Tel: (018) 464-0700 Fax: (018) 462-4126 Email: KDP@ccma.org.za</p> <p>CCMA NORTH WEST - Rustenburg Shop SG7 11B, 43-45 Boom Street RUSTENBURG Private Bag X82104, RUSTENBURG, 0300 Tel: To be confirmed Fax: (014) 538-1267 Email: To be confirmed</p> <p>CCMA WESTERN CAPE CCMA House, 78 Darling Street CAPE TOWN Private Bag X9167, CAPE TOWN, 8000 Tel: (021) 469-0111 Fax: (021) 465-7193/7 Email: CTN@ccma.org.za</p> </td> <td style="width: 33%;"></td> </tr> </table>		<p>CCMA EASTERN CAPE – East London 6 Oxford Street EAST LONDON Private Bag X9068, EAST LONDON, 5200 Tel: (043) 743-0826 Fax: (043) 743-0810 Email: PE@ccma.org.za</p> <p>CCMA EASTERN CAPE – Port Elizabeth CCMA House, 107 Govan Mbeki Avenue PORT ELIZABETH Private Bag X22500, PORT ELIZABETH, 6000 Tel: (041) 505-4300 Fax: (041) 586-4585 Email: PE@ccma.org.za</p> <p>CCMA FREE STATE CCMA House, Cnr Elizabeth & Westburger Streets BLOEMFONTEIN Private Bag X20705, BLOEMFONTEIN, 9300 Tel: (051) 505-4400 Fax: (051) 448-4468/9 Email: BLM@ccma.org.za</p> <p>CCMA GAUTENG – Johannesburg Regional Office 127 Fox Street JOHANNESBURG Private Bag X94, MARSHALLTOWN, 2107 Tel: (011) 220-5000 Fax: (011) 220-5101 / 02/03/04/05 / 0861 392 262 Email: Johannesburg@ccma.org.za</p> <p>CCMA GAUTENG – Tshwane (Pretoria) Metro Park Building, 351 Schoeman Street PRETORIA Private Bag X176, PRETORIA, 0001 Tel: (012) 392-9700 Fax: (012) 392-9701/2 Email: Pretoria@ccma.org.za</p> <p>CCMA KWAZULU-NATAL – Durban Embassy Building, 199 Smith Street DURBAN Private Bag X54363, DURBAN, 4000 Tel: (031) 362-2300 Fax: (031) 368-7387 / 7407 Email: KZN@ccma.org.za</p> <p>CCMA KWAZULU-NATAL – Pietermaritzburg Gallwey House, Gallwey Lane PIETERMARITZBURG PO Box 72, PIETERMARITZBURG, 3200 Tel: (033) 345-9249 / 9271 Fax: (033) 345-9790 Email: KZN@ccma.org.za</p>	<p>CCMA KWAZULU-NATAL – Richards Bay First Floor, Promenade Building, Cnr Tassel Berry & Lira Link Streets RICHARDS BAY Private Bag X1026, RICHARDS BAY, 3900 Tel: (035) 789-0357 Fax: (035) 789-7148 Email: KZN@ccma.org.za</p> <p>CCMA LIMPOPO CCMA House, 104 Hans van Rensburg Street POLOKWANE Private Bag X9512, POLOKWANE, 0700 Tel: (015) 297-5010 Fax: (015) 297-1649 Email: PTB@ccma.org.za</p> <p>CCMA MPUMALANGA CCMA House, Diedericks Street WITBANK Private Bag X7290, WITBANK, 1035 Tel: (013) 656-2800 Fax: (013) 656-2885/6 Email: WTB@ccma.org.za</p> <p>CCMA NORTHERN CAPE CCMA House, 5-13 Compound Street KIMBERLEY Private Bag X6100, KIMBERLEY, 8300 Tel: (053) 831-6780 Fax: (053) 831-5948 Email: KMB@ccma.org.za</p> <p>CCMA NORTH WEST - Klerksdorp CCMA House, 47 Siddle Street KLERKSDORP Private Bag X5004, KLERKSDORP, 2570 Tel: (018) 464-0700 Fax: (018) 462-4126 Email: KDP@ccma.org.za</p> <p>CCMA NORTH WEST - Rustenburg Shop SG7 11B, 43-45 Boom Street RUSTENBURG Private Bag X82104, RUSTENBURG, 0300 Tel: To be confirmed Fax: (014) 538-1267 Email: To be confirmed</p> <p>CCMA WESTERN CAPE CCMA House, 78 Darling Street CAPE TOWN Private Bag X9167, CAPE TOWN, 8000 Tel: (021) 469-0111 Fax: (021) 465-7193/7 Email: CTN@ccma.org.za</p>	
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READ THIS FIRST



Tick the correct box

The name of the employee or an employer that is referring the dispute must be filled in (a).
If there is more than one employee to the dispute and the referring party is not a trade union, then each employee must supply their personal details and signature on a separate page, which must be attached to this form.

These alternate contact details should be of a union official or representative, a relative or a friend.

The name of the trade union or employers organisation that is referring the dispute or assisting a member to refer a dispute must be filled in (b).

OTHER PARTIES

If more than one party is referring the dispute or if the dispute is referred against more than one party, write down the additional names and particulars on a separate page and attach to this form.

Tick the correct box

1. DETAILS OF PARTY REFERRING THE DISPUTE

As the referring party, are you:

- An employee A trade union
- An employer An employer's organization

(a) Name of the party if the referring party is an employee or employer

Name:.....

ID Number:.....

Postal Address:.....

.....Postal Code:.....

Tel:.....Cell:.....

Fax:..... Email:

Alternate contact details of employee:

Name:.....

Postal Address:.....

.....Postal Code:.....

Tel:.....Cell:.....

Fax:..... Email:

(b) Name of the referring party if the referring party is an employer's organisation or trade union, or if the employer's organisation is assisting a member to the dispute

Name:.....

Postal Address:.....

.....Postal Code:.....

Tel:.....Cell:.....

Fax:..... Email:

2. DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)

The other party is:

- An employee A trade union
- An employer An employer's organisation

Name:.....

Postal Address:.....

.....Postal Code:.....

Tel:.....Cell:.....

Fax:..... Email:

Please turn over

Tick the correct box

If the dispute concerns dismissals, also complete Part B (See Page 5)



This section must be completed!

If necessary write the details on a separate page and attach to this form

UNFAIR LABOUR PRACTICE

If the dispute(s) concerns an unfair labour practice the dispute must be referred (ie. received by the CCMA) within 90 days of the act or omission which gave rise to the unfair labour practice. If more than 90 days has elapsed you are required to apply for condonation.

3. NATURE OF THE DISPUTE

What is the dispute about (tick only one box)?

- | | | |
|--|--|---|
| <input type="checkbox"/> Unfair dismissal | <input type="checkbox"/> Unfair Labour Practice
<i>(Give details)</i> | <input type="checkbox"/> Refusal to Bargain |
| <input type="checkbox"/> Organisational Rights | <input type="checkbox"/> Mutual Interest | <input type="checkbox"/> S80 BCEA |
| <input type="checkbox"/> Unilateral change to terms and conditions of employment | <input type="checkbox"/> Severance pay
S41 BCEA | <input type="checkbox"/> Unfair Discrimination
S10 of the Employment
Equity Act <i>(Give details)</i> |
| <input type="checkbox"/> Interpretation/ Application of
Collective Agreement | <input type="checkbox"/> Disclosure of Information | <input type="checkbox"/> S19 Skills Development
Act |
| <input type="checkbox"/> Freedom of Association | <input type="checkbox"/> Unfair Labour Practice
(probation) | |
| <input type="checkbox"/> Other <i>(please describe)</i> | | |

Summarise the facts of the dispute you are referring:

.....

.....

.....

4. DATE DISPUTE AROSE

The dispute arose on:

(give the date, day, month and year)

The dispute arose where:

(give the city/town in which the dispute)

If the dispute concerns a dismissal the date inserted here must be the same as that set out in Item 2 of Part B.

5. DETAILS OF DISPUTE PROCEDURES FOLLOWED

Have you followed all internal grievance / disciplinary procedures before coming to the CCMA? YES NO

Describe the procedures followed:.....

.....

.....

.....

6. RESULT OF CONCILIATION

What outcome do you require?.....

.....

.....

.....

Please turn over 



Tick the correct box

Parties may, at their own cost, bring interpreters for languages other than the official South African languages. Please indicate this under 'other'.

Special features might be the urgency of the matter, the large number of people involved, important legal or labour issues etc.

Only fill this in if this is a dispute about unilateral change to terms and conditions of employment.

The con-arb process involves arbitration being held immediately after the conciliation if the dispute remains unresolved.

Only fill this in if you object to the arbitration commencing immediately after conciliation. An objection cannot be made in disputes relating to probation.

7. SECTOR

Indicate the sector or service in which the dispute arose.

<input type="checkbox"/> Retail sector	<input type="checkbox"/> Private Security	<input type="checkbox"/> Public Service
<input type="checkbox"/> Mining	<input type="checkbox"/> Paper & Printing	<input type="checkbox"/> Health
<input type="checkbox"/> Motor	<input type="checkbox"/> Services	<input type="checkbox"/> Chemical
<input type="checkbox"/> Distribution	<input type="checkbox"/> Food & Beverage	<input type="checkbox"/> Agriculture
<input type="checkbox"/> Wholesale	<input type="checkbox"/> Building & Construction	<input type="checkbox"/> Contract Cleaning
<input type="checkbox"/> Domestic	<input type="checkbox"/> Other (<i>please describe</i>).....	

8. INTERPRETATION SERVICES

Do you require an interpreter at the conciliation / con-arb? YES NO

If yes, please indicate for what language:

<input type="checkbox"/> Afrikaans	<input type="checkbox"/> isiNdebele	<input type="checkbox"/> isiZulu	<input type="checkbox"/> isiXhosa
<input type="checkbox"/> Sepedi	<input type="checkbox"/> Sesotho	<input type="checkbox"/> Setswana	<input type="checkbox"/> siSwati
<input type="checkbox"/> Tshivenda	<input type="checkbox"/> Xitsonga	<input type="checkbox"/> Other (<i>please indicate</i>).....	

9. SPECIAL FEATURES / ADDITIONAL INFORMATION

Briefly outline any special features / additional information the CCMA needs to note:

.....

.....

.....

10. Dispute about unilateral change to terms and conditions of employment (s64 (4))

I/we require that the employer party not implement unilaterally the proposed changes that led to this dispute for 30 days, or that it restore the terms and conditions of employment that applied before the change.

Signed: (*Employee party referring the dispute*)

11. OBJECTION TO CON-ARB PROCESS

I/we object to the arbitration commencing immediately after the conciliation in terms of Section 191(5A)(c).

Signed:

If the employer objects to the arbitration commencing immediately after the conciliation the employer must submit a written notice in terms of CCMA Rule 17(2) at least 7 days prior to the scheduled date of the conciliation. The employer must attend the conciliation regardless of whether it makes this objection.

12. CONFIRMATION OF ABOVE DETAILS

Signature of party referring the dispute:

Signed at.....on this
(place) (date)

16.13 Labour law in action: Kylie's case

CASE STUDY

Sex worker demands labour rights

Who is Kylie?

“Kylie” is a sex worker who was fired from her employment at a brothel in Cape Town. She took her case to the Commission for Conciliation, Mediation and Arbitration (CCMA), arguing that she was unfairly dismissed. The CCMA said it did not have jurisdiction over the case, since the work Kylie was doing – sex work – is currently illegal in South Africa. Kylie then went to the Labour Court. The Labour Court ruled that, as a sex worker, Kylie does not have a right to protection against unfair dismissal. Her lawyers appealed against this judgement to the Labour Appeal Court.

Why is her case important?

Kylie's case is important because the application is about ensuring that the law protects everyone, especially the most vulnerable workers in our society. Sex workers are particularly vulnerable to exploitation in the employment relationship, both because sex work is outlawed and because of the nature of their work.

The Labour Court and the CCMA's interpretation of the employment relationship in the Labour Relations Act (LRA), if taken to its logical conclusion, would have drastic implications in excluding all employees who are in an employment relationship but whose contracts of employment are unenforceable for one reason or another.

This would result in these kinds of employees being deprived of a wide range of protections under the LRA, Basic Conditions of Employment Act, the Occupational Health and Safety Act and the Employment Equity Act, meaning that these workers would be effectively deprived altogether of their right to fair labour practices under section 23 of the Constitution.

The Women's Legal Centre (WLC) interpretation is in line with previous judgements of the Labour Court where the Court has decided that an employment relationship has existed between parties in spite of the fact that they have never entered into an employment contract at all.

The WLC is of the opinion that to grant sex workers their labour rights does not amount to legalising sex work and thus does not conflict with the Sexual Offences Act which criminalises sex work. Even if it was found that the 2 acts contradict each other, the Labour Relations Act states expressly that where the Labour Relations Act conflicts with the provisions of any other law except the Constitution, then the Labour Relations Act should prevail. In other words, committing a victimless crime should not deprive you of the other constitutional rights to which you have a right.

The background

"Kylie" is a sex worker. She was employed at the massage parlour called Brigitte's in Cape Town. She was a full-time employee. She provided personal services to clients for reward. Her services included "massage, intercourse, pelvic massage, foot fetishes, and dominance". She worked for 14 hours a day from 8 am to 10 pm. Only later was she allowed to take Sundays off. She was subject to a system of rules and fines.

Employees who missed work without permission were fined R100. A R50 fine was imposed if an employee went to the shop for more than 15 minutes. If the bath wasn't cleaned a R30 fine was imposed. Employees arguing in front of clients or sleeping while on duty were fined R50. She lived and worked on the parlour premises.

In doing this work, Kylie contravened section 3(a) of the Sexual Offences Act which states that, “any person who resides in a brothel” is deemed to keep a brothel. Keeping a brothel is an offence under section 2 of the Sexual Offences Act. She also contravened section 20(1)(aA) of the Sexual Offences Act because she had “unlawful carnal intercourse” and because she committed “acts of indecency” with other people for reward.

In 2006, after working there for 13 years (from 1993 to 2006) Kylie was summarily dismissed from her employment for not obeying the rules of the brothel. The reasons alleged for dismissing her were:

- A failure to do sufficient bookings.
- Exercising discretion or choice in terms of clients and conduct.
- Spending an hour in her room with her boyfriend who didn't pay.
- Hardly ever working on weekends.
- Failure to adhere to time, leading to discontent of other employees.
- Employer informed Kylie that she is still using drugs and made mention of the fact that she refuses to do oral sex.

In May 2006, Kylie took the dispute to the CCMA for conciliation, alleging that she had been unfairly dismissed. Conciliation proceedings took place in June 2006, but the parties were unable to come to an agreement.

The dispute was referred to arbitration but before that could take place, the Commissioner said another question had to be settled first – did the CCMA in fact have jurisdiction in the matter, since sex work is unlawful in South Africa? She invited Kylie to file an application for a ruling on that issue.

In December 2006, the Commissioner ruled that the CCMA did not have jurisdiction in the matter because:

- The work that Kylie had been employed to do was illegal.

- It rendered her contract of employment invalid.

The CCMA did not have jurisdiction because “the basis of the CCMA’s jurisdiction is that there must be a legally enforceable contract”.

In January 2007, Kylie launched an application in the Labour Court for the Commissioner’s jurisdiction ruling to be reviewed and set aside under section 145(2)(a) of the LRA.

