

# NOTES

## Criminal Procedure 1 CMP201-6

### 1. A BASIC INTRODUCTION TO CRIMINAL PROCEDURE

#### 1.1. The place of the law of criminal procedure in the legal system

The **law of criminal procedure** is the entire body of rules that prescribes the procedure to follow in punishing criminals by virtue of state authority.

Criminal procedure must, subject to the supremacy of the Constitution:

- provide a process to enforce criminal law;
- allocate power to state officials; and
- articulate fair process norms with reliable outcomes.

LAW		
	Public law	Private Law
<b>Substantive law</b> Legal rules determining the rights and duties of individuals and the state	<ul style="list-style-type: none"> <li>• Constitutional law</li> <li>• Administrative law</li> <li>• International law</li> <li>• Criminal law</li> </ul>	<ul style="list-style-type: none"> <li>• Family law</li> <li>• Property law</li> <li>• Law of persons</li> <li>• Law of delict</li> </ul>
<b>Adjectival law</b> Procedures to enforce substantive law by proving and judging the -	Offence <ul style="list-style-type: none"> <li>• <u>Public/Criminal procedure</u> law</li> <li>• Law of evidence</li> </ul>	Instituted Claim <ul style="list-style-type: none"> <li>• Civil procedure law (used in public procedure, eg <i>mandamus</i>, interdict)</li> <li>• Law of evidence</li> </ul>

#### 1.2. Crime control and due process

Criminal procedure is a system which seeks to incorporate certain fundamental values and balance two conflicting social interests, namely individual freedom and effective crime control. This can be best explained in terms of the following models:

Crime Control Model	Due Process Model
Regards the repression of criminal conduct as the most important function of criminal procedure.	Regards the adherence to rules which duly and properly acknowledge individual rights at every stage of the criminal process as the only ground on which a conviction and sentence can be secured.
<b>Not rival models!</b> Both seek to vindicate the goals of substantive criminal law	

No real-life systems conform exactly to one specific model, an appropriate balance must be secured, and there are certain tensions between the underlying values of the two models. Case law illustrates the tension between the two models:

#### Naidoo 1998 (1) SACR 479 N

The police had obtained incriminating evidence in breach of the constitutional right to privacy. This evidence was excluded on the basis of Section 35(5) and resulted in acquittal of the accused despite the fact that the robbery in question was (at that stage) the 'biggest robbery' in the history of South Africa.

Our system, essentially weighted in favour of due process in the spirit of the Bill of Rights, does not neglect the rights of the victims of crime; it merely seeks to ensure that vindication of the rights of victims should not trigger or lead to further injustices against accused by preventing abuse of power and putting practical limitations on state power in place.

Crime control and due process are not the sole models in criminal process and we can also distinguish the –

- punitive model, which affirms the retributive importance of punishment and the need for the rights of victims to be considered along with the rights of the accused; and
- non-punitive model, which attempts to minimise the pain of both victimisation and punishment by stressing crime prevention and restorative justice.

Restorative justice involves a process that seeks to avoid the invocation of the formal criminal sanctions and aims to reach a non-punitive resolution of a dispute. The co-operation of the offender, the victim and members of the community are required to secure restorative justice.

The role of victims are confined to that of ordinary witnesses and they often feel alienated from the process worsened by factors like repeated remands granted to accused, inadequate pre-trial communication with victim, poor investigation and presentation of the case by over-worked officials. Some statutory provisions promote victim participation and some aims at protecting the victim.

### 1.3. Constitutional criminal procedure

Constitutional supremacy entails that it is now possible to have legislation and common law rules which conflict with the Constitution set aside. In the Bill of Rights:

- the criminal procedural provisions usually have vertical operation (i.e. state as power-wielder and the subject);
- constitutional criminal procedural provisions are usually stated negatively prohibiting the state from infringing certain fundamental rights;
- it is recognised that most rights are not absolute and may be limited;
- requires a strong and independent judiciary, whose judges may sometimes go against popular sentiment in interpreting the Bill of Rights.

#### **Section 35 of Constitution - Arrested, detained and accused persons**

- (1) Everyone who is arrested for allegedly committing an offence has the right-
  - (a) to remain silent;
  - (b) to be informed promptly-
    - (i) of the right to remain silent; and
    - (ii) of the consequences of not remaining silent;
  - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
  - (d) to be brought before a court as soon as reasonably possible, but not later than -
    - (i) 48 hours after the arrest; or
    - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
  - (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
  - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
  - (a) to be informed promptly of the reason for being detained;
  - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
  - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
  - (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
  - (f) to communicate with, and be visited by, that person's -
    - (i) spouse or partner;
    - (ii) next of kin;
    - (iii) chosen religious counsellor; and
    - (iv) chosen medical practitioner.
- (3) Every accused person has a right to a fair trial, which includes the right-
- (a) to be informed of the charge with sufficient detail to answer it;
  - (b) to have adequate time and facilities to prepare a defence;
  - (c) to a public trial before an ordinary court;
  - (d) to have their trial begin and conclude without unreasonable delay;
  - (e) to be present when being tried;
  - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
  - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
  - (i) to adduce and challenge evidence;
  - (j) not to be compelled to give self-incriminating evidence;
  - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (o) of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

### The presumption of innocence

Criminal procedure does not deal with the prosecution of criminals, but of –

- suspects, generally referring to persons who have not yet been charged; and
- accused, referring to persons who have been charged.

Due to the presumption of innocence, every person is regarded as innocent until properly convicted by a court of law. A person may be morally or factually guilty of a crime in the public's view, but that does not mean that he will or can be proved to be legally guilty and only legal guilt counts.

The accused do not need to prove his innocence, the onus of proof rests on the prosecution who must prove his guilt beyond a reasonable doubt. If a single element is not proved by the prosecution, the accused cannot be convicted and can even be discharged at the end of the State's case. If the State does succeed in proving a *prima facie* case and the accused does nothing to disturb that case, *prima facie* proof may harden into proof beyond reasonable doubt and the accused may be convicted because there is nothing which produces a doubt in the court's mind

about the guilt of the accused. If the accused can make the court doubt reasonably that one of the required elements has been proved, he must be acquitted.

Even if the State’s version is more probable than the accused’s, he will be acquitted if there is a reasonable possibility that his version may be true and it is not even necessary for the court to believe the accused.

**The right to silence**

Related to the presumption of innocence is the rule that an accused can never be forced to testify, also called his privilege against self-incrimination. The Constitution guarantees the right of every arrestee to remain silent and not to be compelled to make a confession or admission which could be used in evidence against him, as well as the right of every accused person to remain silent and not to testify during the proceedings. The interrelatedness of the presumption of innocence and the right to silence is apparent in Section 35(3)(h) and was explored in:

**Zuma 1995 (4) BCLR 401 (A)**  
 Section 217(1)(b)(ii) of the Criminal Procedure Act requiring an accused, in certain circumstances, to prove that a confession was not freely and voluntarily made, was unconstitutional.

Presumption of innocence is the basis of the rule that the onus in criminal cases should always be on the State. If an accused is unrepresented, he should at all stages in the process be informed of his rights and options, as well as their implications, and he should not be penalised for exercising those rights, otherwise the rights in reality amount to nothing.

A person who exercises his right to silence at his trial should accordingly not be penalised for the exercise of the right. No adverse inference should be drawn against his decision not to testify, for 2 reasons:

- there may be a multitude of reasons why he does not wish to testify
- no such conclusion could logically be drawn to fill the gaps in the State case (if an element of a crime has not been covered by the State’s *prima facie* case, the accused’s silence can’t fill that gap).

However, the accused’s defence can be severely or fatally damaged by his silence if the State has proved a *prima facie* case against the accused and the accused has not raised a reasonable doubt on any of the elements. The *prima facie* case hardens into sufficient evidence for a conviction. This only happens because the accused did not disturb the State’s case and not because the silence of the accused added anything positive to the State’s case.

**1.4. Accusatorial and inquisitorial procedures, and a brief history of South African criminal procedure**

Parties	Accusatorial	Inquisitorial
Judicial officer	Judge’s role is that of a detached umpire, who should never enter the arena of the fight between the prosecution and the defence for fear of his becoming partial or losing perspective because of the dust.	Judge is the master of the proceedings in that he actively conducts and even controls the search for the truth by dominating the questioning of witnesses and the accused.
Prosecution	The police are the primary investigative force. They pass the collected evidence on to the prosecution who then becomes master of the proceedings ( <i>dominus litis</i> ).	After arrest, the accused is questioned primarily by the investigating judge, not the police.
Defence	In court, the trial takes the form of a contest between 2 theoretically equal parties who do the questioning.	In the trial, the presiding judge does the questioning, not the counsel for the prosecution or defence.

South African criminal procedure has basically been accusatorial, but there are inquisitorial elements (eg the procedure of questioning under Section 115 – plea of not guilty; part of Section 112 – questioning pursuant to a plea of guilty).

### 1.5. Sources of the South African criminal procedure

- The Constitution
- The Criminal Procedure Act 51 of 1977 (“CPA”)
- Other legislation
- Common-law rules
- Case law

### 1.6. Remedies

It is in society’s interests that the police should act lawfully and that meaningful control should be exercised over the actions of the executive, therefore the powers of the authorities are subjected to limitations. The rights of the suspect are maintained by a number of sanctions, such as:

- criminal sanctions on the ground of assault;
- rules of evidence regarding admissibility of admissions;
- judicial criticism of police action;
- newspaper reporting and editorial comment;
- internal disciplinary measures by the police;
- public protest;
- **The writ of *habeas corpus* (or *interdictum de libero homine exhibendo*)**

An important remedy to obtain judicial review of police action and thus to protect the subject against unlawful deprivation of his liberty. The court is asked for a remedy that the respondent (Minister / chief warden) produce the body of the detainee before the court at a certain date and time. This order is coupled with a rule *nisi* that the respondent must show reason why the detainee should not be released. *Prima facie* reasons for believing that the detention is wrongful must be alleged.

- **Civil action for damages**

An action for damages (eg on the ground of wrongful arrest, wrongful detention, physical injury) is an example of delictual liability which may arise in the course of the criminal process and which may be used by suspects to compensate them for any abuse they may have suffered.

- **Interdict**

An order of court whereby a person is prohibited from acting in a certain way to limit or prevent harm or damage, it may even be obtained where harm has not yet occurred but is threatening.

- **Mandamus**

It is a positive order that a functionary perform his duties (eg furnish the accused with proper particulars relating to the charges) and is the reverse of an interdict.

- **The Exclusionary Rule**

Section 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights, must be excluded if the admission of that evidence would render the trial unfair or be detrimental to the administration of justice. The exclusion is, however, not automatic, but is contingent on a finding that admission would render the trial unfair and the courts thus have a discretion to exclude or admit it. It aims to deter unlawful police conduct in the pre-trial criminal procedure by rendering inadmissible in a court any evidence which was obtained by state officials by unlawful means.

- **Informal Remedies**

An informal way of obtaining relief is to resist arrest or to escape from unlawful custody, being risky in practice.

- **Constitutional mechanisms**

Various mechanisms for promotion of the maintenance of human rights and legality as against overbearing state action are contained in the Constitution.

## 2. CRIMINAL COURTS OF THE REPUBLIC

### 2.1. Constitutional Court

Seated in Johannesburg and consisting of a Chief Justice, Deputy Chief Justice and 9 other judges, it is the highest court in all constitutional matters. It may decide only constitutional matters to decide whether issues are constitutional or not. It must also confirm constitutional decisions made by the Supreme Court of Appeal, High Court, etc before they have force.

#### Section 167 of Constitution - Constitutional Court

- (4) Only the Constitutional Court may –
- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
  - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
  - (c) decide applications envisaged in section 80 or 122;
  - (d) decide on the constitutionality of any amendment to the Constitution;
  - (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
  - (f) certify a provincial constitution in terms of section 144.

