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Chapter 1
Arrest and bail

1.1 Arrest

Section 38 of the Criminal Procedure Act 51 of 1977 (the CPA) provides for arrest, summons, written notice and indictment as methods for securing attendance of accused persons in court.

As a general rule, the method preferred by the police is arrest, which involves the taking of a person into custody. In other words, a person is deprived of his/her freedom.

1.2 Bail

An attorney could get a call from a client, at any time, and hear the client saying "I have been arrested, get me out of jail". As a general rule, the attorney would be involved in an "after hours bail" or "prosecutor's bail" as many such calls occur after the 'court day', namely the hours a court sits (from 9:00 till 16:00 as defined in section 50(2)(*b*) of the CPA).

Section 59A of the CPA provides for the prosecutor to authorise the release of an accused person on bail for offences listed in Schedule 7 of the Act. These offences are the following:

- ☐ public violence;
- ☐ culpable homicide;
- ☐ bestiality;
- ☐ assault involving the infliction of grievous bodily harm;
- ☐ arson;
- ☐ housebreaking, whether under the common law or a statutory provision, with intent to commit an offence;
- ☐ malicious injury to property;
- ☐ robbery, other than a robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000,00;
- ☐ theft and any offence referred to in section 264(1)(*a*), (*b*) and (*c*), if the amount involved does not exceed R20 000,00;

- ☐ any offence in terms of any law relating to the illicit possession of dependence-producing drugs;
- ☐ any offence relating to extortion, fraud, forgery or uttering if the amount involved in the offence does not exceed R20 000,00; and
- ☐ any conspiracy, incitement or attempt to commit any offence listed in this Schedule.

The attorney needs to contact the investigator in the matter to ascertain the nature of the allegations against the client, and should also canvass the investigator's attitude towards the granting of bail. Once the attorney is satisfied that the offence falls within the ambit of Schedule 7, he/she may contact the bail prosecutor to arrange a time to meet at the court, and arrange with the police to have the client brought to court.

The amount of bail and conditions set by the prosecutor may later be altered by the court. See section 59A(5) of the CPA.

1.3 Bail hearings

The effect of bail is that a person who is in custody is released on payment of the amount set as bail. When the attorney applies for bail which is not opposed and does not relate to a Schedule 5 or 6 offence, then he/she may address the court from the side bar without the client giving evidence.

The attorney is obliged to inform the court of his/her client's previous convictions (if any) or any pending cases and whether the client has been released on bail in respect of those charges. See section 60(11B)(*a*)(i)(ii) of the CPA. Failure to disclose previous convictions or pending cases is a criminal offence. See section 60(11B)(*d*).

The factors the attorney may wish to bring to the attention of the court may include the following:

- ☐ the address of the accused and the period of time he/she has resided at that address;
- ☐ his/her family ties;
- ☐ his/her employment;
- ☐ his/her assets;
- ☐ suitable reporting conditions;
- ☐ the amount of money available for bail;
- ☐ the fact that the client is not a flight risk;
- ☐ the surrender of travel documents;
- ☐ the fact that the client has been instructed not to interfere with witnesses or the investigation;
- ☐ the attitude of the state or investigating officer towards bail; and
- ☐ any other relevant factors.

It is important that the legal representative be acquainted with the provisions of section 60(11)(*a*) and (11)(*b*) of the CPA. Section 60(11)(*a*) refers to offences in Schedule 6, whilst section 60(11)(*b*) refers to offences in Schedule 5.

These provisions place an onus on the accused (in the case of section 60(11)(*a*)) to adduce evidence which satisfies the court that exceptional circumstances exist, which, in the interests of justice permit his/her release, and (in the case of section 60(11)(*b*)) to adduce evidence which satisfies the court that the interests of justice permits his/her release.

Adducing evidence as contemplated above involves *viva voce* evidence or evidence by way of affidavits. It would appear that the legislature's intention in section 60(11)(*a*) and (*b*) was to ensure that the courts were more cautious and circumspect when dealing with bail matters pertaining to persons charged with serious offences. While it may be argued that it is difficult to be admitted to bail under these provisions, bear in mind that it is not impossible to be granted bail.

The CPA mentions various factors that a court may take into account to determine whether bail should be granted or not. Remember that bail does not have a punitive effect and that this fact should be argued *vis-à-vis* the right to be presumed innocent as provided for in section 35(3)(*h*) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

Section 60(4)(*a*)–(*e*) of the CPA lists factors that the court may consider to find that the interests of justice do not permit the release of the applicant on bail. Note also that section 60(5)–(9) enumerates various factors that can be considered to show that the factors mentioned in section 60(4)(*a*)–(*e*) have been established.

The focus at the bail stage is to decide whether the interests of justice permit the release of the applicant pending trial, which entails, in the main, protecting the investigation and prosecution of the case against hindrance.

In *S v Essack* 1965 (2) SA 161 (D), it was held that the presumption of innocence operates in favour of the applicant, even where there is a strong *prima facie* case against him, but if there are any indications that the proper administration of justice and the safe-guarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be justified in refusing to allow bail.

Section 60(11)(*a*) of the CPA makes reference to "exceptional circumstances". Exceptional circumstances can refer to unusual or different circumstances and may relate to the nature of the offence or personal circumstances. In *S v H* 1999 (1) SACR 72 (W), it was held that the words "exceptional circumstances" must be given their ordinary meaning, and in *S v Jonas* 1998 (2) SACR 677 (SE), it was held that where the state's case is weak or non-existent, this may be considered an exceptional circumstance.

