



**Urban LandMark**

# **EVICTIION PROCESS MAPPING GUIDE**

## **A Manual For Rental Housing Managers & Tenants**

June 2010

## **ACKNOWLEDGEMENTS**

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### **Disclaimer**

All care has been taken in the preparation of this document and the information contained herein has been derived from sources believed to be accurate and reliable. The Social Housing Foundation and Urban LandMark does not assume responsibility for any error, omission or opinion expressed as well as investment decisions based on this information.

## PREFACE

The production of this guide is one of several outputs which arose as part of a multi-faceted study into eviction from rental housing commissioned by the Social Housing Foundation (SHF) and Urban Landmark (ULM) in 2009/10. It became evident early in this process that a resource document was required which clearly explained all relevant laws around eviction and mapped out the eviction process.

The laws and processes concerning eviction are often poorly understood by landlords and tenants alike. Furthermore, several recent court rulings and significant amendments to the Rental Housing Act, proclaimed in 2008, have created and/or clarified a range of rights and responsibilities of both parties. It is important that as many stakeholders in rental housing as possible, particularly owners/ managers and the renters themselves, have access to information on this critical issue.

In addition to mapping out the eviction process, this guide also explains some of the statutory and common law rights, protections and remedies which can be utilised in an eviction.

This guide in no way definitive, nor can it be used to substitute for professional legal advice. It has, however, been written to be a neutral and general user friendly resource that can be easily understood by SHIs; private landlords and tenant groups. The versatility of this document allows all parties to be equally informed and empowered with regard to eviction.

For a broader understanding of the legal and public policy issues surrounding eviction in contemporary South Africa, the reader should consult the report on eviction published by SHF and UL in 2010. The report is available on the websites of both organisations: [www.shf.org.za](http://www.shf.org.za) and [www.urbanlandmark.org.za](http://www.urbanlandmark.org.za).

(keywords: eviction report).

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<sup>1</sup> This Guide is a companion to the report entitled: *An Investigation into an Apparent Increase in Evictions from Private Rental Housing*, published by SHF in June, 2010. It is available on [www.shf.org.za](http://www.shf.org.za)

## 1. Introduction

The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 defines the terms evict and eviction as follows: "**'evict'** means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and **'eviction'** has a corresponding meaning".<sup>2</sup>

Prior to the coming into force of the Constitution in 1997, it was relatively simple for the owner of property to obtain a court order to evict someone who was occupying his land or property (the tenant<sup>3</sup>). Such an action of ejectment could be brought by a property owner who would only be required to allege and prove two facts: first, that they are the owner of the property and second, that the tenant is in occupation.<sup>4</sup> He did not have to allege and prove that the tenant was occupying the property unlawfully or the reasons for such an averment. The tenant, if she wished to oppose the eviction, would have to plead that the occupation was lawful in terms of a contract or a statutory right. It is only in such a case that the plaintiff property owner would have to counter the defendant's plea that the occupation was lawful.

The common law position has changed dramatically where a tenant faces eviction from their 'home',<sup>5</sup> and in terms of the Constitution, the court must now also be informed as to the circumstances of the case which go beyond merely stating ownership by the landlord as plaintiff or applicant and unlawfulness on the part of the tenant as the respondent or

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<sup>2</sup> Section 1 of PIE.

<sup>3</sup> For the purpose of ease of reading in this report, the singular 'tenant' will be used, but should be read to include the plural. The same applies to the use of the work 'landlord'.

<sup>4</sup> *Graham v Ridley* 1931 TPD 476, 479; and *Chetty v Naidoo* 1974 (3) SA 13 (A), 20A-E.

<sup>5</sup> The question of what constitutes a 'home' for the purposes of protection afforded by section 26(3) of the Constitution is not entirely clear. Iain Currie and Johan de Waal suggest that a home should be defined as a place where a person resides permanently or for a considerable period of time: I Currie and J de Waal *The Bill of Rights Handbook* (2005) at 587.

defendant. Today, for an eviction from one's home to be lawful it must be done by obtaining an eviction order through a court of law unless agreement has been reached with the tenant that they will vacate the premises and do indeed move out. Where an eviction is from property other than one's home, the common law is still applicable.<sup>6</sup>

This section of the report discusses the key legislation regulating the eviction of a tenant from their home, as well as some of the common law protections and remedies which tenants are able to utilise in the event that they are evicted unlawfully. It begins by setting out the constitutional protections afforded under section 26(3) of the Constitution. It then moves on to a discussion of the requirements in order to evict under the common law, as well as the remedies available under the common law to a tenant who has been unlawfully evicted. Thirdly, it provides a discussion of two key pieces of legislation: the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act(PIE), and the Rental Housing Act, and the protections and procedures set out under those acts. Finally, this section concludes with several tabular descriptions of the findings in this section.

## **2. The Law Regulating Evictions**

### **2 (A) CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996**

#### *Section 26 – Right of Access to Housing*

Section 26 of the Constitution sets out the rights of South Africans to have access to adequate housing and provides constitutional protection against arbitrary eviction. The section reads as follows:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

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<sup>6</sup> *Pareto Ltd and Others v Mythos Leather Manufacturing (Pty) Ltd* 2000 (3) SA 999 (W) at paragraph 5.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 26(3) expressly provides that an eviction order may only be carried out with an order of court made after considering all the relevant circumstances of the person or persons facing eviction. Hence, a court, in considering whether to grant an eviction order, must consider whether the circumstances of the case justify an eviction order. That is, a court must determine not only whether the eviction was procedurally fair but also substantively fair. Thus the Constitution has considerably broadened the protection available in cases of eviction.

In the case of *Brisley v Drotsky*<sup>7</sup> the Supreme Court of Appeal held that section 26 was applicable not only vertically, between citizen and state, but also horizontally between landlord and tenant.<sup>8</sup> This means that the landlord must now demonstrate that the occupation of the property is unlawful, going beyond the mere averments that they are the owner and setting out the unlawfulness of the tenant's occupation. The tenant retains the obligation to put their personal circumstances before the court.

Section 26 is aimed at curbing the creation of further homelessness and all the social ills connected with it, by putting an obligation on the state to respect, protect and promote the right of access to housing. Moreover, the right of access to housing cannot be seen in isolation and must be interpreted as access to housing in conjunction with access to public services such as water and electricity.<sup>9</sup> Through the development of recent jurisprudence, judges must now differentiate between evictions that will not lead to homelessness and those that will. Courts are increasingly looking to local government to assist them with regard to the availability of temporary alternative accommodation. This area of our law is unsettled at the moment. The tendency in the provincial divisions has been for the court to

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<sup>7</sup> 2002 (4) SA 1 (SCA).

<sup>8</sup> *Brisley* at paragraphs 40-41.

<sup>9</sup> *Government of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

join the relevant municipality in the matter in order to obtain information regarding the provision of temporary alternative accommodation.<sup>10</sup>

## **2(B) COMMON LAW REMEDIES IN FAVOUR OF THE TENANT IN CASE OF EVICTION**

There are three remedies available to the tenant under the common law where she is faced with an unlawful eviction. These are, an urgent application for a *mandament van spolie* with a claim for damages if indicated, a lien and the legal principle of *huur gaat voor koop*. These remedies were also available prior to the enactment of the Constitution.

### *Mandament van Spolie*

Of the common law remedies available to the tenant, the *mandament van spolie* or spoliation order, as it is also known, is still the most effective remedy against an unlawful eviction. The *mandament van spolie* is a remedy available to a possessor, in this case, a tenant occupying property, where they are unlawfully deprived of their possession, which restores possession of the property to them. In an application for a spoliation order the court is not concerned with the status or nature of the tenant's occupation seeking the order. In other words, it is not relevant whether the tenant occupies the property lawfully; the only relevant consideration is whether the deprivation of her occupation was lawful. If not, then she is entitled to have her possession restored. The purpose of the *mandament* is to prevent people, such as property owners, from 'taking the law into their own hands'. This is the case also for an organ of state such as a municipality who has arguably acted in the wider the public interest.<sup>11</sup>

Hence, in a spoliation action for unlawful eviction, the court would be concerned primarily with restoring the position as it was before the unlawful eviction, and not with the legality of

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) at 117.



that original possession. In the words of Diemont J: "Where the litigant [that is, the evicted tenant] seeks a spoliation order, a *mandament van spolie*, the Court will not concern itself with the merits of the dispute. The essence of the remedy is to restore the status *quo ante*. ...[I]t matters not whether the applicant acquired occupation secretly or even fraudulently."<sup>12</sup>

In addition to ordering restoration of possession, a spoliation order may also include an order that the person evicted or spoliated must be restored to their former state, which may include the rebuilding of a shack and the replacement of household belongings destroyed in the eviction.<sup>13</sup>

In the matter of *Tswelopele Non-profit Organisation and Others v City of Tshawane and Others* 2007 (6) SA 511 (SCA) the court held that an unlawful eviction not only unlawfully deprived occupiers of their peaceful possession, but infringed their constitutional rights to personal security, privacy and dignity. Furthermore the court held that the unlawful eviction also violated their rights to property.

