Directory of Justice Services

Justice for All

the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

2030 NDP

Contents

About this booklet

This booklet outlines the services rendered by the Department of Justice and Constitutional Developmemt, with a particular focus on issues that affect vulnerable people, women and children.

Most of the services included in this booklet may be accessed at the nearest magistrate's court. If the court is unable to assist, you will be directed to the relevant office.

The Department encourages you to keep this booklet safe, read it and refer to it if you need any of the services offered.

Maintenance

What is maintenance?

Maintenance is the obligation to provide another person, for example a minor, with housing, food, clothing, education and medical care, or with the means that are necessary for providing that person with these essentials. According to the Maintenance Act, Act No. 99 of 1998, this legal duty is called "the duty to maintain" or "the duty to support".

Who must provide maintenance?

The duty to maintain is based on blood relationship, adoption or the fact that the parties are married to each other.

A child must be supported or maintained by:

- his or her parents, whether married, living together, separated or divorced, including parents who have adopted the child; and/or
- his or her grandparents, whether or not the child's parents were married to each other. However, this varies from one case to another.

The duty to support a family member is not limited to supporting a child. Any family member, irrespective of his or her age, can ask any family member to support or maintain him or her, provided that the following two conditions are met:

- The family member who claims support is unable to maintain himself or herself.
- The family member from whom maintenance is claimed is able to afford it.

The main requirement is that the person who is liable to pay maintenance must have means and the maintenance claimed must be reasonable.

What expenses may be claimed?

You may claim reasonable support that is necessary for providing the child or other person who has a right to maintenance with a proper living and upbringing. This includes providing necessities such as food, clothing and housing, as well as paying for a proper education. The court may also order the father to contribute to the payment of laying-in expenses and maintenance from the date of the child's birth up to the date on which the maintenance order is granted.

The court may also grant an order for the payment of medical expenses, or may order the child to be registered on the medical aid scheme of one of the parties as a dependant. To enable the court to grant a fair maintenance order, both parties must provide the court with proof of their expenses.

Follow these steps to lodge a maintenance claim:

To apply for a maintenance claim, take the following documents to your nearest magistrate's court:

- The child or children's certified copies of birth certificates
- Your identity document
- Divorce order and/or settlement, if any
- Proof of applicant's income and expenditure
- Name and surname of parent or person responsible for the payment of maintenance money
- Physical or work address of the parent or person responsible for the payment of maintenance money, if available
- Copy of bank statement
- Proof of residence or affidavit

The Maintenance Clerk will assist you in completing the forms and will then refer your application to the Maintenance Officer for the final assessment of the documents. After assessment, the registration of the application and a reference number will be issued. The Maintenance Officer will call upon the parties to meet so that he or she can start an investigation into the claim.

Did you know?

The maintenance application service is free of charge.

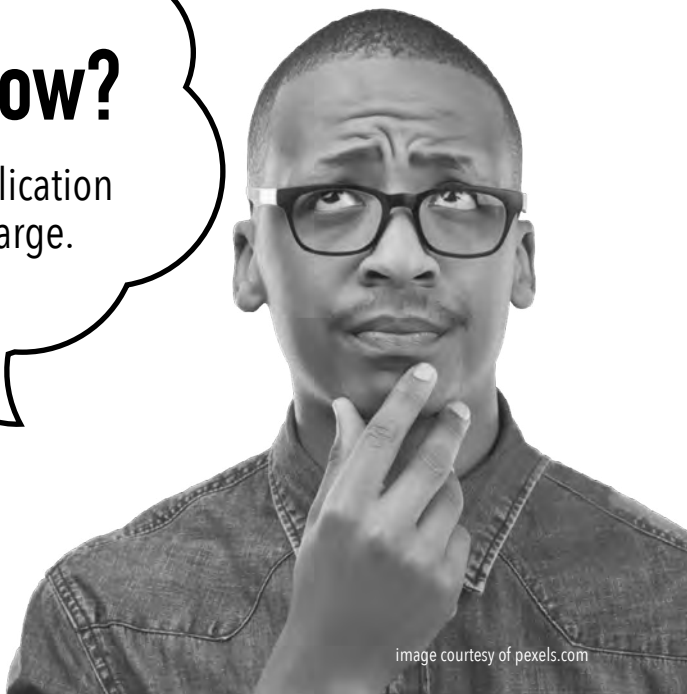

image courtesy of pexels.com

Mediation and granting an order by consent

The Maintenance Officer will conduct mediation with both parties in trying to reach an agreement or settlement of the claim.

Where the parties reach an agreement or settlement, it will then be made an order of the court. The Maintenance Officer may request both parties to sign a written consent and have that made an order of the court. The court then makes an order for the payment of maintenance.

Where parties do not reach an agreement, the matter is referred to court for formal enquiry.

Court date

On the day of the court appearance, an enquiry will be held to determine the needs of the applicant and the means available to provide maintenance from both parties.

Payment method

The court may order the respondent to make payments by means of:

- An electronic funds transfer (EFT) to the beneficiary's bank account.
- A deduction of the maintenance money from the respondent's salary (garnishee order).

What to do when a respondent does not pay maintenance:

If the respondent fails to pay within the specified times, you should report the matter to the maintenance offices.

The court will follow one of the following options:

- Civil enforcement of maintenance, through which the Magistrate may order one of the following:
  - emolument attachment of debt; and/or
  - execution of movable or immovable property.

- Criminal prosecution through which a warrant of arrest can be issued as the respondent failed to comply with an order of court.

Changing (increase or decrease) the amount of maintenance (variation or substitution)

- You can request that the amount paid for maintenance be increased or decreased, either because it has become insufficient or because you can no longer afford to pay the amount of the maintenance.

Steps to follow:

- If you are the person who receives maintenance:
  - Apply at the magistrate's court that is situated in the district where you, as the applicant, and the child reside.
  - Complete the relevant application form and submit it together with a statement of income and expenditure to the maintenance officer.

- If you are the person who pays maintenance, but can no longer afford that amount:
  - Apply for the decrease or variation order at the magistrate's office where the maintenance order was made.
  - Complete the relevant form and submit it to the maintenance officer.
  - Submit a complete statement of income and expenditure, as well as a statement explaining your reasons for the application to the Maintenance Officer, regardless of whether you are the recipient or the payer of the maintenance money. The same process will then be followed as when a claim for maintenance was first instituted.

Where can I get more information?

Please see contact details of Family Advocate offices on page 79.

Child justice

What is child justice?

Prior to 1 April 2010, children who committed a crime were dealt with in terms of the Criminal Procedure Act, Act No. 51 of 1977, which also deals with adults who committed a crime. The aim of the Child Justice Act (CJA) is to set up a child justice system for children in conflict with the law. This means that children under the age of 18, who are suspected to have committed a crime, will not be dealt with in terms of the normal criminal procedure that is used for adults, but the child justice process will be followed.

The CJA seeks to ensure that child justice matters are managed in a rights-based manner and to assist children suspected of having committed a crime to turn their lives around and become productive members of society by engaging with the child in restorative justice measures, diversions and other alternative sentencing options.

The Child Justice Act, Act No. 75 of 2008, is one of the laws that seeks to protect and promote children's rights. The Act establishes a separate criminal justice system for children between the ages of 10 and 14.

What are the benefits of the Act?

The CJA allows for a justice system that rehabilitates children in conflict with the law and looks after the needs and rights of these children. It ensures that the individual needs and circumstances of conflict with the law are assessed when a decision is made about the child. The CJA balances the rights and responsibilities of the child, the victim and the community. When considering diversion options, the prosecutor and the court take all relevant views into consideration. Furthermore, the CJA makes it easier to assist with the rehabilitation and integration of a child, who is in conflict with the law, into society so that he or she can grow up and make a useful contribution to society.

What age groups are covered by the CJA?

According to the CJA, a child is someone who is under the age of 18. The CJA is specifically intended for children between the ages of 10 and 17.

The CJA states that:

- A child under the age of 10 years cannot be arrested. This means that a child under 10 years does not have criminal capacity and cannot be charged or arrested for an offence. In such a case, the child will be referred to the Children's Court.
- A child older than 10 years, but under the age of 14 years, is presumed to lack criminal capacity unless the state proves that he or she has criminal capacity. Such a child can be arrested.
- A child over 14, but under 18 years of age, is said to have criminal capacity and can be arrested.

What types of offences are covered by the CJA?

The CJA provides for three different categories of offences:

- Minor offences include theft of property worth not more than R2 500, malicious damage to property that is not more than R1 500 and common assault.
- More serious offences include theft of property worth more than R2 500, robbery (but not robbery with aggravating circumstances) and assault (including causing grievous bodily harm, public violence, culpable homicide and arson).
- The most serious offences include robbery, rape, murder and kidnapping, among others.

Step-by-step guide on the child justice process

In the event that a child is suspected of having committed an offence, and the offence is serious, the child is informed, arrested and charged by the police. If the offence is less serious, the child and his or her parents or caregivers are warned or summonsed by the police to appear in court.

There are two possibilities at this stage:

- A child under 10 years may be referred to a children's court.
- A child over 10 years must be assessed by a probation officer (social worker).

The parents, other caregivers or the police must bring the child to court. A preliminary inquiry will be set up to enquire into the matter and how the child may be assisted if he or she accepts responsibility. This session will be attended by a magistrate, the child, a prosecutor, the parent(s), a probation officer, the arresting officer and a legal aid attorney.