In *S v C* 1997 (2) SACR 721 (CPD), the Court ruled that section 60(11)(*a*) of the CPA should not be interpreted to mean that the procedure is punitive. The section merely means that the court should exercise exceptional care in assessing usual circumstances.

A caution must be sounded: an applicant, when electing to adduce evidence by way of affidavit, runs a real risk in circumstances where the onus is upon him/her, to not subject him-/herself to cross-examination. See *S v Tshabalala* [1998] All SA 411 (C).

The consideration of the seriousness of the circumstances, such as that the offence was planned and pre-meditated, as well as the motivation for the action, are not only relevant but will constitute aggravating factors in the consideration of an appropriate sentence. They are therefore relevant in an assessment of whether the applicant will attempt to evade trial. See *S v Yanta* 2000 (1) SACR 237 (T) at 247.

In the unreported decision of *S v Duncan Armugam and Two Others*, case no 10841/2008, delivered on 5 September 2008 in the High Court in Durban by Madam Justice Murugasen, the Court stated that "while it may be true that the state case is reliant on witnesses who may be termed accomplices in terms of section 204 of the Act, there is at the stage of bail proceeding no misdirection if the magistrate includes the existence of affidavits and statements from such witnesses in his evaluation of the case against the Appellants".

In a bail application, the enquiry is not really concerned with the question of guilt; that is the task of the trial court. The court seized with the bail application is concerned with the question of possible guilt only to the extent that it may have a bearing on where the interests of justice lie in regard to bail. See *S v Dlamini* 1999 (4) SA 623 (CC).

Prior to a trial, the court may take into account the strength of the state's case against the applicants when deciding whether the applicants would evade trial, be a fugitive from justice, or tamper with evidence if released.

Also note the following:

- ☐ Section 12(1)(*a*) of the Constitution provides that everyone has the right not to be deprived of freedom arbitrarily or without just cause
- ☐ Section 35(1)(*f*) of the Constitution stipulates that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.
- ☐ Section 60(1) of the CPA provides for the release of a person on bail if the court is satisfied that the interests of justice so permit.

It would therefore appear that the concept of 'interest(s) of justice' is of paramount importance when applying for bail.

Please note that when there is an onus on the accused in respect of Schedule 5 and 6 offences, it is irregular for the state to lead the evidence of the investigating officer first. See *S v Porthen* 2004 (2) SACR 242 (C). Also be aware that where the accused is indicted on a Schedule 6 offence, a court has the authority to grant bail only when the accused has discharged the onus on him/her to prove, on a balance of probabilities, the existence of exceptional circumstances, and that the interests of justice will not be prejudiced. See *S v Mataboge and Others* 1991 (1) SACR 539 (B).

In addition, note that the court is not called upon to weigh proven facts in bail applications; it is called upon to speculate on what could happen in future. Note too that bail applications are neither civil nor criminal proceedings; consequently the rules of evidence applied in trial actions are not strictly adhered to.

The role played by the presiding officers in bail applications is totally different from the one they play in trial actions. They are not precluded from descending into the arena. In fact, they are expected to get actively involved in the proceedings. See the unreported decision of *Rolani and Others v S* (case no A52/99) as per Jafta AJ.

In *S v Schietekat* 1998 (2) SACR 707 (C) at 713h–714a, Slomowitz AJ stated:

> Bail proceedings are *sui generis* . . . the state is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take into account whatever information is placed before it in order to form what is essentially an opinion or value judgement of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the state in order to decide whether the accused has discharged the onus of showing "exceptional circumstances exist which in the interest of justice permits his release".

In *S v Mabena and Another* 2007 (1) SACR 482 (SCA), the Supreme Court of Appeal (the SCA) held that bail was not competent in the absence of a proper enquiry being made in terms of the CPA for Schedule 6 offences. The Court said "thus far there has been no such enquiry: justice according to law failed completely. In the absence of the enquiry that is required by law the judge had no legal authority to grant bail and consequently the order was a nullity".

Where the state applies to remand the accused for a period of seven days, the defence attorney/legal representative/prosecutor should challenge the state as to why it wishes to do so.

Section 50(6)(*d*) of the Act provides that:

> The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail applications to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if:
>
> (i) The court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application
>
> (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to it in section 60(11A)
>
> (iii) Deleted

continued

> (iv) It appears to the court that is necessary to provide the state with a reasonable opportunity to –
>
> (*aa*) procure material evidence that may be lost if bail is granted; or
>
> (*bb*) perform the functions referred to in section 37 or
>
> (v) It appears to the court that is necessary in the interest of justice to do so.

Bear in mind that the word "may" (not "shall") is used in this section, so the court can be persuaded to reduce the period of seven days.

The granting or refusal of bail may be considered as the triad of bail, namely:

- ☐ the interests of the accused;
- ☐ the interests of society; and
- ☐ the interests of justice.

The accused's liberty or freedom is an important right, however, and should not be taken away lightly. Nevertheless, the right to liberty has to yield to the interests of justice. Therefore, when making a bail application, the defence attorney should attempt to persuade the court that the release of the accused will not be detrimental to the interests of justice.

The exact meaning of the concept of the "interest(s) of justice" is difficult to define; however, the author believes that it is a subjective judgement call about what is, in effect, a value judgement of what is fair and equitable, having regard to all the circumstances.

Ultimately, the decision to grant bail is a discretionary one, which must obviously be exercised in a judicious manner.

The court also has the right to call witnesses as it deems fit. See section 60(3) of the Act, which provides that:

> . . . if the court is of the opinion that it does not have reliable or sufficient information at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.