The tenant can seek a spoliation order either in High Court, Magistrate Court or Rental Housing Tribunal.<sup>14</sup> If the order made is required to be enforced by the sheriff, this will have costs implications initially for the tenant and if the application for spoliation is successful against the landlord.

A spoliation order is invariably brought as a matter of urgency with negative cost implications for the landlord where it is successful. For landlord, it is therefore advisable to follow due process by giving timely notice of one's intention to terminate the lease and

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<sup>12</sup> *Fredericks* at 117, referring to the leading decision of the Appellate Division in *Yeko v Qana* 1973 (4) SA 735 (AD) at 739.

<sup>13</sup> *Zinman v Miller* 1956 (3) SA 8 (T). See the decision in *Fredericks* for a good example of where this was done.

<sup>14</sup> Section 13(12)(c) of the Rental Housing Act. This power is discussed in more detail below.

the reasons for this, or reach an agreement with the tenant. If no agreement is reached, resort must be had to an application for eviction in either the High Court or the Magistrates Court. If this is not done, and the landlord tries to evict a tenant unlawfully, this may add to the legal costs by having to go through with two court cases instead of a single application for eviction.

### *Huur gaat voor koop*

The maxim '*huur gaat voor koop*' literally means 'hire goes before purchase', and affords a tenant some protection in the event that the property she is leasing is sold. This is so because a purchaser buying a property does so subject to any contract of lease over the property, whether verbal or in writing. The new owner must thus abide by the contract entered into between the seller owner and the present tenant, and the obligations and rights of the seller automatically become those of the purchaser upon transfer of the property.<sup>15</sup> Both the new landlord and the tenant at the time of transfer are bound by the existing contract of lease as it stands and neither of the two parties has the right to change or withdraw from the contract unless there is an agreement by both parties to do so.<sup>16</sup>

If the tenant occupying the property had no contract with the seller and cannot prove any right to the property, the new owner can bring an action to have the property restored to them. An option to renew the existing contract of lease is binding on the new owner who has purchased the property.<sup>17</sup> Whether an option to purchase in favour of the tenant is binding depends on whether or not the option to purchase forms part of the existing contract of lease and the intention of the parties in drafting the contract.<sup>18</sup>

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<sup>15</sup> *Garvin and Others NNO v Sorec Properties Gardens Ltd* 1996 (1) SA 463 (C) at 470-471.

<sup>16</sup> *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) at 939.

<sup>17</sup> *Shala v Gelb* 1950 (1) SA 852 (C).

<sup>18</sup> *Sandmann v Schaefer* 1969 (4) SA 524 (SWA).

In cases where there is no written contract of lease stipulating the time-frame of the lease, the term of the lease is determined by the time periods for payment of the rent. If the rent is paid on a monthly basis, for instance, the new landlord may terminate the contract one month after the purchase, and the tenant would have a month to look for alternative premises or be faced with a notice terminating the lease. If rent was payable yearly, the tenant's right to remain on the property will be extended. (Of course, a tenant whose period of lease has come to an end could always delay her departure by forcing the new owner to apply for a court order for ejectment, but this is costly and provides temporary respite only.)

When purchasing a residential property, the prospective buyer would be advised to acquaint themselves with the terms of present leases over the property in order to avoid unpleasant surprises which could turn out to be very costly. If a property is purchased which is occupied by a tenant, it is advisable to ensure in the contract of sale that the purchaser will only take transfer once proof has been provided that the contract of lease has come to an end and the tenant has left.

### *Sublease*

In some instances, a tenant may sublet a property to another tenant, who is then known as a subtenant, and the agreement known as a sublease. In the case where a landlord attempts to evict a subtenant, the subtenant is bound by the contract between the tenant and the landlord and cannot claim more rights than the contract of lease allows. More usually, however, contracts of lease expressly prohibit subletting, without the express consent of the landlord. If a tenant nevertheless sublets a property, and the subtenant is subsequently faced with an eviction order, the subtenant cannot rely on the contract of lease between the tenant and the landlord for protection. The subtenant does, however, have a right to sue the tenant for damages.

In restricting the right to sublet, the landlord should take care to ensure that the right to sublet is restricted in such a manner that the tenant's right to allow persons onto the property is not infringed.<sup>19</sup>

In cases where subletting is specifically excluded, and the tenant subsequently sublets the premises, the landlord can sue the tenant for breach of contract and give notice that the contract of lease has been cancelled. Subsequently, and as a result of the breach, the tenant has no right to occupy the property and an order for eviction may be applied for. If there is a real and immediate danger of damage or prejudice to the landlord as a result of the actions of the tenant, the landlord can apply for an interim order in terms of section 5 of PIE to have the subtenant evicted, pending a final order in the matter.

Overcrowding is often an issue where sub-lessees are concerned. In the event of overcrowding, but even if there was no breach of contract, the landlord could rely on overcrowding as grounds for the eviction since overcrowding may cause damage to the property, is not conducive to a healthy living environment, and may cause a public nuisance. The breach of contract, overcrowding, damage and the causing of a public nuisance can be seen as an unfair practice and could be referred to the Rental Housing Tribunal. The Rental Housing Tribunal cannot grant an eviction order,<sup>20</sup> but may facilitate an agreement whereby the tenant and the subtenant both agree to move out and the tenant to a cancellation of the lease. Any failure to abide by the agreement will, however, have to be enforced through an order of court to grant an eviction order against the tenant and subtenant in terms of the agreement reached.

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<sup>19</sup> *Muller v Harris and Another* 1958 (2) SA 344 (N) at 347.

<sup>20</sup> Section 13(14) Rental Housing Act.

## **2(c) PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT, 1998**

### *Applicability of PIE*

The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) gives content to and reinforces the requirements for a lawful eviction consistent with section 26(3) of the Constitution. PIE is applicable to all land in South Africa , and regulates the eviction of “unlawful occupiers”, which excludes occupants that are protected by the Extension of Security of Tenure Act 62 of 1997 (ESTA), or by the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).<sup>21</sup>

### *Procedures for obtaining an eviction order in terms of PIE*

In terms of section 4(1) of PIE, the Act applies to all proceedings brought by an owner or person in charge of land for the eviction of an unlawful occupier. PIE establishes procedures for serving a notice of eviction on a tenant which are more onerous than the Rules of the High Court and the Magistrates Court. In addition, the South Gauteng High Court (previously the Witwatersrand Local Division) has issued practice directives regarding applications instituted in terms of PIE, which provide further detail on the process to be followed.

The salient features of these procedures are as follows:

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<sup>21</sup> Sections 1 and 2 of PIE. An “unlawful occupier” is defined as “a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996”: section 1 of PIE.

- The procedures for service and filing of the notice in terms of PIE are the same as those prescribed by the Rules of Court, with one exception.<sup>22</sup> In addition to the normal rules for serving the notice of motion, section 4(2) of PIE requires that a landlord must give a notice of the eviction proceedings, 14 calendar days prior to the proceedings being instituted. This is known as a section 4(2) notice.
- The sheriff must serve the notice in terms of PIE on the occupier.
- If the landlord cannot serve the notices on the tenant in the normal manner as provided for in the Rules of Court, she/he may approach the court for an order to request a process of service different to that provided for in the Rules. In giving the order, the court must consider the right of the unlawful occupier/s to receive adequate notice and to defend an application for eviction.<sup>23</sup>
- Section 4(5) of PIE sets out the content of the section 4(2) notice:
  - "The notice of proceedings contemplated in subsection (2) must-*
    - (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*
    - (b) indicate on what date and at what time the court will hear the proceedings;*
    - (c) set out the grounds for the proposed eviction; and*
    - (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."*
- In terms of the Rules of Court, in an application for eviction, the respondent will be served with a notice in which they must serve their notice of intention to defend the application within 5 (or more) court days and their answer to the allegations made by the applicant landlord within 15 court days after this.

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<sup>22</sup> Section 4(3) of PIE.

<sup>23</sup> Section 4(4) of PIE.

- If no notice of intention to defend the application has been received, alternatively once pleadings have been closed, the landlord will apply to court for approval of a notice in terms of section 4(2) of PIE, together with directions as to service of the notice.
- Sections 4(6) and (7) of PIE set out the relevant circumstances which have to be considered by a court in considering an application for eviction.<sup>24</sup> The sections are worded in such a way that it sets out circumstances which a court is obliged to consider, but does not exclude the court from using its discretion to consider circumstances not listed, provided these circumstances are relevant. Of particular importance are the circumstances of the elderly, children, the disabled and households headed by women as occupiers/tenants.
- The founding affidavit by the landlord as applicant must set out the circumstances of the case which they are aware of, as well as the length of time that the tenant or occupier have been in occupation, to be considered by the court.<sup>25</sup> The tenant, if he/she wishes to oppose the application, should also set out his/her own circumstances in an affidavit to be put before the court.
- If an unlawful occupier has been in occupation of the property for over six months, the court must consider whether land has been or can reasonably be made available by a municipality or another organ of state to resettle the unlawful occupier.<sup>26</sup>
- In cases where the unlawful occupier/tenant has occupied the land for over six months and where homelessness may result, the court may wish to hear from the local

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<sup>24</sup> These circumstances do not apply where land is sold in sale of execution after a buyer defaults on mortgage repayments: section s 4(6) and (7) or PIE.