These people will meet to talk to the child about his or her circumstances, his or her family environment and factors that may have led the child to commit the crime. They will also consider diverting the matter away from the criminal justice system.

Diversion

Diversion can be defined as channelling criminal cases involving a child away from the criminal justice system with or without conditions. In essence, the aim of diversion is to give a child offender a second chance by preventing the child from having a criminal record and to address the root causes of the criminal behaviour through an appropriate diversion programme or intervention.

Diversion may be considered in all cases, irrespective of the nature of the offence and whether or not previous diversions have been ordered in respect of a specific child.

The objectives of diversion are as follows:

- Deal with the child outside the formal criminal justice system in appropriate cases.
- Encourage the child to be accountable for the harm he or she has caused.
- Meet the particular needs of the individual child.
- Promote the reintegration of the child into his or her family and community.
- Provide an opportunity to those affected by the harm to express their views on its impact on them.
- Avoid stigmatising the child and prevent adverse consequences flowing from being subjected to the criminal justice system.
- Reduce the potential for re-offending.
- Prevent the child from having a criminal record.
- Promote the dignity and wellbeing of the child and the development of his or her sense of self-worth and ability to contribute to society.

Diversion may be considered at any time during the trial in the child justice court up to the closure of the state's case.

The CJA provides for two levels of diversion. Level 1 diversion options apply to Schedule 1 offences (the least serious offences) and include options such as:

- an oral or written apology to a specified person or persons or institution;
- formal caution with or without conditions;
- placement under a supervision and guidance order;
- placement under a reporting order; or
- a compulsory school attendance order.

Where can I get more information?

Visit the Magistrate Court or Social Development office near you.

Children's Court

What is children's court?

The Children's Act, Act No. 38 of 2005, makes provision for the children's court. It is a special court that deals with issues affecting children under the age of 18 years. It takes care of children who are in need of protection and makes decisions about children who are abandoned, neglected or abused.

Did you know?

Every magistrate's court in South Africa is a children's court.

Who can approach the children's court?

Any person or child may approach the clerk of the children's court when he or she believes that a child may be in need of care and protection. This includes, but is not limited to the following:

- Dentists
- Teachers
- Social workers
- Lawyers
- Ministers of religion
- Nurses
- Traditional leaders

What matters can be taken to the children's court?

You can go to the children's court with matters relating to the following:

- The protection and wellbeing of a child
- The care of or contact with a child
- The paternity of a child
- The support of a child
- The provision of early childhood development services
- Prevention or early intervention services
- The maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard
- The temporary safe care of a child
- Alternative care of a child
- Adoption of a child, including an inter-country adoption
- A child and youth care centre, a partial care facility or a shelter, drop-in centre or any other facility purporting to be a care facility for children
- Any other matter relating to the care, protection or wellbeing of a child provided for in this Act

Where can I get more information?

Visit the Magistrate Court or Social Development office near you.

Office of the Family Advocate

What does the Family Advocate do?

The Family Advocate assists parents to reach an agreement on disputed custody, access and guardianship of a child. If parents are unable to reach an agreement, the Family Advocate evaluates the parties' circumstances in light of the best interests of the child and makes a recommendation to the court.

When do you need to see the Family Advocate?

- When you have a divorce pending in court and have minor or dependent children whose custody, guardianship or access arrangements are in dispute.
- When you need to apply for the variation of a custody, guardianship or access order.
- When you need to apply for the definition of access, custody or a guardianship dispute arising from the dissolution of a customary marriage.
- When an unmarried father needs to apply for the custody, access or guardianship of his minor child.

Did you know?

Services of the Family Advocate are free of charge.

How does the Family Advocate assist parents and guardians?

- After any of the parents has lodged an application, the Family Advocate holds an enquiry, assisted by a family counsellor (normally a trained social worker), and interviews the parties to find out their personal circumstances and background details with regard to their matter.
- The Family Advocate then interviews the children to allow them the opportunity to be heard. This prevents the child from having to appear in court.
- The Family Advocate may work in liaison with other professionals, for example social workers, psychologists, physiotherapists and psychiatrists, to assist the family to find a solution that is in the best interest of the child.

Why should you use the services of the Family Advocate?

- If you reach an agreement on disputed issues, the matter does not proceed to trial. This reduces costs and time.
- The Office of the Family Advocate allows children to be heard with regard to their position in a pending divorce.
- The Family Advocate is a neutral person, who focuses solely on the best interests of the child.
- The atmosphere at the Office of the Family Advocate is child-friendly.

Points to note about the Family Advocate:

- The Family Advocate can intervene in any matter concerning a dispute over the exercising of the parental responsibilities and rights of all children, regardless of their parents' marital status.
- Parents who have disputes over the exercising of their parental responsibilities and rights may approach the Office of the Family Advocate directly without first having to approach the courts.
- The Family Advocate can assist parents to draft parental plans and parental responsibilities and rights at no cost.
- The services of the Family Advocate are free of charge.
- Under no circumstances can the Family Advocate be subpoenaed to court as a witness to give evidence on behalf of any party.
- The Family Advocate is a neutral institution and cannot act as a legal representative for either litigant in a matter.

What are parental responsibilities and rights?

Parental responsibilities and rights include the care of the child, contact with the child, guardianship of the child and maintenance of the child.

Parents can enter into an agreement on their responsibilities and rights on their own terms and then register it with the Family Advocate or make it an order of court at Family Court.

What is a parenting plan?

A parenting plan is where parents are co-holders of parental responsibilities and rights, including where and with whom the child is to live, maintenance of the child, contact between the child and any of the parents or other persons, and the schooling and religious upbringing of the child.

What are the consultation fees?

The Family Advocate renders his or her services to the public free of charge. Parties to a legal dispute may be required to pay for additional expert reports, e.g. a psychological evaluation or other forensic tests that are critical to the determination of the child's best interests.

Adoption

Adoption is a process whereby a person assumes the parenting of another, usually a child, from that person's biological or legal parent or parents. Legal adoptions permanently transfer all rights and responsibilities, along with other affiliations, from the biological parent or parents.

For more information on the different types of adoption that are available, including inter-country adoptions, please visit the nearest service point of the Department of Social Development or contact its Adoptions and Children's Services units at 012 312 7143 or 012 312 7989.

Where can I get more information?

Please see contact details of Family Advocate offices on page 79.

Domestic violence

What is domestic violence?

According to the Domestic Violence Act, Act No. 116 of 1998, domestic violence is:

- any form of abuse, including physical, sexual, emotional, psychological or economic harassment;
- damage to property;
- stalking;
- entering property without permission; and
- any other abusive or controlling behaviour where such conduct causes or may cause harm to one's health, safety or wellbeing.

What should I do if I am a victim of domestic violence?

If you or anyone you know is victim to any of these forms of abuse, you can apply for a protection order.

What is a domestic violence protection order?

A domestic violence protection order is a document issued by the court that prevents the abuser from performing the following acts:

- Committing an act of domestic violence and/or enlisting the help of another person to commit such an act.
- Entering a residence shared by the complainant and the respondent.
- Entering a specified part of such a shared residence.
- Entering the complainant's residence.
- Entering the complainant's place of employment.
- Preventing the complainant, who ordinarily lives or lived in a shared residence, from entering or remaining in the shared residence or a specified part of the shared residence.
- Committing any other act as specified in the protection order.

Against whom may you seek protection?

- The person to whom you are **married,** whether by civil or customary rites.
- Your **partner** (whether of the same or opposite sex) who lives or has lived together with you, even though you were not married to each other or are not able to be married to each other (if, for example, one of you is already married to someone else).
- The **other parent** of your child or persons who share parental responsibility for a child with you.
- Persons who are **related to you** by blood ties, marriage or adoption.
- The person with whom you shared an **engagement, customary or dating relationship**, including an actual or perceived romantic, intimate or sexual relationship of any duration.
- A person with whom you share or have recently shared the **same residence**.

Which court should I approach?

Approach the court nearest to where you live or work. If you were forced to leave your home as a result of domestic violence and are living elsewhere temporarily, you may approach the court closest to your temporary residence.

Did you know?

A protection order may be obtained on the same day, but generally, this depends on the nature of your case.

A protection order is valid until the abused person cancels it. If the abuser lodges an appeal, the order continues to operate until it is cancelled by the Appeal Court.

Step-by-step guide to obtain a protection order

Step 1:
Report your complaint to the local police station

- The police officer will explain the procedure to you. You have a choice to lodge either a criminal case or to apply for a protection order, or both.
- If necessary, the police will take you to a medical practitioner to assess injuries that you may have suffered during the abuse. The assessment can be used as evidence.
- After the assessment, the police officer will refer you to the local magistrate's court to apply for a protection order.

Step 2:
Obtain a protection order

- At the magistrate's court, the clerk of the court will assist you to complete an affidavit.
- A file will then be opened. Always keep the file number that has been issued by the clerk of the court in a safe place.

Step 3:
A magistrate considers the application

- The magistrate will look at your application and verify the information in your presence.
- After careful consideration, the magistrate may decide to issue an interim protection order and a date for a hearing.
- If the interim protection order has been issued, this means that a warrant of arrest can be effected if the respondent acts abusively towards you again.

Step 4:
An interim protection order is served on the respondent

- An interim protection order will be served to the respondent immediately by the police officer, sheriff or clerk of the court. It will indicate the date of the hearing.

Step 5:
Court proceedings/hearing

- The magistrate will check whether both you and the respondent are present and start the proceedings.
- During the hearing, you and the respondent will have the opportunity to present your side of the story.
- The magistrate will then make a decision whether to issue a final protection order or not.
- Conditions contained in the final protection order are permanent and can only be changed by a court of law.