### 2.2. Superior Courts

#### 2.2.1. The Supreme Court of Appeal

Seated in Bloemfontein and consisting of a President, a Deputy President and the number of judges of appeal determined in terms an Act of Parliament, it decides appeals in any matter. It is the highest court of appeal except in constitutional matters and 3 to 5 judges usually hears a criminal appeal.

#### 2.2.2. The High Court

Consists of 6 provincial divisions, 3 local divisions and the High Courts of Bophuthatswana, Ciskei, Transkei and Venda. Local circuit divisions may also be instituted in all the divisions. A Judge President is appointed for each division of the High Court, except for the High Courts of Ciskei, Transkei and Venda, and the number of judges differs for each division.

### 2.3. Lower Courts

Any court established under the provisions of the Magistrates' Courts Act

#### 2.3.1. The Magistrates' Court

Instituted for districts and consists of Chief Magistrates, Magistrates of District Court Magistrates.

#### 2.3.2. The Regional Courts

Instituted for regional divisions and consists of Regional Court Presidents or Regional Court Magistrates.

#### 2.3.3. Periodical Courts

Magistrates' Courts which sit at regular intervals at places other than the seats of fixed permanent district courts and performs the same function in large and sparsely populated areas as circuit courts in the High Court.

### 2.4. Jurisdiction

- |                                 |   |                                       |
|---------------------------------|---|---------------------------------------|
| Jurisdiction of Criminal Courts | ☞ | Appeal jurisdiction                   |
|                                 | ☞ | Jurisdiction in respect of offences   |
|                                 | ☞ | Territory                             |
|                                 | ☞ | Punishment                            |
|                                 | ☞ | Validity of the provisions of any Act |

### 2.4.1. Appeal jurisdiction

- **The Supreme Court of Appeal**

- Jurisdiction to hear and determine an appeal against any decision of a high court.
- Appeal ≠ automatic - Leave to appeal must first be sought from the High Court.

**Section 333 of CPA - Minister may invoke decision of Appellate Division on question of law**

Whenever the Minister of Justice has any doubt as to the correctness of any decision given by any superior court in any criminal case on a question of law, or whenever a decision in any criminal case on a question of law is given by any division of the Supreme Court which is in conflict with a decision in any criminal case on a question of law given by any other division of the Supreme Court, he may submit such decision or, as the case may be, such conflicting decisions to the Appellate Division of the Supreme Court and cause the matter to be argued before that Court in order that it may determine such question of law for the future guidance of all courts.

**Ex Parte Minister of Justice: In Re R v Bolon 1941 AD 345**

The Minister referred a question of what degree of proof was required from an accused when a statute stated that the onus was on the accused to the SCA and it held that it was the same as in a civil trial (discharge the onus on a balance of probabilities)

- **Provincial divisions of the High Court**

- Jurisdiction to hear and determine appeals and reviews in respect of criminal matters emanating from lower courts.
- A 'full court' (ie, 3 judges) has appellate jurisdiction to hear an appeal from a single judge's decision of the High Court, if the matter does not require the attention of the Supreme Court of Appeal.

- **Local divisions of the High Court**

- WLD has the same appellate jurisdiction as a provincial division.
- The other local divisions have no appellate jurisdiction.

### 2.4.2. Jurisdiction in respect of offences

- **The Supreme Court of Appeal**

Act as court of appeal only, except in case of contempt of court = may impose sentence.

- **Provincial and local divisions of the High Court**

Original jurisdiction in respect of all offences.

- **District court**

Jurisdiction to try all crimes except treason, murder and rape.

- **Regional court**

Jurisdiction to try all crimes except treason.

### 2.4.3. Jurisdiction in respect of offences committed on South African territory

- **The Supreme Court of Appeal**

Jurisdiction to hear an appeal against any judgment of a High Court in South Africa.

- **Provincial divisions of the High Court**

Original jurisdiction in respect of all offences committed within their respective areas. This rule has been extended in the following respects:

- **Hull 1948 (4) SA 239 (C):** One division has jurisdiction to put into effect a suspended sentence imposed by another division or Magistrates' Court.

- **Civil Aviation Act:** An offence is deemed to have been committed in any place the accused happens to be.

- **Fairfield 1920 CPD 279:** If an Act creates an offence and confers jurisdiction merely on a lower court in respect of such offence, a high court is not excluded from hearing the trials.

- **Section 111 of CPA:** Empowers the National Director of Public Prosecutions to order a trial in a court within the area of a Director of Public Prosecutions although the offence was committed within the area of another director. **Section 22(3) of Act 32 of 1998** states nearly the same if it is in the interest of the administration of justice.

- **Local divisions of the High Court**

Area of jurisdiction of each local division includes a number of magisterial districts. In the areas of jurisdiction of local divisions, the provincial divisions have concurrent jurisdiction.

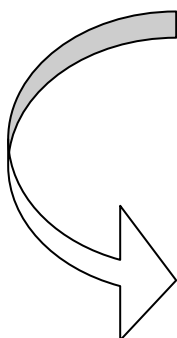
- **Regional courts and district courts**

- **Summary trial**

Here the accused is charged in the Magistrates' Court and this court itself decides whether he is guilty. Section 90 of the Magistrates' Court Act provides that district or regional courts have jurisdiction to hear trials in respect of offences committed within the district or regional division. This principle has been extended as follows:

1. When a person is charged with any offence –
  - (a) committed within the distance of 4km beyond the boundary of the district, or regional division; or
  - (b) committed in or on a vessel or vehicle on a voyage or journey, any part whereof was performed within a distance of 4km from the boundary of the district or regional division; or
  - (c) committed on board a vessel on a journey upon a river within South Africa and such journey or part thereof was performed in the district or regional division or within 4km thereof; or
  - (d) committed on board a vessel on a voyage within the territorial waters of South Africa and the said territorial waters adjoin the district or regional division; or
  - (e) begun or completed within the district or regional division, such person may be tried within the district or regional division, as if he had been charged with an offence committed within the district or regional division.

**4km Rule!**



This rule applies if it is an offence under the common law, and probably also if it is an offence in terms of statutory law operative in both districts. This 4km rule only applies within South Africa and not to crimes committed outside our border, but which fall within 4km of our borders.

2. Where it is uncertain in which of several jurisdictions an offence was committed, it may be tried in any of such jurisdictions.
3. A district or regional court may try an offence if the act, omission or even an element of the offence was committed in that district or regional division.
4. Any person charged with theft or receiving property knowing it to be stolen, etc, may be tried in any district or regional division, where he had part or all of the property in his possession.
5. A person charged with kidnapping, child-stealing or abduction may be tried in any district or regional division through or in which he conveyed, concealed or detained the victim.
6. A statutory provision may grant a Magistrates' Court jurisdiction in respect of an offence committed beyond the local limits of the district or regional division.



7. Where an accused is alleged to have committed several offences in different districts falling within the Director of Public Prosecution’s area, he may order in writing that all the matters be heard in one Magistrates’ Court in his area.
  8. If there are a number of accused, the Director of Public Prosecutions may order in writing that an accused be tried in a district or regional division in his area, to avoid excessive inconvenience or disturbance of a particular area.
  9. In terms of Section 110(1) of the CPA, if a person is, as far as territorial jurisdiction is concerned, wrongly charged before a particular court, and fails to object timeously, such court will acquire jurisdiction.
  10. In terms of Section 18 of the Aviation Act, if an offence is committed on a South African plane, the offence is deemed for purposes of criminal jurisdiction to have been committed in any place the accused happens to be.
  11. In terms of Section 111 of the CPA, the National Director of Public Prosecutions has the power to move a trial from one Director of Public Prosecutions’ area to another.
- o **Preparatory examination**  
 There is a hearing in which the accused is not tried and the Magistrate does not judge whether he is guilty or not guilty, but only hears the evidence which is then sent to the Director of Public Prosecutions who will decide whether to institute a prosecution or not and in which court.

2.4.4. Jurisdiction in respect of offences committed outside South Africa

**General Rule:** South African courts will only exercise jurisdiction with regard to offences committed on South African territory. There are however a number of exceptions:

- High Treason (eg South African citizen resident in a foreign country and joins enemy army in wartime);
- Theft committed in foreign country, but the accused has the stolen property in South Africa (ie a continuing offence);
- Offences on ships (ie territorial waters are considered part of that state);
- Offences on aircraft:

Offence on South African aircraft	Offence outside South Africa on non-South African aircraft
Section 18 of the Aviation Act, if an offence is committed on a South African plane, the offence is deemed for purposes of criminal jurisdiction to have been committed in any place the accused happens to be.	<ul style="list-style-type: none"> <li>• Lands in South Africa with offender still on board ; or</li> <li>• Principal place of business or permanent residence of lessee of aircraft is in South Africa; or</li> <li>• Offender is present in South Africa.</li> </ul>

- Offences committed on territory subsequently annexed by South Africa;
- Offences committed on South African aircraft – Section 18 of Aviation Act;
- Offences committed by South African citizens in Antarctica falls within the jurisdiction of the Cape Town Magisterial District;
- Offences deemed to be committed in Republic regardless where the accused happens to be (eg Correctional Services Act – unauthorised access to any computer of the Department of Correctional Services, South Africa has jurisdiction even if the offence was committed outside South Africa and the computer or accused was in South Africa)
- However, an accused’s mere presence does not always settle the matter: when an accused is illegally abducted from a foreign state by agents of the South African authorities and subsequently handed over to the South African police, the court before which such abducted person is arraigned has no jurisdiction to try such person.
- Embassies - Diplomats remain subject to the jurisdiction of their home states.

#### 2.4.5. Punishment

- **The Supreme Court of Appeal, and the High Court**

The Supreme Court of Appeal will only impose a sentence (any lawful sentence) as a court of first instance where it convicts a person of contempt of court. The Supreme Court of Appeal, a provincial division or the WLD can only impose sentence that could have been imposed by the court of first instance. The following sentences may be imposed:

- Imprisonment (including for life);
- Periodical imprisonment;
- Declaration as habitual criminal;
- Committal to a treatment centre;
- Fine;
- Correctional supervision; and
- Imprisonment from which person may be placed under correctional supervision.

- **Regional courts**

The following sentences may be imposed:

- Imprisonment not exceeding 15 years;
- Periodical imprisonment;
- Declaration as habitual criminal;
- Committal to treatment centre;
- Fine not exceeding R 300,000 (subject to change by Minister);
- Correctional supervision; and
- Imprisonment from which person may be placed under correctional supervision.

- **District courts**

Only the following sentences may be imposed:

- Imprisonment not exceeding 3 years;
- Periodical imprisonment;
- Committal to a treatment centre;
- Fine not exceeding R 60,000 (subject to change by Minister);
- Correctional supervision; and
- Imprisonment from which person may be placed under correctional supervision.

#### 2.4.6. Validity of the provisions of any Act

Section 110 of the Magistrates' Court Act provides that no Magistrates' Court shall be competent to pronounce upon the validity of any law or conduct of the President. If an accused pleads not guilty in a lower court and his defence is based on the alleged invalidity of a provincial ordinance or a proclamation issued by the President, the accused must be committed for summary trial before a superior court having jurisdiction.

### 3. PROSECUTING CRIME

#### 3.1. Introduction

- Most states do not adhere to the principle of compulsory prosecution.
- Prosecuting authorities are vested with a discretion whether to prosecute or not, but the victim may still proceed in a personal capacity against the alleged perpetrator (private prosecution).
- Most states perceive the commission of a crime as a violation of the public interest and punishment is sought on behalf of society. A prosecution, however, does not deprive the injured party of any civil remedies he might have and the victim might still seek to recover his losses in a civil court.
- A conviction or acquittal will, therefore, not bar a civil action for damages, except where the criminal court has ordered the convicted accused to pay compensation to the complainant or to return stolen property – cannot be compensated twice in respect of one and the same loss.