<sup>25</sup> Section 4(6) and (7) of PIE.

<sup>26</sup> Section 4(7) of PIE.

municipality or the province responsible for the implementation of housing with respect to the availability of alternative accommodation. This may result in the joinder of these state entities.<sup>27</sup>

- Where the court is satisfied that all of the requirements set out in section 4 PIE have been complied with, and that the unlawful occupier(s) has no valid defense, it must grant an eviction order, which must be reasonable in the circumstances. The court, however, retains the discretion to vary the order where good cause is shown why it should do so.<sup>28</sup>
- In granting an order which is reasonable, the court must determine the date on which the unlawful occupier must vacate the premises and the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date set down in the order.<sup>29</sup> In deciding on a date for the eviction the court must consider all the relevant circumstances of the case, including the period for which the tenant and her family have resided on the premises.<sup>30</sup>
- In granting an eviction order, a court may order that the buildings occupied by the tenant/occupier must be demolished once the eviction has been completed.<sup>31</sup> This would generally only occur where shacks have been erected without consent.
- The sheriff, who would ordinarily carry out (execute) the order, may request assistance in carrying out the order for eviction and a court may then grant this request. Notwithstanding the granting of such a request, the sheriff must be present at all times

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<sup>27</sup> *Sailing Queen Investments v The Occupants of La Colleen Court* (unreported judgment of the Witwatersrand Local Division, 25 January 2008) at paragraph 6.

<sup>28</sup> Section 4(8) and (12) of PIE.

<sup>29</sup> Section 4(8) of PIE.

<sup>30</sup> Section 4(9) of PIE.

<sup>31</sup> Section 4(10) of PIE.



throughout the eviction of occupiers and any demolition or removal of the property occupied by them.<sup>32</sup>

- Section 8(1) of PIE specifically declares that any eviction which is not carried out pursuant to a valid court order is unlawful. Such an unlawful eviction is then criminalised, and section 8(3) of PIE provides that any person who contravenes this provision is guilty of an offence and is liable, on conviction, to a fine or imprisonment of a period up to two years, or both.

### *Urgent Proceedings for an Eviction*

A landlord may apply to the court for an urgent eviction order in terms of the procedures set out in section 5 of PIE. Such an order is an interim order pending the outcome of proceedings for a final order.

In order to obtain an urgent order the landlord must satisfy the court that *all* of the following requirements have been met:

- There is a real and imminent danger of substantial injury or damage to any person or property if the eviction were not to be granted;
- The hardship the landlord is likely to suffer is greater than that of the tenant/occupier if the urgent order is not granted; and
- That there is no other effective remedy available.

Notice of the urgent proceedings must be served on the tenant/occupier by sheriff, as well as the relevant municipality, and the notice must contain the same information as

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<sup>32</sup> Section 4(11) of PIE.

prescribed in section 4(5) of PIE as set out above. The timeframes as set out in section 4(2) of PIE are not applicable in an urgent application and may be significantly shorter, depending on the urgency.

### *Mediation in Terms of Section 7 of the PIE Act*

Mediation is an option to see if a settlement can be reached between the landlord and tenant before going ahead with an application to court.<sup>33</sup> Either the landlord or the tenant may request for the matter to be referred to mediation.

If no Tribunal is available in a particular town or city, a request can be made to the local municipality to appoint a mediator.<sup>34</sup> A Rental Housing Tribunal can hear a complaint in connection with an unfair practice and is established and funded by Provincial Government.<sup>35</sup> Details of the complaint procedure are as follows:

- A landlord or tenant (or other interested group) may lodge a complaint with the Rental Housing Tribunal;
- The complaint must be delivered to the office of the Tribunal by post, fax or by hand.
- The complaint must contain all the details of the property involved; particulars of the persons involved; as well as the reasons for the complaint; and whether any complaints relating to the same rental property have ever been lodged before.<sup>36</sup>

Mediation is considerably cheaper than following the court route and is preferable if there is a real possibility that the matter can be settled amicably.

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<sup>33</sup> Section 7 of PIE deals with mediation of disputes.

<sup>34</sup> Section 7(3) of PIE.

<sup>35</sup> Section 13(2)(c) and (d) of the Rental Housing Act.

<sup>36</sup> Section 13(2) of the Rental Housing Act and the Rental Housing Procedural Regulations.

## *Rent in Arrears*

Should the landlord want to evict the tenant for rent in arrears, the matter must be referred to court in terms of PIE as per the procedures set out above. The landlord will have had to terminate the lease in accordance with the terms of the lease prior to instituting eviction proceedings.

In *Brisley v Drotsky*, decided under the common law, the Supreme Court of Appeal clarified the court's discretion when considering the circumstances in an application for eviction based on a breach of contract as a result of the fact that the tenant was in arrears with the rent and the landlord has cancelled the lease. This is paraphrased and translated in the headnote as follows:

*"Where the lessor is the owner of the leased property and has cancelled the lease, the lessee (i.e. tenant) has no contractual right to occupy the property. In the absence of any statutory right to occupy the property, the court has no discretion to refuse to grant an ejectment order."*<sup>37</sup>

This decision has been criticised, but has nevertheless been applied in numerous subsequent decisions. The scope of the application of the reasoning, however, has been narrowed down substantially by the Supreme Court of Appeal in *Ndlovu v Ngcobo*.<sup>38</sup> In that decision (which clarified the legal position after a number of High Court decisions going either way<sup>39</sup>), the Court

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<sup>37</sup> 2002 (4) SA 1 (SCA) at paragraph 45. The original Afrikaans reads as follows: "[45] *In die onderhawige geval is die verhuurder die eienaar van die betrokke eiendom. Die huurder se huurkontrak is gekanselleer en sy het gevolglik geen kontraktuele reg om die eiendom te okkupeer nie. Die huurder het ook nie aangevoer dat sy enige statutêre reg, anders as wat te vinde mag wees in art 26(3), het om die eiendom te okkupeer nie en die Hof het geen diskresie om 'n uitsettingsbevel te weier nie.*"

<sup>38</sup> *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).

<sup>39</sup> See, for example, *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W), where the Court found that PIE did not extend to cases of holding-over. This decision was followed in *Ross v South Peninsula Municipality* 2000 (1) SA 589

held that PIE extends to instances of 'holding over', that is, where a tenant continues to occupy property where the contract of lease has expired, or where the occupier has defaulted on her mortgage bond payments.<sup>40</sup> Thus, the dispute in *Brisley* would today be decided under PIE.

The matter can also be referred to a Rental Housing Tribunal as an unfair practice, which is defined in the Rental Housing Act as an act which is in contravention of the Rental Housing Act (which includes the obligation to prompt and regular payment of rent) or which prejudices the rights and interests of any person including a landlord or tenant.<sup>41</sup>

An agreement for payment of rental arrears can be facilitated by the Rental Housing Tribunal and the agreement enforced by the sheriff.<sup>42</sup> Included in the agreement should be the clear statement that the payment of rent must continue as per the contract of lease. Payment for arrear rental is a different payment and must be paid in addition to the regular rent payments as stipulated in the contract of lease.

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(C); *Cape Killarney Property Investments (Pty) Ltd v Mahamba & Others* 2000 (2) SA 67 (C); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE); *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W); and *Van Zyl NO v Maarman* [2000] 4 All SA 212 (LCC). But see *Bekker and Another v Jika* [2001] 4 All SA 573 (SE), where the Court held that PIE does apply to mortgage defaulters.) For a discussion of these cases, see AJ van der Walt 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law' (2002) 18 *SAJHR* 371, 385–90; and *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at paragraphs 51–64.

<sup>40</sup> The Department of Housing, evidently unhappy with this interpretation, has tabled the Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill, 2005. According to the draft bill, it was never Parliament's intention to extend the reach of PIE to tenants and to mortgagors. Proposed amendments to s 2 of PIE make this intention clear. The amendment Bill, however, has not subsequently been enacted.

<sup>41</sup> Section 13 read with section 4(5) read with section 1 of the Rental Housing Act.

<sup>42</sup> Section 13 of the Rental Housing Act.

It is possible to claim arrear rental in addition to eviction in both action and motion proceedings. It is advisable however to separate the proceedings as the arrear rental claim may have the effect of delaying matters.<sup>43</sup>

### *Default Judgment*

Default Judgment may be sought by the landlord in cases where:

- The tenant has been notified as prescribed by section 4 of PIE;
- The tenant fails to lodge a notice of intention to defend, or if a notice to defend has been lodged, the tenant fails to lodge their answering affidavit (in which they put forward their side of the case) within the time frames provided by the Rules of the Court; and
- The tenant or her lawyer fails to appear in court on the day the matter has been set down for a hearing.

In such a case, the landlord applicant may apply for an eviction order by default judgment, that is, in the absence of representations by the tenant. The order obtained in the court for the eviction must then be served on the tenant by the sheriff.

### *Hijacked Buildings*

In the case of buildings that have been hijacked, that is, the tenants in the building are paying rent to someone other than the landlord, an eviction order can be obtained through PIE.