Step 6:
What are the consequences of a respondent violating conditions of the final protection order?

- You must report the respondent's actions at the nearest police station.
- Thereafter, the respondent will be arrested and charged for violation of a protection order and prosecuted in the criminal court.
- If the respondent is found guilty, he or she can be sentenced to a fine or imprisonment, or both.

When can I request a further warrant of arrest in the case of domestic violence?

The clerk of the court will issue a second or further warrant of arrest if a complainant files an affidavit stating that such a warrant is needed for his or her protection. A warrant will also be issued if the existing warrant of arrest was executed and cancelled, or has been lost or destroyed.

Steps to follow:

- **Complete Form 9:** Affidavit for purposes of obtaining a further warrant of arrest at your nearest police station.
- Submit the completed form to a member of the **South African Police Service (SAPS).**
- If it appears to a member concerned that there are reasonable grounds to suspect that the complainant may suffer imminent harm, the member must forthwith arrest the respondent.
- **Make an affidavit** regarding contravention of a domestic violence protection order.
- When a person against whom a protection order was made (the respondent) contravenes the order, the person who requires protection (the complainant) can go to his or her nearest police station, **lodge a complaint** against the respondent and make an affidavit stating what has happened.
- The police officer shall then **assess the danger** that the complainant appears to be in and do one of the following:
    - If the police officer finds reasonable grounds to suspect that the respondent may harm the complainant, he or she shall immediately arrest the respondent for allegedly having contravened the protection order; or
    - If the police officer finds that there are **insufficient grounds** for arresting the respondent (in other words, that he or she will not harm the complainant), he or she shall immediately give the respondent a written notice to appear before the court for allegedly having contravened the protection order.
- Go to your nearest police station and produce the **protection order** that was made against the respondent.
- **Complete Form 10:** Affidavit regarding a contravention of the protection order to declare that the respondent contravened a prohibition, condition, obligation or order contained in a protection order.
- **Complete Form 11:** Notice to appear before the court, which instructs the respondent to appear before the court on a charge of allegedly having committed an offence.
- This form must contain the name, residential address, occupation and/or status of the respondent.
- It must also state the **date and time** when the respondent must appear before the court on a charge of allegedly having contravened a protection order.
- **The form must be signed** by the police officer as proof that he or she had given the respondent the original notice to appear before the court, and that he or she had explained the importance of the notice to the respondent.
- The police officer shall immediately forward a duplicate of the **original notice** to the clerk of the court. Showing the duplicate in court shall be prima facie (sufficient) proof that the original had been given to the respondent.

Applying for a variation or the setting aside of a domestic violence protection order

Either the respondent or the complainant can apply for a variation or the setting aside of a protection order on condition that notice is given to both parties, as well as the court, and that the reasons given should satisfy the court.

Both parties can apply for a variation or setting aside of the protection order. However, this has to be done via the prescribed court process, using the specific form as prescribed in the Regulations. Sound reasons should be given to satisfy the court and there should be just cause that warrants the variation or setting aside of the protection order, for example, the reconciliation of the couple once the respondent has been rehabilitated after attending therapy.

Steps to follow:

- Complete Form 12, Regulation 13: Application for variation or setting aside of protection order, and submit it to the clerk of the court.
- The court will consider the application if there are sound reasons.
- If the court changes or cancels the protection order, the clerk will send a notice to both the complainant and the respondent to inform them of this.

What does it cost?

The service is free of charge.

Where can I get more information?

Visit the Magistrate Court near you or contact; 012 315 1512

Sexual offences

Government introduced a new law to protect communities against rape and other sex-related crimes: The Criminal Law, Sexual Offences and Related Matters Amendment Act, Act No. 32 of 2007. The Act was put in place to protect victims of sexual violence, especially women, children and people living with mental disabilities who have been raped or have experienced sexual crimes.

What are sexual crimes?

The Sexual Offences Amendment Act (SOAA) protects any person or a victim who has experienced rape, sexual assault, sexual grooming, incest, child pornography or prostitution.

- **Rape** occurs when a person forces another person to have sexual intercourse without their consent or permission. The SOAA regards it as an offence and considers it a crime for a person to force another person or to compel a third person to rape another person. This is known as compelled rape.
- **Sexual assault** occurs when a person sexually violates another person without their consent or permission. The SOAA also makes it a crime for a person to force another person to witness or to watch while they perform sexual acts to someone else. This is known as compelled sexual assault.
- **Sexual grooming** occurs when a person educates, introduces or prepares a child to perform or witness any sexual act or become sexually ready. A child is usually unaware that the person is grooming him or her for sexual acts because the groomer is often kind to the child and their family, e.g. by giving the child and his or her parents gifts or treats. In most instances, after realising the motive of the person, the child is scared to speak out or report this. Grooming usually takes place over a long period of time and the child is made to believe that it and the sexual acts that may eventually occur are not wrong. In most cases, children and people living with a mental disability are victims.
- **Incest** occurs when people who are related to each other on account of a blood relationship, or where the relationship is through adoption, engage in a sexual act with each other. It is a sexual offence, even if it is consensual.
- **Child pornography** occurs when a person or company uses child imagery that is of a sexual nature for a reward or money, for the purpose of publishing pornographic material.
- **Child prostitution** occurs when a person uses a child, or a person living with a mental disability, to expose him or her to or to display him or her in prostitution, or to engage him or her in sexual acts for a reward.

How do I report a sexual offence?

- Go to your nearest police station or Thuthuzela Care Centre (usually located at the hospital).
- Ask a friend or a family member to go with you.
- The police will take down everything you tell them in the form of a statement.
- You can make changes to the statement.
- Do not forget to get a case number from the police officer.
- This number will be used to keep you informed of what is happening.
- When reporting to the police, the victim may ask for a medical person to carry out an examination.
- The findings will be included in the case file.
- Do not forget to give the police officers all your details, including your address and telephone numbers.
- Even when you move, inform the police of your new contact details so that they can keep you informed.

Did you know?

In 2013, the Department of Justice and Constitutional Development reintroduced the sexual offences courts. Through these dedicated courts, victims of sexual offences receive specialised support services. The turnaround time in the finalisation of sexual offences matters is reduced and the conviction rates in these cases are improved.

What are your rights?

You have the right to the following:

- **Dignity and privacy:** When you make a report to the police, you should be taken to a separate room where you can make a statement in an environment where you are comfortable.
- **Information:** When you report to a public hospital, you will receive information on the procedures that are required to have the alleged perpetrator/s tested for their HIV status. You will also receive information on your right to receive post-exposure prophylaxis (PEP), which is short-term antiretroviral treatment to reduce the likelihood of HIV infection after potential exposure.
- **Intermediary services:** The courts will appoint a competent person to act as an intermediary in cases where a witness under the age of 18 years would suffer undue mental stress if he or she were to testify at such proceedings without assistance.

Intermediary services provided in the courts

What is the role of an intermediary?

The courts will appoint a competent person to act as an intermediary in cases where a witness under the age of 18 years would suffer undue mental stress if he or she were to testify at such proceedings without assistance. The role of the intermediary is to convey the evidence-related questions from the prosecution, the defence or the magistrate to the child witness or witness with a mental disability in a manner that is sensitive and understandable to the witness.

In carrying out this duty, the intermediary has two specific functions:

- To protect the witness against hostile cross-examination.
- To assist him or her in understanding the questions posed.

The witness will therefore only talk to the intermediary during court proceedings.

How do children testify in court?

A child is any person under the age of 18 years. A child witness gives evidence in a room that is separate from the courtroom. This room is referred to as the private testifying room and is usually located close to the main courtroom.

A video camera or one-way mirror is installed in the private testifying room to facilitate communication between the private testifying room and the main courtroom while the child is giving evidence. The intermediary is provided with earphones to enable him or her to follow the proceedings in the courtroom. The intermediary will hear the questions and relay these to the child. The child's responses will be captured on the live video link.

The child can neither see nor hear the accused or anyone in the courtroom. The courtroom is provided with closed-circuit television sets or a one-way mirror to enable people in the court to view and hear the child and the intermediary from the private testifying room.

The video is live, which means that members of the court will see and hear the child and the intermediary as they speak. No video-taped recording is made when the child gives evidence.

The magistrate is able to have a clear and close view of the child and the intermediary from the private testifying room through a monitor that is installed on the court bench. This monitor also allows the Magistrate to see when the child is tired and requires a break or a nap.

How do persons with a mental disability testify in court?

The law allows a witness with a mental disability to testify in court with the assistance of an intermediary in the same way as in the case of a child witness. The information above that deals with child witnesses therefore applies to mentally disabled witnesses as well.

Are all children or mentally disabled witnesses entitled to receive intermediary services?

The use of intermediary services is only available to the following:

- Children or mentally disabled persons under the mental or biological age of 18 years who would be exposed to undue mental stress or suffering if they were to testify in an open court.
- Adult witnesses in particular circumstances, e.g. when the adult witness shows signs of trauma.

In order to make use of an intermediary and closed-circuit television or one-way mirror, it must be proved in court that the witness will experience more than the normal amount of stress associated with testifying in an open court.

What does undue mental stress or suffering mean?

- Children express stress in different ways. This could include nightmares, bedwetting, change in behaviour, fear, deterioration in schoolwork and depression.
- Children who show any of these symptoms or similar symptoms are more likely to experience undue stress when testifying in open court. As a parent or guardian, it is important to alert the prosecutor of any strange behaviour by a child.