### 3.2. Structure and composition of the prosecuting authority

#### 3.2.1. Constitutional provisions and legislative framework

##### **Section 179 of Constitution - Prosecuting authority**

- (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of -
  - (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
  - (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
- (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
- (3) National legislation must ensure that the Directors of Public Prosecutions -
  - (a) are appropriately qualified; and
  - (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
- (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
- (5) The National Director of Public Prosecutions -
  - (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
  - (b) must issue policy directives which must be observed in the prosecution process;
  - (c) may intervene in the prosecution process when policy directives are not complied with; and
  - (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
    - (i) The accused person.
    - (ii) The complainant.
    - (iii) Any other person or party whom the National Director considers to be relevant.
- (6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.
- (7) All other matters concerning the prosecuting authority must be determined by national legislation.

Parliament passed the National Prosecuting Authority Act, 32 of 1998 ("NPAA"), in order to give effect to the provisions of Section 179 of the Constitution. Any reference in any law to an Attorney-General or Deputy Attorney-General shall be construed as a reference to a Director of Public Prosecutions or a Deputy Director of Public Prosecutions.

##### **Yengeni 2006 (1) SACR 405 (T)**

The accused attended a pre-trial meeting with the National Director of Public Prosecutions and Minister of Justice and Constitutional Development and it was agreed between them that, should the accused plead guilty, the state would not seek a custodial sentence. At trial, a custodial sentence was, however, imposed. This case serves as confirmation that the Constitution guarantees the professional independence of the National Director of Public Prosecutions and every professional member of his staff ensuring freedom from any interference in their functions by the powerful, well-connected, the rich and peddlers of political influence.

#### 3.2.2. Structure and composition of the single national prosecuting authority

The Prosecuting Authority comprises of the:

- National Director of Public Prosecutions ("NDPP");
- Deputy National Directors of Public Prosecutions ("DNDPP");
- Directors of Public Prosecutions ("DPP");
- Deputy Directors of Public Prosecution ("DDPP"); and
- Prosecutors.

The office of NDPP consists of:

- the NDPP, who is the head of and controls the office;
- no more than 4 DNDPPs;
- investigating directors and special directors; and
- other members of the prosecuting authority assigned to the office of NDPP.

Offices of the National Single Prosecuting Authority are established at seats of the High Court and consist of:

- a DPP or DDPP, who is head of and controls the office;
- DDPPs;
- prosecutors; and
- persons appointed on an *ad hoc* basis on account of their qualifications and experience to perform services in specific cases.

### 3.2.3. The power to institute and conduct criminal proceedings

#### **Section 20 of the NPAA, 32 of 1998**

- (1) The power, as contemplated in Section 179(2) and all other relevant sections of the Constitution, to –
- (a) institute and conduct criminal proceedings on behalf of the State;
  - (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
  - (c) discontinue criminal proceedings,
- vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

### 3.2.4. The authority and hierarchy of power to institute criminal proceedings

#### **Section 20 of the NPAA, 32 of 1998**

- (2) Any Deputy National Director shall exercise the powers referred to in subsection (1) subject to the control and directions of the National Director.
- (3) Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of-
- (a) the area of jurisdiction for which he or she has been appointed; and
  - (b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.
- (4) Subject to the provisions of this Act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of-
- (a) the area of jurisdiction for which he or she has been appointed; and
  - (b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director.
- (5) Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.
- (6) A written authorisation referred to in subsection (5) shall set out-
- (a) the area of jurisdiction;
  - (b) the offences; and
  - (c) the court or courts,
- in respect of which such powers may be exercised.

### 3.2.5. The NDPP and DNDPP

- The President appoints the NDPP and may, after consultation with the Minister of Justice and the NDPP, appoint no more than 4 DNDPPs.

- Any person to be appointed as NDPP or DNDPP must possess qualifications that would entitle him to practice in all courts in the Republic and must be a fit and proper person. The NDPP must be a South African citizen.
- The NDPP shall hold office for a non-renewable term of 10 years, but must vacate office on attaining 65. The DNDPP must also vacate his office on attaining the age of 65, but is not subject to the 10 year period which applies in respect of the NDPP. The President may, however, direct that the NDPP or DNDPP be retained for a further period not exceeding 2 years.
- The President may provisionally suspend the NDPP or a DNDPP pending an enquiry, whereafter they may be removed from office for –
  - misconduct;
  - continued ill health;
  - incapacity to carry out his duties;
  - on account of no longer being a fit and proper person.
- **Powers, functions and duties of the NDPP and DNDPP** **NB!!**
  - Any DNDPP may exercise any of the functions or duties of the NDPP which he has been authorised to perform. The powers and functions of the NDPP are set out in Section 22 of the NPAA.
  - The NDPP, as head of the prosecuting authority, shall have authority over the exercising of all powers and performance of all duties conferred on any member of the prosecuting authority by the Constitution and he -
    - must determine prosecution policy and issue policy directives;
    - may intervene when policy directives are not complied with;
    - may review a decision to prosecute or not to prosecute, after consultation with the relevant DPP.
  - Where an offence was committed wholly or partially within the area of jurisdiction of one DPP, the NDPP can direct that it be investigated and tried within the area of another DPP.
  - The NDPP must frame a code of conduct which members of the prosecuting authority must comply with. This has been done and is known as *The Code of Conduct for Members of the Prosecuting Authority*.
  - The NDPP may authorise any competent person in the employ of public service to conduct prosecutions, subject to his control and direction.
  - The NDPP has the power to institute and conduct a prosecution in any court in the Republic in person.
- **Prosecution policy and issuing of policy directives**

The NDPP - with concurrence of the Minister of Justice and after consulting the DPPs - determine prosecution policy. The NDPP must also issue policy directives and he may intervene where these are not observed.
- **Accountability to Parliament**

The prosecuting authority is accountable to Parliament and the NDPP -

  - must submit a report annually to the Minister of Justice;
  - may, at any time, submit a report to the Minister or Parliament with regard to any matter relating to the prosecuting authority if he deems it necessary.
- **Ministerial responsibility over the prosecuting authority**

The Minister has the final responsibility over the prosecuting authority, but ministerial control of or intervention in the decisions of the NDPP is not provided for. To enable the Minister to exercise his final responsibility over the prosecuting authority, the NDPP shall, at the request of the Minister:

  - furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the NDPP or DPP in the exercise of their powers, the carrying out of their duties and the performance of their functions;

- provide the Minister with reasons for any decision taken by a DPP in the exercise of his powers, the carrying out of his duties and the performance of his functions;
- furnish the Minister with information with regard to the prosecuting policy;
- furnish the Minister with information with regard to the policy directives;
- submit the reports;
- arrange meetings between the Minister and members of the prosecuting authority.
- For purposes of certain specified statutory offences, no prosecution may be instituted without the written authority of the NDPP.

### 3.2.6. The DPPs

- The President, after consulting with the Minister of Justice and the NDPP, may appoint a DPP at the seat of every High Court of the Republic.
- Qualifications for appointment as DPP are the same as those for appointment of NDPP, but a DPP, like the DNDPP, does not have to be a South African citizen.
- A DPP must vacate office at the age of 65, but may, like the DNDPP, be re-appointed for a period not exceeding 2 years.
- Suspension and removal of a DPP must be dealt with as if he were the NDPP.
- A DPP reports to the NDPP in the following 3 situations:
  - A DPP must annually, not later than 1 March, submit to the NDPP a report on all his activities during the previous year;
  - The NDPP may at any time request a DPP to submit a report on with regard to a specific activity relating to his powers, duties or functions;
  - A DPP may, at any time, submit a report to the NDPP with regard to any matter relating to the prosecuting authority.

- **Powers, functions and duties of a DPP and a DDPP** **NB!!**

A DPP has, in respect of the area for which he has been appointed, the power to -

- institute and conduct criminal proceedings and to carry out functions incidental thereto;
- supervise, direct and co-ordinate the work and activities of all DDPPs and prosecutors in the office of which he is the head;
- supervise, direct and co-ordinate specific investigations;
- carry out all duties and perform all functions assigned to him under any law which is in accordance with the Constitution.

Subject to the directions of the NDPP, a DPP will be responsible for the day to day management of the DDPP and prosecutors under his control. Where a DPP is -

- considering the institution or conducting of a prosecution for an offence; and
- is of the opinion that a matter connected with or arising out of the offence requires further investigation,

the DPP may request the provincial commissioner of police for assistance in the investigation. A DPP has authority to prosecute an appeal in any court in the Republic.

### 3.2.7. Prosecutors

- Prosecutors shall be appointed on the recommendation of the NDPP or a member of the prosecuting authority designated for that purpose and may be appointed to –
  - the office of the NDPP;
  - offices of the prosecuting authority at the seat of each High Court;
  - investigating directorates; and
  - lower courts in the Republic.

- **Powers, duties and functions of prosecutors**

A prosecutor shall exercise the powers, carry out the duties and perform the functions assigned to him and can only exercise powers lawfully given and has a duty not to act arbitrarily. He must act with objectivity and protect the public interest.

### 3.2.8. The prosecuting authority and the judiciary

- Courts have on rare occasions expressed their disapproval of the fact that a prosecution is instituted. However, courts can in principle not interfere with a *bona fide* decision of the prosecuting authority. It is irregular to do so. Courts can at most impose a lenient sentence reflecting their opinion that the prosecution was unwarranted in the case of a conviction.
- If convinced of the triviality of the case, the court may acquit the accused. The acquittal is based on the substantive criminal law principle *de minimis non curat lex* (the law is not concerned with trivialities). It is a clear indication that there should never have been a prosecution in the first place
- On the whole, the courts are reluctant to comment on the discretion exercised by the prosecuting authority, because it lies within its authority to prosecute and once an accused is on trial, he will have the fullest opportunity to put his defence to the court.
- The prosecuting authority's discretion to prosecute does not, however, fall beyond the jurisdiction of the courts and it can intervene when the discretion is exercised improperly. Discretion may be reviewed, for example, where *mala fides* can be proved, or where it can be proved that the prosecuting authority never applied its mind to the matter or acted from an ulterior motive.

### 3.2.9. Extraordinary powers of the DPP

A DPP has, in certain limited circumstances, the power to detain a prospective State witness for a period of up to 72 hours without a judge having so ordered. A State witness can be detained for a longer period on the basis of an order given by a judge in chambers in consequence of a DPP's application.

### 3.2.10. Control over local prosecutors

Local prosecutors are as a rule permitted to exercise their own discretion in deciding whether to prosecute. It is impossible for a DPP to have full knowledge of each and every criminal matter in his jurisdiction. There are at least the following formal and informal ways in which a DPP can direct and control the decisions of public prosecutors in his jurisdiction:

- DPPs issue circulars to their prosecutors providing guidelines in the exercise of their discretion with regard to certain types of cases;
- A DPP may direct his prosecutors not to prosecute in respect of certain offences without his prior approval. A prosecution instituted contrary to such an instruction would be null and void;
- Sometimes statutory provisions require that in respect of certain offences no prosecution may be instituted without the written authority of the DPP;
- Complaints made to a DPP by members of the public and which relate to some decision taken by a local public prosecutor may draw the attention of the DPP to a specific case. The DPP may then call for the police docket and require the local prosecutor to advance reasons for the decision taken by him;
- Prosecutors should refer difficult, sensitive or borderline cases to the DPP requesting him to take the final decision;
- Only a prosecutor authorised thereto in writing by the NDPP may negotiate and enter into a plea and sentence agreement.

### 3.2.11. Prosecution and the police

- The police do in practice exercise a discretion of their own and often refrain from bringing trivial matters to the attention of the prosecutor. All investigations completed by the police for the purposes of a prosecution must be submitted to the prosecuting authorities as the police do not have the final say whether a prosecution should be instituted. The final decision rests with the DPP concerned or his local public prosecutors.
- The separation between officials who investigate crime and those who decide to prosecute and actually do prosecute crime is an important one. It promotes objectivity and provides the criminal justice system with a process in terms of which the results of a police investigation can be evaluated independently before the step of instituting a prosecution is taken.