In Kylie’s submission to the Labour Court, she and her lawyers argued that:

- Some of the work that she was employed to do was illegal under the Sexual Offences Act 23 of 1957. But, it is work which is widely tolerated in our society and is no longer condemned as other crimes usually are.
- The criminalisation of sex work makes sex workers particularly vulnerable to exploitation by their employers. Therefore, they are all the more in need of protection.
- The provisions in the LRA are designed to ensure the constitutional right to fair labour practices is enjoyed by everyone.
- In considering the proper interpretation of the LRA’s definition of an “employee”, it is clear that the LRA protects everyone who is as a matter of fact in an employment relationship, whether or not it is also underpinned by an enforceable contract.
- The court should not deny sex workers the protection of the LRC because even though sex work is unlawful, protection of sex workers in line with public policy and does not offend it.
- The Labour Court handed down judgement on the 31st of July 2008. The Court decided that the definition of an “employee” in section 213 of the LRA is probably wide enough to include someone whose contract of employment is unenforceable at common law.

But, the Labour Court also decided that a sex worker does not have a right to protection against unfair dismissal under the LRA, because it would be contrary to a common law principle which has been entrenched as a founding value of the Constitution: that the courts “ought not to sanction or encourage illegal activity”.

In August 2008, Kylie's attorneys filed a notice of intention to apply for leave to appeal to the Labour Appeal Court against the whole judgement and orders made by Acting Justice Cheadle of the Labour Court.

On 11 March 2010, the case was heard by 3 judges in the Labour Appeal Court. Kylie's counsel argued that she has a right to protection against unfair dismissal under section 185(a) of the LRA for these reasons:

- Even if the Court accepts that Kylie's work was illegal under the Sexual Offence Act and that it rendered her contract of employment unenforceable at common law, she nevertheless has the right to fair labour practices under section 23(1) of the Constitution, which states: "Everyone has the right to fair labour practices."
- Kylie qualifies for protection against unfair dismissal under section 185(a) of the LRA because she was an "employee" as defined in section 213 of the LRA. That was so because she was in an employment relationship. It does not matter that her contract of employment was unenforceable or indeed whether she had any contract of employment at all.
- There is a common law principle that the courts do not enforce contracts which are contrary to public policy. But this is no more than a principle of common law. It is also more limited in its scope than the Labour Court suggested. It is not a founding value of the Constitution. It is subject to the Constitution and any legislation enacted under it. It is accordingly trumped by Kylie's rights under section 23(1) of the Constitution and section 185(a) of the LRA.

On the 28 May 2010, the Labour Appeal Court (LAC) handed down a favourable judgment. The Labour Appeal Court accepted that when faced with a situation like Kylie's then the starting point should be the Constitution, and that the illegal activity of a sex worker does not prevent her from enjoying a range of Constitutional rights. The Labour Appeal Court decided that the right to fair labour practices does vest in 'everyone' in an employment relationship.

The LAC endorsed the Constitutional Court's comments in another case that sex workers should not be stripped of their right to be treated with dignity by clients, and concluded that this should apply to employers as well. Thus, the right to fair labour practices applies to sex workers in an employment relationship.

In relation to the LAC's finding that giving sex workers a remedy would encourage and sanction illegal activity, the LAC said that the common law principle was not absolute or inflexible and that a Court has discretion in relation to its application.

The LAC noted that "many sex workers are particularly vulnerable and are exposed to exploitation and vicious abuse" and as part of a class of vulnerable employees, sex workers should have the protection of the Labour Relations Act.

As a result of the Labour Appeal Court's judgement, sex workers can now approach the relevant CCMA, Bargaining Council or the Labour Court. The arbitrator or judge would then have to consider if the sex worker has been treated unfairly and what an appropriate remedy would be. It may not mean re-instatement, but there are other available remedies, such as compensation. The LAC decided that the CCMA does have jurisdiction to decide the case.

The WLC referred the case to the CCMA for arbitration. After the case was referred back to the CCMA and before the set down date for arbitration, the parties entered into a settlement agreement, the exact terms of which are confidential. The WLC encourages sex workers to come forward and make use of the CCMA, as this is now a forum that can offer a remedy to them in the case of unfair dismissals and exploitative working conditions. The Kylie case paved the way for this.

Human trafficking

Learning objectives

- To understand the difference between consensual sex work and sexual exploitation.
- To understand human trafficking.
- To understand the laws on human trafficking and the Prevention and Combating of Trafficking in Persons Bill.

Introduction

It is important for paralegals who work with sex workers to be able to distinguish between consensual sex work and sexual exploitation. In the majority of the cases, the sex workers you will deal with have entered sex work voluntarily.

However, in some occasions you might come across sex workers, mainly women and minors, who do sex work because they are being forced to by someone else. In these situations, it is common that the sex worker is also a 'victim' of *human trafficking*.

Paralegals should therefore be able to identify survivors of human trafficking and provide the right support and advice to them. This chapter will help you to better understand what human trafficking is and the current legal framework to deal with this serious human rights issue that requires national, regional and global collaboration and action.⁶⁰

⋮ **Note:** If a client asks for help with issues related to human trafficking, please fill
⋮ in our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: HUMAN
⋮ TRAFFICKING.

⁶⁰ The contents of this chapter include contributions from Anex.

HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE

HUMAN TRAFFICKING

DATE: _____

NAME: _____

PROVINCE: _____

AREA: _____

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym)

(Optional): _____

2. Age

(optional): _____

3. Telephone no/ contact number you can be reached at (Optional): _____

4. Address: _____

5. Where do you

work? _____

6. Please circle/tick-

Gender: Male Female Transgender man Transgender woman

Indoor Street-based Both.

(explain) _____

7. Did you see a male or female?

FEMALE	MALE
--------	------

8. Please provide the date and time that you saw her / him?

DATE	
TIME	

9. Did you speak to her?

YES	NO
-----	----

If no, please state why you could not speak to her

10. If yes, please arrange another date for a consultation.

DATE	
TIME	

11. If you consulted with her, please provide in detail the full contents of your discussion.

Real name:	
Age:	
Where is she from:	
How did she get to Cape Town	
Who brought her to Cape Town	
Who is she living with	
List human rights violations. eg, assault	
How long has she been in Cape Town	
What is her living conditions like	
Does she want to go home	

Any other information	

12. Please provide a description of the area where you saw her working as a sex worker. Include name of the area, street name, and any visible landmarks, etc.

Area	
Street Name	
Number on the house	
Colour of the house	
Description of the house	
Directions to the house	
Visible Landmarks	

13. Did you see where she lives?

YES	NO
-----	----

14. If yes, please provide a description of her place of residence. Include name of the area, street name, and any visible landmarks, etc.

Area	
Street Name	

Number on the house	
Colour of the house	
Description of the house	
Directions to the house	
Visible Landmarks	

15. Please provide a description of her or him. Please include height, colour of complexion, eye colour, hair colour, description of clothing and an estimation of age.

GENDER	
HEIGHT	
COLOUR OF COMPLEXION	
EYE COLOUR	
HAIR COLOUR	
DESCRIPTION OF CLOTHING	
AGE / ESTIMATION OF AGE	

16. Please provide any information that you may have received from other people about the female or male, for example, information that other sex workers can provide you with.

Name and contact details of Witness /	
---------------------------------------	--

Informer 1	
Name and contact details of Witness / Informer 2	
Name and contact details of Witness / Informer 3	

17. Any other information:

18. Please provide a description of the pimp.

GENDER	
HEIGHT	
COLOUR OF COMPLEXION	
EYE COLOUR	
HAIR COLOUR	
DESCRIPTION OF CLOTHING	
AGE / ESTIMATION OF AGE	

19. Any other information.

20. What legal remedies are you seeking? _____

21. Plan of action
 WLC: _____

SWEAT: _____

Assent / Confidentiality
 Does the source give her/his assent to share the information (with the authorities, the media)?

 Can the source's name be used? _____
 Can we forward your story to SWEAT to be used for advocacy? _____
 Is it necessary for any information to be confidential? Why? Until when?

17.1 What is human trafficking?

Human trafficking includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale disposal or receiving of a person, within or across the borders of South Africa, *by means of one or more of:*

- A threat of harm.
- The threat or use of force, intimidation or other forms of coercion.



- Abduction.
- Fraud.
- Deception or false pretences.
- The abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his/her unwillingness or resistance to being trafficked, or unwillingness to participate in trafficking.
- The giving or receiving of payments, compensation, rewards, benefits or any other advantage.

The *purpose* of this human trafficking is often sexually exploiting, grooming or abusing a person. This includes the commission of any sexual offence or any offence of a sexual nature in any other law against the person or performing any sexual act with the person, whether committed in or outside the borders of South Africa.

17.2 How does human trafficking work?

Human trafficking is a process with 3 stages:

1. Recruitment of a person → Country, province, town of origin.
2. Transportation of a person → Country, province, town of transit.
3. Exploitation of person → Country, province, town of transit.

17.2.1 Recruitment

Partially deceptive recruitment

Victims may be aware that they are to be employed in a given activity but do not know under what conditions, for example: sex workers.

Fully deceptive recruitment

Victims are lured by promises of employment, educational opportunities or financial gain, and are fully deceived by the true intentions of the traffickers.

Forcible recruitment

- Victims are forcibly taken (abduction).
- People in a vulnerable situation are abused, for example: children and refugees.
- Refugees are both victims and perpetrators of trafficking.
- Ethnically-based refugee syndicates assist the trafficker to lure refugees and exploit them sexually.
- Payments are sometimes given to a person in control of another person, for example: children are sold off by a relative.

17.2.2 Transportation

Trafficking routes always reflect one consistent factor – victims are routed to where the demand exists for their services and where the potential profit for their exploitation is the highest.

South Africa has become both an origin and a transit destination for trafficking to take place.

17.2.3 Exploitation

Types of exploitation

- Sexual exploitation (for example, in streets, bars, brothels, massage parlours, saunas, call-girl, escort agencies).
- Forced labour (for example, in agriculture, fishery, construction, mines, sweatshops, catering).
- Domestic servitude.
- Street begging or peddling.
- Forced military service.
- Organ removal.
- Removal of body parts.
- Children trafficked for adoption.
- Orphans of refugees being exploited.

17.3 Others who facilitate trafficking in people

- Transport providers (for example: taxi drivers, long distance truck drivers, bus drivers, sailors).
- Professionals (for example: individuals involved in adoption of babies, lawyers, health professionals).
- Government officials (for example: immigration, border police and other law enforcement agencies).

17.4 How does human trafficking differ from smuggling?

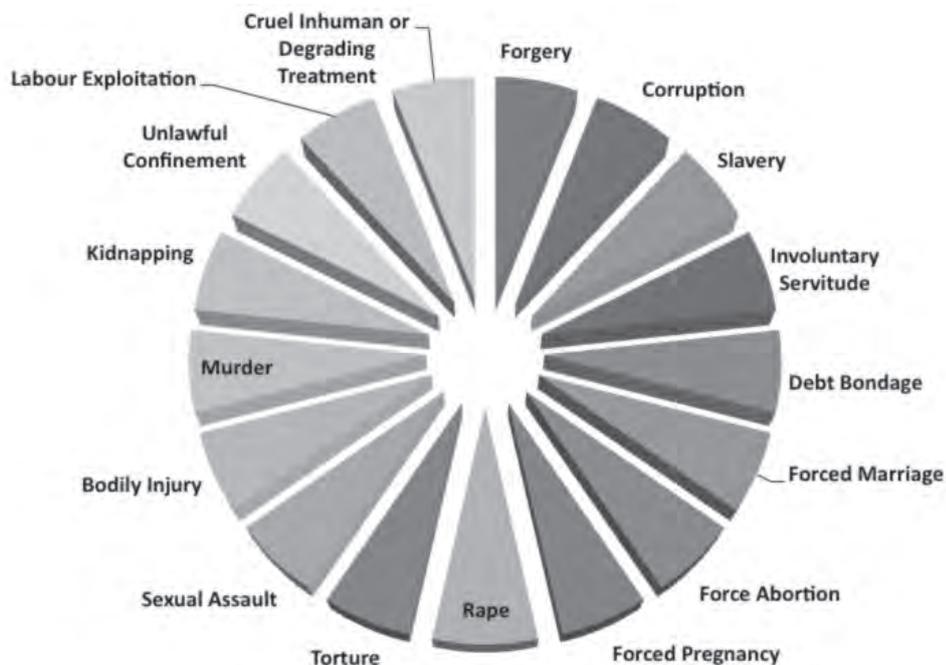


Figure 34: Trafficking crimes

With smuggling, the smuggler requests fees and there may be no deception involved in the illegal agreement.

On arrival at their destination, the smuggled person is usually free.

With trafficking, the victim is enslaved, or the terms of their debt bondage are fraudulent or highly exploitative.

The trafficker takes away the basic human rights of the person being trafficked and abused.

17.4.1 The elements of smuggling

Activity	Transportation and transfer of persons.
Means	No element of distortion of the free will of the person, either by force, deception or abuse of power. In most smuggling cases, the migrants seek to realise their objective of crossing the border into a third country illegally.
Purpose	Financial profit from illegal border crossing.



Figure 35: Trafficking and smuggling

17.4.2 Difference between trafficking and smuggling

Trafficking	Smuggling
Legal, Illegal, no border crossing	Illegal border crossing
Legal or illegal documents	Illegal (false or stolen documents)
Documents taken	Voluntary
Coercion or repeated exploitation	Person a commodity
Restricted movement, control	Movement
Crime against an individual	Crime against the State
Deception	Willingness
Intimidation	Immigration law
Coercion	Secrecy
Exploitation	Entry illegal
<i>Relationship between trafficker and victim continuous and exploitative</i>	<i>With the smuggler the relationship ends at the border crossing</i>

Under the International Labour Organisation Convention 182:

“Labour exploitation of children includes: -

- a) All forms of slavery or practices similar to slavery, debt bondage and serfdom and forced and compulsory labour, including forced and compulsory recruitment of children for use in armed conflict.
- b) The use of procurement or offering of a child for prostitution, for the production of pornography.
- c) The use, procuring or offering of a child for illicit trafficking of drugs as defined in the relevant law.
- d) Work which by its nature or the circumstances in which it is carried out is likely to harm the health, safety or morals of children.
- e) Work done by children below the minimum age for admission to employment.”

17.5 The impact of trafficking

Psychological impact

Trauma(longer lasting trauma), learning difficulties, attention disorders, chronic stress, depression, sexual behaviour, low self-esteem, poor social skills, obsessive compulsive disorder, multiple personality disorder.

Health

Stunted growth, physical injuries affecting development, HIV, sexually transmitted infections (STIs), tropical diseases, malaria, dengue fever, typhoid, brain damage, psychosomatic ailments, eye problems, chronic migraines, stomach aches.

17.6 International law on human trafficking

- The United Nations Convention against Transnational Organised Crime of 2000.
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, of 2003.
- The Convention on the Rights of the Child of 1989.
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000 (obliges the State to extend legislative and other measures to act effectively against these practices and to assist victims).
- The Convention on the Elimination of all Forms of Discrimination against Women of 1979 (obliges the State to ensure that women are not treated like objects that can be bought or sold and that women should not be exploited).
- The Rome Statute of the International Criminal Court; the Convention Concerning Forced Labour 29 of 1930.
- The Convention Concerning the Prohibition and Immediate Action on Human and Peoples Rights of 1981.
- The African Charter on the Rights and Welfare of the Child of 1990 and Protocol to the African Charter on the Rights of Women in Africa (commits State parties to take appropriate measures to prevent the sale of or traffic in children for any purpose or in any form by any person, including parents or legal guardians of the child).

