



Legal Health and Wellness: Criminal Law

Criminal cases must follow certain rules. These rules are called criminal procedure. First there is the procedure before getting to court. This covers things like:

- Powers of the police to question people
- Powers of the police to arrest people
- Rights of arrested people
- Powers of the police to search and seize property
- What to do if you are arrested.

Police Powers

If you are driving a car, motorcycle or other vehicle the police can ask you to:

- Stop at any time and you must stop
- Give your name and address and you must give this to them
- Show your driver's licence and you must do this
- If you don't do any of these things, you can be charged.

The police can ask you to produce your ID book **at any time** and you must do this. The police can **question** anyone without arresting them. But whether a person has to answer the police's questions depends on the circumstances. The police may ask you to give your **full name and address** if they:

- Suspect you of committing a crime
- Suspect you of trying to commit a crime
- Think that you might be able to give them some information about a crime.

But you can ask the police officer for his or her identity document. If the police officer refuses, you need not give your name and address. If the police officer produces his or her ID then you must give your name and address. It is a crime not to give your name and address. You can get a fine of R2 500 or 3 months in prison if you refuse.

If the police officer asks you **any other questions** it is your right not to answer these questions. But sometimes you might feel it is safe to answer some questions so that you

can be released quickly. It is also your right to say that you will only answer other questions if your lawyer is present.

The police might ask you to go to a police station to make a statement. You have the right to refuse to go. But the police may then decide to arrest you.

You must then go to the police station with them, but you still have the right to refuse to make a statement, even if you are under arrest. You can say you will only make a statement if your lawyer is present.

The police are not allowed to assault people for not answering questions or for refusing to make a statement.

Powers of the Police to Search and Seize

You have a right to keep your body and property private. But sometimes the police need to collect evidence against criminals. So the police are allowed to search you in some cases. And they can take things away. This is called seizing the things.

There are two ways of searching and seizing property. These are:

Search with a Search Warrant

A search warrant is the legal permission for a search. It is usually signed by a magistrate. It must describe the person or the place to be searched and the things which the police will seize. The police must carry out the search by day unless the warrant says they can search at night.

The police can only search the people and property mentioned in the warrant and they can only seize the things mentioned in the warrant. If the police are about to search you or seize your property, you can **demand to see the search warrant**.

A special type of search warrant can be issued allowing the police to enter any place or premises if they think that a meeting held on the premises threatens state security, or if they think that any offence was committed or planned on the premises.

Search without a Search Warrant

The police do not need a search warrant to search if:

- You agree to let them search you
- The police have reasonable grounds for thinking that a magistrate would issue a warrant, but that the delay in getting the warrant would give you time to get rid of the evidence
- You are arrested
- The search is at a roadblock but they must still have reasonable grounds for thinking that a magistrate would issue warrant
- The police suspect that you have drugs or dagga, illegal liquor, guns or ammunition or stolen crops or animals with you

- The police reasonably suspect you have information that can help an investigation. Then they can enter your property to question you, but they must always first ask for your consent to search or enter your property.

The police can use force to enter premises if you refuse to allow them in and they asked you if they could enter. A policeman can only search men NOT women. Women can only be searched by policewomen or any other woman that the police ask to do the searching. If your premises are unlawfully searched or if you are abused during a search, you can sue the Minister of Safety and Security.

If the police get evidence against you by going against any of your rights, the court may refuse to hear that evidence.

Powers of the Police to Arrest

The law says that the police can only arrest you if:

- They want to charge you and take you to court
- If you are a suspect in a police investigation.

An arrest for any other reason is unlawful. For example, if the police arrest you just to scare you, this is unlawful. An arrest is also unlawful if the police do not obey the rules about arrest.

If the police arrest you, you can usually pay bail money to the police or the court, and go home until the date of your court case.

Bail

Arrest: General Rules

There are two ways in which the police can arrest you:

- With a warrant of arrest
- Without a warrant of arrest

Arrest with a Warrant

A warrant of arrest is a piece of paper that says the police have the power to arrest you and take you to court.