### 3.2.12. The prosecution, the public and reporting crime

- There is no general legal duty on members of the public to report crime. A legal duty exists only in certain exceptional instances. The only common law example is that a legal duty rests on all those who owe allegiance to the State to provide information on acts of high treason. Certain statutory provisions impose such a legal duty, for example the obligation to report corrupt transaction and child pornography.
- Members of the public may at times, for fear of reprisals, be most reluctant to report the activities of criminals. The criminal justice system makes use of the “informer’s privilege” to meet this situation. The identity of the private individual who has secretly given information to the police concerning the commission of a crime may as a rule not be disclosed in a court of law and the contents of his communication enjoy a similar protection. The purpose of the privilege is to encourage information as to the commission of crime by placing the informer in a condition of safety.
- A further method aimed at encouraging a member of the public to come forward and report crime and ultimately to testify if necessary, is the witness protection system.
- The mere fact that an individual is under no general duty to report crime does not mean that he may in all instances lawfully refuse to co-operate once it is likely that he could be a potential State witness

### 3.2.13. The prosecution as *dominus litis*

The prosecution can be described as *dominus litis* (master of the case) and it merely means that the prosecution can do what is legally permissible to set criminal proceedings in motion, such as determining the charges and the date and venue of the trial. A measure of control by the courts over decisions taken by the prosecution remains essential. For example:

- The prosecution may not proceed against the accused in a piecemeal fashion by bringing successive prosecutions on different charges in relation to one broad incident;
- Although the prosecution can determine the numerical order in which several accused are named in the charge, the court may, in the interest of justice, right and fairness, order the sequence in which the accused present their evidence be varied;
- If a prosecutor, after an application by him for postponement of the trial has been rightly rejected by the court, refuses to adduce evidence or to close the State’s case, the judicial officer will continue with the proceedings as if the prosecutor had indeed closed the State’s case.

### 3.2.14. The discretion to prosecute

A prosecutor has a duty to prosecute if there is a *prima facie* case and no compelling reason for refusal - “Is there a reasonable prospect of success?” The prosecutor must ascertain whether there is a reasonable and probable cause for prosecution and at trial be able to furnish proof beyond a reasonable doubt.

In exercising his discretion, the prosecutor must respect the individual’s right not to be harassed by a prosecution that has no reasonable prospect of success. Occasionally there might be good grounds for refusing to prosecute despite the fact that a *prima facie* case exists. Such grounds may be the triviality of the offence; the advanced age or very young age of the accused; or the tragic personal circumstances of the accused (ie a father who has through his negligent driving caused the death of his young children).

Once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction, a prosecution should normally follow. When considering whether or not to prosecute, prosecutors should consider all relevant factors, including:

- **The nature and seriousness of the offence**
  - The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
  - The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.



- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.
- **The interests of the victim and the broader community**
  - The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it.
  - The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
  - Prosecution priorities as determined from time to time, the likely length and expense of the trial and whether or not a prosecution would be deemed counter-productive
- **The circumstances of the offender**
  - The previous convictions of the accused, his criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
  - Whether the accused has admitted guilt, shown repentance, made restitution or expressed willingness to co-operate with the authorities in the investigation or prosecution of others.
  - Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.
  - Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend on the circumstances of each case. When exercising the discretion:

- The police and prosecuting authority should not knowingly allow a pattern of contravention of a certain statute to develop and then, most unexpectedly, arrest and prosecute;
- The DPP should not exercise this discretion in a discriminatory way.

#### **The distinction between withdrawing a charge and stopping a prosecution NB!!**

The prosecuting authority has the discretion to withdraw a charge before the accused has pleaded. However, the accused is not entitled to a verdict of acquittal, as he may again be prosecuted if new evidence is discovered. A prosecutor may withdraw a charge without the consent of his DPP as the DPP, if dissatisfied with the withdrawal, may charge the accused afresh. A DPP may, at any time after the accused has pleaded, but before conviction, stop the prosecution in respect of that charge and then the accused is entitled to an acquittal. The accused can later successfully rely on a plea of *autrefois acquit* (previous acquittal). A public prosecutor may, however, not stop a prosecution without the consent of the DPP.

#### 3.2.15. Prescription of the right to prosecute

The right to institute a prosecution for any offence shall, unless some other period is expressly provided for in law, lapse after the expiry of a period of 20 years from the time the offence was committed. The following crimes have no prescription period:

- Murder;
- Treason committed when the Republic is in a state of war;
- Robbery, if aggravating circumstances were present;
- Kidnapping;
- Child-stealing;
- Rape;
- Genocide, crimes against humanity and war crimes.

### 3.2.16. The prosecution and legal ethics

A public prosecutor must display the highest degree of fairness to an accused and this duty is more pronounced in respect of an unrepresented accused. Information favourable to the defence must be disclosed. If there is a serious discrepancy between the State witness' oral testimony in court and his earlier written statement made during the investigation, the prosecutor must draw attention to this fact and make the written statement available to the defence. It is not the task of the prosecutor to secure a conviction at all costs and his paramount duty is to assist the court in ascertaining the truth. In certain circumstances, the grossly improper conduct of the prosecutor may result in an interdict restraining him from participating in the prosecution.

### 3.2.17. The prosecution and the assistance of a private legal practitioner

A private practitioner who has no authority to prosecute may not assist the prosecutor by cross-examining defence witnesses or addressing the court on behalf of the prosecution. It would not seem irregular, however, renders some other assistance on an informal basis to the prosecution.

### 3.2.18. Diversion of the criminal trial

There are certain procedures or methods in terms of which a criminal trial can be avoided, for example conversion of a trial to children's court procedure, conversion of a trial into an enquiry with a view to committing an accused to a rehabilitation centre, and an enquiry into mental illness.

## 3.3. Private prosecutions

2 forms in terms of the CPA:

- Private prosecution by an individual on the basis of a certificate *nolle prosequi*; and
- Private prosecution under statutory right.

Latter not a true 'private prosecution' even though so identified in the CPA as it does not involve an individual who is aggrieved by the fact that the prosecuting officials have declined to prosecute.

### 3.3.1. Private prosecution under statutory right

In terms of Section 8(1) of the CPA, any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law may institute and conduct a prosecution in respect of such offence in any court competent to try that offence and some municipalities prosecute in terms of this section. However, such right of prosecution shall only be exercised after consultation with the DPP and he has withdrawn his right of prosecution.

### 3.3.2. Private prosecution by an individual on a certificate *nolle prosequi*

A private prosecution must be instituted and conducted in the name of the private prosecutor and all process must be issued in the name and at the expense of the private prosecutor. A private prosecution is reported in the names of the parties, eg *Smith v Jones*. A private prosecution shall proceed in the same manner as a public prosecution meaning that the accused will enjoy the same procedural rights. The accused enjoys the additional privilege that he may be brought before the court only by way of a summons in a lower court and an indictment in the supreme court.

- ***Locus standi* of a private prosecutor**

If the DPP has declined to prosecute, the following people may institute a prosecution in a competent court:

- Any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the offence;
- A husband, if the offence was committed in respect of his wife;
- The wife or child or, if none, any next of kin of any deceased person, if the death of such person is alleged to have been caused by the offence;
- The legal guardian or curator of a minor or lunatic, if the offence was committed against his ward.

Whether a person has substantial and peculiar interest, is a question of fact and law. The purpose of private prosecution is to reduce the temptation of taking the law into your own hands. A private prosecutor has the burden of proving his *locus standi* if it is disputed.

**Mullins and Meyer v Pearlman 1917 TPD 639**

Only persons who can prove that they have suffered actual damage as a result of the commission of the alleged offence are entitled to institute a private prosecution.

- **The certificate *nolle prosequi***

No private prosecutor wishing to proceed in terms of Section 7 of the CPA may do so if he does not produce a certificate *nolle prosequi*. This certificate is signed by the DPP, in which he confirms that:

- he has examined the statements on which the charge is based; and
- he declines to prosecute at the instance of the state.

The DPP is not entitled to investigate whether the private prosecutor has *locus standi*. At the trial, the accused can raise lack of *locus standi* of the private prosecutor and if he can show that the certificate does not relate to the charges against him he is entitled to a discharge. The certificate shall lapse unless proceedings are instituted within 3 months of date of certificate.

- **Security by private prosecutor**

No private prosecutor may issue any process commencing private prosecutions unless he deposits R 1,500 with the Magistrates' Court, which serves as security that the private prosecutor will prosecute the charge to conclusion without undue delay.

- **Failure of private prosecutor to appear**

If the private prosecutor does not appear on the day set down for appearance of the accused, the charge will be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control, in which case the court may adjourn the case to a later date, and the amount forfeited to the State. Where the charge is dismissed, the accused will be discharged. He may not be privately be prosecuted again in respect of the same charge, but the DPP may authorise him being prosecuted by the State in respect of that charge.

- **Costs of a successful private prosecution**

Generally, the costs and expenses of a private prosecution must be paid for by the prosecutor, but the court may order the convicted person to pay the costs.

- **Costs of accused in an unsuccessful private prosecution**

The court dismissing the charge may order the private prosecutor to pay such accused the whole or any part of the costs and expenses incurred by him in connection with the prosecution.

- **Intervention by the State in a private prosecution**

A DPP may apply for the proceedings to be stopped so that the prosecution may be instituted or continued at the instance of the state.

#### 4. THE RIGHT TO LEGAL ASSISTANCE

##### 4.1. Introduction

One of the most important rights of a suspect is to be assisted by counsel (attorney or advocate) and friends. It is a right that originates in the law of nature and God.

Having access to a legal representative derives from a person's right to have access to the courts as held in **Mandela v Minister of Prisons 1983 (1) SA 938 (A)**.

This right is entrenched in Section 35(2) and (3) of the Constitution and confirmed in Sub-Sections 73(1), (2) and (2A-C) of the CPA. Section 73(3) of the CPA, furthermore, provides for some form of qualified assistance that may be rendered by third parties other than legal qualified counsel. Section 74 of the CPA provides for the presence of a parent or guardian at the trial of an accused who is under 18.

The effect of Section 35(2)(c) and 3(g) of the Constitution is that an arrested person, as well as an accused, must be provided with legal representation at the expense of the State if substantial

injustice would otherwise result. The accused must, however, accept the legal representative appointed by the state and has no choice as to the latter's identity.

#### 4.2. **The duty of a police officer to inform a person of the right to legal representation during the pre-trial phase**

##### **Li Kui Yu v Superintendent of Labourers 1906 TS 181**

"I think it is quite clear that the only way of preventing a person being illegally done away with and illegally treated is to uphold to the fullest extent the right of every person to have any of his friends come and see him who choose to do so. I am not now dealing with solicitors, I am thinking of the ordinary question of friends. I think to prevent the access to friends to any person is a most serious infringement of the liberty of any subject".

The court continued to state that it is even more serious to withhold access to an attorney.

Section 35(2)(b) of the Constitution entrenches a detained person's right to choose and consult with a legal practitioner and to be promptly informed of this right. A person who has been arrested is in detention from the moment of his arrest and, thus, immediately qualifies for this right and is entitled to exercise this right at any stage during his detention.

The arrested person must be informed of this right in a manner that it can reasonably be supposed that he understood the right and the importance thereof.

The State is required to inform the detained person of this right at the time of his arrest, but also at every further stage of the investigation where his co-operation is sought. If he is not informed, the evidence so obtained cannot be used against him in trial.

The right to legal representation includes the right to confidentiality during the consultation with the legal practitioner and a detainee, therefore, has the right to consult with his legal adviser without the conversation being overheard.

#### 4.3. **The duty of a presiding officer to inform a person of the right to legal representation during the criminal proceedings**

##### 4.3.1. The duty to inform the accused of this right

A right is of no use to a person if he is not aware of it and the Constitution accordingly provides in Section 35(2)(b) that he must be informed promptly of the right. A judicial officer thus has a duty to inform an unrepresented accused that he has the right to be legally represented. A judicial officer must explain this right and point out to the accused that he has the right to be legally assisted by a legal representative with whom he can communicate in his own language.

##### **Radebe 1988 (1) SA 191 (T) & Mabaso 1990 (3) SA 185 (A)**

A failure on the part of the judicial officer to inform an unrepresented accused of his legal rights, including the right to legal representation, can lead to a complete failure of justice.