How does the state usually prove undue mental stress?

- The prosecutor will have to prove to the court that the child will experience undue mental stress or suffering during the court process.
- The prosecutor may require the child to undergo an assessment. In this case, the prosecutor will refer the child to a social worker for an assessment. This will usually be arranged by the investigating officer.
- The social worker will consult with the child to determine whether the child will suffer undue mental stress if he or she should testify in court, and will submit a report with his or her findings.
- This report will be used in court to prove that it is necessary for the child to testify from the private testifying room with the assistance of an intermediary.
- In cases involving a mentally disabled witness, the same process will be followed.

The child or any other witness will also be taken through the court preparation programme offered by court preparation officers before testifying in court. This programme is intended to allay witnesses' fears and to empower them on the court procedure and their roles in court.

Who can ask for an intermediary?

- Since an intermediary is not automatically appointed, the general rule is that the prosecutor or attorney who is calling the witness should apply to the court for the appointment of an intermediary.
- The court may, however, appoint an intermediary if it sees that the child is experiencing undue mental stress when testifying, even though no such application has been made.
- Parents or caregivers should approach prosecutors to find out whether the child can make use of an intermediary and indicate if they have observed any signs of stress.

Does the child have to go into the main courtroom?

- Generally, the child remains in the private children's waiting room with his or her parents or guardians until he or she is called to testify.
- The private children's waiting room provides suitable furniture for children. It also has play and reading areas to keep the children occupied and having fun.

Will the child receive a travelling and food allowance for coming to court?

- Every state witness, including a child, is entitled to a travelling and food allowance when in court. This allowance is usually referred to as a witness fee.
- The parent or guardian is entitled to the same allowance for accompanying the child to court.
- The intermediary will assist the parent and child witness to get this allowance every time they attend court, until the time the child testifies in court. The parent or guardian is further allowed to use the private witness kitchen if he or she has brought prepared food for the child.

Can intermediaries be used in children's courts?

A magistrate has the discretion to request that intermediary services be provided to a child appearing in the children's court. This discretion can be granted if the magistrate is of the opinion that the child will suffer mental stress if he or she testifies without assistance.

Where can I get more information?

Visit the Magistrate Court near you or contact : 012 315 1830/1868

Equality Act and courts

What is the Equality Act?

The Constitution of the Republic of South Africa, 1996 (the Constitution), provides that all people are equal before the law and have the right to equal enjoyment and the protection of the law. The aim of the Constitution is to facilitate full enjoyment of all rights and freedoms by every person.

The Promotion of Equality and Prevention of Unfair Discrimination Act (Act No. 4 of 2000), otherwise known as the Equality Act, seeks to build a country that is based on the principles of equality, fairness, equity, social progress, justice, human dignity and freedom in a caring society. The Equality Act is established in terms of section 9(4) of the Constitution to prohibit and prevent unfair discrimination.

How can the Equality Act help me?

The main purpose of the Equality Act is to do the following:

- Facilitate full equal enjoyment of all rights and freedoms by every person
- Prohibit and prevent unfair discrimination
- Prohibit and prevent hate speech
- Prevent harassment
- Promote equality
- Provide remedies for victims of unfair discrimination, hate speech and harassment.

Where can I find an equality court?

- In terms of the Equality Act, all high courts and magistrate's courts are designated as equality courts for their area of jurisdiction.
- Although the equality court is conducted in a formal sitting, rules and procedures are more relaxed than in normal courts.
- You or any other person acting on your behalf can lodge a complaint.

Did you know?

The services offered by the equality courts are free of charge. In other words, the complainant does not have to pay any court fees. You do not need a lawyer to approach the Equality Court as equality court clerks are trained to assist members of the community in instituting complaints in the Equality Court.

When can I approach the equality court?

You can approach the equality court if you feel that you have been subjected to unfair discrimination on the basis of any of the following grounds:

- Race
- Gender
- Pregnancy
- Marital status
- Ethnic or social origin
- Colour
- Sexual orientation
- Sex
- Age
- Disability
- Religion
- Conscience
- Belief
- Culture
- Language
- Birth
- HIV/AIDS
- If you feel that you are subjected to unfair discrimination on the basis of any other grounds where discrimination based on that ground:
    - Causes or perpetuates systematic disadvantage;
    - Undermines human dignity; or
    - Adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the abovementioned grounds

Step-by-step guide for lodging a case in the equality court

Step 1:

- Go to the clerk of the equality court at your nearest magistrate's court and inform him or her of your intention to institute proceedings in the equality court. He or she will give you Form 2 to complete. If you are unable to complete it, you have a right to be assisted to complete the form.

Step 2:

- The clerk of the equality court must then notify the respondent(s) (the person(s) against whom you are lodging your complaint) within seven working days, using Form 3.

Step 3:

- The respondent(s) has 10 working days within which to reply to the complaint.
- Should the respondent wish to state his or her version of the complaint, he or she will be given a copy of Form 4, which must be completed and returned to the clerk within 10 working days.
- The clerk has seven working days from the receipt of the response to notify the complainant of the response.

Step 4:

- Within three working days of the expiry of the period within which the respondent(s) is meant to reply, the clerk must refer the matter to the Presiding Officer (the magistrate or judge who will hear the matter).
- The Presiding Officer has seven working days to decide whether the matter is to be heard at the equality court or whether it should be referred to an alternative forum such as the South African Human Rights Commission.
- If the Presiding Officer decides to refer the matter, the clerk must notify the parties.
- The alternative forum must deal with the matter as quickly as possible.
- If it fails to do so or fails to resolve the matter, it must refer the matter back to the court with a report.
- If the matter is referred back to the court, it has seven working days within which to give instructions as to how the matter should be dealt with.

Step 5:

- If the Presiding Officer decides to hear the matter, the clerk must, within three working days, assign a date for the directions hearing.

Step 6:

- A hearing will be held where the Presiding Officer listens to the evidence of both parties and witnesses and decides on the matter.

Where can I get more information?

Equality Court forms can be found on http://www.justice.gov.za/EQCact/eqc_forms.htm

For more information, contact:
Tel: 012 357 8813 Email: NSeleka@justice.gov | Tel: 012 315 1620 Email: EPoto@justice.gov.za | Tel: 012 357 8866 Email: TDzhaudzhau@justice.gov.za

small claims court

What are small claims courts?

Small claims courts are a quick and inexpensive alternative to the normal civil courts when you wish to deal with a civil matter. In a small claims court you can claim an amount up to R20 000, for example from someone to whom you have lent money or someone who owes you money for rental. No lawyer is needed or allowed. Small claims courts can be approached at your nearest Magistrates' Office. Details of all Magistrates' offices are on the departmental website, www.justice.gov.za.

You cannot institute an action against national or provincial government departments in the small claims court, but local governments, such as municipalities and metropolitan councils, may be sued in the small claims court, as can "semi-state institutions" such as Eskom, Telkom, the South African Broadcasting Corporation, South African Airways, the Council for Scientific and Industrial Research, and all universities.

Matters that can be taken to the small claims court include the following:

- Repayment of monies lent: If someone owes you money and refuses to pay you at the agreed time, you may take the matter to the small claims court.
- Claiming goods that are due to you: If someone has bought goods such as furniture from you and they have failed to pay for it, you can take the matter to the small claims court, provided that the value of the goods does not exceed the monetary limit for small claims courts at that time.
- Claiming monies owed: If you have rented out a house or any other property to a person (tenant) and the tenant does not pay the agreed rental at the right time, you may take the matter to the small claims court.

Steps to follow

- Cautionary principle for persons using the small claim courts: If you intend instituting a claim in the small claims court, ensure that the opposing party is able to compensate you should the judgment be in your favour. It is futile to institute a claim against another person who is unemployed or who possesses no property.
- Contact the person with whom you have a dispute in person, in writing or telephonically and ask them to settle your claim.
- Go to the clerk of the court.
- If the person owing you money has not paid the claim within 14 days, go to the small claims court with the following:
    - A copy of the letter of demand.
    - Any contract or agreement between you and the person that proves the claim, a post slip or any other document that proves that the letter of demand was handed to the person.
    - The person's personal and contact details.
- The clerk of the court will prepare a summons that will force the person to come to court at the set date.
- The summons will be delivered by you or the sheriff of the court.

- Please always remember the date and time during which your case will be heard.
- On the day of the court hearing, you must bring proof that the summons was delivered to the person you are claiming from.
- The court procedure is informal and is not complicated.
- You will be expected to tell your story and answer questions from the Commissioner of the small claims court.
- If the person who owes you money, for example, refuses to pay, they should be sent a letter of demand that indicates all the facts and the specific amount you are claiming.
- The letter must be delivered in person or by registered mail (the Post Office can assist with this).
- Once the person receives the letter, they are given 14 days within which to settle your claim.
- If judgment is given in your favour, the person must pay the money immediately and will be issued a receipt. If they are not able to pay, the court will investigate their financial position and determine a payment plan.

If the person does not settle the dispute as agreed, the matter will be referred to the magistrate's court.

Enforcing a civil claim based on a legal document

If you have a document that proves that you should receive money from someone, an acknowledgement of debt or promissory note, you can take the matter to the small claims court to enforce this agreement.

Claiming damages

If you are involved in an accident and you can produce proof that the other driver was at fault, you can take the matter to the small claims court. However, the value of the claim must be within the limit that can be dealt with by small claims courts.