17.7 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

This is the most significant international protocol which directs South Africa to adopt legislative and other measures as may be necessary to establish trafficking as a criminal offence.

Article 5 of Protocol

State parties must adopt legislative and other measures to establish trafficking as a criminal offence.

Article 6 of Protocol

State parties must assist and protect victims of trafficking, and ensure that their domestic, legal or administrative system have measures to provide victims of trafficking with information.

17.8 South African Constitution and laws

- Section 231 of the Constitution addresses International Agreements, and says that an international treaty binds South Africa at an international level after it has been approved by resolution in both the National Assembly and the National Council of Provinces.
- Section 231(4) states that an international agreement only becomes law in South Africa when it is enacted into law by national legislation.
- South African Constitution: Bill of Rights: sections 9, 10, 12, 21 and 28.
- Child Care Amendment Act of 1996.
- Sexual Offences Act of 1957.
- Children's Act of 2005.
- Prevention of Family Violence Act of 1993.
- Basic Conditions of Employment Act 1997.
- Prevention of Organised Crime Act 121 of 1998.
- Immigration Act 13 of 2002.

17.9 The Prevention and Combating of Trafficking in Persons Act

The Prevention and Combating of Trafficking in Persons Act 7 of 2013 was signed into law on 28 July 2013. For the first time, South Africa has one law to address all the offences relating to the trafficking of people.

Besides creating the main offence of trafficking in persons, this new Act also creates offences such as debt bondage; the possession, destruction and tampering with travel documents; and using the services of victims of trafficking.⁶¹

SUMMARY OF THE ACT

Preamble

- Recognise that poverty, unemployment and search for improved socio – economic opportunities are contributing factors making persons vulnerable to become victims of trafficking.
- Concerned by the increase of trafficking in persons, especially women and children, and the increasing role played by organised criminal networks in the trafficking of persons globally.
- Must be in line with human rights.
- Must be in line with the Protocol (see 17.7 on page 342).

Chapter 2: Offences, penalties and extra-territorial jurisdiction

- Trafficking is an offence and if a person is found guilty, he/she will be liable on conviction to a fine or imprisonment, including a fine up to R100 million or life imprisonment.
- *Debt bondage* is an offence:

“Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence.”
- It is also an offence to intentionally destroy, confiscate, tamper or conceal an identity document, passport or other travel document of a victim of trafficking.
- It is an offence to use the services of or to enable someone to use the services

61 Media Release issued by the Presidency, viewed at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=38366&tid=114758>.

of a person who was trafficked.

- Anyone who incites, conspires, instigates, commands, directs, aids, advises, encourages or procures any other person to commit the offence of trafficking, can get a fine or imprisonment, including life imprisonment.
- A perpetrator cannot use a defence stating that the victim consented to the intended exploitation or that the exploitation did not occur.
- If someone commits an offence of trafficking, the employer or principal may be liable too, if the person acts within the scope of his/her employment, apparent authority, or with the implied consent of the director, employer or principal.
- Conduct facilitating trafficking in persons: if someone who leases a room or house, building or establishment, advertises, publishes, prints, facilitate or promote, including the use of the internet, is guilty of an offence, they can get a fine or imprisonment for a period up to 10 years.
- Internet Service Providers: must take all reasonable steps to prevent the use of their service for purposes of trafficking – they can be guilty of an offence and liable to a fine or imprisonment of up to 5 years.
- Liability of carriers: any one who brings a victim or removes a victim from South Africa and the victim does not have travel documents, can be liable to a fine up to R1 million or imprisonment up to 5 years.
- *Extra-territorial jurisdiction*: a court has jurisdiction for an act committed outside South Africa which would have been an offence under this Act.
- Under section 14, when a person is convicted of any offence in Chapter 1, the court may impose a sentence, and will consider these *aggravating factors*:
 - ~ The significance of the role of the convicted person in the trafficking process.
 - ~ Previous convictions relating to the offence of trafficking in persons.
 - ~ Whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance.
 - ~ The conditions in which the victim was kept.
 - ~ Whether the victim was held captive for any period.
 - ~ Whether the victim suffered abuse and the extent of this abuse.
 - ~ The physical and psychological effects the abuse had on the victim.

- ~ Whether the offence formed part of organised crime.
- ~ Whether the victim was a child.
- ~ The nature of the relationship between the victim and the convicted person.
- ~ The state of the victim's mental health.
- ~ Whether the victim had any physical disability.

Chapter 3: Status of foreign victims of trafficking

- There are protective steps for a victim to remain in South Africa during the investigation and prosecution of a perpetrator for trafficking.
- If the National Commissioner of the SAPS has in writing confirmed that the victim will be able to assist the police investigation, the victim can be issued a visitor's visa under section 11 of the Immigration Act for up to 3 months.
- Once the person agrees to assist, they must be assessed by an accredited organisation.
- If after the 90 days, the person does not co-operate, then Social Development must decide whether it is safe for the person to return home, or Home Affairs will decide whether to repatriate (return to the country of origin) the foreigner – BUT these steps must be taken after carefully assessing the safety of the person in returning to their country of origin *and* after checking if there are institutions there to assist victims of trafficking.
- Permanent residence: application under section 27(h) for permanent residence after being in South Africa for 5 years.

Chapter 4: Identification and protection of victims of trafficking

- Immigration official, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional healer who suspects that a person is a victim of trafficking, must within 24 hours report it to a police official.
- The police official must within 24 hours refer the child victim to a child protection organisation or the provincial Department of Social Development, pending a police investigation.

- With adult victims, the persons mentioned in point 1 must get written consent from the victim, unless the adult victim is mentally disabled, or in an altered state of consciousness through drugs or other causes. And then the police official must refer the adult victim to an accredited organisation.
- The accredited organisation must within 24 hours make an assessment and the victim must be informed of the right to apply for a recovery and reflection period.
- Child victims must be placed in temporary safe care and a foreign child can apply for refugee asylum.
- Foreigners must be given access to health care services.
- There should be no prosecution for being an illegal immigrant, for false documents and for being involved in an illegal activity.

Chapter 5: Services to adult victims of trafficking

- Accredited organisations: must get a certificate from the Minister of Social Development.
- These organisations deal with the safety and health care of victims.
- Programmes should be focused on accommodation, counselling, rehabilitation and reintegration.
- The organisation must provide statistics on the number of victims, purposes for trafficking, and methods used to recruit.

Chapter 6: Compensation

- *To victims of trafficking*: the court can order that the offender pay for the damage to or the loss or destruction of property, including money, physical, psychological and other injuries, being infected with a life-threatening disease, or loss of income and support.
- *Compensation to the State*: the court may make an order for payment for expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim.

Chapter 8: General provisions

- If a child was trafficked by a parent, guardian or a person who has parental rights and responsibilities to the child, the court may suspend the person's parental rights and responsibilities, and place the child in a temporary place of safety.
- The Director-General of Home Affairs can be requested by another country that is a party to the UN Protocol to check on the legality of identity documents that may have been used to traffic a person.

⋮ **Note:** A copy of this Act is available by following this link:

⋮ [http://www.gov.za/documents/index.php?term=trafficking&dfrom=&dto=&tps%5B%5D=1](http://www.gov.za/documents/index.php?term=trafficking&dfrom=&dto=&tps%5B%5D=1&subs%5B%5D=0)
⋮ [&subs%5B%5D=0](http://www.gov.za/documents/index.php?term=trafficking&dfrom=&dto=&tps%5B%5D=1&subs%5B%5D=0).

The law of succession

Learning objectives

- To understand the law of succession.
- To know the differences between testate and intestate succession.
- To know how to advise a client on a will.
- To know the basic procedures involved in winding up an estate.

Introduction

The law of succession will guide your advice for when a sex worker or one of their family members dies, especially on what should happen to their *estate* (their property, assets and debts) after death. The rules of succession determine and identify the people who are entitled to benefit or inherit from the estate of the deceased person. Whether a person dies with or without a will affects how the estate should be divided and who should benefit from the estate.

⋮ **Note:** If a client approaches you with a query relating to their will and estate, please complete our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: OTHER MATTERS on the following pages, which has space to record issues around succession.



HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE

OTHER MATTERS

DATE: _____ NAME: _____

PROVINCE: _____ AREA: _____

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym)
(Optional): _____
2. Age
(optional): _____
3. Telephone no/ contact number you can be reached at (Optional): _____
4. Address: _____
5. Where do you work? _____
6. Please circle/tick-
Gender: Male Female Transgender man Transgender woman
Indoor Street-based Both:
(explain) _____
7. Describe the presenting issue. _____

8. What legal remedies are you seeking? _____

9. Plan of action

WLC: _____

SWEAT: _____

Assent / Confidentiality

Did the source give his/her assent to share the information (with the author/ies, the media)?

Can the source's name be used? _____

Can we forward your story to SWEAT to be used for advocacy? _____

If necessary for any information to be confidential? Why? Until when? _____

18.1 Intestate succession

Intestate succession is when a person dies without leaving a will and is governed by the Intestate Succession Act 87 of 1987. The Act summarises the process after the death of a person (the *deceased*) who dies intestate in 9 rules.⁶²

Rule 1

Section (1)(1)(a): if the deceased leaves a spouse/spouses, but no children or descendants, then the spouse/spouses become the beneficiaries of the estate. The deceased may leave more than one spouse, which means that the deceased may have entered into a customary marriage – then all spouses will have a right to inherit/benefit from the deceased estate in equal shares.

E EXAMPLE

Ben and Mary were married to each other in community of property without having any children in their marriage. On the death of Ben, Mary will firstly have her half share of the estate because of the way they were married, which in this case was in community of property. The balance of the estate which is Ben's half share of the estate will be enjoyed by Mary.

But if Ben was married to Mary according to the customary law and then later on married Martha, then on the death of Ben, Mary and Martha have a right to Ben's estate in equal shares. This means that they can share it in half and each get to enjoy half of Ben's estate.

Rule 2

Section (1)(1)(b): if the deceased dies having no spouse, but having descendants/children, the children have a right to inherit from the estate. All children of the deceased have a right to inherit. It doesn't matter if a child was born out of marriage (child out of wedlock) or the child was an adopted child.

Rule 3

Section (1)(1)(c): if the deceased dies and leaves both spouse(s) and descendants/children, then both spouse(s) and descendants have a right to inherit.

Depending on the amount of the deceased estate, the spouse(s) will inherit either a child's share of the estate or R125,000, whichever is the greatest, and this will be inherited by each spouse and thereafter the child inherits the residue or the balance

⁶² Intestate Succession Act 87 of 1987: sections (1)(1)(a)-(h).

after the spouse(s) entitlement.

Both spouses and descendants inherit according to the amount of the deceased estate. If the estate is less than R125,000, then the spouse(s) will inherit the whole estate to the exclusion of the children and other family members.

Rule 4

Section (1)(1)(c): if the deceased leaves no spouse or descendant, but they leave both parents, then the deceased parents will inherit in equal shares. It makes no difference if the deceased parents were married, divorced or never married; they are still and will always be the deceased parents.

The parents of the deceased are his/her biological parents. In the case where the deceased was adopted, then for purposes of intestate succession the adoptive parents of the deceased inherit in equal shares and not his biological parents. But step parents and foster parents are *not* considered as parents of the deceased for intestate succession.

Rule 5

Section (1)(1)(d): if the deceased leaves no spouse nor descendants, and only one parent is alive, but the one deceased parents left children, then one surviving parent inherits one half of the estate and the descendants/children of the other parents inherit the other half. Here the deceased estate is shared equally by the one surviving parent and the deceased's brothers and sisters.

Rule 6

Section (1)(1)(e): if the deceased leaves no spouse or descendant and only one surviving parent but the other deceased parents leaves no descendants, then the one surviving parent will inherit the whole of the estate. This means he/she will be the sole heir.

Rule 7

Section (1)(1)(f): if the deceased leaves no spouse, no descendant and no parent but both parents leave descendants, then the parent's descendants will inherit in equal shares. Here the estate splits into two halves: a "mother half" and a "father half". Each parent's half share is divided and shared by their descendants according to mother half and father half. Then the descendants from both halves get to inherit in equal shares.

Rule 8

Section (1)(1)(g): if the deceased leaves no spouse, no descendants and no parents but only one parent leaves descendants, then the descendants of the one parent will inherit the estate.

Rule 9

Section (1)(1)(h): if the deceased leaves no spouse, no descendant, no parent and none of the parents left surviving descendants, then the nearest blood relations will inherit the estate. This will probably leave the deceased aunts and uncles as the nearest blood relations who will inherit the deceased estate.

No intestate heirs

When a person dies and leaves no person capable of inheriting from the deceased estate, then the executor of that estate, after paying off all creditors, will have to transfer the residue into the Guardians Fund.⁶³ The money will remain in the Fund and will be kept for a period of 30 years, and if no person comes to claim the money within 30 years, the money will then accrue to the State.

18.2 Wills

18.2.1 Testate succession

Testate succession is where the person leaves a will/testament of the manner in which his/her estate should be shared. The legislation governing testate succession is the Wills Act 7 of 1953.

What is a will?

This is the document in which a person sets out the manner in which his/her estate should be handled and distributed after death. The person who makes a will is referred to as the *testator* (male) or *testatrix* (female). *The will sets out:*

- Who should benefit? (the testamentary heirs)
- In what proportion should the heirs benefit?
- At what stage should the beneficiary inherit? Some wills have conditions of inheriting, for example: that a child only inherits when they are 18 or 21.
- Who should be responsible for the administration of the estate? (the *executor* or

⁶³ Administration of Estates Act 66 of 1965: sections 35(18) and 92.

the *executors* when more than one person is appointed)

Who can make a will?

Every person can make a will, whether married or unmarried. When a person is married *in community of property*, he/she may make a will for his/her half share in the joint estate. Any person who is 16 or older can make a will provided that you are not mentally ill and also capable of understanding the consequences of your own actions.

Why should a person make a will?

It is your opportunity to express your wishes about who should benefit from your estate when you die. If you don't make a will, then the above rules of intestate succession will kick in. So your will is proof of your wishes for your estate.

In the past many African people did not have the chance of making a will based on the fact that culture dictated who would inherit from the deceased person's estate. Women particularly were deprived of the chance of owning and inheriting any property because it was only men who were allowed to take control of property and inherit from the deceased estate.

C CASE STUDY

In the constitutional judgement of *Bhe and Others v the Magistrate Khayelitsha*⁶⁴ and *Others*, it was decided that, when a person dies without a will, the rule of intestate succession should determine the way in which an estate is shared. The rule of *primogeniture* (succession to the oldest male in the family) in African culture was thus declared unconstitutional.

18.2.2 Formal requirements to make a will

There are certain requirements which must be followed for a will to be considered a valid (legal) will.

T TIPS

Section 2(1) of the Wills Act says:

- A will must be in writing.
- The will must be signed.

64 2005 (1) BCLR 1 (CC).



- The testator can sign by means of a full signature, or a mark or thumb print when unable to write.
- The testator should sign at the end of the will, meaning that at the end of the wording of the will. This is to prevent someone else adding something to the end of the will, which may be against the testator's wishes.
- When the will has more than one page, each page should be signed by the testator.
- There must be 2 witnesses present to sign as witnesses to the signature of the testator – they must be *competent*: 14 or older and not mentally ill.
- The witness to a will cannot be a person who will benefit from the will. If this happens, the witness who is a beneficiary will be disqualified from benefiting from the will.
- Where a testator signs by a mark and not his full signature, or another person is chosen to sign on behalf of the testator in her/his presence, then this must happen in the presence of a Commissioner of Oaths. The Commissioner must then issue a certificate to certify she/he is satisfied that the will is the will of the testator and is the expression of the testator's wishes. This certificate must be added to the back of the will.