Usually a magistrate signs the warrant. But a police officer of the rank of lieutenant or higher can also sign an arrest warrant.

The police must show you the warrant if you ask to see it. And they must give you a copy of the warrant if you ask for a copy.

Arrest without a Warrant

Sometimes the police can arrest you without a warrant. Here are some examples of when this can happen:

- If you escape, or try to escape, after the police arrested you earlier
- If the police catch you while you are committing a crime
- If the police think you committed a serious crime like murder, rape, serious assault, housebreaking, and so on
- If the police think you committed a drug or liquor offence
- If the police find you at night, doing something that makes them think that you are about to commit a crime or have already committed a crime
- If the police think you have not paid a fine which a court ordered you to pay
- If you try to stop the police from doing their duty
- If the police think you have guns or ammunition without a licence
- If you are carrying any other dangerous weapon and you can't give a good reason to the police
- If the court said you must go to prison for certain periods, for example every weekend, and you do not go
- If the police think you broke the conditions of a suspended sentence.

Making a Lawful Arrest

There are three things the police must do to make an arrest lawful:

- **The police must tell you that you are under arrest.**

Sometimes the police ask you to go with them to the police station without saying that they are arresting you. If you go with them voluntarily, then they do not have to arrest you. It is your right not to go with them unless they arrest you.

- **The police must have physical control over you when they arrest you.**

This means the police must make sure you can't get away. If you do not try to run away, the police do not have to use force to control you. But if you do try to run away, the police can use reasonable force to keep control of you, in other words only as much force as is necessary.

- **The police officer must tell you why you are under arrest.**

This means the police must tell you what offence they think you have committed.

But if the police catch you while you are committing an offence, then they do not have to give you details about why they are arresting you, because you already know why.

Unlawful Arrest

Here are some examples of unlawful arrest:

- If there was no good reason to suspect that you committed an offence
- If the purpose of the arrest was not to charge you but just to scare you
- If the police officer did not tell you that you were under arrest, and you were not caught while committing an offence.

Using Force to Make an Arrest or to Stop You Escaping from Arrest

The law says that when the police make a **lawful** arrest, they can use force if you try to fight or run away. The law says that the amount of force must be just enough to stop you fighting or running away.

The Criminal Procedure Act includes the right for police (or someone entitled to make an arrest) to 'shoot to kill' in certain situations. Section 49 (1) of the Act deals with the use of force to carry out an arrest. Section 49 (2) says that 'deadly force' may be used in certain circumstances to carry out an arrest. The 'shoot to kill' clause was challenged in the constitutional court because it was held to go against a person's right to life [section 11] (as well as their right to human dignity [section 10] and bodily integrity [section 12]).

In the case of *S v Walters* (May 2002) Mr Walters and his son had been charged with murder after they shot a suspect running away from their bakery one night in Umtata. The state (the prosecution) said Mr Walters had no right to kill a suspect in the process of carrying out the arrest.

The Constitutional Court analysed the right to use force, including the use of a firearm, given by section 49 to people making an arrest. The judges of the court had to look at balancing peoples' right to life, dignity and bodily integrity and the interests of a just criminal system.

The Court found that section 49(1) must be interpreted to exclude the use of a firearm unless:

- The suspect is threatening to harm the person arresting him or her or someone else, or
- The suspect is suspected of having committed a serious crime involving or threatening harm to a person.

The Court found that the provisions in section 49(2) allowing the use of 'deadly force' for arrests were too wide and were therefore unconstitutional. For example, using 'deadly force' in the case of a person caught shoplifting would not be justifiable.