Claims based on credit agreements

If you have a business that lends people money on credit and your creditor/s are not paying the agreed installments, you can take the matter to the small claims court.

Claims that are excluded from small claims courts

You cannot bring claims that:

- go against a judgment or order of a court;
- are more than R20 000;
- are against the state, local municipality or local government; However, claims can be brought against municipalities, metropolitan councils and semi-state institutions, such as Eskom, Telkom, the South African Broadcasting Corporation, South African Airways, the Council for Scientific and Industrial Research, and universities,
- are for the official cancellation of a marriage; or
- concerns the validity of a will.

Where can I get more information?

All the relevant forms can be found on formshttp://www.justice.gov.za/forms/form_scc.htm

For more information, contact your local Magistrate's Office and speak to the Small Claims Clerk who can provide you with all required information.

Wills, deceased estates and the Guardian's Fund

You need to plan ahead to ensure that your family and loved ones will be looked after in the event that you die.

Guardian's Fund

Did you know?

Services rendered by the Guardian's Fund are free of charge for the payment of inheritances and maintenance allowances.

image courtesy of pexels.com

Purpose of the Guardian's Fund

The purpose of the Guardian's Fund is to protect the funds of minors, persons lacking legal competence and capacity, known or unknown, absent and untraceable heirs of deceased estates.

Functions of the Guardian's Fund

- The Guardian's Fund administers money that has been received lawfully from sources such as National Treasury, attorney firms and bank institutions. Cards are opened on the system for each and every beneficiary so that beneficiaries and guardians can claim the money without any hindrance.
- The Guardian's Fund is the custodian of funds, ensuring that qualifying beneficiaries receive what is due to them with the interest generated.
- Creditors and untraced beneficiaries do not receive interest (only minors and state patients or the mentally disabled are entitled to interest).
- From time to time, the Guardian's Fund invests money with the Public Investment Commission (PIC). The interest generated from this investment is paid to beneficiaries.
- Application by guardians to invest funds outside the Guardian's Fund in a specific way will be considered if it will benefit the minor. This includes the investment of funds in immovable property.
- Money that remains unclaimed in the Guardian's Fund for a period of 30 years from the date upon which the person became entitled to claim the money is forfeited to the state.
- The Master of the High Court administers all the funds in the Guardian's Fund free of charge and no administration cost is paid by account holders (beneficiaries).

Procedure for claiming from the Guardian's Fund

- Minors and state patients (the mentally disabled): Money in the Guardian's Fund can be claimed by the guardian, tutor, curator or person caring for the minor until the minor reaches the age of majority (or the age as determined in the will, if any).
- As a guardian, you may claim monies for the needs of the minor child (under the age of 18 or disabled persons), with proof of expenditure. This amount may not be more than R250 000 of the capital, until the minor is 18 years old or at the age stipulated in the will. Once the minor is of the right age, he or she may claim the monies left in the Guardian's Fund.

The importance of a will

What is a will?

A will is a document in which you set out what must happen to your assets and liabilities – called your estate – when you die.

Why should you have a will?

It allows you to decide who should be the beneficiaries of your estate once you die. In your will, you can also appoint the person who will administer your estate.

Who can make a will?

Anyone over the age of 16 years can make a will, as long as the person is not mentally ill and understands the consequences of their actions. Two or more people, for example, spouses, can make a joint will in which they dispose of their separate estates.

Who can assist you in drafting a will?

You can get assistance from attorneys, banks, chartered accountants, boards of executors, insurance companies, trust companies and various individuals who have the necessary qualifications.

Things to remember:

- All wills must be in writing.
- If you cannot sign your will personally, you can ask someone to sign on your behalf, but that must be done in the presence of a Commissioner of Oaths (a police officer, postmaster, bank manager or attorney).
- Beneficiaries or the spouse of the testator (the person who made the will) may not be witnesses to the will.

Where can I get more information?

Visit the Master of the High Court office near you or check the contact list on page 63

What is a deceased estate?

A deceased estate comes into existence when a person dies leaving property or a document that is a will or purports to be a will.

How to report a deceased estate

Within 14 days of a testator's death, the estate and all wills, whether they are valid or not, must be reported to the Master of the High Court in the area in which the testator ordinarily resided.

The required documents

To report a deceased estate, you need to submit the following documents:

- original or a certified copy of the death certificate
- original or a certified copy of the marriage certificate
- original will
- completed death notice
- completed next-of-kin affidavit
- completed inventory showing all the assets of the deceased
- nominations by all the beneficiaries for the appointment of an executor and a certified copy of the executor's ID
- declaration of existing marriage
- list of creditors.

Did you know?

If the value of the deceased's estate is below R125 000 and there is no will or minor heirs, you can report it at the magistrate's court in whose region the deceased ordinarily resided.

What happens next?

Once the deceased estate's death has been reported and all documents have been lodged in order, it takes on average no more than 15 days to receive an appointment from the Master of the High Court.

What happens when you die without a will?

If you die without a will, your estate will devolve in terms of the rules of intestate succession (your assets will, contrary to general belief, not go to the state). The rules will take many factors into consideration, like whether the deceased was married in community of property, how many children he or she had, or whether they have any surviving relatives.

Where can I get more information?

Visit the Master of the High Court office near you or check the contact list on page 63.

Trusts

Trusts

The administration of trusts is governed by the provisions of the Trust Property Control Act, Act No. 57 of 1988.

There are two types of trusts:

- An inter-vivos trust is created between living persons.
- A testamentary trust derives from a valid will of a deceased.

An inter-vivos trust must be registered with the Master of the High Court in whose area of jurisdiction the greatest portion of the trust's assets are situated. If more than one Master has jurisdiction over the trust assets, the Master in whose office the trust was first registered will continue to have jurisdiction.

The following documents must be lodged to enable the Master to register an inter-vivos trust and to issue letters of authority to the nominated trustee(s):

- The original trust deed or notarial certified copy thereof
- Due to the abolition of stamp duty Masters' fees, a registration fee of R100 must be paid into the Department of Justice and Constitutional Development's bank account
- Application form (J401)
- Acceptance of trusteeship by the trustee (J417)
- Undertaking of auditor or accountant (inter-vivos trust) (J405)
- Beneficiary's declaration (J450)
- Trustee(s) identification – certified copies of ID, passport or organisation's proof of registration (CK1)
- Trustee(s) representative identification – certified copies of ID or passport [mandatory for organisation trustee(s)]
- Beneficiaries' identification – certified copies of ID or birth certificates, passport or organisation's proof of registration (CK1)
- Bond of security – Form J344 or proof of exemption (if applicable)
- Final certified court order (if applicable)
- Confirmation that the trust is created as a "family business trust" – if not, one of the trustees needs to be an objective person, not related to the trust in any way.

The following requirements have to be lodged for a testamentary trust (a trust created in a valid will):

- Copy of the registered and accepted will or testamentary trust
- Trustee(s) identification – certified copies of ID, passport or organisation's proof of registration (CK1)
- Trustee(s)' representative identification – certified copies of ID or passport (mandatory for organisation's trustee(s))
- Beneficiaries' declaration form

- Beneficiaries' identification – certified copies of ID or birth certificates, passport or organisation's proof of registration (CK1)
- Beneficiaries' guardian identification – certified copies of ID or passport
- Bond of security – Form J344 or proof of exemption (if applicable)
- Undertaking by an auditor or accountant (if applicable).

There are no fees involved and the deceased's last will serves as the trust document.

Where can I get more information?

All the relevant forms can be obtained directly from the Master's Office or from http:// www.justice.gov.za/ master/ forms.html

On receipt of all the required documents, the Master may issue the nominated trustees with letters of authority to administer the trust. No trustee may act as such without the written authority of the Master. Trustees should keep accurate financial statements to comply with their fiduciary obligations to the beneficiaries. The Master may request the trustees to account for the administration of the trust.

Visit the Master of the High Court office near you or check the contact list on page 63.

Tutors and curators

What is a tutor?

A tutor is a person appointed by the Master or court to administer the property of a minor.

When must a tutor be appointed?

Minors are under disability, in that the law does not regard them as capable of managing their own affairs. Where they possess property, therefore, it is necessary for there to be someone to administer it on their behalf. Usually, the minor has parents who, as his or her natural guardians, supervise his or her affairs, and these need no appointment. It sometimes happens, however, that a minor has no natural guardian. If he or she possesses property, it may be necessary to appoint a tutor to administer it properly.

The court may do so even where there is a natural guardian. Where the minor's property consists of money deposited in the Guardian's Fund, no tutor to his property will be required, although a tutor may be appointed.

The appointment of a tutor over the affairs of a minor can have a dual purpose:

- to administer the property of a minor; and/or
- to take care of the person of the minor.

Did you know?

According to South African law, a minor is a person under the age of 18 years, who has not yet been emancipated by marriage or an order of the court.

What is required for the appointment of a tutor?

- Application to the Master of the High Court.
- A preliminary inventory – Form J243, which reflects the assets of the minor.
- Nomination of a suitable person to be appointed as tutor by the next-of-kin of the minor (these nominations are usually obtained during a meeting convened by the Master for this purpose).
- Undertaking and bond of security – Form J262 – by the nominated tutor.
- Application for the appointment as tutor – Form J197.
- Certified copies of the ID document of the nominated tutor, as well as the ID document or birth certificate of the minor.