To inform the accused A of his right would be worthless if he is too poor to afford it. The Constitution requires that an accused must be informed promptly that he is entitled to have legal representation appointed for him at State expense if substantial injustice would otherwise result.

The court pronounced in **Rudman** and **Mthwana** that a presiding officer has a duty to inform an unrepresented accused of his right to legal representation under common law.

##### **Hlantlala v Dyanti 1999 (2) SACR 541 (SCA)**

The court decided that a clear distinction must be drawn between the constitutional right to retain legal counsel at state expense when material injustice would arise without it, and the common law right to representation, which entails the right to be informed about it, as well as the right to apply to the Legal Aid Board for legal assistance and for the opportunity to retain legal assistance. A legal officer is duty bound to inform the accused about this in virtue of his common law right to legal representation. The court did not decide the position with regard to the duty of a judge concerning the constitutional right (because the court found that the common law right had been violated), but Unisa suggest that the accused also has to be informed of the content of the constitutional right.

With regard to the question whether the presiding officer had a duty to inform the accused not only of his right to legal representation, but also of his right to legal assistance, the court referred

with approval to the verdict in **Radebe** where it was decided that the content of the common law right to legal representation required that, under suitable circumstances, the court was obliged also to inform the accused that he was entitled to apply to the Legal Aid Board for legal assistance. The court decided that where the presiding officer failed to inform the accused of his common law right to legal representation, an irregularity might arise.

This irregularity does not in itself result in an unfair trial. The primary question to be resolved is whether the conviction has been affected by the irregularity. The accused will have to show on appeal or review that the irregularity resulted in a failure of justice.

#### **Irregularity = Failure of Justice Test**

Where the accused suffers no prejudice, no failure of justice has been caused, just as there will be no injustice if the accused would have been found guilty all the same, regardless of the irregularity and even if the presiding officer did not neglect to inform the accused of his common law right to legal representation.

#### 4.3.2. The duty to afford the accused an opportunity to obtain legal representation

The court must always consider an application by an accused for a postponement in order to enable him to obtain legal representation, as refusal to grant the postponement might amount to an irregularity. If the accused's legal representative withdraws from the case, the court should ask him whether he wishes to have the opportunity to instruct another legal representative or whether he is ready to undertake his own defence. Failure to do so is irregular and invalidates the proceedings.

However, if the accused is given ample opportunity to obtain legal representation and he doesn't, he then can't attack the proceedings unless he has an acceptable explanation for his failure. If a failure by the court to allow a postponement is found to be irregular, the conviction will be set aside.

#### 4.3.3. The role of the legal representative and others in providing the accused with assistance

#### **Section 73(3) of CPA - Accused entitled to assistance after arrest and at criminal proceedings**

An accused who is under the age of eighteen years may be assisted by his parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.

Assistance by a parent or guardian is not synonymous with legal representation and the parent or guardian has no greater right than a legal representative to decide how the case should be conducted. A Magistrate had authorised an articled clerk to assist an accused in terms of this section.

The court will not allow the same advocate to defend 2 accused with interests that conflict in material respects.

Generally, the accused is bound by what is done by his legal representative in the execution of his mandate during the trial.

#### 4.4. **The accessibility of legal representation**

*Pro Deo* counsel is appointed for needy accused in certain serious cases. If the charge is not of a serious nature and the accused cannot afford legal representation, the court sometimes has a duty to determine before commencement of the trial whether the absence of legal representation would prejudice the accused to such an extent, that continuation of the trial would result in an unfair trial. If the court believes the accused should be assisted, it must refer the matter to a legal aid scheme or lawyers willing to offer assistance *pro bono* and decline to continue with the trial until such time as legal representation is procured.

The Legal Aid Board grants legal aid to needy people and the Board has the capacity to procure the services of legal practitioners and to stipulate the conditions under which legal aid is to be given. In Johannesburg there are also public defenders who defend needy accused free of charge in certain cases.

## 5. THE PRESENCE OF THE ACCUSED AS A PARTY

### 5.1. The general rule

It is a basic principle of the law of criminal procedure that the trial of an accused must take place in his presence and that the verdict of the court and the sentence that it imposes, must be announced in his presence. This principle is contained in:

#### **Section 34 of Constitution - Access to courts**

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

#### **Section 35(3)(c) & (e) of Constitution – See page 3**

#### **Section 158(1) of CPA - Criminal proceedings to take place in presence of accused**

Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused. All criminal proceedings must take place in the presence of the accused, unless provided for otherwise.

Examples of the application of the principle:

#### **Seedat 1971 (1) SA 789 (N)**

The accused was convicted in terms of the Insolvency Act. Prior to sentencing the accused, the Magistrate had called an expert witness in regard to certain bookkeeping matters after a discussion he had with the prosecutor in the absence of the accused and his legal representative. On appeal, it was held that this amounted to a serious irregularity and disregarded the witness' evidence.

#### **Radebe 1973 (4) SA 244 (O)**

The Magistrate changed the suspension order on the accused's driver's license in his absence. On review it was held that the Magistrate acted irregularly.

#### **Rousseau 1979 (3) SA 895 (T)**

The Magistrate had spoken to a medical practitioner regarding the evidence that had been given by an expert witness in a trial in the absence of the accused and his legal representative. It was held that this procedure amounted to a serious irregularity and the accused's conviction and sentence were set aside.

This principle means more than that the accused must merely know what the witnesses have said, there should be a confrontation: he must see them as they testify against him so that he can observe their behaviour. The denial of this fundamental right of the accused amounts to a failure of justice that will lead to the setting aside of his conviction on appeal or review.

### 5.2. Exceptions to the rule

#### 5.2.1. Trial in absence of accused on account of his misbehaviour

#### **Section 159(1) of CPA - Circumstances in which criminal proceedings may take place in absence of accused**

If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.

The court will only use its powers under this section as a last resort and if it cannot be avoided. It would prefer to postpone or temporarily adjourn the matter and then continue with the case at a later stage in the presence of the accused. If used, the court should first warn the accused. Even after removal, it is advisable to grant the accused a further opportunity and have him brought back to the proceedings and to ask him if he wants to give evidence.

### 5.2.2. Absence of accused where there is more than one accused

#### **Section 159(2)(a) of CPA - Circumstances in which criminal proceedings may take place in absence of accused**

If two or more accused appear jointly at criminal proceedings and -

- (a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative -
  - (i) that the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or
  - (ii) that circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary;

If the accused is absent as a result of Section 159(1) or simply with or without leave of the court, the court may direct that the proceedings be proceeded with in the absence of the accused. The court will only make such an order if in its opinion the trial cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness.

The court may also direct that the absent accused be separated from the proceedings in respect of the accused who are present and when the absent accused returns, the proceedings will continue from the point at which he became absent. If the proceedings continue in his absence, he may examine a witness who testified in his absence and also inspect the record.

### 5.2.3. Evidence by means of closed circuit-television or similar electronic media

#### **Section 158 of CPA - Criminal proceedings to take place in presence of accused**

- (2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
- (b) A court may make a similar order on the application of an accused or a witness.
- (3) A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would -
  - (a) prevent unreasonable delay;
  - (b) save costs;
  - (c) be convenient;
  - (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
  - (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.
- (4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

### 5.2.4. Payment of a fine without appearance in court (admission-of-guilt fines)

If a public prosecutor or the clerk of the court believes on reasonable grounds that a Magistrates' Court, on convicting the accused on the offence in question, will not impose a fine exceeding the amount determined by the Minister (R 5,000 at present), he can endorse the summons when he issues it to the effect that the accused may admit his guilt in respect of the offence and that he may pay a fine stipulated on the summons without appearing in court.

After an accused has appeared in court, but before he has pleaded, a public prosecutor may, if he believes on reasonable grounds as above, hand or cause a peace officer to hand to the accused a written notice with a similar endorsement.

An accused may, without appearing in court, admit his guilt in respect of the offence by paying the admission of guilt fine to the clerk of the Magistrates' Court or to the police. The summons or written notice may stipulate a date by which the admission must be paid.

The admission payment amounts to a conviction and sentence of the offence concerned and will be regarded as a previous conviction. The judicial officer may in certain instances set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course.

The public prosecutor can reduce an admission of guilt fine on good cause shown. Although not stipulated, this procedure should only be used for statutory offences (ie traffic offences).

### 5.3. Compounding of minor offences

Compounding of offences is different from admission of guilt. With compounding, the offender pays a certain amount to another body (ie the Municipality) in order not to be prosecuted for some minor offence which he has committed (ie Parking on yellow line), as opposed to admission where a summons or written notice is sent to the accused and prosecution has been initiated and by signing the admission of guilt, the accused is deemed to have been convicted and sentenced.

This procedure is only used in minor traffic offences and contraventions of the rules and regulations of local authorities.

## 6. THE EXERCISE OF POWERS AND THE VINDICATION OF INDIVIDUAL RIGHTS

### 6.1. Introduction

The law jealously protects the personality and property rights of individuals and these rights are also fully protected by the Constitution. Sometimes, however, society's wider interest in combating crime necessitates the limitation of these rights and it may be necessary to arrest persons and thereby encroach on their freedom of movement or seize property.

Despite this, the law constantly strives towards achieving a balance between society's demands (to bring offenders to justice) on the one hand and upholding the personality and property rights of the individual (the offender being innocent until proven guilty) on the other hand. To achieve this, the law lays down strict rules with regard to the circumstances in which a limitation of these rights will be permissible to investigate crime and bring offenders to justice and the constitutionality can only be determined by measuring it against Section 36 of the Constitution.

The court will have to determine what purpose the limitation sets out to achieve, whether this purpose is sufficiently important to justify a limitation of the right, whether the limitation will be effective to achieve the purpose and whether the purpose could be achieved in another, less restrictive, manner.

The rules of criminal procedure are very strict in order to prevent arbitrary action by the police or private persons and persons acting outside the limits laid down by these rules, act unlawfully. Therefore, the search of persons or premises, the seizure of objects and the arrest of persons will always be unlawful, unless such action complies with the rules or is justified on some ground of justification. The consequences of unlawful conduct are threefold:

- A person unlawfully arrested or whose property was unlawfully searched or seized, may institute a civil claim against the person effecting the arrest, search or seizure or in some instances his employer;
- In appropriate circumstances, an unlawful search, seizure or arrest may even constitute an offence; and
- Section 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights, must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

#### **Hammer 1994 (2) SACR 496 (C)**

An 18 year old prisoner wrote a letter to his mother, which he handed without an envelope to the police to be posted. The police read the letter without his consent and handed it to the DPP for a prosecution.

The court decided that a policeman or other person with statutory authority, who intercepted and read another person's correspondence without that person's permission, was committing the offence of *crimen iniuria*.



## 6.2. The requirement of reasonableness in the exercise of powers

The various statutory provisions providing for the power to conduct searches, to seize articles and to arrest persons, repeatedly refers to “reasonableness” in their description of the circumstances in which these powers may be exercised. Examples in the CPA:

- **Section 20:** Articles may be seized if they are “on reasonable grounds believed to be” articles of a certain nature.
- **Section 21(a):** Issuing of search warrants authorised where if it appears from information on oath that there are “reasonable grounds for believing” that certain articles will be found at a certain place.
- **Section 22(1)(b):** A police officer is authorised to conduct a search if he “on reasonable grounds believes” that certain circumstances exist.
- **Section 24:** A person in charge of or occupying premises may conduct a search and seize articles provided he “reasonably suspects” certain circumstances to exist.

### **S v Makwanyane 1995 (2) SACR 1 (CC)**

The court decided that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.