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<sup>43</sup> South Gauteng High Court Practice Directives, issued by Mojapelo DJP, 26 October 2007.

## **2(D) RENTAL HOUSING ACT AND THE RENTAL HOUSING TRIBUNAL**

According to the long title of the Rental Housing Act, that Act defines the responsibility of Government in respect of rental housing property, and creates mechanisms to promote the provision of rental housing property and to ensure the proper functioning of the rental housing market. It also makes provision for the establishment of Rental Housing Tribunals and lays down general principles governing conflict resolution in the rental housing sector. Finally, it provides for the facilitation of sound relations between tenant and landlord through balancing their interests and for this purpose lays down general requirements relating to leases. In the remainder of this section we set out the salient features of the Act for the purposes of this report:

- A landlord may not unfairly discriminate against a prospective tenant, or the members of the tenant's household or the visitors of the tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.<sup>44</sup>
- The Act gives a number of rights to the tenant, including the rights:
  - To privacy;
  - Not to have her person or home searched;
  - Not to have her property searched;
  - Not to have her possessions seized, except in terms of a law of general application and the landlord having first obtained a ruling by a Tribunal or an order of court; and
  - Not to have the privacy of her communications infringed.<sup>45</sup>
- The Act also lays down a number of duties on the landlord, including:

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<sup>44</sup> Section 4(1) of the Rental Housing Act.

<sup>45</sup> Section 4(3) of the Rental Housing Act.

- An obligation on the landlord to exercise his rights of inspection in a reasonable manner only, and after reasonable notice has been given to the tenant;<sup>46</sup>
  - An obligation to provide the tenant with a written receipt for all payments made;<sup>47</sup> and
  - An obligation on the landlord to invest the deposit (if any) in an interest-bearing bank account.
- Similarly, the landlord is afforded a number of rights, including the rights:
    - To prompt and regular payment of rent or any other charges payable in terms of a lease;
    - To recover unpaid rent or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law;
    - To terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease;
    - On termination of a lease to:
      - receive the rental housing property in a good state of repair, save for fair wear and tear; and
      - repossess rental housing property having first obtained an order of court; and
    - claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any, caused by the tenant, a member of the tenant's household or a visitor of the tenant.<sup>48</sup>
  - The Rental Housing Act establishes a Rental Housing Tribunal ('the Tribunal') in order to fulfill the objectives of the Act.<sup>49</sup> The key features of the Tribunal and its role are highlighted as follows:

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<sup>46</sup> Section 4(2) of the Rental Housing Act.

<sup>47</sup> Section 5(3)(a) of the Rental Housing Act.

<sup>48</sup> Section 4(5) of the Rental Housing Act.

<sup>49</sup> Sections 8 and 9 of the Rental Housing Act.

- Any tenant or landlord, or other interest group, may lodge a written complaint with the Tribunal, concerning an unfair practice.<sup>50</sup> An unfair practice is defined as any contravention of the Act, or any practice which unreasonably prejudices the rights or interests of the tenant or landlord.<sup>51</sup>
- If the Tribunal is of the view that a dispute may be resolved through mediation, it may appoint a mediator to try to resolve the dispute.<sup>52</sup>
- Where the Tribunal is of the opinion that the matter cannot be resolved through mediation, or where a mediator has issued a certificate to that effect, the Tribunal may conduct a hearing, and makes such a ruling it considers to be just and fair in the circumstances.<sup>53</sup>
- If the Tribunal is of the opinion, at the conclusion of the hearing, that an unfair practice exists it may:
  - rule that any person must comply with a provision of the Act;
  - refer the matter for an investigation to the relevant competent body or local authority, if it appears the provisions of any law are being contravened; or
  - make any other ruling that is just and fair, aimed at terminating any unfair practice, including making a ruling aimed to discontinue:
    - overcrowding;
    - unacceptable living conditions;
    - exploitative rentals; or
    - lack of maintenance.<sup>54</sup>
- If the Tribunal finds that an unfair practice exists, it may make a determination regarding the amount of rent payable by a tenant, provided it is just and equitable to both the tenant and landlord; and takes into account the prevailing economic conditions of supply and demand, the need for a realistic return on investment for

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<sup>50</sup> Section 13(1) of the Rental Housing Act.

<sup>51</sup> Section 1 of the Rental Housing Act.

<sup>52</sup> Section 13(2)(c) of the Rental Housing Act.

<sup>53</sup> Section 13(2)(d) of the Rental Housing Act.

<sup>54</sup> Section 13(4) of the Rental Housing Act.



investors in rental housing, and any incentives, mechanisms, norms and standards or other measures introduced by the Minister of Housing in terms of the policy framework on rental housing.<sup>55</sup>

- When making a decision that an unfair practice exists, the Tribunal must have regard to the regulations put in place regarding unfair practices; the common law as far as any particular matter is not specifically addressed in the regulations or a lease; the provisions of any lease to the extent that it does not constitute an unfair practice; the national housing policy and national housing programmes; and the need to resolve matters in a practicable and equitable manner.<sup>56</sup>
- The Tribunal has powers to:
  - Make a just and equitable ruling regarding costs;
  - Make an agreement reached in mediation, a ruling;
  - Issue spoliation and attachment orders and grant interdicts;<sup>57</sup> and
  - Order that possessions are seized.<sup>58</sup>
- The Tribunal does not have the power to hear applications for eviction orders.<sup>59</sup>
  
- The Rental Housing Act expressly states that it does not prevent any person from approaching a competent court for urgent relief, under circumstances where he or she would have been able to do so were it not for this Act, or to institute proceedings for the normal recovery of arrear rental, or for eviction in the absence of a dispute regarding an unfair practice.<sup>60</sup> At the same time, it also provides that a Magistrates' Court may refer any matter related to an unfair practice to the Tribunal.<sup>61</sup>

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<sup>55</sup> Section 13(5) of the Rental Housing Act.

<sup>56</sup> Section 13(5) of the Rental Housing Act.

<sup>57</sup> Section 13(12) of the Rental Housing Act. These powers were expanded recently in the Rental Housing Amendment Act No 43 of 2007 which came into force on 13 May 2008.

<sup>58</sup> Section 4(3)(c) of the Rental Housing Act.

<sup>59</sup> Section 13(14) of the Rental Housing Act.

<sup>60</sup> Section 13(10) of the Rental Housing Act.

<sup>61</sup> Section 13(11) of the Rental Housing Act.

- Any person who unlawfully locks out a tenant or shuts off the utilities to the rental housing property will be guilty of an offence and liable on conviction to a fine or imprisonment, or both.<sup>62</sup>

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<sup>62</sup> Section 16(hA) read with section 16(i) of the Rental Housing Act.

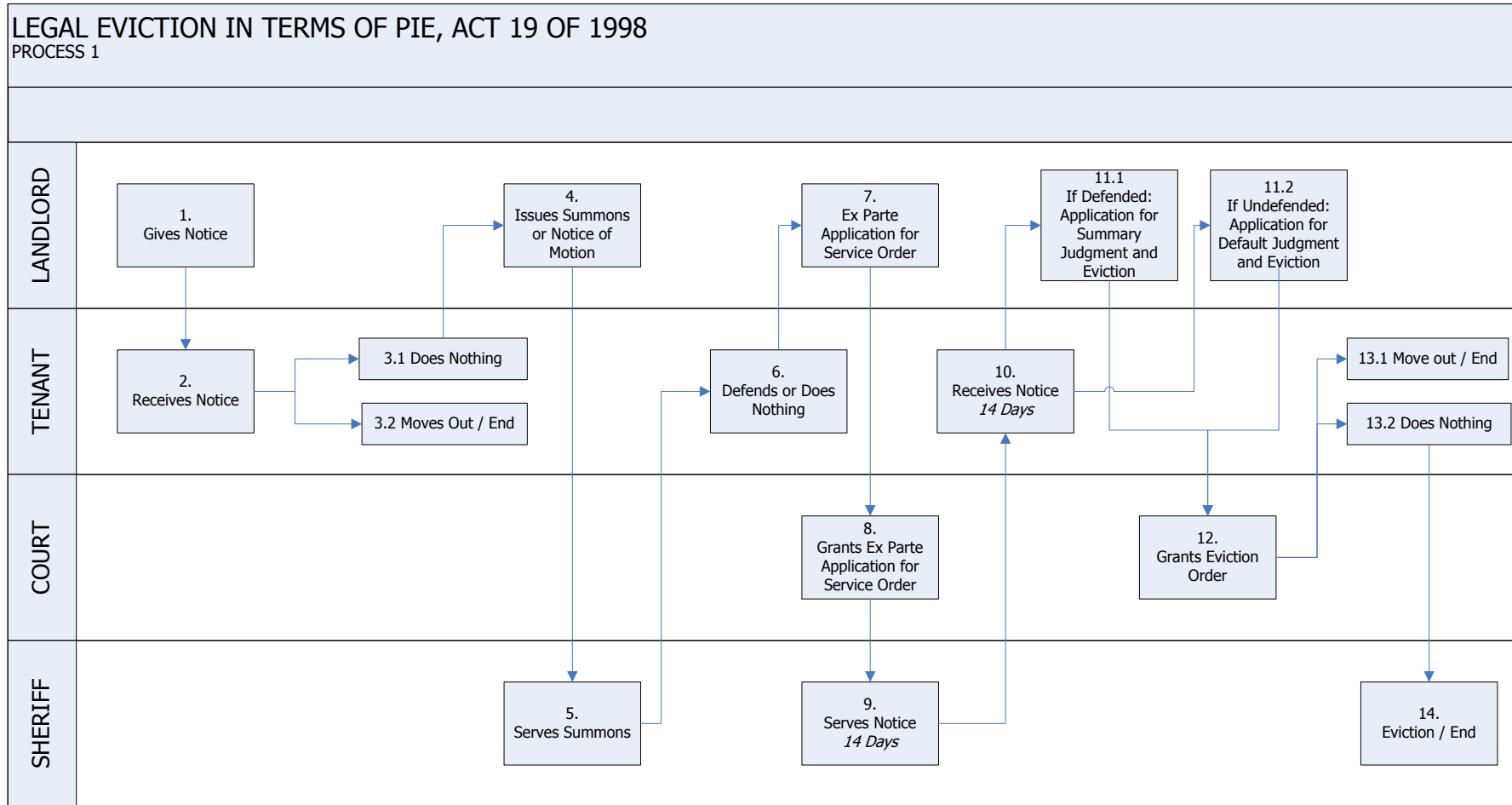
### 3. Process Mapping Based on Research Scenarios