The court summarised the main points regarding the use of force to make arrests under this section:

- Force can only be used where it is necessary in order to carry out the arrest
- Where force is necessary, then the least amount of force to carry out the arrest must be used

- When deciding what degree of force is reasonable and necessary, all the circumstances must be taken into account including:
- The threat of violence from the suspect to the arrestor or someone else, and
- The nature and circumstances of the offence committed by the suspect (the force must be proportional to the offence)
- Shooting a suspect for the sole purpose of making an arrest is only possible in limited circumstances, for example when:
 - There is a threat of violence from the suspect to the arrestor or someone else
 - The suspect is suspected of having caused someone serious harm
 - There is no other reasonable way of carrying out the arrest, at that time or later
 - The arrestor is acting in self-defence or in defence of any other person

Parliament has passed a new section 49 but this has not yet been put into operation by the President.

Unlawful Use of Force

Here are some examples of unlawful use of force:

- If the arrest itself is unlawful, any force that the police use is unlawful
- If you did not try to fight or run away, and the police used force in making the arrest
- If the police used more force than necessary.

Where there has been unlawful use of force, a person can lodge a complaint with the *Independent Complaint's Directorate (ICD)*.

The Independent Complaint's Directorate (ICD) is an independent body set up to investigate serious complaints about police misconduct. Cases involving unlawful use of force can be reported to the ICD. If a person was killed by the police and it was unlawful use of force you can take the following steps:

- Contact the ICD and get hold of a lawyer without delay. The ICD will investigate the case.
- In the meantime, you can get statements about what happened from any witnesses to the killing. Keep these statements for the lawyer and ICD. Statements can be made directly to the ICD investigator. It is better if no-one makes a statement to the local police until they have spoken to the lawyer or ICD investigator.
- Ask the lawyer to make sure as quickly as possible that a private doctor representing the family of the dead person examines the body.
- When all statements have been typed and signed, and handed to the ICD, a criminal charge may be investigated. If you know the names of the killers, there is a chance that someone will be charged.

- If there is no charge, an inquest should be held. This is a special kind of trial where a magistrate decides what the cause of death was and whether anyone is to blame. If the killers are identified by name during the inquest, they should be criminally charged after the inquest.
- Whatever happens with the ICD investigation and criminal charges, you can still make a civil claim against the Minister of Safety and Security.

Arrest by an Ordinary Person

This is also called a **citizen's arrest**. Any ordinary person, for example, a farmer, can arrest you, without a warrant of arrest, in these cases:

- If you committed a serious offence, or the person suspects that you committed a serious offence
- If the person is reasonably sure that you committed an offence and you try to run away when he or she tries to arrest you
- If you are fighting
- If the person thinks you went into any fenced land, or a kraal shed or stable, intending to steal crops or animals
- If the person finds you with some animals or crops which he or she suspects that you stole, and you can't explain why you have them
- If the person is in charge of premises, or is the owner, he or she can arrest anyone who commits an offence on the premises

You are also an 'ordinary person'. You can arrest other people in the above cases too. For example, someone snatches your bag in the street. You chase after them and catch them. You can lawfully arrest the person.

Rights of Arrested People

South African Constitution and Bill of Rights, Section 35: Arrested, detained and accused persons

If you are arrested under the ordinary laws you have these **rights**:

- From the time of arrest, you have a right to see your lawyer. The police sometimes tell you that you can only see your lawyer after you have been charged, but this is not what the law says.
- The police officer must take you to a police station as soon as possible, unless the warrant of arrest says they must take you to some other place.
- You do not have to answer any questions, except you must give your name and address. It is best not to say anything else to the police until you speak to your lawyer.
- While you are locked up in a cell, you have the rights to:

- Have family visits
 - See a minister of religion (usually this is a minister working for the government)
 - See a doctor (usually this is a government doctor, the district surgeon or a prison doctor)
 - Wear your own clothes
 - Exercise for at least one hour a day in the open air
 - Write and receive letters
 - Get enough properly prepared food and drink.
- The police must take you to court within 48 hours after your arrest.

If the 48 hours ends after 4 pm on a weekday, then they must take you to court on the next day, before 4 pm. If the 48 hours ends on a weekend or a public holiday, then they must take you to court on the first court day, before 4 pm. This is usually the next Monday, unless the Monday is a public holiday. If this does not happen, then it is unlawful for the police to keep you in prison. You can sue the police.