Although it would be impossible to lay down any hard and fast rules, the following guidelines may be followed to determine when a suspicion may be said to be a “reasonable suspicion” or when one could be said to have “reasonable grounds” for believing a state of affairs exists:

- The requirement of reasonableness may be described as a requirement that there be “reasonable grounds” from which an inference can be drawn. It can, for instance, only be said that force is “reasonable necessary” if there are “reasonable grounds” for believing that such force is actually necessary to achieve the goal.
- A person will only be said to have “reasonable grounds” to believe or suspect something or that certain action is necessary if:
  - he really “believes” or “suspects” it;
  - his belief or suspicion is based on certain “grounds”; and
  - in the circumstances and in view of the existence of those “grounds”, any reasonable person would have held that same belief or suspicion.
- The word “grounds” refers to facts, meaning that there will only be “grounds” for a certain suspicion or belief, if the suspicion or belief is reconcilable with the available facts. The existence of a “fact” is objectively determined, meaning that one will look at the facts as they really are and not as someone may “think” they are.
- Once a person has established what the facts are, he will evaluate them and make an inference from these facts with regards to the existence of other facts, which he is at the time unable to establish. This means that he will consider the true facts and will then decide whether the true facts are in his view sufficient to warrant a belief that the other facts also exist.
- Once he has made the inference that the other facts exist, it can be said that the person himself “believes” or “suspects” that such facts exist.
- However, the mere fact that a certain person believes or suspects that certain facts exist is not sufficient to regard his belief as one based on “reasonable grounds” as required by law. This will only be the case if it can be said that any reasonable person would have held the same belief in the circumstances.
- A person can therefore be said to have “reasonable grounds” if he actually suspects it, his belief is based on facts from which he has drawn a conclusion and if any reasonable person would also have drawn the same conclusion.

## 7. METHODS OF SECURING THE ATTENDANCE OF THE ACCUSED AT HIS TRIAL

### Section 38 of CPA - Methods of securing attendance of accused in court

The methods of securing the attendance of accused in court for the purposes of his trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.

#### 7.1. Summons

This is used for a summary trial in a lower court where the accused is not in custody or about to be arrested when there is no reason to suppose that such an accused will abscond, attempt to hamper police investigation or attempt to influence State witnesses. The accused may still have to be arrested after summons if it becomes clear he will attempt to defeat the ends of justice. The procedure to follow as contained in Section 54 of the CPA:

- (1) The public prosecutor draws up charge and hands it, together with information relating to name, address and occupation of the accused, to the clerk of the court.
- (2) The clerk of the court issues a document known as a summons, containing the charge and information handed to him, specifying the place, date and time for the appearance of the accused in court.
- (3) The clerk of the courts hands the summons to a person empowered to serve it.
- (4) The summons is served by delivering it to the person named therein or, if he can't be found, by delivering it at his residence or place of employment or business, to a person apparently over the age of 16 and apparently residing or employed there. A summons is in force throughout the Republic and may be served anywhere in the Republic. It may be transmitted by telegraph and service of a telegraphic copy has the same effect as that of the original. Service must take place at least 14 days (Sundays and public holidays excluded) before the date fixed for trial.

If the person summoned fails to appear, he commits an offence and is liable to punishment of a fine or imprisonment for a period not exceeding 3 months. A return by the person who served the summons that the service has been effected may then be handed in at the trial as *prima facie* proof of service and the court may, if satisfied that the summons was duly served, issue a warrant for the accused's arrest in terms of Section 55 of the CPA and must endorse it to the effect that the accused may admit his guilt in respect of the offence and pay the fine stipulated in the summons without appearing in court. The court may further endorse the warrant to the effect that the accused may, upon arrest, admit his guilt in respect of the failure to appear in answer to the summons and pay the amount stipulated on the warrant. The amount stipulated may not exceed the amount of the admission of guilt fine that could have been imposed for such an offence.

If the accused fails to pay the admission of guilt as stipulated on the warrant and appears in court on the due day, the court may convict him of the offence, unless the accused satisfies the court that his failure to appear was not due to any fault on his part. In the following instances, the accused need not be arrested:

- (1) Where it appears to the person executing the warrant that the accused received the summons and that he will appear in court in accordance with a warning, the accused may be released on such warning - the official = discretion.
- (2) Where it appears to the person executing the warrant that the accused did not receive the summons or that the accused has paid an admission of guilt fine or that there are other grounds on which it appears that the failure to appear on the summons was not due to any fault on the part of the accused, the accused must be released - the official ≠ discretion.

#### 7.2. Written notice to appear

If a peace officer believes on reasonable grounds that a Magistrates' Court, on convicting an accused of an offence, will not impose a fine exceeding R 2,500, he may hand the accused a written notice -

- (1) specifying the name, residential address and occupation of the accused;
- (2) calling upon the accused to appear at a place, on a date and at a specified time to answer the charge;

- (3) containing an endorsement that the accused may admit his guilt and pay a fine without appearing in court; and
- (4) containing a certificate signed by the peace officer that he has handed the original notice to the accused and explained the importance thereof to the accused.

If an accused fails to respond to the written notice, the provisions of Section 55 of the CPA apply as for the summons. A written notice differs from a summons as follows:

- A written notice is prepared, issued and handed directly to the accused by a peace officer, whereas a summons by the prosecutor, issued by clerk of the court and served by messenger of court or a police official.
- A written notice always offers the accused the option of payment a set admission of guilt fine, whereas a summons need not provide this option.

### 7.3. Indictment

At a trial in a superior court the charge is contained in a document known as a indictment, which is drawn up in the name of the DPP. It contains:

- the charge against the accused;
- the accused's name, address, sex, nationality and age;
- a summary of the substantial facts of the case; and
- a list of the names and addresses of State witnesses.

The indictment, together with a notice of trial, must be served on the accused at least 10 days (Sundays and public holidays excluded) before the date of the trial unless the accused agrees to a shorter period. The procedure:

- (1) Served by handing it to the accused in substantially the same manner as a summons; or is handed to the accused by the Magistrate or Regional Magistrate who commits him to the superior court for trial.
- (2) A return of service is *prima facie* proof of service.
- (3) Failure to appear is *mutatis mutandis* governed by Section 55 of the CPA.

### 7.4. Arrest

Arrest constitutes one of the most drastic infringements of the rights of an individual and therefore strict rules apply. An arrest should preferably be effected only after a warrant of arrest has been obtained and it is only in exceptional circumstances that private individuals or the police are authorised to without a warrant. Any arrest without a warrant which is not specifically authorised by law is unlawful. If an arrestee challenges the validity of his arrest, the arrester bears the onus of proving it was lawful.

#### 7.4.1. The requirements for a lawful arrest

Lawful arrest and lawful continued detention are based on 4 pillars:

- (1) The arrest (with or without a warrant) must have been properly authorised.
- (2) The arrester must exercise physical control over the arrestee and must limit the arrestee's freedom of movement. Unless the arrestee submits to custody, an arrest is effected by actually touching his person or, if circumstances require, by forcibly confining his person.
- (3) The arrester must inform the arrestee, at the time of the arrest or immediately thereafter, of the reason for his arrest or hand him a copy of the warrant. An arrestee's detention will be unlawful if this is not complied with and the question whether the arrestee was given an adequate reason for his arrest depends on the circumstances of each case, particularly the arrested person's knowledge concerning the reasons for his arrest. The exact wording of the charge need not be conveyed at the time of the arrest. When he is informed of the reason for his arrest later and after an unlawful arrest, the detention will be lawful.
- (4) The arrestee must be taken to the appropriate authorities as soon as possible and Section 50(1) of the CPA provides that the arrestee must be taken to a police station or is his arrest was made in terms of a warrant, he must be taken to the place mentioned.

#### 7.4.2. Arrest with a warrant

A warrant for the arrest of a person is a written order directing that the person described in the warrant be arrested by a peace officer in respect of the offence set out therein and be brought before a lower court.

- **The issue of a warrant of arrest**

Upon the written application of a DPP, prosecutor or police officer, a Magistrate or justice of the peace for issue of warrant of arrest. The application must -

- set out alleged offence;
- allege that such offence was committed in area of jurisdiction of such Magistrate, or in the case of a justice of peace, within the area of jurisdiction of the Magistrate within whose district or area application is made to the justice for such warrant, or where the offence was not committed within his area of jurisdiction, that the person in respect of whom the application is made, is known or is on reasonable grounds suspect to be within such area of jurisdiction.
- state that from information taken on oath, there is a reasonable suspicion that the person committed the alleged offence.

A warrant may be issued on any day and remains in force until cancelled or executed and, if issued in one district, is valid in all districts in throughout the Republic.

- **The execution of a warrant of arrest**

A warrant of arrest is executed by a peace officer, who includes a Magistrate, justice of peace, police official, member of correctional services and certain persons declared by the Minister of Justice to be peace officers for specified purposes.

**Kalase JS 315/17 (C)**

A charge of resisting an arrest made in terms of a warrant will not fail merely because the police officials were not in uniform, provided it appears that the warrant was shown and explained to the arrestee and that he knew or was informed that it was being executed by the police.

Upon demand by the arrestee, a copy of the warrant must be handed to him and if no such copy can be provided the arrest is unlawful.

#### 7.4.3. Arrest without a warrant **NB!!**

Circumstances may arise where the delay caused by obtaining warrant will enable the suspect to escape and therefore the CPA empowers persons to arrest in circumstances in which any right-thinking citizen would normally feel morally obliged to intervene, so that a citizen would be reasonably safe in obeying his instincts in deciding whether or not he should effect an arrest.

The powers of arrest of peace officers are wider than those of private individuals and that wider powers are given in respect of the arrest of persons who are caught in the act, than in respect of persons who are merely suspected of the commission of an offence where only a reasonable suspicion will justify an arrest.

**Tsose v Minister of Justice 1951 (3) SA 10 (A)**

It was held that if the object of an arrest is to frighten or harass and so induce him to act in way desired by the arrester, without his appearing in court, the arrest is unlawful.

Punitive arrest (arrest to punish the offender) is therefore illegal.

- **Powers of peace officers**

**Section 40(1) of CPA - Arrest by peace officer without warrant**

A peace officer may without warrant arrest any person -

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
- (c) who has escaped or who attempts to escape from lawful custody;

- (d) who has in his possession any implement of housebreaking or carbreaking as contemplated in Section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;
- (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;
- (f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;
- (g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;
- (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;
- (i) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;
- (j) who wilfully obstructs him in the execution of his duty;
- (k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;
- (l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;
- (m) who is reasonably suspected of being a deserter from the South African National Defence Force;
- (n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;
- (o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;
- (p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;
- (q) who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1(2) of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

**Section 41(1) of CPA - Name and address of certain persons and power of arrest by peace officer without warrant**

A peace officer may call upon any person -

- (a) whom he has power to arrest;
- (b) who is reasonably suspected of having committed or of having attempted to commit an offence;
- (c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address, and if such person fails to furnish his full name and address, the peace officer may forthwith and without warrant arrest him, or, if such person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest him without warrant and detain him for a period not exceeding twelve hours until such name or address has been verified.

The failure of the person to furnish his name and address in the abovementioned circumstances and the furnishing of an incorrect or false name and address, constitutes an offence and is punishable by a fine or imprisonment without the option of a fine for a period of 3 months.

- **Powers of private persons**

**Section 42 of CPA - Arrest by private person without warrant**

(1) Any private person may without warrant arrest any person -

- (a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;
- (b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
- (c) whom he is by any law authorised to arrest without warrant in respect of any offence specified in that law;
- (d) whom he sees engaged in an affray.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.

This power of private citizens to arrest should be used sparingly and with great caution.

- **Special statutory powers of certain officials**

Section 52 of the CPA specifically provides that nothing contained in the CPA in regard to arrest shall be construed as taking away or diminishing any authority specially conferred by any other law to arrest, detain or place any restraint on a person. For example:

- An officer appointed by the Board of Trustees of National Parks has powers of arrest similar to those of peace officers;
- An officer of a society for the prevention of cruelty to animals may arrest without a warrant any person reasonably suspected of having contravened the Animal Protection Act;
- If the commander of an aircraft in flight has reasonable grounds to believe that a person on board the aircraft has done or is about to do anything which in the opinion of the commander is a serious offence under the law in force in the country in which the aircraft is registered, he can detain such person.