Case / Scenario <sup>63</sup>	Recourse / Remedy	Process
<p><i>Contract of Lease Terminated:</i></p> <ul style="list-style-type: none"> <li>• Cancellation of Lease by Tenant or Landlord</li> <li>• Court Order</li> <li>• Rent in Arrears</li> <li>• Subleases in Breach of Contact</li> </ul>	<p>Tenant:</p> <ul style="list-style-type: none"> <li>• The landlord can cancel the contract and the tenant can voluntarily vacate the property to new accommodation</li> <li>• Should the tenant feel that the agreement was cancelled unlawfully, the tenant has common law remedies and can ask for specific performance or damages</li> </ul> <p>Landlord:</p> <ul style="list-style-type: none"> <li>• Cancel the contract and institute legal eviction proceedings in terms of PIE</li> <li>• Pursue common law remedies in terms of the contract such as specific performance and a claim for damages</li> </ul>	<p>1. Legal Eviction in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE)</p>
<p><i>Unlawful Eviction:</i></p> <ul style="list-style-type: none"> <li>• Lock-out</li> <li>• Fraudulent Court Order</li> <li>• Unlawful Physical Eviction</li> <li>• Constructive Eviction i.e. Water and/or Electricity Cutoffs</li> </ul>	<ul style="list-style-type: none"> <li>• Any eviction without a court order is illegal</li> <li>• The tenant can bring a common law spoliation application to have their possession of the property returned</li> <li>• The tenant can claim compensation for damages</li> </ul>	<p>2. Spoliation Application in terms of the common law</p>
<p><i>Unfair Practices:</i></p> <ul style="list-style-type: none"> <li>• Rent not paid regularly to landlord or Rent in Arrears</li> <li>• Unfair Termination of the Lease</li> <li>• Damage of property by Tenant</li> <li>• Overcrowding</li> <li>• Unacceptable Living Conditions</li> <li>• Exploitative Rentals</li> </ul>	<ul style="list-style-type: none"> <li>• Both landlord and tenant can lodge a complaint at the Rental Housing Tribunal</li> </ul>	<p>3. Rental Housing Tribunal Complaints Process in terms of the Rental Housing Act 50 of 1999</p>

<sup>63</sup> As per findings from research conducted.

<b>Case / Scenario<sup>63</sup></b>	<b>Recourse / Remedy</b>	<b>Process</b>
• Lack of Maintenance		

## PROCESS 1 – LEGAL EVICTION PROCESS



Legal Eviction Process (Process 1)			
Ref.	Item	Description	Reference
1.	Landlord Gives Notice	<ul style="list-style-type: none"> <li>In terms of the lease agreement, the Landlord is normally required to give notice to the tenant. If notice is not required (such as in a fixed term lease), then this stage may be omitted</li> </ul>	<ul style="list-style-type: none"> <li>Lease Agreement</li> </ul>

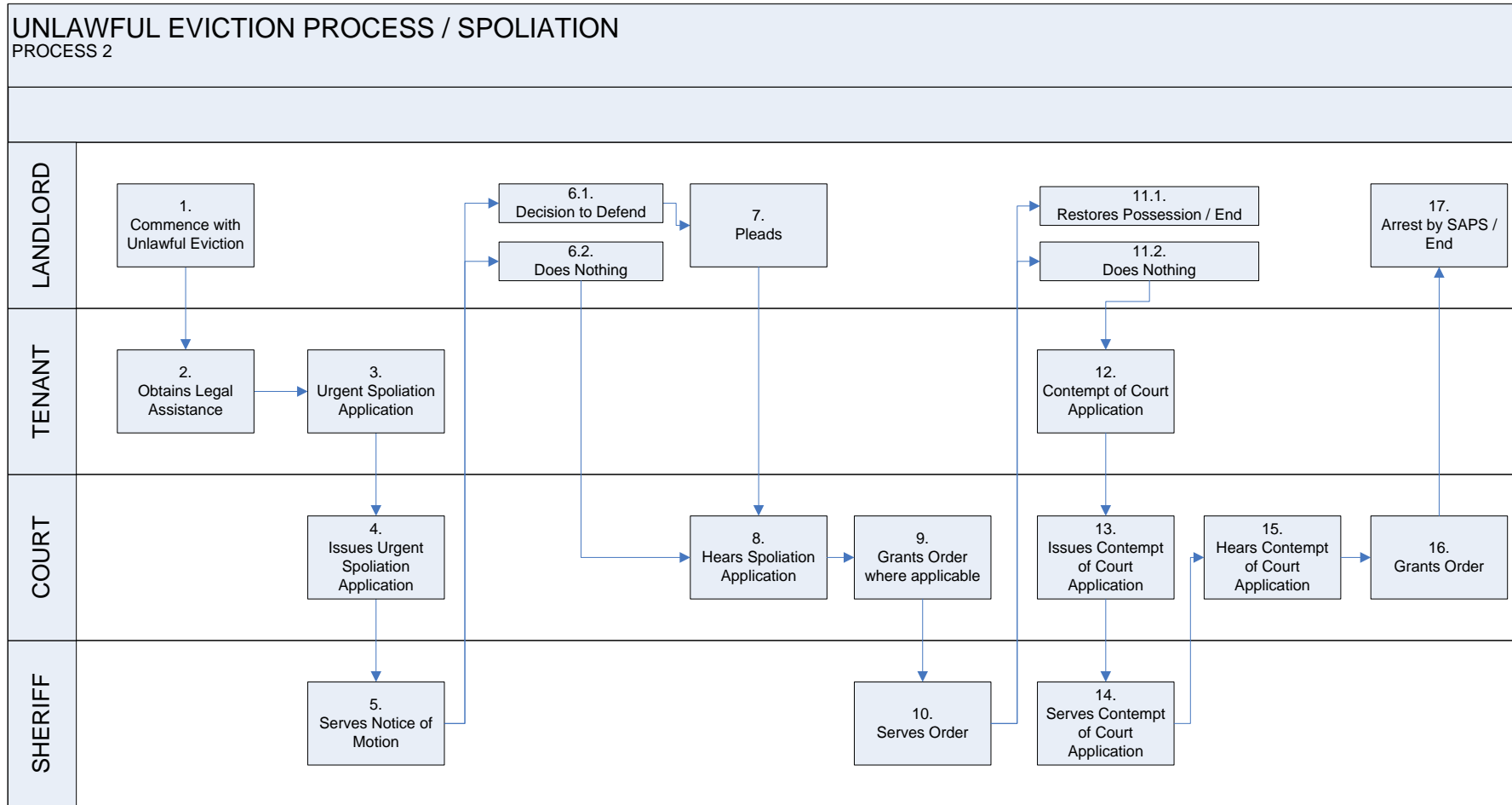
<b>Legal Eviction Process (Process 1)</b>			
<b>Ref.</b>	<b>Item</b>	<b>Description</b>	<b>Reference</b>
		<ul style="list-style-type: none"> <li>The number of days notice to be given is normally provided for in the lease agreement</li> <li>It is advisable to give reasons for termination of the lease in order to avoid accusations of unfair discrimination</li> <li>Should the landlord not give notice when required to do so, or does not give notice according to the lease agreement, the tenant can institute legal action based on breach of the agreement</li> <li>Normally written notice is given to the tenant who is a signatory to the lease agreement. It may, however, also be given verbally if the contract allows for this</li> </ul>	
2.	Tenant Receives Notice	<ul style="list-style-type: none"> <li>The tenant receives either written or verbal notice that the agreement is terminated and that the tenant must vacate the property by a certain date</li> </ul> <p>The Notice can be either written or verbal. It is preferable that the notice be written</p> <ul style="list-style-type: none"> <li>The Notice should state when the property must be vacated by, as well as what the reasons are for the notice to vacate</li> </ul>	<ul style="list-style-type: none"> <li>Lease Agreement</li> <li>Written Notice</li> </ul>
3.1	Decision to do nothing	<ul style="list-style-type: none"> <li>The tenant may ignore the notice to vacate and does not move out of the property</li> <li>The reasons could be that no alternative accommodation is available or that alternative accommodation cannot be afforded</li> <li>Another reason could be that the tenant is deliberately refusing to leave even where she can afford alternative accommodation, putting the landlord to the trouble and expense of an eviction order</li> </ul>	
3.2	Decision to vacate property	<ul style="list-style-type: none"> <li>The tenant decides to vacate the property and the process ends</li> </ul>	
4.	Landlord Issues Summons / Notice of Motion	<ul style="list-style-type: none"> <li>The landlord, through a legal representative, issues summons or brings an application by notice of motion</li> <li>Summons is issued through a High Court or Magistrates' Court</li> <li>The jurisdiction depends on the cause of action and the amount involved, or as agreed in the lease agreement between the parties</li> </ul>	<ul style="list-style-type: none"> <li>Rules of Court</li> <li>PIE or common law</li> </ul>
5.	Sheriff Serves Summons	<ul style="list-style-type: none"> <li>The summons must be served by a sheriff</li> <li>There are various rules that dictate how a summons must be served. (For instance, a summons is</li> </ul>	