18.2.3 Amending a will

The Wills Act allows you to amend your will at the time of the initial signing or at any time afterwards. An addition to your will at a later date is called a *codicil* to the will.

Each amendment should be accompanied by the signature of the testator or the person signing on behalf of the testator, in the presence of the testator and 2 competent witnesses. These witnesses need not be the same witnesses who signed the initial will.

18.2.4 What happens if a will does not follow these formalities?

If a will does not follow the formalities in the Wills Act, the will may be rejected by the Master of the High Court. As a result, the deceased estate may be shared according to the rules of intestate succession.

An interested person (for example: someone who benefited under the original will) can insist that the will of the testator should be accepted by the Master of the High Court because they believe that the will is an expression of the testator's true wishes. This person will have to apply to the High Court to excuse any formalities that were not followed and declare the will valid if it is satisfied that the document was intended to be the testator's will.

E EXAMPLE

A will

LAST WILL AND TESTAMENT OF _____

1. I, _____ married out of community of property to _____ (hereinafter referred to as my spouse), hereby revoke all Wills and Codicil previously made by me and declare this to be my Last Will and Testament.

2. I bequeath the residue of my estate to my spouse.

Should my spouse not survive me for a period of 30 (thirty) days, then I bequeath the residue of my estate to my children.

Should a child predecease me, the benefit that would have devolved upon such child shall devolve upon such child's descendants by representation or failing descendants, upon my remaining children or their descendants by representation.

3. Failing a natural guardian, I appoint my _____, and failing him my _____, to be the guardian of my minor children and I direct that the said guardian shall not be required to furnish security for acting in that capacity.

1. I direct that any of my furniture, household effects, personal effects and motor vehicles to which a minor may become entitled under my Will, may be handed to such minor's guardian at the discretion of my executor for the period of the beneficiary's minority. The receipt of the said guardian, who shall not be required to furnish security in this regard, shall be sufficient discharge to my executor.

2. I direct that should any beneficiary be a minor at the date of my death, his or her inheritance shall not be paid into the guardian's fund but shall be paid to his or her guardian who may apply such inheritance, or the income therefrom, for the exclusive benefit of such minor during his or her minority and account to such beneficiary for the capital, or so much thereof as may remain, and any accumulation of income thereon when he or she attains majority. The receipt of the said guardian, who shall not be required to furnish security in this regard, shall be a sufficient discharge to my executors.

AS WITNESSES:

1. _____
2. _____

Figure 36: Example of a will

18.3 Reporting of the estate to the Master of the High Court

On the death of the deceased, regardless of whether they die intestate or testate, the deceased estate should be reported to the Master of the High Court, who keeps all the records of estates. The procedures involved are governed by the Administration of Estates Act 66 of 1965.

The Act says:

- If a person dies and leaves assets or a will or both, then the person's estate must be reported to the Master within 14 days of death.
- This duty to report usually rests with the surviving spouse, or the nearest relative who resides in the area where the death occurred. If there is no relative, then the duty rests on the person who was in control of the premises at which the person died.
- Where the testator nominated an executor or executors to administer the estate, the family member usually informs the nominated executor who will be responsible for the reporting of the estate to the Master of the High Court. It is the Master in the area where the deceased normally lived to whom the estate must be reported.
- If the value of the estate is less than R50,000, and the deceased did not leave a will, then the estate can also be reported to the Master through a magistrate at the nearest Magistrate's Court.

18.4 Appointing an executor or Master's representative

No person may administer the estate of the deceased unless they are given Letters of Authority or Executorship by the Master of the High Court. I

The amount of the estate usually determines the type of appointment:

- If the value of the estate is more than R125,000, then the Master appoints the executor. Where there is a will which expressly states who should be the executor, then the Master will appoint that person or people.
- If the value is less than R125,000, the Master may not have an executor but a Master's representative (called a *section 18(3) appointment*).

18.5 The estate administration process

Once the executor receives his/her Letters of Executorships by the Master, then the process of administration then begins. The main function of the executor or Master's representative is to take control of the deceased estate, pay all creditors and administration costs, and then transfer the residue (what is left) to the heirs of the deceased.

After appointment, the executor should:

- Place an advert in the Government Gazette and in a local newspaper circulating in the district where the deceased lived calling on all creditors of the deceased to lodge their claims against the estate within 30 days after the advert.
- Take control of and identify all assets of the deceased, and be able to place a monetary value on the assets.
- Open a banking account in the name of the estate and deposit all funds received for and on behalf of the estate to this account. Any payments made should be made to this account.
- Notify institutions with which the deceased had dealings, such as SARS and banks, of the death of the deceased. With SARS, the executor should provide them with details of the deceased's final tax liability and an estate number.
- Within 6 months of appointment, lodge with the Master an account of his/her administration. This *Liquidation and Distribution Account* sets out all the deceased's assets and liabilities, and how the balance should be distributed to the heirs. Any income and expenditure received after death up to and until the account is lodged with the Master, must also be included.

After the account is lodged and approved by the Master, it must be available for inspection for 21 days to allow any interested person to view the account and make any objections to the account within the 21 day period. These objections are made to the Master of the High Court.

If there are no objections to the account after 21 days, then the executor may go ahead and pay all creditors and distribute to all heirs within 2 months. Once the executor has completed all duties, he/she can apply to the Master for a formal discharge from these duties.

Property law

Learning objectives

- To understand the right to property and property law in South Africa.
- To be able to give advice on lease contracts.
- To be able to give advice on evictions.

Introduction

Section 25 of our Constitution protects property rights of all individuals in South Africa. It serves a guarantee of everyone in the country to have access to land and security of tenure. Section 26 (3) says everyone has a right of access to housing. These 2 sections place a duty on government to ensure progressively that everyone has access to land, housing and security of tenure, and that no one is deprived of opportunities to access these rights.

⋮ **Note:** If a client approaches you with a query relating to property law, please complete our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: OTHER MATTERS, which allows you to record property-related issues (the same questionnaire on page 351 in Chapter 18: The law of succession.).

To help enforce these rights, government has enacted these laws:

- The Restitution of Land Right Act 22 of 1994 which seeks to address the imbalances of the past to all persons or communities dispossessed of property after 19 June 1913 as a result of past racial discriminatory laws and practices, to restore property or receive just and equitable redress.
- The Land Reform (Labour Tenants) Act 3 of 1996.

- The Extension of Security of Tenure Act 62 of 1997.
- The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998, which aims to prohibit unlawful eviction, to provide procedures for the eviction of unlawful occupiers and to repeal the Prevention of Illegal Squatting Act, 1951.

19.1 The contract of lease

The contract is governed by the Rental Housing Act 50 of 1999. The Act regulates the rental of properties which are let for housing purposes, as part of the right of access to housing under section 26(3) of the Constitution.

A *lease* is a contract or an agreement entered into between the *lessor* (landlord) and *lessee* (tenant). The lessor allows the lessee to use and enjoy the property (which is usually owned by the lessor) in return for a payment of rent which is determined in agreement between the 2 parties.

The lessor and lessee must agree on these terms of the contract:

- The full names and contact details of both the parties.
- A full description of the property to be leased.
- The amount of rent payable and the amount at which it may increase during the lease period.
- The period for paying rent (usually monthly) and the date on which it is due.
- The amount of the deposit, if it is required.
- The lease period – if there is no fixed period, then the notice required to terminate the lease.
- The duties of both lessor and lessee within the duration of the lease.
- The party responsible for utility payments (water and electricity bills).
- Maintenance of the premises (usually the responsibility of the lessor).
- Things that need to be done or fixed within the property (which the lessor can promise to do in the contract).



Note

As a lessee, always get your lease contract in writing signed by both the lessor and yourself as lessee. You have a right to ask the lessor to put down all the terms of the lease in a written contract.

19.2 Duration of the lease

The lease may be entered into for:

- A fixed period of time: monthly, weekly or annually, or
- An undetermined period of time, which should end upon the decision of either party.

Due notice should always be given to the other party on termination of the lease. The notice must be written down as a term in the lease contract. Often if you pay rent monthly, the notice period will also be 1 month.

19.3 Termination of the lease

The ending of the lease is determined by the terms of the contract. If the lease was for a fixed period, then the lease in this instance ends upon reaching the end of that period. This is often 1 year.

If the lease was for an undetermined period, then reasonable notice must be given by the one party deciding to terminate the lease to the other party.

In some circumstances, the lease may be brought to an end before it reaches the particular date upon which agreed by both parties. The lease may also be renewed after the expiry of the fixed period.

19.4 Duties of the lessor

Each party to the lease contract will have to carry out certain duties within the duration of the agreement.

T TIPS

The lessor's duties are:

- To make the property available to the lessee upon the agreed date.



- To not disturb the use and enjoyment of the lessee's property within the duration of the contract.
- To provide the property in the conditions agreed on and to ensure that these conditions are maintained to the satisfaction of the lessee.
- To ensure the premises are fit for residential purposes for the benefit of the lessee, for example: proper access to water.
- To ensure the general maintenance of the premises (depending on the wording of the contract).
- To provide a written receipt on payment of rent.
- To raise any complaints relating to the premises verbally or in writing to the lessee.
- To give the lessee written notice of failure to pay rent or to remedy any other breach of the lease.
- To pay the lessee their deposit back plus interest at the end of the contract, unless the lessor is owed rent money or has to use some of the deposit towards repairs due to the fault of the lessee.

19.5 Duties of the lessee

T TIPS

The lessee's duties are:

- To pay the rent at the time agreed on and in the manner agreed on.
- To raise any complaints relating to the premises verbally or in writing to the lessor.
- To take care of the premises, and keep them tidy and clean at all times.
- To respect the rights of other tenants to use and enjoy their premises (for example, without making too much noise).
- To return the premises at the end of the contract in its original state.
- To use the premises for the agreed purpose only, for example: for residential purposes.
- To not make any structural changes to the premises without permission.
- To allow the lessor to inspect the premises at reasonable times and after reasonable notice.

19.6 Breach of contract and remedies

If the lessor or lessee breach (break) the terms of the contract, this is called *breach of contract*.

E EXAMPLES

Examples of breaches by a lessor are:

- Not maintaining the property properly, for example: not repairing a leaking roof.
- Not allowing the lessee to enjoy use of the premises through not providing agreed services, for example: not providing a clean, uninterrupted water supply.
- Not respecting the lessee's privacy, for example: demanding access to the lessee's flat and searching the premises for no good reason.

Examples of breaches by a lessee are:

- Not paying rent at all, only paying part of the rent or paying rent late.
- Causing a nuisance to other tenants through the playing of loud music and partying through the night.
- Causing serious damage to the property or not cleaning the premises, leading to complaints being made.

Remedy options

Ideally, both lessor and lessee should attempt to resolve minor breaches of contract verbally or in writing, and give each other the opportunity to correct the breach, for example: the lessor warns the lessee to pay rent for the end of March by 15 April, or the lessor requests a reduction in rent until the lessor fixes a leaking roof.

If attempts to resolve breaches peacefully do not work, both lessor and lessee can choose to give notice and terminate the contract. Unless it is a very serious breach, they should each give the required notice set out in the lease. Both lessor and lessee can also consider claiming civil damages or bringing a criminal charge, depending on what has happened.

The lessor can terminate the lease by written notice to the lessee after the lessee, for example, does not:

- Pay rent after being given a warning and still not paying rent within another 7 days.
- Remedy another breach of the lease after being given another 14 days to do this after an initial warning.

The sex worker as lessee may choose to get advice from a Legal Aid Clinic or law clinic, or from you as a paralegal before deciding what to do next, or to defend any action by the lessor.

⋮ **Note:** If a sex worker is renting the property, and using it as a business property to run a brothel, the lease is 'null and void' – this means it cannot be enforced under current South African law.

The lessor has to be careful about taking any drastic steps and will have to follow the legal requirements of laws relating to evictions in 19.7 below.

19.7 Evictions

Tenure refers to the different ways of owning and occupying property, land or housing. *Security of tenure* means that your right to stay where you are is secure. For example, even if you breach a lease contract, you cannot be thrown out or evicted easily because of security of tenure.

These laws give security of tenure:

- The Extension of Security of Tenure Act 62 of 1997 (ESTA).
- The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE).
- The Land Reform (Labour Tenants) Act 3 of 1996 (LTA).

The Extension of Security of Tenure Act (ESTA)

Under ESTA, if you have lived on land (rural, or farm or undeveloped land) owned by someone else on or before 4 February 1997, you are defined as an *occupier*.

T TIPS

You can only be evicted if:

- As the occupier you receive 2 months' written notice of the owners' intention to apply for an eviction, called a *section 9(2)(d) notice*.
- Copies of this notice are also be sent to the nearest municipality and to the provincial office of the Department of Rural Development and Land Reform – the aim of this is to warn them that you may need alternative accommodation if the court grants an eviction order.

- An eviction is ordered by the court – thus a simple letter of termination of residence is not enough.
- The Magistrate’s Court or a Land Claims Court orders an eviction if they think an eviction order is just and equitable in the circumstances

The Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE)

PIE sets out procedures for evicting unlawful occupants and prohibits unlawful evictions in urban areas.

T TIPS

Section 4 of PIE says that, before going to court, the lessor must send you a letter as the unlawful occupier:

- Advising you of your unlawful occupation.
- Setting out the damages caused as a result of the unlawful occupation.
- Giving you a certain period to leave the property before they will make an application in court to evict you for unlawful occupation.

PIE also says that, at least 14 days before the hearing of the eviction proceedings, the Sheriff of the court must serve written notice to you as an unlawful occupier and also to the nearest municipality.

This notice must:

- State that the proceedings are for an eviction order of an unlawful occupier.
- Indicate the date and time of the court hearing.
- Set out the grounds for evicting you.
- Say that you can appear before the court and apply for Legal Aid.

The application for an eviction order can be made in the High Court or the Magistrate’s Court.

The Land Reform (Labour Tenants) Act (LTA)

For rural farming areas and small holdings, the LTA says that labour tenants may not be arbitrarily evicted except for an order of court by the Land Claims Court.

The procedures are the same as those for occupiers under ESTA, except that the written notice by the owner should be sent to the Director General of the Department of Rural Development and Land Reform.

A labour tenant, who lodged an application to acquire land under the LTA to the Director General of the Department of Rural Development, cannot be evicted from the land they occupy while their application is decided. The Land Claims Court would have to decide there are exceptional circumstances before evicting them.

⋮ **Note:**

⋮ Occupiers under the LTA or ESTA can also only be evicted under 'exceptional
⋮ circumstances' if:

- ⋮ • They are 60 or older, and
- ⋮ • They have lived on that land for 10 years or more.

Sexual violence and rape

Learning objectives

- To understand the law around sexual violence and rape, including difference between consensual and non-consensual sex.
- To know the remedies available to clients and procedures to follow in assisting them.

Rape is a cruel form of violence in our society. The violation not only causes physical pain and harm to the rape survivor, but long-lasting psychological harm. Rape forever changes the way the survivor sees the world, herself, her environment and her safety. In most cases the complainant is a woman, but men are also victims and survivors of rape.

⋮ **Note:** If a client approaches you with a query related to sexual violence or rape, please complete our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: SEXUAL ASSAULT on the following pages.