#### 7.4.4. Procedure after arrest (NB)

An arrested person must be brought to a police station as soon as possible after arrest to ensure that he is in custody of the police and that he is not detained for more than 48 hours. Section 50 of the CPA envisages two periods of custody:

- arrest to arrival at police station;
- period after arrival at police station.

Law enforcement officers other than police officials who have the power to arrest do not have powers of detention. They cannot assume the power of detention merely because the police cannot or will not exercise its power.

**Mahlongwana v Kwatinidubu Town Council 1991 (1) SACR 669 (E)**

The arrested person was unlawfully detained overnight in back of municipal van because police cells were full.

If an arrested person is not released because no charges are to be brought against him, he may not be detained for longer than 48 hours unless brought before a lower court (first appearance). At his first appearance, he is either remanded in custody pending further investigation, or released on bail or on warning. He need not be charged, nor need he plead, but must be given a reason for his continued detention – refer Section 35 of Constitution.

The 48 hour rule is considerably extended by Section 50(1)(d)(i) – (iii) the CPA, which provides that if the 48 hour period expires:

- (a) on a day which is not a court day, or after 16h00 on a court day, then the 48 hour period is deemed to expire at 16h00 on the next court day (eg arrested Wednesday 18h00, expires Monday 16h00);
- (b) on a court day before 16h00, then period expires at 16h00 on such court day;
- (c) at a time when the arrestee is outside the court's area of jurisdiction and is in transit to court, then period ends at 16h00 on next court day after he is brought into court's area of jurisdiction;
- (d) at a time when arrestee cannot be brought to court because of his physical illness or other physical condition, court can order that he be detained (eg at hospital) for as long as is necessary for him to recuperate so as to prevent abuse.

Court day is a day on which the court is sitting (ie Monday to Friday).

If the 48 hour period expires on a day when the periodical court is not in session, an arrested person should be brought before a district court which has jurisdiction over the area of the periodical court.

If the accused is held for more than 48 hours, his detention is unlawful and his escape will then not be unlawful. The police may release certain arrestees before the 48 hour period lapses.

#### 7.4.5. The effect of an arrest

The effect of a lawful arrest is that the arrestee will be in lawful custody and may be detained until he is lawfully discharged or released. The fact that an arrest is unlawful, will not affect the liability of an accused insofar as the offence is concerned in connection with which he is detained.

If the arrestee is being unlawfully detained, he may apply to the court for an order for his release. The application is brought by an interested party and the question in the application is whether he is being detained unlawfully. Uncertainty prevailed whether to apply the principles of the English law remedy *habeas corpus* or the Roman-Dutch remedy *interdictum de libero homine exhibendo*.

#### **Kabinet van die Tussentydse Regering van Suidwes-Afrika v Katofa 1987 (1) SA 695 (A)**

The court held that the principles of *habeas corpus* are not part of South African law and that the principles of the *interdictum de libero homine exhibendo* must apply and that parties against whom such order have been made, may appeal against them.

#### 7.4.6. The duty to arrest

**General Rule:** There is no obligation on private individuals to arrest someone

#### **Section 47 of CPA - Private persons to assist in arrest when called upon**

- (1) Every male inhabitant of the Republic of an age not below sixteen and not exceeding sixty years shall, when called upon by any police official to do so, assist such police official -
  - (a) in arresting any person; **Exception!!**
  - (b) in detaining any person so arrested.
- (2) Any person who, without sufficient cause, fails to assist a police official as provided in subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

#### 7.4.7. Resisting arrest and attempts to flee (very NB!!)

- **Use of force in effecting an arrest**

Arrest is a drastic method of securing the presence of an accused at his trial. To use force to effect an arrest, is even more drastic. Accordingly, the law lays down very strict requirements that must be complied with before force may be used to effect an arrest.

**General Rule:** Force may not be used to effect an arrest.

If the person to be arrested submits to the arrest, force may not be used. Force can only be used to overcome resistance to the arrest or to prevent the subject from fleeing. The use of force to punish the person who is being arrested will always be unlawful.

#### **Section 49 of CPA - Use of force in effecting arrest**

- (1) For the purposes of this section -
- (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; and
  - (b) 'suspect' means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.
- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds -
- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
  - (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
  - (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

#### **Matlou v Makhubedu 1978 (1) SA 946 (A)**

The degree of force used should be proportional to the seriousness of the offence in respect of which the attempt is made to arrest the suspect. The less serious the offence, the less the degree of force that may be used in order to effect the arrest.

#### **Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)**

The proportionality test in **Matlou** *supra* is too narrow and should not only refer to the seriousness of the offence, but should actually refer to all the circumstances in which the force was used.

Not only the seriousness of the offence, but all circumstances such as whether the suspect is armed, poses a threat to the arrestor or another person, is known and can easily be apprehended at a later stage, etc, should be taken into account in determining whether the use of a particular degree of force was justified.

Until recently, the use of deadly force in order to effect an arrest was governed by the previous Section 49(2) providing that the killing of a person who is to be arrested for an offence referred to in Schedule 1 but who could not be arrested or be prevented from fleeing by other means than by killing him, would be deemed to be justifiable homicide. However, in **Walters 2002 (4) SA 613 (CC)** the previous Section 49(2) was declared to be unconstitutional and this section has now been repealed and replaced. The law with regard to the use of force in order to effect an arrest was also stated.

If an accused has killed another and claims the protection afforded by Section 49, the onus is on him to show on a balance of probabilities that the requirements of this section were complied with. It is important that the police do not exceed the limits of their powers in terms of Section 49. Accordingly, every facet of police action under Section 49 must be carefully analysed and measured against the requirements of this section.



“Deadly force” or “potentially lethal force” should be regarded as referring to that degree of force which has the potential of killing the suspect.

Our courts have always emphasized that an arrestor should not indiscriminately have recourse to shooting at a suspect in order to effect an arrest.

A private citizen should exercise the powers conferred upon him in terms of Section 42 and 49 of the CPA sparingly and with great caution.

- **The requirements for the use of force**

The following requirements must be met before an arrestor may use force in order to effect the arrest:

- (1) The person to be arrested must have committed an offence. If the arrestor is doing so on the suspicion that the suspect has committed an offence, the suspicion must be reasonable.
- (2) The arrestor must be lawfully entitled to arrest the suspect.
- (3) The arrestor must attempt to arrest the suspect.
- (4) The arrestor must have the intention to arrest the suspect and not to punish him.
- (5) The suspect must attempt to escape by fleeing or offering resistance.
- (6) The suspect must be aware that an attempt is being made to arrest him or in some way be informed of the intention and continue to flee or resist arrest.
  - The arrestor can't take it for granted that arrestee knows somebody is attempting to arrest him - **Barnard** (van with exploding noises)
- (7) There must be no other reasonable means to effect the arrest.
- (8) The force used must be directed against the suspected offender.
  - If there are several people in a car, you can't shoot indiscriminately.
- (9) The degree of force that may be used to effect the arrest must be reasonably necessary and proportional in all the circumstances.

#### 7.4.8. Escape from lawful custody

Escaping from lawful custody or attempting to is a serious offence. This includes a person in custody, but not yet lodged in any prison or police cell. Anyone assisting him to escape or harbouring or concealing him also commits an offence.

#### 7.5. **Other methods**

Apart from the above four methods, there is also the possibility of release on warning in terms of Section 72 of the CPA. If an accused is in custody and the police or court may release him on bail under Sections 59 or 60, the police or court may, in lieu of bail and with regard to certain offences, release the accused from custody and warn him to appear before a specified court at a certain time on a specified date. If the accused is under the age of 18, he is placed in the care of the person in whose custody he is and such person is warned to bring the accused to the specified court on the fixed date.

#### 7.6. **Extradition**

Although extradition is not a method of securing the attendance of the accused at his trial, it is a way of ensuring that the accused is handed over to the authorities of another state in order to allow them to take the accused to the court of that state. In terms of international law principles, the government of every sovereign state has exclusive authority over everything happening within the borders of that state. Generally, it has no power to punish persons who have committed crimes in the area of jurisdiction of another state. Therefore, where a person commits a crime in one state and flees to another state and then fails to return of his own accord in an attempt to escape the consequences of his act, the state where the crime was committed is powerless to act.

Extradition makes provision for the person to be extradited to the state in whose area of jurisdiction the crime was committed, but states are not obliged to extradite criminals. An obligation to extradite can only come into being by agreement. A state may, however, if it deems it proper because of ties of friendship, extradite a criminal to a foreign state on that state's request. The principles usually corresponding to extradition agreements are:

- Extradition is only granted in respect of serious crimes.

- A person is not extradited to a foreign state if he is charged with a crime of a political nature.
- A person is tried in the state to which he is extradited only for the crime in respect of which he has been extradited.
- Extradition is refused if the crime for which extradition is sought is punishable by the death penalty.
- An extradition agreement usually contains a ne bis in idem rule which corresponds with pleas of *autrefois acquit* and *autrefois convict*.

A person whose extradition is sought is brought before a Magistrate who then conducts an enquiry with a view to possible extradition.

## 8. INTERROGATION, INTERCEPTION AND ESTABLISHING THE BODILY FEATURES OF A PERSON

### 8.1. Interrogation

#### 8.1.1. General power with regard to interrogation

Once the police become aware of the commission of a crime, an important part of their investigation will consist in asking questions in order to obtain information relating to the commission of the offence. In the light of the answers received, the police will decide how to proceed with the investigation. The police do not need any special powers to interrogate as nothing prohibits them or anyone else from interrogating another person.

The need for special powers arises only when a person refuses to grant police access to someone they wish to interrogate, refuses to respond to police questioning or answers questions but refuses to furnish them with his name and address in order to be subpoenaed to testify. There is no general legal duty on persons to furnish information that they may have concerning the commission of an offence to the police and it is only in exceptional circumstances that there is such a duty (common law duty = only high treason; statutory provisions = drug trafficking etc).

- **Entry to premises to interrogate persons**

It occasionally happens that the person the police wish to question is on private premises and the person in charge of the premises refuses to allow them to enter.

#### **Section 26 of CPA - Entering of premises for purposes of obtaining evidence**

Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.

The reason for the proviso that police may not enter without consent is to prevent police from entering without having requested permission amounting to a serious infringement of the dwellers' privacy. However, this once again presents the possibility that the occupier may refuse the police entry, which may hamper investigations.

#### **Section 27(1) of CPA - Resistance against entry or search**

A police official who may lawfully search any person or any premises or who may enter any premises under Section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises.

- **Obtaining the name and address of a person**

Provision has been made to oblige persons who, despite a request to this effect, refuse to furnish the police with information relating to an offence or alleged offence or to provide the court with this information. Provision is also made for persons who are suspected of having committed certain minor offences, not to be arrested, but to be brought before the court by means of summons.

However, each of these provisions requires that at least the name and address of the person concerned be known. If the person refuses to give his name and address to the police upon request, he will make it impossible to apply the said provisions to him. To prevent this, certain powers is conferred on peace officers in terms of –

**Section 41(1) of the CPA – see page 29**

Refusal by a person to furnish his name and address as indicated in Section 41(1) and the furnishing of an incorrect or false address constitutes an offence and is punishable by a fine or imprisonment without the option of a fine for a period of 3 months.

- **Detention for the purposes of interrogation**

In the case of certain serious offences, the legislature has empowered the police to arrest persons and to detain them for the purposes of interrogation. For example:

Section 12 of the Drugs and Drug Trafficking Act relates to people suspected of having committed drug offences or of having information relating thereto who may be detained indefinitely subject to being brought before a Magistrate within 48 hours after the arrest and thereafter not less than once every 10 days..