Legal Eviction Process (Process 1)			
Ref.	Item	Description	Reference
		<p>normally served at the workplace or residence of the defendant. The summons must either be served personally on the defendant or on a person older than 16 years at the address of the defendant.) The address where documents must be served is known as the <i>domicilium citandi et executandi</i> and is normally included in the lease agreement.</p> <ul style="list-style-type: none"> <li>• The sheriff completes a Return of Service in which it is indicated whether the summons was served on the defendant or not as well as the manner in which it was served</li> <li>• The reason for this process is to ensure that the defendant is given the opportunity to respond to the claim</li> </ul>	
6.	Decision by Tenant to Defend or Not to Defend	<ul style="list-style-type: none"> <li>• Upon receipt of a copy of the summons from the sheriff, the tenant must decide whether there is cause to defend the claim, preferably, with legal assistance.</li> <li>• If the tenant decides to defend the action, she must give notice of her intention to defend to the plaintiff/landlord</li> <li>• Normally the defendant/tenant will acquire legal representation at this point</li> </ul>	
7.	Ex Parte Application for Service Order	<ul style="list-style-type: none"> <li>• PIE requires that an application must be made to Court for an order as to how a section 4(2) notice must be given that an eviction hearing will take place</li> <li>• Application is made, normally in the Judge/Magistrate's chambers</li> <li>• The sheriff normally serves the section 4(2) notice on the respondent</li> <li>• Local municipality must be joined as a party</li> </ul>	<ul style="list-style-type: none"> <li>• PIE</li> </ul>
8.	Granting of Order	<ul style="list-style-type: none"> <li>• Judge/Magistrate grants the service order</li> </ul>	
9.	Sheriff Serves 14 Days Notice	<ul style="list-style-type: none"> <li>• Service is effected by the sheriff of the Court</li> <li>• Service is normally on the person, but may be on a person older than 16 years of age at the <i>domicilium</i>. The <i>domicilium</i> is the place where documents must be served, normally agreed to in the lease agreement</li> <li>• Service can also be attached to the door</li> </ul>	<ul style="list-style-type: none"> <li>• Rules of Court</li> <li>• PIE</li> </ul>
10.	Tenant Receives Notice	<ul style="list-style-type: none"> <li>• Notice is served by sheriff on the tenant</li> <li>• The tenant now has to decide whether to attend Court on the date indicated in the notice</li> </ul>	

<b>Legal Eviction Process (Process 1)</b>			
<b>Ref.</b>	<b>Item</b>	<b>Description</b>	<b>Reference</b>
		<ul style="list-style-type: none"> <li>The tenant can still obtain legal representation at this point</li> </ul>	
11.1	If Action Defended: Apply for Summary Judgment	<ul style="list-style-type: none"> <li>Application for summary judgment in Court</li> <li>Application for summary judgment is normally made when there is suspicion that the other party is abusing the Court process through delay (although summary judgment is normally used for liquid claims, it may also be used in application for ejection, although in practice this is rare.)</li> </ul>	
11.2	If Action Not Defended: Apply for Default Judgment	<ul style="list-style-type: none"> <li>Application for judgment by default</li> </ul>	
12.	Court Grants Eviction Order	<ul style="list-style-type: none"> <li>Obtain warrant of execution based on order granted</li> </ul>	
13.1	Tenant Moves Out	<ul style="list-style-type: none"> <li>Decision to vacate</li> <li>Process ends</li> <li>If rent interdict is in place, the tenant may not remove her belongings</li> </ul>	
13.2	Tenant does not vacate	<ul style="list-style-type: none"> <li>Tenant does not vacate</li> </ul>	
14.	Eviction by Sheriff	<ul style="list-style-type: none"> <li>Landlord makes application for warrant of ejection based on judgment granted</li> <li>With a warrant of ejection, the sheriff can legally eject the tenant</li> <li>If summons was issued with a rent interdict, the sheriff will, upon service, list possessions, which may not be removed from the property by the tenant and may subsequently be sold in execution.</li> </ul>	



## PROCESS 2 – UNLAWFUL EVICTION PROCESS / SPOILIATION

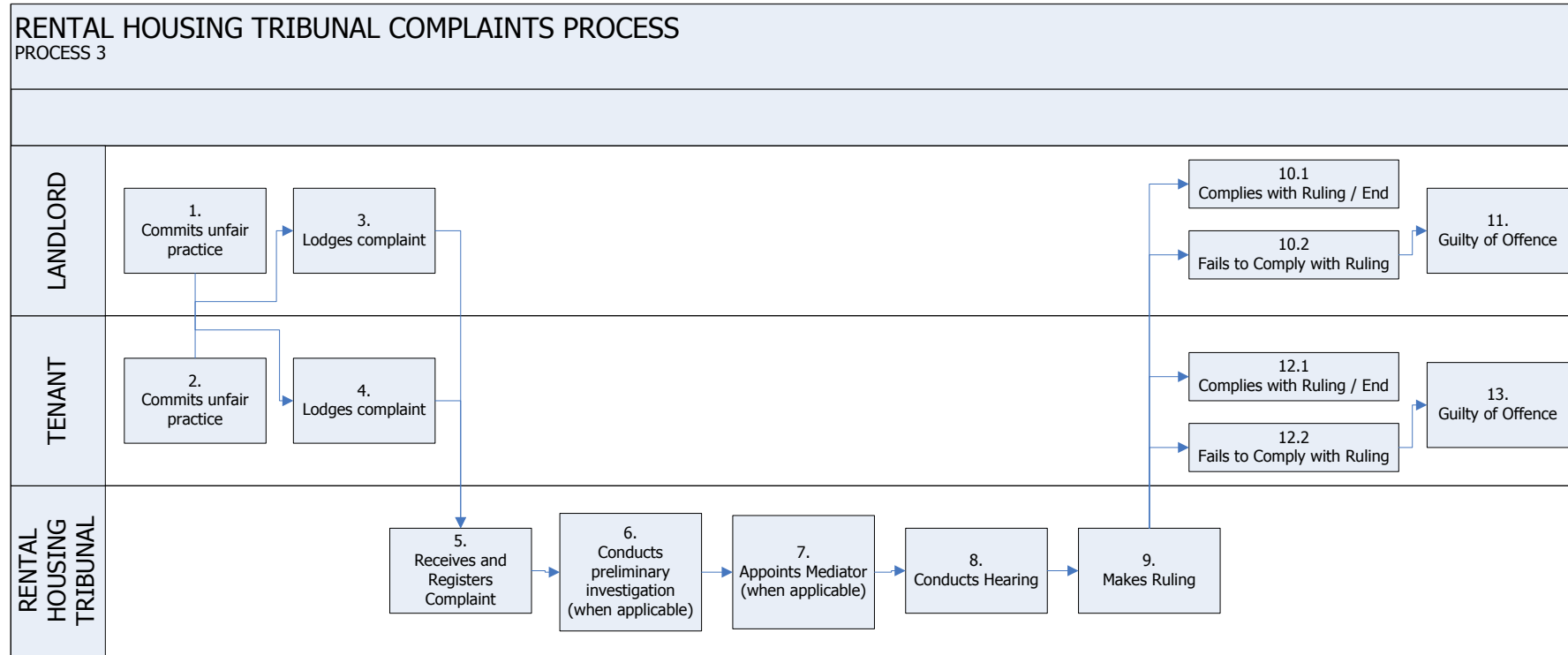


Unlawful Eviction Process / Spoliation (Process 2)			
Ref.	Item	Description	Reference
1.	Landlord commences with unlawful eviction	<ul style="list-style-type: none"> <li>Any eviction without a court order is unlawful</li> </ul>	<ul style="list-style-type: none"> <li>Section 26(3) of the Constitution</li> </ul>