Human Rights Violations Questionnaire

SEXUAL ASSAULT

DATE: _____ NAME: _____

PROVINCE _____ AREA: _____

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. Name/ the name you are known by (pseudonym) (Optional): _____

2. Age (optional): _____

3. Telephone no/ contact number you can be reached at (Optional): _____

4. Address: _____

5. Where do you work? _____

6. Please circle/tick-

Gender Male Female Transgender man Transgender woman

Indoor Street-based Both (explain) _____

Details of the Incident:

7. Please identify the perpetrator. *Please tick next to the appropriate one.*

Police	
Client	
Current personal partner	

Ex partner	
Pimp	
Stranger	
Other	

8. What was the nature of the assault?

9. When and where did the assault occur? _____

10. What actions have already been taken. Please tick the appropriate box.

laid a charge	
Counselling	
Seen a doctor	

11. Do you require us to assist you with:

Lay a charge	
See a counsellor	
See a doctor	

12. What legal remedy are you seeking? _____

20.1 The definition of rape

For many years, the definition of rape in South Africa was criticised because it was limited to penetration of the female penetration by the male penis. In other words, the definition was gender-, instrument- and orifice-specific. Other forms of sexual penetration were punished as indecent assault.

C CASE STUDY

In 2007, the Constitutional Court decided in *Masiya v Director of Public Prosecutions (Pretoria) and Others*⁶⁵ that this common law definition should be extended to include anal penetration of a woman. The question of whether penetration of the penis into the anus of another male was rape was left open.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (also referred to as the 2007 Sexual Offences Act) further amended the common law definition of rape. It also created a number of new sexual offences, including compelled rape, sexual assault and consensual sexual acts with children.

T TIPS

Rape is now legally defined as “intentionally and unlawfully committing an act of sexual penetration with a complainant without his or her consent”.

For a rapist to be convicted of rape, all the elements in the definition must be proved:

Intention

The rapist must have intended to rape the complainant. In other words, he must have committed the crime on purpose and must have been aware of what he was doing. It is sufficient if he simply foresees the possibility that he was having intercourse with the complainant without consent.

Unlawfulness

The rapist must have acted against the law. Rape can be committed by a man or woman of 7 years or older.

⁶⁵ *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007).

Sexual penetration

The Sexual Offences Act defines *sexual penetration* as:

- (a) “Penetration of the genital organs of one person into or beyond the genital organs, anus or mouth of another person;
- (b) penetration of any body part of one person or any object into or beyond the genital organs or anus of another person;
- (c) penetration of the genital organs of an animal into or beyond the mouth of another person.”

Without consent

The complainant must have refused to have sex with the rapist, and the sexual penetration must therefore have taken place against her/his will.

The issue of consent is one of the most difficult obstacles to overcome in a rape trial, as the rapist will usually argue that the complainant consented and she will argue that she did not. Thus the issue often boils down to his word against hers. The credibility of the complainant as a reliable and honest witness will therefore always be a very important issue in a rape case.

The Sexual Offences Act sets out a number of circumstances where the complainant does not voluntarily or without coercion agree to an act of sexual penetration. These include:

“Where the complainant (B) submits or is subjected to a sexual act as a result of

- (a) the use of force or intimidation by A (the perpetrator) against B or a third person (for example, B’s child) or against the property of B or a third person; or
- (b) a threat of harm by A against B or a third person or against the property of B or a third person;

Where there is an abuse of authority by the perpetrator to the extent that the complainant is inhibited from indicating her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

Where the sexual act is committed under false pretences or by fraudulent means;

Where the complainant is incapable in law of appreciating the nature of the sexual act, including where she is, at the time of the commission of the sexual act –

- (a) asleep;

- (b) unconscious;
- (c) in an altered state of consciousness, including under the influence of any drug or alcohol;
- (d) a child below the age of 12 years; or
- (e) a person who is mentally disabled (this must be read with the definition of a 'person who is mentally disabled' contained in the Act’).”

Most of these factors set out in the 2007 Sexual Offences Act are those that have developed in South African case law through the years, and are therefore not 'new' to our law. The prosecution will still have to prove beyond reasonable doubt that the complainant did not consent to sexual penetration.

20.2 Strategies used to survive rape

Different victims employ different tactics to survive rape:

- Some rape survivors talk to the rapist to try to negotiate their way out of the rape; others scream, try to stall for time, and offer the rapist alternatives.
- If none of the above strategies work, violence often escalates and the rape survivor may choose non-resistance. Her goal changes from preventing the rape to survival and she becomes compliant.
- Some survivors experience *frozen fright*: a state of panic where she is immobilised by fear and realises that her only hope for survival depends on the whims of the rapist because he controls the situation. She tries to do everything to ensure that he does not become angry.

⋮
Note

- In many rape cases, rape is achieved through intimidation and the fear of physical force, without the rapist actually having to use physical force. For this reason, not all rape victims will have physical injuries.
- Absence of physical injury should never be a factor pointing to consent nor should physical injuries be the measure of the survivor's trauma.

20.3 What are some of the factors that point to an absence of consent?

T TIPS

Lack of capacity to consent due to intoxication

Rape sometimes happens during parties where the rapist gives the complainant alcohol or drugs to get her to have sex with him. In this case, the law may recognise that she was so drunk that consent was not given and rape did take place.

Use of force by the rapist

Where the rapist uses force (the force does not necessarily have to be physical) or threatens the complainant, it may prove that the complainant did not consent. This is especially so where the rapist mutilates or beats the complainant up. The courts have sometimes decided that the threat needs to be “reasonably ascertainable” – something the reasonable person understands as a threat.

However, our courts have sometimes wrongly decided that some women enjoy rough sex and have put injuries obtained through the intercourse down to kinky sex, rather than rape.

The fact that the rapist is a stranger

The courts are more willing to believe that a woman refused to have sex with a stranger than with a colleague, a friend or her husband.

The fact that the rapist and the complainant are of different races or classes

Due to our history of racism, rape of white women by black men was always treated far more seriously than the rape of black women by white men. A black man could be hanged for raping a white woman in the days when we still had the death penalty.

Though our courts may have become more progressive, they may still decide that, where the alleged rape has taken place between a woman of one race group and a man from another race, this tends to show an absence of consent.

When the woman was menstruating

When the woman was menstruating at the time of the alleged rape, this would tend to be a factor showing her absence of consent.

Where the woman was pregnant

Where a woman is pregnant and is allegedly raped by a man who is not the father of her unborn child, the court may tend to view this as factor indicating her lack of consent.

Note

- The mental state of the accused is the key to an inquiry about whether he should be found criminally liable. His mindset will therefore be examined, and therefore the issue of consent is not really about whether she in fact consented, but *whether he thought she consented*.
- If the court decides that she did not consent, but he genuinely believed she consented, he may be acquitted. The court does not examine whether or not his mistake was reasonable, since there is no crime of raping negligently, only intentionally.
- Remember, it is sufficient to prove that the accused foresees the possibility that the woman did not consent, but still continues having intercourse with her.

Attempted rape

Attempted rape takes place when a man tries to commit an act of sexual penetration, for example, to penetrate the woman's vagina with his penis. However, his attempt fails for some reason: for example, because she succeeds in pushing him off or he is disturbed by someone coming along. A survivor of an attempted rape is still a victim and she may suffer the same trauma as a survivor of a completed rape.

Compelled rape

The Sexual Offences Act 32 of 2007 states that:

“Any person (A) who unlawfully and intentionally compels a third person (C) to commit an act of sexual penetration with a complainant (B), without B's consent, is guilty of the offence of compelled rape.”

This offence is intended to make provision for a situation where, for example, a gang leader forces a new member at gun-point to rape a woman as part of a gang initiation rite. C, the new member, will not be guilty of rape, due to the fact that he was forced to carry out the instructions of A, the gang leader. He would have to show that he had no other option than to follow these instructions and that he feared for his own life.

It was necessary to enact this offence because of certain technicalities in our law, which could in the past have resulted in a person in A's position being acquitted.

20.4 Sexual assault

Before the introduction of the 2007 Sexual Offences Act, South African law recognised sexual offences mainly in two categories: rape and indecent assault:

female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital

organs or anus of that person or, in the case of a female, her breasts,

which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.”

20.5 Consensual acts with children

Background: ‘Statutory rape’

Our law regards children under 12 as incapable of consenting to sexual intercourse. Even if a girl under 12 has sexual intercourse ‘voluntarily’, the law does not regard this as valid consent, and the man will therefore be charged with rape. The Sexual Offences Act has extended this rule to boys.

Once a girl is 12, the law recognises her capacity to consent to sexual intercourse. However, society recognises that young persons are sexually vulnerable and in need of some protection, and for this reason, it is an offence for an adult to have sex with children between 12 and 16, even where they do consent. This is often referred to as *statutory rape* – this is misleading, as the young person may have consented and thus this is technically not rape.

Offences

The Sexual Offences Act says that:

- A person who commits an act of sexual *penetration* with a child between the ages of 12 and 16 is, despite the consent of the child, guilty of an offence.
- A person who commits an act of sexual *violation* with a child between the ages of 12 and 16 is, despite the consent of the child, guilty of an offence.

The Act also states that, where both parties were under the age of 16 at the time of the commission of the offence, the National Director of Public Prosecutions must authorise the prosecution, and both parties must be charged with the offence.

In the past, it often happened that the boy was punished, even though the girl may have been the ‘instigator’ of the activity. The decision may only be taken by the National Director due to the sensitive nature of these cases, and the fact that it may not always be desirable to address under-age sexual activity by means of criminal prosecution

20.6 Laws on sexual exploitation of children

The Sexual Offences Act also lists offences relating to the sexual exploitation of children. *Sexual exploitation* is the sexual, emotional and physical abuse of children through forms of sexual violence, including rape, sexual battery, inappropriate sexual contact, exposure to inappropriate sexual acts, pornography and prostitution. Here we use the word *prostitution* because they are being exploited, and not selling sex with consent.

⋮ **Note:** If you are approached for help in a case relating to an underage child selling sex, please complete our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: UNDERAGE SEX on the following pages.



HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE

UNDERAGE SEX WORKERS

DATE: _____ NAME: _____

PROVINCE: _____ AREA: _____

SWEAT and the Women’s Legal Centre are attempting to monitor the human rights violations experience by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

1. **Name/ the name you are known by (pseudonym)**
(Optional): _____
2. **Age**
(optional): _____
3. **Telephone no/ contact number you can be reached at (Optional):** _____
4. **Address:** _____
5. **Where do you work?** _____
6. **Please circle/tick–**
Gender: Male Female Transgender man Transgender

woman

Indoor Street-based Both:

(explain) _____

7. Did you see a girl or boy?

GIRL	BOY
------	-----

8. Please provide the date and time that you saw her / him?

DATE	
TIME	

9. Did you speak to her?

YES	NO
-----	----

If no, please state why you could not speak to her

10. If yes, please arrange another date for a consultation.

DATE	
TIME	

11. If you consulted with her, please provide in detail the full contents of your discussion.

Real name:	
Age:	
Where is she from:	
How did she get to Cape Town	
Who brought her to Cape Town	
Who is she living with	
List human rights violations, eg, assault	
How long has she been in Cape Town	
What is her living conditions like	
Does she want to go home	
Any other information	

12. Please provide a description of the area where you saw her working as a sex worker. Include name of the area, street name, and any visible landmarks, etc.

Area	
Street Name	
Number on the house	
Colour of the house	
Description of the house	
Directions to the house	

Visible Landmarks	

13. Did you see where she lives?

YES	NO
-----	----

14. If yes, please provide a description of her place of residence. Include name of the area, street name, and any visible landmarks, etc

Area	
Street Name	
Number on the house	
Colour of the house	
Description of the house	
Directions to the house	
Visible Landmarks	

15. Please provide a description of the girl or boy. Please include height, colour of complexion, eye colour, hair colour, description of clothing and an estimation of age.

GENDER	
HEIGHT	
COLOUR OF COMPLEXION	
EYE COLOUR	
HAIR COLOUR	
DESCRIPTION OF CLOTHING	
AGE / ESTIMATION OF AGE	

--	--

16. Please provide any information that you may have received from other people about the girl or boy, for example, information that other sex workers can provide you with.

Name and contact details of Witness / Informer 1	
Name and contact details of Witness / Informer 2	
Name and contact details of Witness / Informer 3	

17. Please provide a description of the pimp.

GENDER	
HEIGHT	
COLOUR OF COMPLEXION	
EYE COLOUR	
HAIR COLOUR	
DESCRIPTION OF CLOTHING	
AGE / ESTIMATION OF AGE	

18. Any other information. _____

19. What legal remedies are you seeking? _____

20. Plan of action

WLC: _____

SWEAT: _____

Assent / Confidentiality

Does the source give his/her assent to share the information (with the authorities, the media)?

Can the source's name be used?

Can we forward your story to SWEAT to be used for advocacy?

Is it necessary for any information to be confidential? Why? Until when?

Section 17 of the Sexual Offences Act

Section 17 criminalises the primary (direct) or secondary (indirect) exploiting of children for sex:

- Section 17(1): A person who unlawfully and intentionally engages services of child, with or without child's consent, for financial or other reward, favour, compensation to a child or a third person, for the purpose of engaging in a sexual act with the child, irrespective of whether sexual act is committed or not.
- Section 17(2): A person who unlawfully and intentionally offers the services of child to a third person, with or without child's consent, for financial or other reward, favour, compensation to themselves as the exploiter, the child or another person. This means that it is an offence for someone to offer, invite or persuade another person to have sex with a child.

- Section 17(3): A person who:
 - ~ Intentionally allows or knowingly permits the commission of a sexual act by a third person with the child, with/without child's consent, while being primary care-giver, or
 - ~ Owns, leases, rents, manages, occupies / has control of any movable / immovable property to be used for purposes of committing a sexual act with the child by a third person.

If a person has committed this offence, he may be guilty of furthering the sexual exploitation of a child. This section covers situations where parents allow their children to be exploited, for example: a mother knows that the child is having sex with the taxi driver and she allows it because she gets free taxi rides to work. It also covers property owners who allow their premises to be used for people to have sex with children.

- Section 17(4): A person who intentionally receives financial or other reward, favour or compensation from the commission of sexual act with a child by a third person. This means that it is an offence for a person to benefit from the sexual exploitation of a child.
- Section 17(5): A person who intentionally lives wholly or in part on rewards, favours or compensation for commission of sexual acts with children by a third person. This means that it is an offence to live off the earnings from the sexual exploitation of a child.
- Section 17(6): A person, including a juristic person (such as a company), who
 - ~ Makes or organises any travel arrangements for or on behalf of a third person, whether other person is resident within or outside South Africa, with the intention of facilitating commission of any sexual act with children, irrespective of whether the act is committed or not, or
 - ~ Prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would be a sexual act with a child.

This means that it is an offence to arrange tours for people to come to South Africa to have sex with children.

Note

- If you come across a child who is selling sex, it is best not to scare the child. Rather chat to the child to see if she needs any immediate assistance, as it is likely that she is selling sex against her own free will.
- Approach the nearest police station, ask for the telephone number of the after hours social worker, and call the social worker to visit the child. Only a social worker may remove the child from the street and find a place of safety.
- It may be better not to inform the child that you are going to approach the police or social worker, as the child may run away.

20.7 Types of rapists

T TIPS

Anger rapist

Anger rapists use brutality and excessive force. He wants to hurt and humiliate the victim. He may inflict both physical and verbal abuse, and use more violence than is necessary to control the victim. He may beat up the woman after he has raped her.

