

Evictions: How to Institute Commercial and Residential Evictions in South Africa

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24 June 2024

INTRODUCTION

This article focuses on the rights and procedures intrinsic to Residential and Commercial Evictions in South Africa.

CONSTITUTIONAL RIGHTS INTRINSIC TO EVICTION PROCEEDINGS

It is important to note two important rights enshrined in the Constitution:

1. Section 26 (1)-(3): recognises the right to adequate housing as a human right. This includes the right to adequate housing that the state must take reasonable measures to provide and realise this right; and that no one may be evicted from their home or have it demolished without a court order.
2. Section 25: recognises the right to property. This right provides that no one may be arbitrarily deprived of their property.

LEGISLATIVE AUTHORITY

There are two important pieces of legislation that oversee evictions in South Africa:

1. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE Act"); this act applies to municipal, private and state-owned land. Land is defined to include any building or structure on the land in question.
2. The Extension of Security of Tenure Act, 1997 ("ESTA"); this Act applies to rural or peri-urban land. This piece of legislation is mainly concerned with the eviction of lawful occupiers, or individuals who reside on land with the express or tacit consent of the landowner (this Act covers areas outside of townships, but does not include townships which are utilised for agricultural purposes).

LOCUS STANDI - WHO MAY EVICT OR BE EVICTED?

Lastly, the locus standi of who may evict, and who can be evicted includes:

Who can evict:

- The property owner;
- A person acting as an agent of the land owner;
- A Trustee that owns the land;
- Lessor;
- Individuals with the right to habitation;
- The landlord;
- An executor of an estate; and
- An organ or state.

Who may be evicted:

- Unlawful occupiers of land.

RESIDENTIAL EVICTIONS

What is important to note from the outset, is that an eviction can only occur through a court order. This does not strip away the landowner's property rights, instead, the PIE Act merely ensures that the court has had the opportunity to decide whether it is just and equitable to evict the unlawful occupier after considering all relevant circumstances.

Sections 4 and 5 of PIE states that the lessor has to obtain a court order to evict an unlawful occupier. Awhile Sections 4 to 6 of PIE provides for the procedure in case of normal and urgent evictions.

RESIDENTIAL EVICTIONS: REQUIREMENTS TO START THE PROCESS.

A letter of termination, and/or a letter of demand is a prerequisite to any eviction proceedings being commenced:

1. A Letter of Termination and Letter of demand

As a first step, it is important to ensure that the relevant lease agreement with the tenant has been terminated and/or cancelled.

If the lease agreement has been terminated then the agreement has ended, and the tenants lack the legal authorisation to remain on the property. A letter of demand is an important additional step herein, showing the courts that the lessor has afforded the tenant every opportunity to rectify their arrears in anticipation of a monetary claim for arrear rental in addition to an eviction.

Documents are important in this step; include signed lease agreement and any communication regarding the tenant's breach (such as the letter of demand) and any indication of the tenants arrears. Scrutinising lease agreements is important – with a specific focus on the breach clause, which normally contains conditions for cancellation.

2. Draft Eviction Papers

If the lessee does not remedy its breach and the lease has been validly cancelled, then the institution of Action and Application proceedings should commence.

ILLEGAL AND /OR UNLAWFUL EVICTIONS

It should be emphasised that the PIE Act prohibits unlawful evictions and makes it a criminal offence to unlawfully evict an individuals. The punishment for an unlawful eviction is a fine or imprisonment for up to two years.

The following types of evictions are considered to be unlawful:

- a. Eviction without a court order – no person may be evicted without an order of the court;
- b. No person may be evicted from a house or land in which they are lawfully residing;
- c. Intimidation, threats or changing of the locks by a landlord is illegal and does not amount to lawful eviction;
- d. Farm workers who live on a farm where they work cannot be forced to leave by the employer through terminating their contract of employment;
- e. Constructive evictions are also illegal evictions. These are instances where ESTA occupiers leave the farm because conditions have been made intolerable, often through intimidation or where the occupiers have had their electricity or water supply cut off or have had their privacy repeatedly invaded.

OBLIGATIONS TO PROVIDE ALTERNATIVE ACCOMMODATION

The obligation to provide alternative accommodation arises when the court determines that the eviction proceedings would result in homelessness or significant hardships for the tenants.

The obligation of a landlord to provide alternative accommodation was cemented in the case of Port Elizabeth Municipality v Various Occupiers (2005), the court held that both the government and private property owners have a constitutional obligation to take reasonable measures, within the available resources, to provide alternative accommodation to individuals or families facing eviction and who are unable to secure housing on their own.

This stance was re-affirmed in Blue Moonlight Properties 39 (Pty) Ltd and Another v Occupiers of Saratoga Avenue (2011); where the court emphasised that when considering eviction applications, courts must take into account the socio-economic circumstances of the occupiers and whether they would be rendered homeless as a result of the eviction. In instances where homelessness is likely, the court may require the landlord to provide suitable alternative accommodation or may delay the eviction to allow the occupiers more time to secure housing.

COMMERCIAL EVICTIONS

Commercial evictions take place when a commercial tenant is removed from a rental property, building, structures or other premises which are not used for shelter or dwelling purposes.

Commercial evictions are different from Residential Evictions because Commercial Evictions rely on:

- a. the common law;
- b. the lease agreement; and
- c. Section 14 of the Consumer Protection Act 68 of 2008.

The PIE Act and ESTA do not apply in Commercial Evictions. It is ultimately the use of the property that determines the eviction procedure to be one of a commercial eviction.

Commercial Evictions can take place in one of two ways:

- a. Action or Application Proceedings in the High Court (which depends on the facts of the case); or
- b. Action Proceedings in the Magistrates Court.

Normally, the lease agreement sets out the procedure for eviction. Generally, it follows 4 steps:

- a. A Breach of the lease agreement,
- b. A Letter of Demand dispatched by the lessor: In terms of Section 14 of the Consumer Protection Act, the lessor must give the lessee 20 business days written notice of a breach of the lease agreement. This means a lessor must wait the 20 business days before cancelling the lease.

If there is a failure to remedy the breach:

- a. A Notice of Termination of the lease agreement,

If the Commercial tenant fails to evict the premises:

- a. Court Proceedings in the High Court or the Magistrates Court (depending on which court has the relevant Jurisdiction). Whether the eviction is brought in terms of Action or Application proceedings depends on the facts of the case. If there is a material dispute of the facts, then an Action Procedure would be best.

CONCLUSION

Eviction proceedings, either residential or commercial, are complex matters that require the requisite procedures to be followed rigorously. This is so that the relevant Courts can ensure both the Landowner’s land rights, and the unlawful occupier’s rights to housing are upheld and balanced. Therefore, it is important that both parties understand their Constitutional Rights, as well as the relevant rights and procedures to be followed in terms of PIE Act and ESTA.

If you require urgent assistance and you need to approach a court you can contact a partner of the Public Law Department, Charissa Kok at kok@hbgschindlers.com, alternatively Emshareed Botes at emshareed.botes@hbgschindlers.com

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