<b>Unlawful Eviction Process / Spoliation (Process 2)</b>			
<b>Ref.</b>	<b>Item</b>	<b>Description</b>	<b>Reference</b>
		<ul style="list-style-type: none"> <li>Unlawful eviction can take the form of forced evictions, lock-outs and demolition of property</li> </ul>	and PIE
2.	Tenant obtains Legal Assistance	<ul style="list-style-type: none"> <li>Either by appointing an attorney or applying for legal aid or other forms of legal assistance</li> </ul>	
3.	Urgent Spoliation Application	<ul style="list-style-type: none"> <li>The attorney (and possibly an advocate) prepares a spoliation application on an urgent basis</li> </ul>	<ul style="list-style-type: none"> <li>Common Law</li> </ul>
4.	Application issued at Court	<ul style="list-style-type: none"> <li>High Court or Magistrates' Court issues the spoliation application</li> </ul>	
5.	Service of Spoliation Application	<ul style="list-style-type: none"> <li>In terms of the Rules of Court, the notice of motion must be served by a sheriff on the landlord</li> </ul>	<ul style="list-style-type: none"> <li>Rules of Court</li> </ul>
6.1	Landlord decides to defend	<ul style="list-style-type: none"> <li>Landlord gives notice that they are going to defend the application</li> </ul>	
6.2	Landlord decides to do nothing	<ul style="list-style-type: none"> <li>The landlord decides not to defend the motion</li> <li>The matter then remains undefended and the tenant can proceed to Court for an order restoring her possession of the property</li> </ul>	
7.	Pleading by Landlord	<ul style="list-style-type: none"> <li>Should the landlord decide to enter a defense, the landlord will then state his case in pleadings</li> </ul>	
8.	Court hears Spoliation Application	<ul style="list-style-type: none"> <li>After the pleadings have closed, the matter is set down for hearing by the Court</li> <li>If undefended, the tenant's counsel states their case in support of the application</li> <li>If the matter is defended, counsel for both parties raise their arguments</li> </ul>	
9.	Court grants Order	<ul style="list-style-type: none"> <li>The Court then applies the law and grants or does not grant the order for spoliation</li> <li>If the order for spoliation is not granted, then the tenant's possession will not be restored</li> <li>Should the order be granted, then the tenant must restore possession of the property</li> </ul>	
10.	Order served by Sheriff	<ul style="list-style-type: none"> <li>The order is served by the sheriff on the landlord</li> </ul>	
11.1	Landlord restores possession to tenant	<ul style="list-style-type: none"> <li>The landlord then has to restore possession to the tenant</li> <li>Sometimes the order can also contain provisions to order that the property be restored to its previous state when it was damaged or destroyed. The order can also contain provisions that alternative temporary accommodation such as tents must be supplied</li> </ul>	

<b>Unlawful Eviction Process / Spoliation (Process 2)</b>			
<b>Ref.</b>	<b>Item</b>	<b>Description</b>	<b>Reference</b>
11.2	Landlord ignores Order	<ul style="list-style-type: none"> <li>The landlord can decide to ignore the order</li> </ul>	
12.	Tenant brings Contempt of Court Application	<ul style="list-style-type: none"> <li>When the order is ignored, this is a criminal offence and the tenant can bring a contempt of court application</li> <li>The relief sought is for the landlord to be arrested and to be charged for contempt of court</li> </ul>	<ul style="list-style-type: none"> <li>Rules of Court</li> <li>Criminal Procedure Act</li> </ul>
13.	Court issues Application	<ul style="list-style-type: none"> <li>The same process of issuing and services is followed</li> </ul>	<ul style="list-style-type: none"> <li>Rules of Court</li> </ul>
14.	Service of Application by Sheriff	<ul style="list-style-type: none"> <li>Service by the sheriff of the Court</li> </ul>	<ul style="list-style-type: none"> <li>Rules of Court</li> </ul>
15.	Court hears Contempt of Court Application	<ul style="list-style-type: none"> <li>The legal representatives of the tenant appear in Court to bring the contempt of court application</li> </ul>	
16.	Court grants Order	<ul style="list-style-type: none"> <li>After consideration of the matter, the Court will generally grant the order</li> </ul>	
17.	Arrest of Landlord by SAPS for Contempt of Court	<ul style="list-style-type: none"> <li>If granted, the landlord will be arrested by the South African Police Services and charged with contempt of court</li> </ul>	

### PROCESS 3 – RENTAL HOUSING TRIBUNAL COMPLAINTS PROCESS



Rental Housing Tribunal Complaints Process (Process 3)			
Ref.	Item	Description	Reference
1.	Landlord commits unfair practice	<ul style="list-style-type: none"> <li>A landlord may not unfairly discriminate against a prospective tenant, or the members of such tenant's household or the visitors of such tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth</li> </ul>	<ul style="list-style-type: none"> <li>Section 4(1)–(4) of the Rental Housing Act</li> </ul>

<b>Rental Housing Tribunal Complaints Process (Process 3)</b>			
<b>Ref.</b>	<b>Item</b>	<b>Description</b>	<b>Reference</b>
		<ul style="list-style-type: none"> <li>• A tenant has the right, during the lease period, to privacy, and the landlord may only exercise his or her right of inspection in a reasonable manner after reasonable notice to the tenant</li> <li>• The tenant's rights as against the landlord include his or her right not to have his or her person or home searched; his or her property searched; his or her possessions seized, (except in terms of a law of general application and having first obtained a ruling by a Tribunal or an order of court; or the privacy of his or her communications infringed</li> <li>• The rights set out above apply equally to members of the tenant's household and to visitors of the tenant</li> </ul>	
2.	Tenant commits unfair practice	<ul style="list-style-type: none"> <li>• The landlord's rights against the tenant include his or her right to: <ul style="list-style-type: none"> <li>○ prompt and regular payment of a rental or any charges that may be payable in terms of a lease;</li> <li>○ recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law;</li> <li>○ terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease;</li> <li>○ on termination of a lease to receive the rental housing property in a good state of repair, save for fair wear and tear; and repossess rental housing property having first obtained an order of court; and</li> <li>○ claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any, caused by the tenant, a member of the tenant's household or a visitor of the tenant</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Section 4(5) of the Rental Housing Act</li> </ul>
3 & 4	Either the Tenant or the Landlord lodges a complaint at the Rental Housing Tribunal	<ul style="list-style-type: none"> <li>• Lodge complaint in the prescribed manner, that is, in writing and in the prescribed form set out in the regulations</li> <li>• The complaint can be lodged either by mail, fax or in person at the office of the Tribunal</li> <li>• As from the date of any complaint having been lodged with the Tribunal, until the Tribunal has made a ruling on the matter or until a period of three months has elapsed, whichever is the earlier: <ul style="list-style-type: none"> <li>○ the landlord may not evict any tenant (subject to the tenant paying rent);</li> <li>○ the tenant must continue to pay the rental payable in respect of that dwelling as applicable prior to the complaint or, if there has been an escalation prior to such complaint, the amount payable immediately</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Section 13(1) of the Rental Housing Act</li> <li>• Regulation 2 of the Rental Housing Procedural Regulations, 2008</li> <li>• Section 13(7) of the Rental Housing Act</li> </ul>

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		<p>prior to such escalation; and</p> <ul style="list-style-type: none"> <li>○ the landlord must effect the necessary maintenance</li> </ul>	
5.	The Rental Housing Tribunal receives and registers the complaint	<ul style="list-style-type: none"> <li>• The Tribunal lists particulars of the dwelling to which the complaint refers in a register</li> <li>• The Tribunal opens a file and allocates a reference number to such file</li> <li>• A receipt is issued to the complainant containing such file reference number</li> </ul>	<ul style="list-style-type: none"> <li>• Section 13(2) of the Rental Housing Act</li> </ul> <p>Regulation 3 of the Rental Housing Procedural Regulations, 2008</p>
6.	A preliminary investigation is conducted by the Rental Housing Tribunal when applicable	<ul style="list-style-type: none"> <li>• An investigator of the Tribunal conducts such preliminary investigations as may be necessary to determine whether the complaint relates to a dispute in respect of a matter which may constitute an unfair practice</li> <li>• Inspectors have the following general powers, duties and functions: <ul style="list-style-type: none"> <li>○ conduct routine building inspections and provide written inspection reports when requested to do so by the Tribunal and staff members;</li> <li>○ trace and contact property owners from information held by the Registrar of Deeds;</li> <li>○ consult with complainants and respondents and record all the information received;</li> <li>○ obtain sworn statements from disputing parties and other parties concerned;</li> <li>○ give evidence before the Tribunal when requested to do so;</li> <li>○ obtain or examine copies of all books and documents, which may be relevant to a case;</li> <li>○ contact any local authority to determine arrears in rates and taxes owed in respect of a dwelling;</li> <li>○ investigate the legal status of residents when illegal subletting is alleged to be occurring;</li> <li>○ deliver notices and other documentation to the relevant parties involved in a dispute;</li> <li>○ obtain copies of all receipts in respect of a dwelling, which is the subject of a complaint;</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Section 13(2) of the Rental Housing Act</li> <li>• Regulation 10(2) of the Rental Housing Procedural Regulations, 2008</li> <li>• Regulation 8 of the Rental Housing Procedural Regulations, 2008</li> </ul>