This kind of rapist often rapes after an event in his personal life in which he feels he suffered an injustice, and his rapes are often impulsive and unplanned. His victim may sustain visible, physical injuries.

Power rapist

The power rapist may not want to hurt the victim, but rather to have her as a conquest and to control her. He may also want her to like him. A power rapist may use a knife or gun to control the victim without ever intending to use it. He may have fantasies about raping a woman as a way of establishing an intimate relationship with her. He may keep his victim with him for hours, conversing 'normally' with her, and may even ask her for a date at some future time.

These rapists are usually men who have been unsuccessful in establishing relationships with women in their lives and they rape to compensate for their feelings of inadequacy. Their victims often survive without serious physical injuries.

Sadistic rapists

Sadistic rapists are the most dangerous but also the rarest. These rapists eroticise aggression. They get pleasure from torturing their victims. They use extreme forms of degradation and abuse, such as bondage, biting, burning, cutting and mutilating. These rapists may even murder their victims.

20.8 The effects of rape

Women who are raped are deeply affected by the experience. Some feel as if a part of them has been killed or lost, and that their lives will never be the same again. They may lose their confidence to trust people and to feel safe again. They may feel degraded and humiliated by the rape.

E EXAMPLES

The trauma of rape results in symptoms such as:

- Shock, disbelief – she may appear to be outwardly calm.
- Denial – she may not report the crime.
- Acute distress – she may feel anxiety for her personal safety, may suffer from sleep disturbances, crying, helplessness, a lowering of her self-esteem, guilt and self-blame. Her personal safety may become her overwhelming concern.

For many survivors, the most pervasive feeling during the rape continues after the rape is over. Fear may dominate their lives, and they may experience nightmares, anxiety, withdrawal and other behavioural and lifestyle changes.

Many victims also suffer from a form of post-traumatic stress called *Rape Trauma Syndrome*.

20.9 Crisis intervention

Most rape survivors remain silent because of:

- Feelings of shame, self-blame, guilt and denial.
- Fears about their assailants coming back.
- Concerns about how they will be treated by the legal system and medical personnel.
- Fear of reaction by family members and friends.
- A lack of knowledge about their rights or where to turn to for assistance.
- A belief that nothing will be done if they seek assistance.

However, some rape survivors do seek crisis intervention. Counsellors play an important role in helping women to heal.

T TIPS

Here is a summary of a protocol developed by the Rape Trauma Centre in Santa Monica for dealing with rape survivors:

1. Introduce yourself to the survivor.
2. Explain your role and your purpose.
3. Acknowledge the rape.
4. Encourage the survivor to talk with you about the assault.
5. Encourage the expression of feelings related to the assault.
6. Validate the feelings expressed.
7. Find out the survivor's concerns about the impact of the rape.
8. Summarise the concerns she has expressed.
9. Help the survivor prioritise her concerns.
10. Help her to problem-solve.
11. Assess her ability to cope with the impact of the assault.
12. Prepare her for future reactions.
13. Identify ways for her to deal with her feelings, concerns and future reactions.
14. Involve her family or significant others – she must consent to this.

20.10 Different kinds of rape

T TIPS

Date rape or acquaintance rape

Date rape or acquaintance rape takes place where the parties know each other. They may or may not be in a dating relationship. They may be close friends who spend lots of time together, students at the same university or college, co-workers or neighbours.

It is sometimes difficult to prove rape where people know each other and where there has been some form of previous sexual intimacy. However, it does not matter at which point the complainant said 'no'. For example, if they both were undressed and she then changed her mind and did not consent to penetration, this is rape.

Rape by a stranger

It is believed that this is the most common kind of rape, although rape by a person known to the complainant is actually by far more common. Sentences given for stranger rape would appear to be higher largely because the courts find it easier to believe that a woman did not consent to having sex with a stranger than with someone known to her.

Figure 37: Differences between stranger and acquaintance rape

THE DIFFERENCES BETWEEN STRANGER RAPE AND ACQUAINTANCE RAPE		
	Stranger rape	Acquaintance rape
Circumstances surrounding the assault	<p>No prior relationship with attacker.</p> <p>Victim caught off-guard by threats or force.</p> <p>Use of a lethal weapon such as knife or gun.</p> <p>Often occurs in or near victim's home.</p> <p>Victim fears death.</p>	<p>Prior relationship between rapist and victim (casual, friendly, dating). Rapist is someone the victim has had no reason to fear prior to rape – she usually trusts him.</p> <p>May begin as voluntary consensual encounter (a date or a meeting).</p> <p>Rapist rarely carries weapon – brute physical force commonly used.</p> <p>Likely location is victim or offender's residence.</p>

Attitudes towards the victim	Victim will tend to be believed and people will sympathise and victim will receive empathy and support.	Victim's allegations viewed with suspicion – she may be blamed or disbelieved. Often prosecution will decide not to prosecute. Her trauma will tend to be minimised.
Victim reporting patterns	Tend to be reported closer to the event.	Tend to be reported long after the event. More underreported than stranger rape.
Impact on victim	More than likely that she will be able to protect her identity.	Difficult to keep her identity secret if she reports because rapist may be part of a group of mutual friends or colleagues. Upon reporting, her behaviour and character may become the subject of debate in her social circle.

Gang rape

Gang rape⁶⁶ occurs where a woman is raped by more than one rapist. A phenomenon known as 'jackrolling' was common during the 1980s in many South African townships. *Jackrolling* is where a group of young men drag a young woman into a car and drive off with her to a deserted place and rape her. The aim of jackrolling was to assert the youth's authority in the township. Although jackrolling is less frequent, gang rape still takes place.⁶⁷

Gang rape takes place when a group of men force a woman to have sexual intercourse with them at the same time. Our law does not recognise gang rape as a specific form of rape, and each rapist will be charged with rape and individually prosecuted.

When it comes to proof, the focus is not on consent but on the identity of the rapists. For example: if a woman was attacked by a group of 5 men and 3 of them raped her,

66 For more information on gang rape please check, Vetten, L. and Haffejee, S. (2005), "Urban Predators" *CSVR Gender Programme, Policy Brief, No.01*, accessible from: www.csvr.org.za/papers/paplvsh.pdf .

67 For more information on 'jackrolling' please see: Mokwena, S (1991), "The Era of the Jackrollers: Contextualizing the Rise of Youth Gangs in Soweto", paper presented at the *Centre for the Study of Violence and Reconciliation*, Seminar No. 7, 30 Oct., available from: www.csvr.org.za/papers/papmokw.htm .

it may be very easy for them to claim that there were so many of them, and that the woman is therefore not able to identify which of them actually raped her.

Marital rape

Our law recognised only in recent years that a husband can be charged with raping his wife. This was introduced into our law in 1993 by the Prevention of Family Violence Act 133 of 1993.

If a wife refuses to have sex with her husband and he forces himself on her, he can be prosecuted for rape and will be sentenced in the same way as any other rapist. Again, consent will be an issue, as a husband or ex-husband can easily argue that he thought she wanted sex, and that they had had sexual intercourse many times in the past.

Rape in the family: incest

Incest is a term used to describe illegal sexual intercourse between family members. If the family relationship means that the parties cannot legally marry each other, such as a father and daughter, the law does not allow them to have sex. This also includes stepfathers and stepdaughters, uncles and nieces, brothers and sisters, grandfathers and granddaughters, and adoptive fathers and adoptive daughters.

Challenges in dealing with incest include:

- Incest may begin when the complainant is very young and she may be reluctant to talk about any act of incest, as it may not be the first incident of abuse.
- Incest survivors may suffer guilt and they may be reluctant witnesses in their case. This guilt is a result of the fact that it was difficult to say 'no' as the rapist or abuser was a family member and much older and may have offered her financial support.
- Taking legal action may break up the family (the complainant's relationship with other members of the family), but you should advise her to take action.

Rape of a child by a school teacher

Intercourse with a girl under 12 is rape, even if she has consented. Where a child is raped by a school teacher, the school teacher will face disciplinary action from the school and this can result in expulsion, as well as criminal action.

In some cases, parents have taken the school to court because there is an assumed duty of care by the school in regard to the children. This means that a civil action for

damages can be brought against the school, but the rape must have taken place at the school and during school hours.

If the child was raped after school hours in the afternoon, and the teacher usually keeps pupils in after school, the school will still be liable as this is still considered to be part of school hours.⁶⁸

Rape where the woman is a sex worker (prostitute)

The dominant value-system in our society about the roles of women and men has a major impact on the way in which rape survivors are perceived. Rape has generally been regarded as an intrusion upon a woman's integrity. However, when the woman is considered not to have any integrity, a crime of rape is not regarded with as much concern as the rape of a 'virtuous woman'.

Where a woman exchanges sex for money, it is assumed that she will always consent to sex. This is not the case, and sex workers are often targets for rapists who wish to 'teach them a lesson'. Should a sex worker reveal her status to a counsellor and also to the police, when she makes her statement? By reporting that she is a sex worker, she makes it possible for other sex workers to come forward with their experiences of rape.

Rape where the woman is a lesbian

There has been a pattern of rape and violence against women who are lesbians in South Africa, particularly black lesbians in the townships.

The same principles should be applied to lesbians as to any other woman, which is that her sexual history should not be relevant to the issue of whether she consented to sexual intercourse with the rapist. However, the fact that she is a lesbian could lend support to her case that she did not consent to sexual intercourse with the male accused.

On another level, you can encourage a lesbian complainant to reveal her sexual orientation – in doing this, she may assist other lesbians who have been raped and abused to come forward without shame. The decision whether or not to reveal her sexual orientation ultimately rests with the client.

Rape where the woman is homeless

Homeless women are more vulnerable to rape because they live in an environment

68 For a more detail overview of the matter please consult HRW(2001), "Scared at School: Sexual Violence Against Girls in South African Schools", *Human Rights Watch Report*, available from: www.hrw.org/reports/2001/safrica.

that is not safe. Sleeping and living in streets, parks and abandoned buildings exposes women to reliance on others for 'protection'. This protection often bears the price of consenting to unwanted sexual intercourse.

The fact that they do not have a permanent residence is used against them when they report rape to the police, as the police often argue that if they do not have a contact number, they cannot be informed of updates with their case.

You should advise the complainant to give the address of a service organisation where she goes for counselling, and that she remain in contact with the police and prosecutor.

Where the woman was asleep

Where the woman was asleep when intercourse took place, our courts should decide that she did not consent, even if she consented to intercourse with the accused on previous occasions when she was awake. However, the accused must be aware of the fact (or at least foresee the possibility) that she was asleep and that, as a result, she did not consent. If however, before she fell asleep, she consented to intercourse with the accused on that particular occasion, the act of intercourse will not be considered to be rape.

Where the woman was intoxicated or drugged

This may happen when the complainant is at a party and alcohol or drugs are used to get her to have sex. In these cases, the court may be persuaded by a defence lawyer that the complainant consented to sex. The question is whether consent can be given in a state of intoxication.

Consent must be informed consent – in other words, understanding the implications of your actions despite the use of alcohol or drugs. Where your ability or capacity to consent was so eroded by the effects of the drugs or alcohol, the courts should decide that you did not consent.

20.11 Challenges in getting a successful conviction

Rape is difficult to prove because our law is inadequate to deal with it. The law is based on myths about women and rape. There are many other ways in which the law makes it difficult for women to see their rapists punished. You should communicate these issues to a complainant so that she does not pin all her hopes on a successful conviction.

20.11.1 Consent as an element of rape

A woman is often not believed when she says that she did not consent when she was intimate with the rapist and a relationship might have existed before the rape, for example: with date rape.

20.11.2 Lack of sufficient evidence

A rape case can be dismissed because there was not enough evidence that the rape took place, The complaint must be advised to keep all evidence and to try to remember as much detail as possible about events leading up to the rape and the rape itself. In one case of gang rape, the court dismissed the case because the complaint could not remember in what order the rapists raped her and because she confused the second rapist with the third.

20.11.3 Rules of evidence

As shown by the table below, the entire legal process favours the accused and makes it very difficult for the complainant to believe that she has a chance of succeeding in getting a conviction.

SUMMARY	
The accused	The complainant
The presumption of innocence protects him.	She is subjected to rules of evidence such as the 'hue and cry' rule.
The onus is on the state to prove his guilt beyond a reasonable doubt. His defence of consent is simply about showing that he genuinely believed she consented, not that she did in fact consent.	His defence of 'consent' focuses on her conduct.
His character is protected unless he puts his character in issue by attacking her character.	Her character can be attacked.
His prior sexual history is not admissible because the court will generally regard it as irrelevant.	Her prior sexual history with the accused can be explored because the court will generally regard this as relevant to whether or not she consented.

Figure 38: Rules of evidence weighted in favour of the accused

20.12 Consequences for rape survivors

20.12.1 Pregnancy

A complainant who falls pregnant as a result of rape can have a free abortion under the Choice on Termination of Pregnancy Act 92 of 1996. She is the only person who needs to give her consent to the termination of pregnancy. If she is married, her husband does not need to give his consent and if she is under the age of 18, she does not need the consent of her parents or guardian. A termination can be requested in case of all types of rape, including marital rape.

20.12.2 HIV and AIDS

The force the rapist uses during rape can sometimes lead to tearing of the vagina walls and this increases a woman's chances of contracting HIV. The complainant's health care practitioner should advise her to have an HIV test immediately after the rape. You should advise clients that they should receive counselling before and after the HIV test.

However, the first test will not accurately show her HIV status, and she will have to return for further tests at 6 weeks, and 3 and 6 months after the rape, to confirm the HIV test results.

If she tests HIV positive, the prosecutor must be informed as soon as possible. If it can be proved that the accused *knowingly* exposed her to HIV infection, he could be charged with attempted murder in addition to rape. This would result in a much higher sentence if he is convicted.

The complainant can also sue the rapist for civil damages if she is infected, for example: for hospital costs, counselling, pain and emotional suffering.

⋮ **Note**
⋮ For more on HIV and AIDS, please see Chapter 22.
⋮

20.12.3 Customary practices

In some cases, rape is not reported to the police but to the parents of the rapist. This practice happens often in rural areas, where customary rules and practices are followed. The family of the complainant asks for damages to be paid. The problem with this practice is that the damage is often regarded as seduction, thus giving the impression that what happened was not rape, but something far less serious.

Sometimes the parents may request that the rapist marry their daughter, in addition to payment of damages. The complaint's parents may pressurise her not to lay criminal charges, as they may fear that if the rapist is in jail, his parents will not pay damages. It is important to discuss with the complainant her right to lay criminal charges as a way of honouring her dignity within the community. The final decision should always be hers.

Children in conflict with the law

Learning objectives

- To understand the law around children in trouble with the law.
- To be able to advise young sex workers or sex workers with children on rights and legal procedures around children in trouble with the law.

21.1 South African law before the Child Justice Act

Before the Child Justice Act 75 of 2007 became law, the age of criminal capacity of a child was determined by common law. A child below 7 was presumed to lack criminal capacity. A child between the 7 and 14 was presumed to have full criminal capacity and thus could be found criminally responsible for their actions. A child older than the age of 14 years was seen as having full criminal capacity.

Under section 7(1) of the Child Justice Act, the minimum age of criminal capacity was increased to 10. This means that a child who at the time of committing a criminal offence was 10 or younger cannot be criminally prosecuted.

Section 7(2) also says that a child, who is between 10 and 14 at the time of committing the criminal offence, is presumed not to have criminal capacity unless it is proved by the State that the child had the criminal capacity. Children who are 14 and older continue to have full criminal capacity.