Only the following persons may validly nominate a tutor in their will:

- The sole natural guardian (surviving parent) of a legitimate minor who has not been deprived of his or her guardianship over such minor by the court.
- The mother of an illegitimate minor who has not been deprived by the court of guardianship of such a minor.
- The parent to whom the sole guardianship of the minor has been granted by the court.

Requirements for an appointment:

- The will in which the tutor has been nominated must be properly registered and accepted by the Master of the High Court.
- A preliminary inventory – Form J243, which reflects the assets of the minor.
- A declaration by the nominated tutor in which he or she declares that the person who nominated him or her in the will was legally competent to do so.
- Undertaking and bond of security – Form J262, by the nominated tutor, unless the tutor has been exempted from providing security in the will.
- Application for appointment as a tutor – Form J197.
- Certified copies of the ID document of the nominated tutor, as well as the ID document or birth certificate of the minor.

Tutor appointed by the court

The court, as the upper guardian of all minors, may appoint a person as the tutor of a minor to take care of the person of the minor and to administer the property of the minor. This is usually an interested party who applies to the court. On receipt of the application, the court will usually appoint a curator-ad-litem to protect the interests of the minor and to investigate the merits of the application. Both the curator-ad-litem and the Master must lodge reports to the court.

Once the court has granted the application and appointed a tutor, the Master must give effect to the court order by issuing letters of tutorship, thereby authorising the appointed tutor to act in this capacity.

Requirements for an appointment:

- A copy of the application to the court, together with the reports by the curator-ad-litem and the Master of the High Court.
- The court order appointing the tutor.
- A preliminary inventory – Form J243, which reflects the assets of the minor.
- Undertaking and bond of security – Form J262, by the nominated tutor, unless the tutor has been exempted from furnishing security by the court
- Application for appointment as a tutor – Form J197.
- Certified copies of the ID document of the nominated tutor, as well as the ID document or birth certificate of the minor.

Where can I get more information?

Visit the Master of the High Court office near you or check the contact list on page 63.

Curators

When will a curator be appointed?

The Master of the High Court appoints curators in the following instances:

- To administer the estates of persons incapable of managing their own affairs, including:
  - mentally deficient persons
  - persons who, owing to physical infirmity, cannot manage their own affairs
  - persons declared a prodigal by the court
- To administer the assets of persons and legal entities attached by the Asset Forfeiture Unit in terms of a court order.
- To administer the assets of an absentee (a person whose whereabouts are unknown and has no legal representative in the Republic).

What are the requirements for appointment?

- A copy of the application to court, together with the reports by the curator-ad-litem and the Master.
- The court order appointing the curator bonis.
- A preliminary inventory – Form J243, which reflects the assets of the incapacitated person.
- Undertaking and bond of security – Form J262, by the nominated curator bonis, unless the curator has been exempted from furnishing security by the court.
- Application for appointment as curator bonis – Form J197.
- Certified copies of the ID document of the nominated curator bonis, as well as the incapacitated person.

Where can I get more information?

Visit the Master of the High Court office near you or check the contact list on page 63.

Guardians and custodians

Who can appoint a guardian or custodian?

The Master of the High Court has no jurisdiction to appoint a guardian or custodian over a minor.

Only the High Court can appoint a person other than the natural guardian of a minor, as the legal guardian of a minor. Likewise, only the High Court can deprive a natural guardian of guardianship over his or her minor.

As far as custody of a minor is concerned, the Children's Act, Act No. 38 of 2005, provides that the Commissioner for Child Welfare for the district in which the minor is resident and who is a designated magistrate may appoint a custodian over a minor. If, after an enquiry, it is found that the minor is a child in need of care, Section 150 of the Children's Act sets out the circumstances in terms of which a minor is deemed to be in need of care and protection. This includes the situation where a child has no parent or guardian or where a child's parent or guardian cannot be traced.

The custodian, who is appointed by the Commissioner of Child Welfare, is the person who is responsible for the day-to-day care of the minor. However, the custodian does not have the right to administer the assets of the minor.

Administrator in terms of the Mental Health Care Act, Act No. 17 of 2002

The Master appoints an administrator to administer the estates of persons suffering from a mental illness or a severe or profound intellectual disability.

Requirements to consider the application:

- Application to the Master – Form CB11.
- A preliminary inventory – Form J243, which reflects the user's assets.
- Two medical certificates confirming that the user suffers from a mental illness or an intellectual disability.
- A certified copy of the ID document of the user.

Where can I get more information?

Visit the Master of the High Court office near you or check the contact list on page 63.

Insolvent estates

When may an insolvent apply for rehabilitation?

An insolvent is a debtor whose estate (everything, including money, that a person owns) is under sequestration (has been placed under control until certain statutorily provided time periods and/or prescribed conditions have been met). If you are married in community of property and your spouse becomes insolvent, the Insolvency Act, Act No. 24 of 1936, considers you to be insolvent as well, in light of the fact that there is only one joint estate.

Who can apply for rehabilitation?

- The insolvent himself or herself
- The insolvent's duly authorised agent if the insolvent does not live in South Africa
- The widow or widower of an insolvent if they were married in community of property
- The former spouse of an insolvent if they were married in community of property
- The executors of the deceased estate of an insolvent

How soon after having been sequestrated can an insolvent apply for rehabilitation?

For more specific details, please read sections 119 to 129 of the Insolvency Act as amended:

- **At any time:** If an offer of composition is made and accepted by three quarters of creditors in number and value, and after payment has been made or security given, or if all creditors' claims and sequestration costs have been paid in full.
- **After six months of sequestration:** If no claims have been proven against the estate, provided the insolvent has not been convicted of certain offences and has not previously been sequestrated.
- **After twelve months of sequestration:** If the insolvent has not been convicted of certain offences and has not previously been sequestrated, he may apply for rehabilitation after 12 months have elapsed from the date of the Master of the High Court's confirmation of the first trustee's account in the estate.
- **After three years of sequestration:** If the insolvent has not been convicted of certain offences, but has previously been sequestrated, he may not apply for rehabilitation until three years have elapsed from the date of the Master of the High Court's confirmation of the first trustee's account in the estate.
- **After five years of sequestration:** If the insolvent has been convicted of certain offences, he may not apply for rehabilitation until five years have elapsed from the date of his conviction.
- **After ten years of sequestration:** After 10 years have expired, an insolvent is deemed to be rehabilitated unless a court orders otherwise upon the application of an interested person. Such an application must be made within the ten-year period.

Where can I obtain more information?

Please contact an attorney or your nearest office of the Master of the High Court for more information and assistance regarding the steps to follow when applying for rehabilitation.

This is a very busy and complex division, which supervises the administration of thousands of insolvent estates every year.

Estates are usually administered by professionals who know the functions and procedures. Although insolvency procedures are too complex to explain in a page or two, the information below may be of interest to the public.

All requisitions lodged at offices of the Master of the High Court must be original. No copies, emailed or faxed requisitions will be accepted. The section 9(3) security has also been increased to an amount of R30 000.

For more information, contact:
Visit the Master of the High Court office near you or check the contact list on page 63.

Master of the High Court contact details

EASTERN CAPE

Bisho
Tel: 040 608 6600
Fax: 086 641 9358
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Bisho, 5605
1st Floor, SITA Building
(Cnr Phalo and
Rharhabe avenues),
Bisho

Grahamstown
Tel: 046 603 4000
Fax: 046 622 9990
Private Bag X1010,
Grahamstown, 6140
5 Bathurst Street,
Grahamstown

Port Elizabeth
Tel: 043 403 5100/
5142
Fax: 041 487 1148
Private Bag X2,
Centrahill,
Port Elizabeth, 6006
523 Govan Mbeki Avenue
(Cnr Crawford and
Govan Mbeki Avenue),
North End

Umtata
Tel: 047 531 2120/
047 531 0980
Fax: 047 531 0980/
047 532 2040
Private Bag X6057,
Mthatha, 5099
Holy Cross Building,
7 Craister Street,
Mthatha

GAUTENG

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8035
Private Bag X5,
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241 Church Street,
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LIMPOPO

Polokwane
Tel: 015 230 6000
Fax: 015 230 6100/
6200
Private Bag X9670,
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105, Library Garden
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Thohoyandou
Tel: 015 962 1032
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Venda, 0950
Venda Government
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FREE STATE

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Fax: 051 448 6182/
051 447 6575
Private Bag X20584,
Bloemfontein, 9300
Southern Life Building
(Cnr Charlotte Maxeke
(Maitland) and Aliwal
streets), Bloemfontein

MPUMALANGA

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Nelspruit, 1200
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(Cnr Marloth and
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Getting married under customary law

What is a customary marriage?

The Recognition of Customary Marriages Act (RCMA) became law on 15 November 2000. If you were in an existing valid marriage under customary law before this date, your marriage is recognised under this new law. When a husband already had more than one wife under customary law, all of those marriages are recognised under this new law. This Act regulates customary marriages entered into after this Act came into operation and states the rules that people getting married under customary law must follow in order for their marriage to be recognised.

The RCMA recognises all customary marriages that were valid under customary law. This includes those marriages that were regarded as invalidated by the Black Administration Act. Further, customary marriages under the Transkei Marriage Act (TMA) could co-exist with a civil marriage out of community of property. If these marriages were valid under the TMA, they are recognised by the RCMA.

In terms of section 4(3)(a) of the RCMA, customary marriages entered into before the commencement of the Act, which are not already registered in terms of any other law, had to be registered within a period of 12 months after the commencement of the Act, or within such a period as the Minister may prescribe from time to time by a notice in the Government Gazette.