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		<ul style="list-style-type: none"> <li>○ obtain from any Rental Housing Information Office established under the Act, any reports concerning inquiries and complaints received as contemplated under section 13(3) (a) of the Act;</li> <li>○ provide any information and produce any reports or documents concerning an inspection conducted, which may have bearing on a complaint;</li> <li>○ serve a notice or subpoena;</li> <li>○ assist the Tribunal in conducting any preliminary inquiry to provide a complete record of all relevant information acquired through inspections and investigations;</li> <li>○ deliver written recommendations of the Tribunal to a party against whom action will be taken for non-compliance with the Unfair Practices Regulations; and</li> <li>○ do anything in the reasonable execution of functions and duties required by these Regulations, the Act or the Tribunal</li> </ul> <ul style="list-style-type: none"> <li>● If a respondent who is alleged to have engaged in an unfair practice does not respond, within five days, to inquiries by the staff of the Tribunal when the complaint is initially lodged or if the respondent refuses to participate in an effort to resolve the matter, the Tribunal may proceed to investigate and determine whether there has been a violation of the unfair practices regulations, and to make a ruling which is just and fair in the circumstances</li> </ul>	
7.	The Tribunal appoints a mediator when applicable	<ul style="list-style-type: none"> <li>● Where the Tribunal is of the view that there is a dispute and that such dispute may be resolved through mediation, a mediator is appointed in order to resolve the dispute</li> <li>● The mediator may be a member of the Tribunal, a member of staff or any person deemed fit and proper by the Tribunal</li> <li>● The Tribunal may, where a mediation agreement has been made, make such an agreement a ruling of the Tribunal</li> <li>● The Tribunal must ensure that mediations and hearings are conducted in a language that all the parties concerned can comprehend and for this purpose, the Tribunal will provide the services of an interpreter, if necessary</li> <li>● Mediation must be completed within thirty days from commencement thereof</li> <li>● If mediation is not completed within the prescribed period of thirty days, then the mediation may be</li> </ul>	<ul style="list-style-type: none"> <li>● Section 13(2) of the Rental Housing Act</li> <li>● Section 13(12) of the Rental Housing Act</li> <li>● Regulation 7 of the Rental Housing Procedural Regulations, 2008</li> </ul>

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		<p>extended, with the consent of the Tribunal, for a period not exceeding thirty days. No further extension is possible and mediation must be regarded as having failed if it is not completed within the prescribed period or extended period</p> <ul style="list-style-type: none"> <li>• If the mediation results in an agreement it must be reduced to writing, and signed by all the parties and the mediator. Before requesting the parties to sign the agreement, the mediator must ensure that each party fully understands the agreement, is entering into it freely and voluntarily, and understands the effects of sections 13(12) and 13(13) of the Act</li> <li>• If any of the parties request that the agreement must be made a ruling of the Tribunal, the mediator must submit the signed agreement to the Tribunal accompanied by such request. If the other party, or the majority of parties where there are more than two parties, agrees with the request, the Tribunal must grant the request. If any other party opposes the request, the Tribunal must grant all parties the opportunity to make submissions to the Tribunal in support of their respective views. The Tribunal must consider the submissions and decide to grant or refuse the request</li> <li>• If any party to a dispute, which was resolved by an agreement reached through mediation and that was not made a ruling of the Tribunal, alleges that the other party breached the agreement, that party may seek relief by reporting the allegations to the Tribunal in writing</li> <li>• Upon receipt of such a report, the Tribunal must conduct an investigation into such allegations to determine whether the terms of the agreement are being adhered to, or not. If non-compliance is found to exist, the Tribunal must make the agreement a ruling of the Tribunal</li> <li>• Mediation proceedings must be recorded</li> </ul>	
8.	The Tribunal conducts a hearing	<ul style="list-style-type: none"> <li>• Where the Tribunal is of the view that the dispute is of such a nature that it cannot be resolved through mediation, or where a mediator has issued a certificate to the effect that the parties are unable to resolve the dispute through mediation, it must conduct a hearing</li> <li>• The Tribunal may: <ul style="list-style-type: none"> <li>○ require any Rental Housing Information Office to submit reports concerning inquiries and complaints received, as well as on any other matters concerning the administration of the Act within the area of jurisdiction of that office;</li> <li>○ require any inspector to appear before the Tribunal to give evidence, to provide information, or to produce any report or other document concerning inspections conducted which may have a bearing on any complaint received by the Tribunal;</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Section 13(2) of the Rental Housing Act</li> <li>• Section 13(3) of the Rental Housing Act</li> <li>• Regulation 7(1)(c) of the Rental Housing Procedural Regulations, 2008</li> </ul>



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		<ul style="list-style-type: none"> <li>○ require any Rental Housing Information Office to advise the Tribunal on any matter concerning a dwelling or concerning a complaint received from any landlord or any tenant within the area of jurisdiction of that office;</li> <li>○ summon any tenant or landlord or any other person who, in the Tribunal's opinion may be able to give evidence relevant to a complaint, to appear before the Tribunal;</li> <li>○ summon any person who may reasonably be able to give information of material importance concerning a complaint or who has in such person's possession or custody or under such person's control any book, document or object, to attend its proceedings and to produce any book, document, or object in his or her possession or custody or under his or her control, to give evidence or to provide the information under his or her control;</li> <li>○ call upon and administer an oath to, or accept an affirmation from, any person present at the meeting</li> <li>• The Tribunal must ensure that mediations and hearings are conducted in a language that all the parties concerned can comprehend and for this purpose, the Tribunal will provide the services of an interpreter, if necessary</li> <li>• Hearings must be recorded</li> </ul>	<ul style="list-style-type: none"> <li>• Regulation 11(2) of the Rental Housing Procedural Regulations, 2008</li> </ul>
9.	The Tribunal makes a ruling	<ul style="list-style-type: none"> <li>• The Tribunal makes such a ruling as it may consider just and fair in the circumstances</li> <li>• The Tribunal may make the following rulings: <ul style="list-style-type: none"> <li>○ rule that any person must comply with a provision of the Rental Housing Act;</li> <li>○ where it would appear that the provisions of any law have been or are being contravened, refer such matter for an investigation to the relevant competent body or local authority;</li> <li>○ make any other ruling that is just and fair to terminate any unfair practice, including, without detracting from the generality of this power, a ruling to discontinue: <ul style="list-style-type: none"> <li>▪ overcrowding;</li> <li>▪ unacceptable living conditions;</li> <li>▪ exploitative rentals; or</li> <li>▪ a lack of maintenance</li> </ul> </li> </ul> </li> <li>• A ruling by the Tribunal may include a determination regarding the amount of rental payable by a tenant,</li> </ul>	<ul style="list-style-type: none"> <li>• Section 13(2) of the Rental Housing Act</li> <li>• Section 13(4) of the Rental Housing Act</li> <li>• Section 13(5) of the Rental Housing Act</li> <li>• Section 13(6) of the Rental Housing Act</li> <li>• Section 13(12) of the Rental Housing Act</li> </ul>

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		<p>but such determination must be made in a manner that is just and equitable to both tenant and landlord and takes due cognisance of:</p> <ul style="list-style-type: none"> <li>○ prevailing economic conditions of supply and demand;</li> <li>○ the need for a realistic return on investment for investors in rental housing; and</li> <li>○ incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the policy framework on rental housing</li> </ul> <ul style="list-style-type: none"> <li>• When making a ruling, the Tribunal must have regard to: <ul style="list-style-type: none"> <li>○ the regulations in respect of unfair practices;</li> <li>○ the common law to the extent that any particular matter is not specifically addressed in the regulations or a lease;</li> <li>○ the provisions of any lease to the extent that it does not constitute an unfair practice;</li> <li>○ national housing policy and national housing programmes; and</li> <li>○ the need to resolve matters in a practicable and equitable manner</li> </ul> </li> <li>• The Tribunal may: <ul style="list-style-type: none"> <li>○ make a ruling as to costs as may be just and equitable;</li> <li>○ where a mediation agreement has been concluded, make such an agreement a ruling of the Tribunal; and</li> <li>○ issue spoliation and attachment orders and grant interdicts</li> </ul> </li> <li>• A ruling by the Tribunal is deemed to be an order of a magistrate's court in terms of the Magistrates' Courts Act 32 of 1944, and must be enforced in terms of that Act</li> </ul>	<p>Act</p> <ul style="list-style-type: none"> <li>• Section 13(13) of the Rental Housing Act</li> </ul>
10.1 & 12.1	The Tenant or Landlord complies with the ruling of the Tribunal.	<ul style="list-style-type: none"> <li>• The process ends</li> </ul>	
10.2, 12.2,	Either party fails to comply with the ruling	<ul style="list-style-type: none"> <li>• Failure to comply with the provisions of the Rental Housing Act, or any regulations issued in terms of that Act, will result in such a person being guilty of an offence and such person will, upon conviction, be liable</li> </ul>	<ul style="list-style-type: none"> <li>• Section 16 of the Rental Housing Act</li> </ul>

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11 & 13		for a fine or imprisonment not exceeding two years, or both a fine and imprisonment	