The Child Justice Act aims to provide to:

- Protect children's rights as provided for in the Constitution.
- Recognise the need to have a balance between protecting the accused child's

rights as a child and an individual, together with ensuring that human rights and freedoms of the general community are respected.

- Extending the concept of *restorative justice*: making children in trouble with the law accountable for their actions towards victims and to the community as a whole.
- Emphasises the involvement of parents and the community to ensure that the children are able to blend into the community after they have been dealt with by the justice system.
- Encourages co-operation between all affected government departments.

21.2 Who is a child?

Under the Child Justice Act, a child is a person who is under 18. In certain circumstances a child can be 18 or older, but under the age of 21, who committed an offence when he/she is under 18.

21.3 Children in conflict with the law: main role players

- A police official: a member of SAPS or a member of a municipal police service.
- A probation officer who will be a social worker.
- The prosecutor, appointed by National Prosecuting Authority to investigate and prosecute crimes.
- A magistrate, who presides in the initial enquiry.
- The magistrate, who presides over the Child Justice Court.
- A diversion service provider: a person who takes the child through the diversion programme as an alternative to the formal criminal justice system.

21.4 Proof of criminal capacity

For children between 10 and 14, the State has the duty to prove beyond a reasonable doubt that the child had criminal capacity to commit the offence.

Section 11 of the Act covers the issue of criminal capacity. The magistrate makes the final decision on whether or not criminal capacity of the child has been proved:

- The magistrate has to consider reports and recommendations from various people, including the probation officer's (social worker) assessment.
- The magistrate may also, on request by the prosecutor or the child's legal representative, hold an evaluation into the child's criminal capacity. This is done by a suitably qualified person who assesses the moral, emotional psychological and social development of the child, and has 30 days to complete and submit the assessment evaluation.

21.5 Criminal proceedings for children who commit a criminal offence

When a child is suspected of committing a criminal offence, there are 3 ways to secure the child's attendance at a preliminary enquiry:

- *Written Notice to Appear*: this notice must be sent by the police officer who suspects that a child has committed a criminal offence. The notice should include a date, time and place for the enquiry. This is handed to the child in the presence of parents or guardians who have to acknowledge receipt of the Notice.
- *Summons*: this is mostly used when the prosecutor has decided after reading a docket to charge, or where the charges were withdrawn and then re-instated. This form of notice is also served by a police officer in the presence of the child and parents/guardians.
- *Arrest*: this is considered a 'last resort' to secure the child's attendance. The Act says that a child may not be arrested except in unusual circumstances, where it is believed:
 - ~ The child doesn't have a residential address.
 - ~ The child would continue committing the offence.
 - ~ The child is a danger to society.

A child, who has been arrested, must be present in a Magistrate's Court for the enquiry within 48 hours of arrest.

Once the child receives notice through any of the above means, then he/she would then have to await the date of the preliminary inquiry to appear in the Magistrate's Court.

Orders that can be made after the preliminary enquiry include:

- Diversion: if the child is 10 or older, the magistrate should first be satisfied that the child has criminal capacity.
- Referring the case to the Child Justice Court for plea and trial: the magistrate must then refer the child to the Legal Aid board for legal representation if the child does not have a lawyer.

21.6 Diversion

Section 2 of the Act includes the use of diversion as means to prevent the child from being exposed to the formal criminal justice system.

Diversion can be achieved in one of 3 ways:

- Prosecution for minor offences committed – this is decided on by prosecutors.
- Preliminary enquiry through an order of the magistrate.
- During trial proceedings in the Child Justice Court through an order of the court.

21.7 The Child Justice Court

The Child Justice Court is not a separate court. It is a forum which hears the plea and trial of the child. Presence in the court is strictly by permission from the presiding officer or if a person is somehow linked or connected to the crime committed by the child.

Under section 65 of the Act, the child must be assisted by his parents/guardian in the court. Failure to attend by the parents/guardian results in a fine or an imprisonment of up to 3 months.

The normal proceedings of a trial are followed in court and the presiding officer will at the end of the trial, if the child was not referred to diversion during the trial, sentence the child if he/she is convicted.

HIV, AIDS and the law

Learning objectives

- To understand the law around HIV and AIDS.
- To be able to advise sex workers on their rights and remedies to do with HIV in the community or in the work place.

22.1 What are HIV and AIDS?

HIV stands for Human Immune-deficiency Virus. It attacks the immune system, which is the human body's resistance against diseases. If untreated, HIV can lead to AIDS: the Acquired Immune Deficiency Syndrome.

AIDS is a name given to a group of serious illnesses, such as pneumonia, when the body is not able to fight infections due to a very weak immune system.

Far fewer people living with HIV in South Africa now develop AIDS because antiretroviral (ARV) treatment is now available in public clinics.

22.2 The law on HIV and AIDS

People living with HIV or AIDS have rights under the Constitution and other laws. You cannot be denied your constitutional rights because of your HIV status, for example: your rights to equality, dignity and privacy. The Constitution also includes socio-economic rights for people living with HIV, such as the right to basic health care, education and social services. As a paralegal, it is your duty to help people claim these rights.

22.3 How people living with HIV can claim rights in the Bill of Rights

T TIPS

Section 27:⁶⁹ the right to health care, food and social security. This means that no one may be refused emergency medical treatment. Hospitals cannot refuse to treat you because you are living with HIV or AIDS. You have a right to receive a disability grant if you are too ill to support yourself and family.

Section 26: the right to housing. This means that you may not be refused a subsidy or loan to buy a house because you are living with HIV or AIDS. It is also unlawful for you to be chased away from your home because of your HIV status.

Section 10: the right to dignity. A person or an institution may not take away your self-respect and standing in the community through passing insulting remarks or actions because of your HIV status.

Section 14: the right to privacy. As a person living with HIV, you have the right to choose to or not disclose your HIV status to your employer or clinic. And your employer may not dismiss you from employment because of your HIV status.

Section 23: the right to fair labour practices. This means that a person living with HIV may not be unfairly discriminated against at work because of their HIV status.

Section 29: the right to basic education. A person living with HIV has the same right to education. A school may not refuse to take in a student because of their HIV or because a parent is living with HIV.

Thus all the rights in Chapter 2 of our Constitution can be claimed by people living with HIV or AIDS. Yet people living with HIV often complain of the way they are treated in public hospitals and clinics. They complain especially of the lack of confidentiality by health care workers.

Note

As patients, all people living with HIV have the right to:

- Confidentiality around their HIV status.
- Test for HIV after giving informed consent.
- Medical treatment.

For more on confidentiality and informed consent, please see Chapter 14 on pages 261 and 263.

69 Constitution of South Africa Act 108 of 1996 (Chapter 2).

22.4 HIV in the workplace

Employees living with HIV or AIDS may often face unfair treatment by their employers and even other employees. These are the key laws protecting and promoting your rights as an employee living with HIV:

- *The Labour Relations Act* gives employees the right to be treated equally. It is unfair labour practice to unfairly discriminate against an employee on any ground, including any listed ground such as race, gender, sex, age, sexual orientation, disability or marital status.
- *The Employment Equity Act* is more specific about the rights of people living with HIV or AIDS. The Act prohibits unfair discrimination against people at work on grounds of their HIV status. The Act also prohibits testing for HIV in the workplace unless there is permission given by the Labour Court. An employer cannot force a person who is applying for a job to have an HIV test, automatically make an HIV test as part of medical examination, or force someone who is already working for them to have an HIV test.
- *The Occupational Health and Safety Act* places a duty on employers to ensure that the workplace is safe and that the employees are not at risk of HIV infection. This could easily happen when there is an accident at work and blood is exposed. Under Regulations of the Department of Labour to ensure employee safety:
 - ~ Rubber gloves should be kept available in the first aid box.
 - ~ All staff must be trained so that they know what safety measures to take after an accident.
- *The Compensation for Occupational Injuries and Diseases Act* gives employees the right to compensation if they are injured at work due to an accident or unforeseen circumstances. A person who gets infected with HIV in the workplace has a right to claim for compensation.
- *The Medical Schemes Amendment Act* prohibits discrimination on the ground of “state of health”. This includes a person living with HIV or AIDS. It means that a medical scheme cannot refuse to cover reasonable care that could prolong the lives of people living with HIV or AIDS. All schemes must offer a minimum level of benefits decided by government to employees with HIV or AIDS. The minimum level of benefits includes:
 - ~ The treatment of all infections which may lead to AIDS.

- Hospital admissions when being treated, but they do not have to provide anti-retroviral drugs.

22.5 Remedies available to protect your rights in the workplace

All disputes relating to discrimination and dismissals can be addressed with the CCMA (Commission for Conciliation, Mediation and Arbitration). The CCMA will attempt settlement through conciliation or arbitration.

Cases relating to unfair discrimination and automatically unfair dismissal will be referred to the Labour Court. Decision of the Labour Court can be appealed in the Labour Appeals Court if the employee is not satisfied with proceedings in the Labour Court.

22.6 General remedies

People living with HIV or AIDS, who feel their rights have not been respected in the community or in the work place, can consult with their nearest Legal Aid Clinic for legal advice and assistance. In cases of discrimination, you can approach the Equality Courts (at your nearest High Court) to lodge a complaint. The Clerk of the Court will help the complainant through the process.

⋮ **Note**

⋮ If a sex worker asks for help on issues related to HIV, please fill in our questionnaire:
⋮ HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: HEALTH (see page 258).
⋮

Social welfare

Learning objectives

- To understand the law around social welfare.
- To be able to advise sex workers on how to access their rights to social welfare.

Social grants are the way for people to access social security as a right guaranteed by section 27 of our Constitution.

23.1 Laws affecting social welfare

The Constitution

Section 27 guarantees the right to food, water, healthcare and social security.

The Social Assistance Act

The Social Assistance Act 13 of 2004 covers different types of social grants, social intervention in the form of social relief of distress, and the delivery of social assistance grants.

The South African Social Security Agency Act

The South African Social Assistance Security Agency (SASSA) is the government body that administers social assistance grants. The South African Social Security Agency Act 9 of 2004 provides for the effective management, administration and payment of social assistance and services through the establishment of SASSA.

The Children's Act

The Children's Act 38 of 2005 ensures that the best interests of the child are carried out through the provision of social services which are a right for each child.

23.2 Types of social grants

The Social Assistance Act provides for different types of social grants:

Social grants for adults who are 18 or older

Old Age Grant, Disability Grant, War Veteran's Grant, Grant-in-Aid and supplementary grants.

Social support for children

Care Dependency Grant, Foster Child Grant, and Child Support Grant.

Special awards

Social Relief of Distress Grant and Transport Relief Grant.

23.3 Who can apply for a social assistance grant?

Social grants are available to South African citizens and permanent residents. Non-South African citizens, for example: refugees may also receive South African social grants provided that there is an agreement between South Africa and that person's country of origin.

23.3.1 Requirements in applying for a grant

T TIPS

For an Old Age Grant

You will need:

- Your South Africa identity document (ID).
- If you are single, you will need an affidavit stating this.
- Marriage certificate if you are married.
- Divorce papers if you have been divorced.
- If you are employed, you need a wage certificate/payslip
- If you are unemployed, a UIF record of registration or a discharge certificate from you previous employer.
- If you have a private pension, proof of this.
- Proof of any other income you receive
- Proof of assets like a car or house.

For a Disability Grant

The same requirements as for an Old Age Grant, but if your partner died within the last 5 years, then you will also need a copy of his/her will (if it's available) and a First and Final Liquidation and Distribution Account. You can get this document from the Lawyer appointed as an executor in the winding up of the deceased estate, if the estate was reported after death.

For a Grant-in-Aid

The same requirements as for the Old Age Grant and the Disability Grant, plus a medical report or medical assessment report which is less than 3 months old.

The grant is available to parents or the primary care-giver of the child who is unable to support the child because they are unemployed and have no source of income.

For a Child Support Grant

The grant is meant to provide for the basic needs of South African children whose parents or primary care givers are not able to cover their basic needs due to unemployment. However, you will not be able to get the grant for more than 6 children who are not your biological or legally adopted children if you are applying on their behalf *as the primary-care giver*.

Requirements for the grant are:

- An ID document of the primary care giver.
- The child's birth certificate as proof of identity.
- Proof of maintenance if the child receives maintenance.
- Proof of the primary care givers earning – you should earn less than R34, 800 a year if single, and if married your combined earnings should be less than R69, 600 a year.
- An affidavit stating that you have permission to take care of the child if you are not the parent of the child.
- A death certificate if the parents of the child are dead.

For a Foster Care Grant

This grant is meant to provide for foster children who have been placed in the care of a foster parent by court because of being:

- Orphaned.
- Abandoned.
- Abused.
- At risk.
- Neglected.

These additional documents will be needed:

- The child's school certificate of regular attendance.
- The court order for foster care.

There are conditions for foster parents to keep the child – the child should:

- Remain in the care of the foster parent.
- Be living in adequate housing.
- Be fed and given clothes to wear.
- Receive necessary medical care.
- Go to school regularly.

23.3.2 When will the grant lapse?

- When the child or the last living foster parent dies.

- When the child is admitted to a State institution.
- If the grant is not claimed for 3 consecutive months.
- If the child is no longer in your foster care.
- When the foster parent is no longer in South Africa.
- If you are no longer a refugee (in the case of a refugee).

The foster parent must inform SASSA of any changes in the circumstances of either the child or the parent.

23.4 Care Dependency Grant

This is a grant to provide support to parents, primary care-givers or foster parents of any child with severe mental/and or physical disability requiring full-time home care. The person receiving the grant is responsible for ensuring that the child is fed and clothed, and receives care and access to health/medical services.

T TIPS

In addition to the normal documents for grants, the parent/primary care giver of the child needs:

- A medical assessment or report confirming disability.
- Proof that you qualify under the means test for a Care Dependency Grant: that means you have to be earning less than R15,2 00 a year if you are single and less than R30,2400 a year if married.

The child must:

- Be younger than 18.
- Not be cared for permanently in a State institution.
- Have a severe disability and require full-time care.

⋮ **Note**

A state medical officer has to assess the child before the grant is approved.

23.5 Methods of payment for all grants

- Cash at a particular pay point on a particular day.
- Electronic deposit into your bank or post bank.

Note

If you are unable to collect the money yourself, you can appoint a person at the SASSA office or give someone power of attorney to collect the money for you.

23.6 Application process

T TIPS

The application for a social grant is free and the forms for each grant are available at your nearest SASSA office:

- You need all the necessary documents for each type of grant.
- The application form should be filled in the presence of a SASSA officer, who will interview you afterwards.
- You will have to have your fingerprints taken.
- When making the application, you should indicate which method of payment you prefer.
- Once the application is filled in, you will receive a receipt as proof of making the application, so this receipt should be kept in a safe place.

Notification

You should receive a response from the office within 30 working days although it may take longer. You can check with the office you applied at. If your application is successful, you will receive payment of your grant according to the date of application.

If your application is unsuccessful, then you should receive written reasons stating why the application was rejected by SASSA.

Note

If you have not received payment within 3 months of approval, then you can go to the nearest SASSA office with your receipt or dial the toll free number: 0800 601011.

Appeal

If your application was rejected and you received the letter from SASSA, you can challenge this if you feel you have a right to receive the grant, by writing a letter to the Minister of Social Development. Get help from your nearest Legal Aid Clinic if you need this. The letter should be given in within 90 days of receiving the letter of rejection.

The Minister will then decide whether to overturn the decision or agree with the first assessment.