Section 4(3)(b) of the Act provides that marriages entered into after the commencement of the Act must be registered within a period of three months after the conclusion of the marriage or within such a period as the Minister may prescribe from time to time by a notice in the Government Gazette. In terms of Notice No. 1000, published in Government Gazette 38290 dated 12 December 2014, the period in terms of which a customary marriage could be registered in terms of both 4(3)(a) and 4(3)(b) of the Act was extended to 31 December 2016.

Proving the existence of a customary marriage that has not been registered can pose a problem to both the executor in an estate and the Master of the High Court when an estate is reported, especially when the existence of such a marriage is being disputed by interested parties. It is for this reason that the Master usually insists on proof of registration of a customary marriage. This will impact on the eligibility to inherit from an estate. Registration of a marriage is fundamental to the protection of the rights of women and children in customary marriages.

A customary marriage is recognised if people getting married under customary law have complied with the following requirements:

- According to section 1 of the Act, "customary marriage" means a marriage concluded in accordance with customary law, while "customary law" means the customs and usages traditionally observed among the indigenous African people of South Africa and that form part of the culture of those people.
- The Act does not apply to customary marriages concluded by African people outside South Africa.
- Both parties to the marriage must be above the age of 18 years.

- Both parties must consent to being married under customary law.
- The marriage must be negotiated, celebrated and entered into in accordance with customary law.
- Lobola is not a necessary requirement for the validity of the customary marriage. However, if it is paid, it proves that the marriage was negotiated in accordance with the custom.

Note that these marriages have always been recognised under customary law.

When should I register my marriage?

Even though not registering the customary marriage does not invalidate the marriage where there is one husband and one wife, it does invalidate the marriage if the husband is marrying a second wife after the commencement of the RCMA. Therefore, registration is encouraged as it constitutes prima facie proof of the existence of a customary marriage. After the coming into effect of the RCMA, all marriages entered into prior to or after 15 November 2000 must be registered with the Department of Home Affairs.

If you were married after the law was passed, you should register your marriage within three months of the marriage taking place.

Note: Non-registration of a customary marriage, where there is one husband and one wife, does not invalidate the marriage. However, non-registration of a subsequent customary marriage invalidates the customary marriage.

Customary marriages and community of property

All customary marriages where there is one husband and one wife, whether entered into prior to or after the coming into operation of the RCMA, are in community of property (Gumede v President of the Republic of South Africa 2009 (3) BCLR 243 (CC)). This means that the husband and wife have an equal share in the assets, money and property, and also means that they share all the debts.

If the parties would like their marriage to be out of community of property, they will have to enter into an antenuptial contract prior to getting married. If they want to change this once they are already married, they will have to apply to the High Court.

Under the RCMA, the wife has equal rights and status with the husband to decide what happens to the property. A customary wife now has the capacity to enter into a contract without the assistance of her husband.

What if my husband wants to marry another wife?

The husband must enter into a written agreement or contract, which will state what should happen to the property. The husband must then apply to the court to approve the written contract. The court has to make sure that all the property interests of all the wives are protected.

What if we want to enter into a civil marriage after marriage under customary law?

If your husband has no other wives, you can get married under civil law, as well as customary law. However, neither of you will be able to enter into customary marriages with anyone else while you are married to each other under civil law.

Requirements for a valid customary marriage

The general requirements for a valid customary marriage, entered into after the commencement of the Act, are as follows:

- The prospective spouses must both be over 18 years of age.
- They must both consent to be married to each other under customary law.
- The marriage must be negotiated and entered into or celebrated in accordance with customary law.
- If either of the prospective spouses is a minor, either his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage. If there is no legal guardian, the Act provides for substitute consent.
- The parties must not be prohibited from marriage because of relationship by blood or affinity as determined by customary law.

In addition to the above requirements, a husband in a customary marriage, who wishes to enter into a further customary marriage with another woman after the commencement of the Act, must comply with a further requirement set out in section 7(6) of the Act, namely an application to the court to approve a written contract that will regulate the future matrimonial property system of his marriages.

Non-compliance does not render the subsequent marriage null and void, but will render it to be a marriage out of community of property. In the case of Mayelane v Ngwenyama and Another (Women's Legal Centre Trust and others as amici curiae) 2013 (8) BCLR 918 (CC), it was confirmed that the husband must obtain the consent of the first wife before he may enter into a further customary marriage. Failure to do so will render the further marriages automatically out of community of property.

A party to a civil marriage cannot validly enter into a customary marriage with another person while the civil marriage exists.

Steps to follow

When registering customary marriages:

Customary marriages must be registered within three months of taking place. This can be done at any office of the Department of Home Affairs or through a designated traditional leader in areas where there are no Home Affairs offices.
The following people should present themselves at either a Home Affairs office or a traditional leader in order to register a customary marriage:

- The two spouses (with copies of their valid ID books and a lobola agreement, if available)
- At least one witness from the bride's family
- At least one witness from the groom's family and/or the representative of each of the families

In the event that the spouses were minors (or one was a minor) at the time of the customary marriage, the parents should also be present when the request to register the marriage is made.

Customary marriages are registered by completing the BI-1699 form and paying the required fees. An acknowledgement of receipt, Form BI-1700, will then be issued by the Department of Home Affairs.

When registering more than one customary marriage:

If a male person is already in a customary marriage and wishes to enter into another customary marriage, he has to, at his own cost, get a court order from a competent court, which will regulate his future matrimonial property system.

It is also possible for a male person who is already in a customary marriage to enter into a civil marriage with his current customary wife. They should follow the normal procedure for civil marriages. A spouse in a customary marriage cannot enter into a civil marriage with another woman.

Divorce under the RCMA

Only the court of law can grant a divorce decree. The ground of divorce is the fact that the marriage has broken down to an extent that it cannot be restored.

Custody of children under the RCMA

The court will decide on the custody of children based on the best interest of the children, not on who paid lobola.

Legal framework

The Recognition of Customary Marriages Act, Act 120 of 1998, and related regulations are available at:
http://www.justice.gov.za/legislation/acts/acts_full.html

Service standard

An abridged certificate is issued immediately. An unabridged certificate takes six to eight weeks.

The registering officer will inform you if he or she refuses to register a customary marriage as contemplated, stating the reasons for the refusal.

Where can I get more information?

Please contact the offices of the Department of Home Affairs to enquire about the costs involved and the forms to be completed.

Visit the Master of the High Court office near you or check the contact list on page 63.

Expungement of a criminal record

What is the expungement of a criminal record?

The expungement of a criminal record is a process by which the criminal record of a convicted offender is removed from the criminal record database of the Criminal Record Centre (CRC) of the South African Police Service.

When can a person apply for the expungement of a criminal record?

- When a period of 10 years has lapsed after the date of the conviction for that offence
- When the person has not been convicted and sentenced to a period of imprisonment without the option of a fine during those 10 years; and provided that the person was sentenced to any of the following sentences:

Corporal punishment

- The sentence was postponed or the person was cautioned and discharged.
- The fine did not exceed R20 000.
- The sentence was imprisonment with the option to pay a fine instead of serving the period of imprisonment.
- The imprisonment was suspended wholly.

Correctional supervision

- Imprisonment in terms of section 276(1)(i) of the Act – imprisonment where a person may be released under correctional supervision at the discretion of the Commissioner or a parole board.
- Periodical imprisonment.

Sexual offence against a child or a mentally disabled person

- Proof is provided that his or her name was not entered into the National Register of Sex Offenders or the National Child Protection Register, or if it was entered, proof is provided that his or her name has been removed from the relevant register.

When will a person not qualify for the expungement of a criminal record?

- When a period of 10 years has not lapsed after the date of the conviction.
- When a person was sentenced to direct imprisonment.
- When a fine of more than R20 000 was imposed.
- When a person was sentenced to direct imprisonment (the imprisonment was not suspended and there was not the option of a fine) during the relevant 10-year period.
- His or her name is included in the National Register for Sex Offenders or the National Child Protection Register and his or her name has not been removed from those registers.

What is required when you apply for expungement of a criminal record?

- Completed application form, which is available on the Department of Justice and Constitutional Development (website: www.doj.gov.za).
- A clearance certificate, which can be obtained from your nearest police station or directly from the SAPS Criminal Record Centre.
- Sexual offences: Confirmation stating that your name has been removed from the National Register for Sex Offences or the National Child Protection Register if your name has been included in any of these registers.
- The completed application form (Part II and Part III), together with the attachments, must be posted or delivered by hand to the Director-General: Department of Justice and Constitutional Development. Postal address: Private Bag X81, Pretoria, 0001. Street address: Pretmed Building, 319 Pretorius Street, Pretoria, 0001.

This process takes approximately four months to be finalised. It is done free of charge.

Where can I get more information?

Enquiries can be directed to: expungements@justice.gov.za
Tel. 012 315 1601/1388/4654/4681.

Enquiries can also be made at:
Postal address:
Private Bag X81, Pretoria, 0001.
Street address:
Pretmed Building,
319 Pretorius Street,
Pretoria, 0001.

Court-annexed mediation

What is mediation?

It is a process by which a mediator assists the parties in a legal dispute by:

- facilitating discussions between parties;
- assisting them in identifying issues;
- exploring areas of compromise; or
- generating options in an attempt to resolve the dispute.

Mediation is an alternative to having the dispute resolved in court.

What are the advantages of mediation?

- It offers the speedy resolution of disputes.
- It is considerably cheaper than litigation.
- It provides a win-win situation for both parties in a dispute.
- The process is flexible and avoids technicalities.
- It is a voluntary process.
- It promotes reconciliation.
- Parties can use their own languages.

