

The South African Legislative Framework

There are a few Acts of Parliament relating to residential property leasing in South Africa.

The Rental Housing Act 50 of 1999

The Rental Housing Act (often abbreviated to RHA) regulates all residential leases. This Act has essential common-law duties, such as a landlord's obligation to provide a property in good order and condition, and the tenant's obligation to return the property in a similar condition. The Act concentrates on fair and unfair practices, with each case being weighed up accordingly.

The Act stipulates the regulations that apply to all tribunals. Regulations are subordinate legislation issued in terms of enabling statutes and are needed to clarify key definitions and establish how the state and statutory bodies will implement the laws. The regulations deal with enforcement and penalty provisions and may have rules or provisions for the establishment of these.

In terms of the Rental Housing Act, there are two sets of regulations; one contains procedures (Procedural Regulations) and the other relates to problems or disputes arising from unfair practices (Unfair Practices Regulations). Rental Housing Tribunals must follow the standardised rules, practices and procedures contained in the Procedural Regulations and refer to the Unfair Practices Regulations, which list certain categories of unfair practices.

According to the definition in the Rental Housing Act, an 'unfair practice means any act or omission by a landlord or tenant in contravention of this Act; or a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord'.

The Act, together with the accompanying regulations, states what the unfair practices are, what the landlord and tenant must do in terms of their obligations, and what they cannot do. Find the regulations on www.theexpertlandlord.com/legislation.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Generally known as the Prevention of Illegal Eviction Act (often abbreviated to PIE), this Act sets out to prevent arbitrary evictions. In terms of the Constitution, 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions' (section 26[3]). The Act sets out the procedure to be followed in the case of such evictions. The Prevention of Illegal Eviction Act was enacted specifically to prevent situations in which landlords or property owners take the law into their own hands in order to evict unlawful occupiers, and sets out the only way to carry out an eviction legally. If the landlord or owner turns off the electricity, changes the locks on the property or physically removes the unlawful occupier and their goods from the property, they may be liable for criminal and/or civil charges.

The Prevention of Illegal Eviction Act applies to residential leases, and to all land throughout South Africa, unless the Extension of Security of Tenure Act 62 of 1997 applies. This includes any building or structure on municipal, private or state-owned land.

The Prevention of Illegal Eviction Act is used by the owner (as defined by the Act, 'the registered owner of land, including an organ of state') or person in charge of the land ('a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question'), who may approach the courts in terms of the Act.

An unlawful occupier in terms of the Act is defined as 'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, and excluding a person whose informal right to land, but for the provision of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996'. The Prevention of Illegal Eviction Act also applies where the occupation was lawful to begin with but became unlawful later.

The Extension of Security of Tenure Act 62 of 1997

This Act deals with the eviction of unlawful occupiers of rural or peri-urban land whose occupation was previously lawful, subject to certain conditions.

An occupier is defined as a person residing on land that belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding:

- a) A labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996); and
- b) A person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land themselves and does not employ any person who is not a member of their family; and
- c) A person who has an income in excess of the prescribed amount, which is R5 000.

In terms of section 2, the Extension of Security of Tenure Act applies to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including:

- a) Any land within such a township which has been designated for agricultural purposes in terms of any law; and
- b) Any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.

Section 2 concludes: 'Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.'

The Act applies to occupiers who have the necessary consent to occupy, who do not use the occupied land for commercial purposes, and whose income is less than R5 000. It applies to residential leases, and covers both owners and occupiers. The Act is also used by attorneys when applying for evictions.

The preamble to the Act states that it 'provides for measures with state assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith.'

The Extension of Security of Tenure Act distinguishes between occupiers as of 4 February 1997, and occupiers after that date. The procedures for and limitations on evictions are set out in section 9: 'Not less than two calendar months' written notice must be given of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out on ground on which the eviction is based'. The 'just and equitable' principle is invoked repeatedly.

The Consumer Protection Act 68 of 2008

The introduction of the Consumer Protection Act (often abbreviated to CPA) improved consumer rights for those transacting in South Africa.

The Consumer Protection Act applies to 'consumers', which includes all natural persons, and those entities with an annual turnover of less than R2 million. If your property is owned by an entity – that is, rather than in your personal name – and your tenant is a natural person, then the Act applies to you.

Some key areas of the Act that have particular application include the following:

- *Section 14 – provisions regarding fixed-term agreements.* Note that this provision does not apply to fixed-term agreements entered into between two juristic persons, regardless of their turnover or asset value.
 - The lease may not exceed 24 months, unless a longer period is expressly agreed to and you can demonstrate a financial benefit to the tenant in the extension.
 - The natural tenant may cancel the lease by giving 20 business days' notice, without having to prove there was breach of the agreement.
 - The natural tenant will remain liable to the landlord for any amounts up to the date of cancellation, but not to the end date of the lease agreement.
 - The landlord may impose a reasonable cancellation penalty.
 - The natural tenant must be notified that the lease will expire not more than 80 business days and not less than 40 business days before expiry of the lease.
 - Upon expiry, the lease will automatically renew on a month-to-month basis, subject only to material changes which the landlord has given notice of. The Act provides that a month-to-month renewal will apply unless the natural tenant expressly directs the landlord to terminate the agreement on the expiry date or agrees to a renewal for a further fixed term.

- *Section 22 – Plain language.* The ‘plain and understandable’ language requirement means that lease agreements and other documents between the landlord and tenant must be readily understandable by the consumers for whom the document was prepared.
- *Sections 48 and 51 – Prohibited contract terms.* A landlord is prohibited from including in their lease agreement any terms that are unfair, unreasonable or unjust, which includes terms that are excessively one-sided.
- *Section 49 – Warranties and indemnities.* This section requires a consumer’s (tenant’s) attention to be drawn to any provision in the lease agreement that
 - limits in any way the risk or liability of the landlord or any other person
 - constitutes an assumption of risk or liability of the tenant
 - imposes an obligation on the consumer to indemnify the supplier or any other person for any cause, or
 - is an acknowledgement of any fact by the consumer. This refers to clauses such as those that make the tenant liable for payment of rates, property taxes and municipal services, etc.
- *Section 45 – Letting ‘as is’.* The Consumer Protection Act confers on consumers the right to receive services that are good and free of defects. Therefore, if there is an ‘as is’ clause in your lease agreement, you will remain liable to give your tenant a property that is in good order, and to maintain the property as such.