23.7 How much do you receive?

The amounts paid differ according to each grant and they can change or increase from time to time. You can get this information from the nearest SASSA office.

⋮ **Note**
⋮
⋮ If a sex worker asks for help on issues related to social welfare, please fill in our
⋮ questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: OTHER MATTERS
⋮ (see page 352).
⋮

Refugees

Learning objectives

- To understand the law around refugees in South Africa.
- To be able to advise clients on how to apply for refugee status.

24.1 Who is a refugee?

A *refugee* is a person who is outside their country of origin who has moved because of compelling circumstances such as:

- Fear of persecution because of their race, religion, nationality, political opinion or sexual orientation.
- Because the person happens to be a member of a disliked/unfavourable social group in their country.
- Because they are fleeing from natural disasters which are frequent in their country of origin.

People are only recognised as refugees in the country where they are seeking refuge on application. In South Africa, a person who applies to be recognised as a refugee should apply to the nearest refugee office available.

24.2 Which laws protect refugees?

The Refugee Act 130 of 1998 says that South Africa cannot refuse to allow a foreigner into the country or force them to return to their own country:

- Because of persecution for reason of race, religion, nationality, political opinion or because they belong to a certain social group.
- If their lives could be in danger because of public disorder or serious war.

A person will not be granted the status of a refugee if he/she has committed a serious non-political crime in their country of origin. People who are fleeing due to economic hardship or natural disasters like floods and earthquakes are unfortunately not recognised as refugees in terms of the Refugee Act.

24.3 Application process

T TIPS

A person who wants to qualify as a refugee must apply at the Refugee Reception Office. *You must follow all the required procedures, guided by the Refugee Reception Officer:*

- The officer must accept the application, and see to it that the application is done properly by assisting applicants.
- The officer may conduct an enquiry to check on the provided information.
- An applicant who is 16 or older must bring 2 recent photographs.
- Every applicant has to have their fingerprints taken on making the application.
- The officer must keep all information received in the application confidential at all times.
- The officer should then submit the applicant's application to the Refugee Status Determination Officer.
- Once you have made an application, you will receive an *asylum seeker permit*. This permit can be extended from time to time.

24.4 What does it mean to be a refugee?

Once the application to be recognised as a refugee has been approved, you can enjoy most rights under the South African Constitution's Bill of Rights:

- The only rights that a refugee would not enjoy would be rights specifically reserved for citizens, such as the right to vote.
- You can apply for an immigration permit under the Immigration Act⁷⁰ only

⁷⁰ Immigration Act 13 of 2002.

after living in South Africa for a period of 5 years or more after the date that your asylum was granted (meaning after your status as a refugee had been approved).

- You can get an identity document and passport. You can then be employed in South Africa and carry on business legally.
- You can also use the basic health care services and primary education facilities.
- Social services like social grants are also available to you as a refugee on application and after producing the relevant required documents.

24.5 Refusing the application

If an application is rejected, you should get written reasons within 5 days of the refusal. If the application was refused because the application is “manifestly unfounded, fraudulent or abusive”, the Standing Committee for Refugees will review the decision.

The asylum seeker can lodge an appeal with the Appeal Board once they have been informed of the refusal of the application. You are allowed to be legally represented at an appeal to ensure that your rights are protected and that the process is fair.

- **Note**
- If a sex worker asks for help on issues related to refugees, please fill in our questionnaire: HUMAN RIGHTS VIOLATIONS QUESTIONNAIRE: OTHER MATTERS (see page 352).

Useful words

Adjudication: When a court decides a case.

Administrative action: Action taken or not taken by a State or public body.

Advocacy: Mobilising and working for change, for example: to decriminalise sex work.

Affidavit: Written statement sworn to be true and can be used as evidence in court.

Alleged: When you accuse someone of a crime, for example: an alleged rapist.

Appeal: Ask a higher court to overrule a judgement, sentence or decision.

Arbitration: When people allow a third person to make a decision on a disagreement.

Arrest warrant: Legal document authorising an arrest.

Attorney-client privilege: What a client tells an attorney or paralegal is confidential.

Bail: Money an accused pays to go free before a trial.

Breach: Breaking something, for example: the law or the terms of a contract.

Cause of action: The issues that form the basis of a case.

Common law: Laws that have been part of our law for a long time, for example: murder, rape.

Complainant: Person bringing a criminal charge or making a complaint.

Conciliation: Bringing the two sides in a dispute together to talk things out.

Condonation: Asking for permission to do something later than the normal time in a civil case.

Consent: Give permission or agree to do something.

Constitutionality: Whether or not a law or action is in line with the Constitution.

Contempt of court: Not obeying a court order, or showing disrespect for a judge or magistrate.

Contravening: Going against or disobeying.

Contumelia: Physical, verbal or sexual assault.

Correctional supervision: Conditional release from prison to be monitored in the community.

Criminalisation: Making or keeping something a crime, for example: criminalising sex work.

Damages: Money claimed for loss, harm or pain suffered.

Decriminalisation: Making something no longer a crime, for example: decriminalising sex work.

Default judgement: Civil case judgement made when someone does not come to court.

Defendant: Person you bring a civil claim against.

Derogatory: Insulting or abusive, for example: calling someone derogatory names.

Dispute of interest: Dispute over something you claim, for example: your right to do sex work.

Dispute of right: Dispute over a right you have already, for example: to get better pay.

Diversion: Sentence out of prison or an institution, for example: community service.

Domestic violence: Abuse in your home environment, including physical, sexual and emotional abuse.

Ethics: Rules and values you should respect, for example: Code of Conduct for paralegals.

Executor: Person chosen to administer the estate of a person who dies.

Fugitive: Someone running away from the law.

Family Advocate: Social worker appointed in family law cases.

Harassment: Unwelcome pressure, attention or physical actions, for example: stalking.

Human trafficking: Includes capturing, supplying and using people inside South Africa and across our borders, for example: children being groomed or exploited sexually.

Illegal: Against the law or breaking the law.

Incriminate: When you involve someone in a crime.

Informed consent: Agreeing after having all the information you need to decide something, for example: to have an HIV test.

Instructions: What a client asks you to do as a paralegal in their case.

Interdict: A court order to protect you, or force someone to do something or to stop doing it.

Intestate succession: Dying without leaving a will.

Jurisdiction: The powers that a court has and the geographical area it covers.

Justice of the Peace: Public officials who are given the power to do certain tasks, for example: magistrates, senior police officers.

Liable/Liability: Legally responsible for something or owing money.

Lobola: Negotiated price paid for a bride, for example: cattle or money.

Misrepresentation: Making a false or incorrect statement.

Onus: When you have the duty to prove a case in court.

Paralegal: Person not fully qualified as lawyer, but who has legal skills, knowledge and experience, for example: a paralegal in a community advice office, a law firm or an NGO.

Parties: The different sides in a case or dispute.

Perpetrator: Person responsible for committing a crime.

Plaintiff: When you bring a civil case against someone.

Pleadings: Documents in civil cases.

Post-test counselling: Counselling after an HIV test.

Prescription: When a claim expires, for example: for an accident insurance claim: 2 years.

Pre-test counselling: Counselling before an HIV test.

Primogeniture: The right of an eldest child to succeed when someone dies.

Proceedings: Formal steps in a legal case.

Protection order: Court order to protect you from harm, for example: to stop domestic violence.

Ratified: Formally approve and agree to respect, for example: South Africa ratifying an international agreement or protocol.

Rehabilitation: A programme to enable an offender to eventually be re-integrated into society.

Reinstatement: Re-employing a dismissed worker.

Remedies: Court order, money compensation or other solution to a case or dispute.

Review: When a higher court checks the decisions of a lower court to see if all procedures were correctly followed.

Search warrant: Legal document authorising a search.

Seizing: Legally taking away things after a court order or search warrant.

Stigma: Thinking about or labelling someone negatively, for example: stigmatising a sex worker.

Subpoena: Official paper forcing you to go to court to give evidence.

Sue: Claim money from someone in a civil case for harm they caused you.

Testify: Give evidence in court or at a formal hearing, for example: a disciplinary enquiry.

Undertaking: When you give your word to do something.

Unfair discrimination: Treating someone differently in an unfair way, for example: because a woman is a lesbian.

Unfair labour practice: Employer doing something that the law or courts say is unfair, for example: not following correct procedures for demoting or promoting a worker.

Unlawful: Outside the powers given by law, for example: unlawful arrest by the police.

Violate: Abuse or not respect, for example: violate your right to human dignity.

Cases

Amod v Multilateral Motor vehicle Accidents Fund 1998 (4) SA 753.

Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC).

Daniels v Campbell and Others (CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004).

F v Minister of Safety and Security and Another (4194/2006) [2009] ZAWCHC 101; 2009 (2) SACR 639 (WCC); 2010 (1) SA 606 (WCC) (26 June 2009).

Gasa v Road Accident Fund and 6 Others: Case no. 579/2006.

Govender v Ragavayah NO and Others (6715/08) [2008] ZAKZHC 86; 2009 (3) SA 178 (D); [2009] 1 All SA 371 (D) (6 November 2008).

Gumede v President of the Republic of South Africa & others 2009 (3) BCLR 243 (CC).

Hassam v Jacobs NO and Others (5704/2004) [2008] ZAWCHC 37; [2008] 4 All SA 350 (C) (18 July 2008).

K v Minister of Safety and Security (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749 (CC) (13 June 2005).

Kylie v Commission for Conciliation Mediation and Arbitration and Others (C52/07) [2008] ZALC 86; [2008] 9 BLLR 870 (LC) ; (2008) 29 ILJ 1918 (LC) (31 July 2008).

Louw v Louw (20811/08) [2011] ZAWCHC 228 (17 May 2011).

Masiya v Director of Public Prosecutions Pretoria (The State) and Another (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007).

McGeary case: Jansen van Vuuren and Another NNO v Kruger, 1993 (4) SA 842 (A).

Mokoena v Mokoena and others CCIV/APN/216/2005) [2007] LSHC 14 (16 January 2007).

Ntsabo v Real Security CC 2003 (24) ILJ 2341 (LC).

Radebe v S (726/12) [ZASCA] 31 (27 March 2013).

Solarie v Solarie and Others (26186/09) (24 August 2010).

Van Der Merwe v Road Accident Fund & Another 2006 4 SA 230 (CC).

Van Zijl v Hoogenhout 2004 All SA 427 SCA.

Useful materials

Books, articles, reports, submissions and manuals

AIDS Law Project and AIDS Legal Network (2001) *HIV, AIDS and the Law: A Resource Manual* (2nd edition).

Bekker, P. and Joubert, J. (1999), *Criminal Procedure Handbook*, Kenwyn, Juta & Co.

Bouchoux, D. (2010), *NALA Manual for Paralegals and Legal Assistants*, Clifton Park, NY: Delmar Cengage Learning (5th edition).

Canadian HIV/AIDS Legal Network (2005), *Sex, Work, Rights, Changing Canada's Criminal Laws To Protect Sex Workers' Health And Human Rights*.

Community Law Centre (2007), *Socio-Economic Rights in South Africa: A Resource Book* (2nd edition).

Cornick, M. (2012), *Using Computers in the Law Office: advanced*, Clifton Park, NY: Delmar Cengage Learning.

Education and Training Unit (ETU) and Black Sash (2005), *Paralegal Manual*: also available at: www.paralegaladvice.org.za.

Gender Manual Consortium (1999), *Making Women's Rights Real: A resource manual on women, gender, human rights and the law* (1st edition).

Global Rights (2011), *Paralegal Training Manual: Promoting Access to Justice and Human Rights*, Budinbugyo District, Uganda: available from: http://www.globalrights.org/site/DocServer/Training_Manual_Final_13_Jan_2011__3_.pdf?docID=12524.

HRW (2001), "Scared at School: Sexual Violence Against Girls in South African Schools", *Human Rights Watch Report*: available from: www.hrw.org/reports/2001/safrica.

Mokwena, S. (1991), "The Era of the Jackrollers: Contextualizing the Rise of Youth Gangs in Soweto", Paper presented at the *Centre for the Study of Violence and Reconciliation*, Seminar No. 7, 30 October: available from: www.csvr.org.za/papers/papmokw.htm.

Naylor, N. and O'Sullivan, M. (2009) *Sexual Harassment and the Amended Code of Good Practice on the handling of sexual harassment in South Africa*, Women's Legal Centre.

Open Society Foundations (2012), *Criminalising Condoms: How policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, the United States and Zimbabwe*: also available at: <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>.

Schneeman, A. (2000). *Paralegal careers*. Albany, NY, West Legal Studies/Thomson Learning.

Shuttleworth, M. (coord.) (2003), *“What are Human Rights?” by the Youth for Human Rights International*: available from: <http://www.westerncape.gov.za/eng/topics/43870>.

SWEAT (2010), *Submission to the South African Law Reform Commission*.

Training Today (2013), “How to Conduct an Effective Training Session”, *Training Today*, available from: <http://trainingtoday.blr.com/employee-training-resources/How-Conduct-Effective-Training-Session>.

UNAIDS Global Reference Group on HIV/AIDS and Human Rights (2003) Public Report: available from: http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fglobalhealth.usc.edu%2Fen%2FResearch%2520And%2520Services%2FPages%2F~%2Fmedia%2F8127C33BEE624E2F8AB79D450A9D800A.ashx&ei=9zSJUaj7BoyxhAf11oGAAQ&usq=AFQjCNEaAKNZhe1DSHkWs5_AujDtnm066g&bvm=bv.45960087.d.ZG4.

UNFPA, (2011), *“Maybe it will be better once the this World Cup has passed”*, Research Findings regarding the impact of the 2010 Soccer World Cup on Sex Work in South Africa.

Vetten, L. and Haffejee S. (2005), “Urban Predators”, *CSVR Gender Programme, Policy Brief No. 01*: available from: www.csvr.org.za/papers/paplvsh.pdf.

Online references

Black Sash official website: <http://www.blacksash.org.za/>.

ETU/Black Sash Paralegal Manual online: <http://www.paralegaladvice.org.za/>.

LexisNexis: <http://www.lexisnexis.co.za/>.

Southern Africa Legal Information Institute:- <http://www.saflii.org/>.

SWEAT official website: <http://www.sweat.org.za/>.

Tswaranang Legal Advocacy Centre: <http://www.tlac.org.za/>.

Women’s Legal Centre: www.wlce.co.za.

Links to Women’s Legal Centre booklets

General issues: <http://wlce.co.za/index.php/what-we-do/general-issues>.

Health: <http://wlce.co.za/index.php/what-we-do/health/112-general-information8>.

Know your rights: *A simplified guide to sex work and your rights*: <http://wlce.co.za/index.php/2013-04-30-11-53-09/2013-05-08-11-48-14/violence-against-women/206-a-simplified-guide-to-sex-work-and-your-rights>.

Labour: <http://wlce.co.za/index.php/what-we-do/labour/104-general-information5>.

Legal advice: <http://wlce.co.za/index.php/what-we-do/legal-advice>.

Property rights: <http://wlce.co.za/index.php/2013-04-30-11-53-09/2013-05-08-11-48-14/land-housing>

Relationship rights: <http://wlce.co.za/index.php/what-we-do/relationship-rights/96-general-information1>.

Report on Human Rights Violations by Police against Sex Workers in South Africa:
http://wlce.co.za/images/violence_against_women/General/Sex%20Workers%20Report.pdf.

Violence against women: <http://wlce.co.za/index.php/what-we-do/violence-against-women/14-general-information>.



WOMEN'S LEGAL CENTRE