Which matters can be referred for mediation?

Most disputes are appropriate for mediation, as long as the court has jurisdiction in respect of the matter. Examples are contractual claims, motor vehicle collisions and other damages claimed, neighbourhood disputes and family disputes.

Will there be court fees?

There are no court fees, but the mediator is entitled to charge a fee according to a fixed tariff. The parties contribute equally to this fee, which must be paid before the mediation commences.

Who will be the mediator?

The mediator will be a person that the parties choose, with the help of the mediation clerk, from a panel of accredited mediators appointed by the Minister of Justice and Constitutional Development. All mediators have undergone mediation training. Some specialise in particular types of matters such as family disputes. The clerk will advise you as to which mediator is appropriate for your dispute, depending on factors such as area of practice and experience.

Will the mediator be a lawyer?

Not necessarily, many mediators are lawyers, but may also be experts from other professions. For example, engineers are often mediators in building construction disputes. Family disputes are often mediated by social workers or psychologists.

Will the mediator tell the parties who is right and who is wrong?

A mediator does not judge the parties or tell them what the solution to their dispute is. It is for them to find a solution that meets their needs and interests. The task of the mediator is to assist them to do this. The mediator will help them to identify the real issues and explore different options for resolving those issues. The mediator assists them, using skills acquired through training and experience, to diffuse conflict and explore options for settlement.

If the parties reach agreement, the mediator will assist them to draft a settlement agreement. The settlement agreement is enforceable in law as a contract. It can be given additional strength by having it made an order of court, if the parties agree to this. If the parties are unable to settle their dispute through mediation, they may still resort to litigation and adjudication.

Do I need to be represented by a lawyer?

Parties have the right to be represented if they so wish, but this is not obligatory. Parties who are represented will be responsible for the fees of their legal practitioners. It is the task of the mediator to ensure a fair and structured process with a level playing field, irrespective of whether parties are represented by lawyers or not. Parties can also request that a friend or family member be present during mediation to lend support.

Can mediation be used where litigation has already commenced?

Yes, matters can be referred for mediation at any stage during the court process before a judgment has been given.

How long does the process of mediation take?

Simple disputes can often be resolved within a few days. More complex disputes may take a few weeks.

What happens in the event that mediation has resulted in a positive outcome, but one of the parties later fails to comply with their agreement?

If the agreement has been made an order of the court, it can be enforced through the Sheriff of the Court in the same way as any order of a civil court. If it has not been made an order of the court, it is enforceable in the law in the same way as any other legal binding agreement. Download the pdf version of frequently asked questions on mediation.

Where can I get more information?

Visit the Magistrate Courts that render mediation services (please refer to the list on page 76 and 77) or contact Ms Stella Maphoso, Tel: 012 406 4813, Email: mediation@justice.gov.za or
Terry Mphelo, Tel: 012 315 4507, Email: tmphelo@justice.gov.za.

Mediation services are offered at the following courts:

GAUTENG

MAGISTRATE COURTS:

Magistrate's Court, Benoni
Magistrate's Court, Heidelberg
Magistrate's Court, Johannesburg
Magistrate's Court, Kempton Park
Magistrate's Court, Krugersdorp
Magistrate's Court, Oberholzer
Magistrate's Court, Palm Ridge
Magistrate's Court, Pretoria
Magistrate's Court, Pretoria North
Magistrate's Court, Randburg
Magistrate's Court, Springs

DETACHED COURTS:

Detached Court, Ekangala
Detached Court, Germiston
Detached Court, Kagiso
Detached Court, Sebokeng
Detached Court, Soshanguve
Detached Court, Soweto (Protea)
Detached Court, Vereeniging

BRANCH COURTS:

Branch Court, Kliptown

FREE STATE

MAGISTRATE COURTS:

Magistrate's Court, Bethlehem
Magistrate's Court, Bloemfontein
Magistrate's Court, Botshabelo
Magistrate's Court, Heilbron
Magistrate's Court, Kroonstad
Magistrate's Court, Phuthaditjhaba (Witsieshoek)
Magistrate's Court, Sasolburg
Magistrate's Court, Selosesha (Thaba 'Nchu)
Magistrate's Court, Welkom

LIMPOPO

MAGISTRATE COURTS:

Magistrate's Court, Giyani
Magistrate's Court, Groblersdal
Magistrate's Court, Lebowakgomo
Magistrate's Court, Lephalale
Magistrate's Court, Makhado
Magistrate's Court, Mahwelereng (Morekong)
Magistrate's Court, Modimolle
Magistrate's Court, Musina
Magistrate's Court, Phalaborwa
Magistrate's Court, Polokwane
Magistrate's Court, Schoonoord (Sekhukhune)
Magistrate's Court, Thohoyandou
Magistrate's Court, Tzaneen

BRANCH COURTS:

Branch Court, Burgersfort

NORTH WEST

MAGISTRATE COURTS:

Magistrate's Court, Bloemhof
Magistrate's Court, Brits
Magistrate's Court, Klerksdorp
Magistrate's Court, Lichtenburg
Magistrate's Court, Mankwe
Magistrate's Court, Mmabatho
Magistrate's Court, Potchefstroom
Magistrate's Court, Rustenburg
Magistrate's Court, Taung
Magistrate's Court, Temba
Magistrate's Court, Vryburg

DETACHED COURTS:

Detached Court, Atamelang
Detached Court, Ga-Rankuwa

EASTERN CAPE

MAGISTRATE COURTS:

Magistrate's Court, Aliwal North
Magistrate's Court, Bizana
Magistrate's Court, Butterworth (Mnquma)
Magistrate's Court, Cradock
Magistrate's Court, East London
Magistrate's Court, Graaff-Reinet
Magistrate's Court, Humansdorp
Magistrate's Court, King William's Town
Magistrate's Court,Makhanda (Grahamstown)
Magistrate's Court, Mount Frere (Kwabhaca)
Magistrate's Court, Mthatha (Umtata)
Magistrate's Court, Port Elizabeth (New Lock)
Magistrate's Court, Queenstown (Komani)
Magistrate's Court, Uitenhage

MPUMALANGA

MAGISTRATE COURTS:

Magistrate's Court, Eerstehoek
Magistrate's Court, Evander
Magistrate's Court, KwaMhlanga
Magistrate's Court, Mbombela
Magistrate's Court, Middelburg
Magistrate's Court ,Siyabuswa
Magistrate's Court, Thulamahashe (Mahla)
Magistrate's Court, Tonga

NORTHERN CAPE

MAGISTRATE COURTS:

Magistrate's Court, Calvinia
Magistrate's Court, Colesberg
Magistrate's Court, De Aar
Magistrate's Court, Griekwastad (Griquatown)
Magistrate's Court, Kimberley
Magistrate's Court, Kuruman
Magistrate's Court, Prieska
Magistrate's Court, Springbok
Magistrate's Court, Upington
Magistrate's Court, Williston

DETACHED COURTS:

Detached Court, Groblershoop
Detached Court, Jan Kempdorp

WESTERN CAPE

MAGISTRATE COURTS:

Magistrate's Court, Beaufort West
Magistrate's Court, Bellville
Magistrate's Court, Cape Town
Magistrate's Court, George
Magistrate's Court, Hermanus
Magistrate's Court, Knysna
Magistrate's Court, Malmesbury
Magistrate's Court, Oudtshoorn
Magistrate's Court, Paarl
Magistrate's Court, Somerset West
Magistrate's Court, Stellenbosch
Magistrate's Court, Swellendam
Magistrate's Court, Vredendal
Magistrate's Court, Worcester
Magistrate's Court, Wynberg

DETACHED COURTS:

Detached Court, Atlantis
Detached Court, Khayelitsha

KWAZULU-NATAL

MAGISTRATE COURTS:

Magistrate's Court, Dundee
Magistrate's Court, Durban
Magistrate's Court, Emlazi (Umlazi)
Magistrate's Court, Empangeni
Magistrate's Court, Eshowe
Magistrate's Court, Ingwavuma
Magistrate's Court, Ixopo
Magistrate's Court, Kokstad
Magistrate's Court, KwaDukuza (Stanger)
Magistrate's Court, Ladysmith
Magistrate's Court, Mahlabatini (Ulundi)
Magistrate's Court, Mtubatuba
Magistrate's Court, Newcastle
Magistrate's Court, Nkandla
Magistrate's Court, Nongoma
Magistrate's Court, Ntuzuma
Magistrate's Court, Pietermaritzburg
Magistrate's Court, Pinetown
Magistrate's Court, Pongola
Magistrate's Court, Port Shepstone
Magistrate's Court, Mahlabatini (Ulundi)
Magistrate's Court, Mtubatuba
Magistrate's Court, Newcastle
Magistrate's Court, Nkandla
Magistrate's Court, Nongoma
Magistrate's Court, Ntuzuma
Magistrate's Court, Pietermaritzburg
Magistrate's Court, Pinetown
Magistrate's Court, Pongola
Magistrate's Court, Port Shepstone
Magistrate's Court, Scottburgh
Magistrate's Court, Umbumbulu
Magistrate's Court, Umzimkulu
Magistrate's Court, Verulam
Magistrate's Court, Vryheid

DETACHED COURTS:

Detached Court, Madadeni

BRANCH COURTS:

Branch Court, Richards Bay

Family Advocate Offices:

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Andries Street was renamed Thabo Sehume
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