### 8.1.2. Powers relating to possible witnesses

**Section 205(1) of CPA - Judge, regional court magistrate or magistrate may take evidence as to alleged offence**

A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

Such examinations can be conducted privately and need not be held in court. Should the person fail or refuse to give the information, he shall not be sentenced to imprisonment as contemplated in Section 189 of the CPA unless the judicial officer concerned is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order. This section is thus specially designed to compel a person to reveal his knowledge of an alleged crime, which knowledge he has refused to disclose to the police. If such witness refuses to give the necessary information or refuses to answer the questions, the court may enquire into such refusal, but he is not obliged to answer self-incriminating questions. Section 205 only provides for examination and not for cross-examination

### 8.1.3. Powers relating to suspects and accused

The right to remain silent must be distinguished from the right not to be questioned. Suspects and accused persons have the former, but not the latter. No adverse inference may be drawn from his silence.

## 8.2. **Interception and monitoring**

Interception of post and private conversations between persons constitute serious infringements of privacy of individuals and strict measures were laid down as in Section 14 of the Constitution.

**Exception:** A police official may intercept communications in order to prevent serious bodily harm or to determine the location where some person is at a given time under mandate from a judge.

**Kidson 1999 (1) SACR 338 (WLD)**

The court warns of the need to guard against an “inappropriately extravagant notion of privacy” that takes the form of protecting the rights of privacy in cases that do not deserve such protection.

### 8.3. Ascertainment of bodily features of accused

Section 37 of the CPA regulates the obtaining of data through finger-, palm- and footprints, conducting identity parades, ascertaining bodily features; taking of blood samples and taking of photographs.

#### **Huma 1996 (1) SA 232 (W)**

The court held that the taking of fingerprints does not violate the accused's right to remain silent or his right to dignity.

Only suspects and accused and convicted persons may be finger-, palm- or footprinted. Only medical staff may take blood samples. A person may also be subjected to a voice identification parade.

#### **Minister of Safety and Security and Another v Xaba 2003 (2) SA 703 (D)**

The court held that Section 37(2)(a) of the CPA does not authorise the removal of a bullet under general anaesthetic.

Finally, Section 37 provides for the destruction of data if a person is acquitted or criminal proceedings are not continued

## 9. SEARCH AND SEIZURE

### 9.1. Introduction

The searching of persons and premises, seizure and related matters seems to go against the spirit and content of Sections 12, 14 and 35 of the Constitution. However, rights may be limited by reasonable and justifiable limitations imposed by law of general application in terms of Section 36 of the Constitution.

### 9.2. Articles that are susceptible to seizure

#### **Section 20 of CPA - State may seize certain articles**

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) -

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

The only exception relates to documents which are privileged and of which the holder of the privilege has not yet relinquished his privilege.

### 9.3. Search in terms of a search warrant

**General Rule:** Searches and seizures should be conducted only in terms of a search warrant issued by a judicial officer such as a Magistrate or judge whenever possible.

The judicial officer must himself decide whether or not there are reasonable grounds for the search. This discretion must be exercised in a reasonable and regular manner and he must also decide whether the article that will be searched for is one that may be seized in terms of Section 20 and whether there are reasonable grounds for believing the article is present at the particular place.

#### **Divisional Commissioner of SA Police, Witwatersrand Area v SA Associated Newspapers**

The merits of a decision by a justice of the peace that there are objective grounds upon which a warrant may be issued, may not be contested in court.

#### 9.3.1. General search warrants

#### **Section 21 - Article to be seized under search warrant**

- (1) Subject to the provisions of Sections 22, 24 and 25, an article referred to in Section 20 shall be seized only by virtue of a search warrant issued -

- (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
  - (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.
- (2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

The warrant must clearly define the purpose of the search and the article that must be seized. To limit the infringement of privacy, Section 21(3)(a) provides that a search warrant must be executed by day, unless the judicial officer gives written authorisation for it to be executed at night. A warrant may be issued and executed on a Sunday and remains in force until executed or cancelled by the person who issued it.

### 9.3.2. Warrants to maintain internal security and law and order

#### **Wolpe v Officer Commanding South African Police, Johannesburg 1955 (2) SA 87 (W)**

Urgent application was brought for an interdict to prohibit police from attending a private political meeting. Court held that the basic duties of the police are not confined to those mentioned in statutes and that it rather flow from the nature of the police as a civil force in state. It was concluded that if there were a suspicion that as a result of the holding of a meeting, a disturbance of public order would occur, the police is entitled to attend the meeting in order to prevent it.

#### **Section 25 of CPA - Power of police to enter premises in connection with State security or any offence**

- (1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing -
- (a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or
  - (b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,
- he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose -
- (i) of carrying out such investigations and of taking such steps as such police official may consider necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence;
  - (ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and
  - (iii) of seizing any such article.
- (2) A warrant under subsection (1) may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

### 9.3.3. General information requirements with regard to warrants

It is desirable that the subject involved has access to the document which infringes upon his private rights. Thus, a police official who executes a warrant in terms of Sections 21 or 25 of the CPA must, once the warrant has been executed and upon the request of any person whose rights have been affected, provide such person with a copy of the warrant.

#### 9.4. Search without a warrant

It is conceivable that circumstances may arise where the delay in obtaining a search warrant would defeat the object of the search. Provisions are made for the power to conduct searches without a warrant. While search warrants empower only police officials to conduct search and seizure, both private persons and police officials can conduct search and seizure without a warrant.

##### 9.4.1. Powers of the police

###### **Section 22 of CPA - Circumstances in which article may be seized without search warrant**

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 -

- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes -
  - (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
  - (ii) that the delay in obtaining such warrant would defeat the object of the search.

The belief of the police official must be objectively justified on the facts.

###### **Section 25 of CPA - Power of police to enter premises in connection with State security or any offence**

- (3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he on reasonable grounds believes -
  - (a) that a warrant will be issued to him under paragraph (a) or (b) of subsection (1) if he applies for such warrant; and
  - (b) that the delay in obtaining such warrant would defeat the object thereof.

Section 13(6) of the South African Police Services Act empowers a police official to, for the purposes of border control or to control the import and export of any goods, search without a warrant any person, premises, vehicle, vessel, ship etc within 10km from any border or territorial waters of South Africa and seize anything found, which may lawfully be seized.

Section 13(7) of the South African Police Services Act empowers the National or Provincial Commissioner of the South African Police Service to, in order to restore the public order or to ensure the safety of the public, authorise that the particular area or any part thereof be cordoned off.

Section 13(8) of the South African Police Services Act empowers the National or Provincial Commissioner of the South African Police Service to authorise a member in writing to set up a roadblock on a public road in a particular area and search any vehicle or person without a warrant and seize any article referred to in Section 20. Such member, upon demand, exhibit to person affected by the search a copy of the written authorisation by the commissioner.

##### 9.4.2. Powers of the occupiers of premises (private persons)

###### **Section 24 of CPA - Search of premises**

Any person who is lawfully in charge or occupation of any premises and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises concerned, or that any article has been placed thereon or therein or is in the custody or possession of any person upon or in such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs, arms and ammunition or explosives, may at any time, if a police official is not readily available, enter such premises for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found, he shall take possession thereof and forthwith deliver it to a police official.

##### 9.4.3. Search for the purposes of effecting an arrest

In the event of search of premises to find and arrest a suspect, exactly the same powers are conferred on public officials and private persons.

**Section 48 of CPA - Breaking open premises for purpose of arrest**

Any person who may lawfully arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may, if he first audibly demands entry into such premises and notifies the purpose for which he seeks entry and fails to gain entry, break open, enter and search such premises for the purpose of effecting the arrest.

9.5. **Search of an arrested person****Section 23 of CPA - Search of arrested person and seizure of article**

- (1) On the arrest of any person, the person making the arrest may -
  - (a) if he is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he shall forthwith deliver any such article to a police official; or
  - (b) if he is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.
- (2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to himself or others.

9.6. **The use of force in order to conduct a search****Section 27 of CPA - Resistance against entry or search**

- (1) See page 34
- (2) The proviso to subsection (1) shall not apply where the police official concerned is on reasonable grounds of the opinion that any article which is the subject of the search may be destroyed or disposed of if the provisions of the said proviso are first complied with.

9.7. **General requirements of propriety with regard to searching****Section 29 of CPA - Search to be conducted in decent and orderly manner**

A search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.

9.8. **Unlawful search**

In terms of Section 35(5) of Constitution it is clear that evidence obtained in a manner that violates fundamental rights must be excluded if the admission of it would render the trial unfair or be detrimental to the admin of justice and therefore it is clearly futile to gather information unlawfully, as it will be excluded.

Furthermore, a police official commits an offence when he acts contrary to Sections 21 and 25 of the CPA.

9.9. **Disposal and forfeiture of seized articles**

Normally an article, seized by a police official in terms of Section 20 or to whom any such article is delivered, is kept in police custody and, if required for criminal proceedings, will be handed to the Clerk of the Magistrates' Court or Registrar of the High Court for safe custody. At the end of the proceedings, the judicial officer must make an appropriate order in respect of the disposal of the article (eg return to owner or forfeit to state).

If no proceedings are instituted, the article is returned to the person from whom it was seized if he may lawfully possess it or, if he may not lawfully possess it, be returned to a person who may lawfully possess it or, if no such person could be found, it is forfeited to the state. Once notified, a person must take delivery of the item within 30 days or it will be forfeited to the state

## 10. BAIL AND OTHER FORMS OF RELEASE

### 10.1. Introduction

#### 10.1.1. The effect of bail

In terms of Section 58 of the CPA when bail is granted, an accused is released from custody upon payment, or the furnishing of a guarantee to pay, of a sum of money determined for his bail. He must then appear at the place and on the date appointed for his trial. His release usually endures until a verdict is given or until sentence is imposed. An accused's failure to appear in court or to comply with the conditions of his bail, may result in cancellation of bail and forfeiture of bail money to the State. Such failure is also a criminal offence and punishable by a fine or imprisonment not exceeding 1 year.

#### 10.1.2. The Constitutional right to bail and the need for and nature of bail as a method of securing liberty pending the outcome of a trial

- Section 35(1)(f) of Constitution stipulates that everyone arrested for allegedly committing an offence, has the right to be released from detention, if the interests of justice permit, subject to reasonable conditions.
- An accused is constitutionally presumed innocent until convicted.
- The purpose of bail is to strike a balance between the interests of society and the liberty of an accused.
- Legislation determines that the refusal to grant bail will be in the interests of justice where one or more of the grounds referred to in Sections 60(4)(a) to (e) are established.
- It is clearly not in the best interests of justice to grant bail to an accused who will not stand his trial or who might otherwise abuse his liberty (ie intimidate State witnesses). The opposite is also true that the interests of justice will not be served in refusing bail an accused if he will stand his trial and comply with the conditions.
- Section 39(2) of the Constitution stipulates that all courts must promote the spirit, purport and objects of the Constitution.

#### 10.1.3. Bail and some fundamental principles of criminal justice

It's not the purpose of bail to punish - neither the amount determined for bail, nor refusal of bail, may be influenced by corrective notions. However, the prevalence of a particular type of crime may be considered. If a sentence is likely to be a fine, the accused should be granted bail.

The prosecutor must make an independent assessment of whether bail should be granted and not blindly follow the police's recommendation. The court should not act as a 'rubber stamp' in confirming the viewpoint of the police of prosecution.

The issue of release on or refusal of bail should not be used to induce the accused to give a statement. A court must inform an unrepresented accused of his right to apply for bail, as well as the procedure to be followed.

### 10.2. **Bail granted by police before first court appearance of an accused**

In terms of Section 59 of the CPA, bail may, in certain limited circumstances, be granted by the police and this is referred to as "police bail". The purpose of this type of bail is to ensure that pre-trial release on bail in respect of relatively trivial offences be secured as soon as possible - even before first appearance in a lower court. If police bail cannot be granted or it can be granted but is refused, the accused may still apply to a lower court for bail even before his first compulsory appearance. Bail granted by the prosecution pending an accused's first appearance in court, is also possible.

#### 10.2.1. Procedure concerning police bail

##### **Section 59 of CPA - Bail before first appearance of accused in lower court**

- (1) (a) An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.



- (b) The police official referred to in paragraph (a) shall, at the time of releasing the accused on bail, complete and hand to the accused a recognizance on which a receipt shall be given for the sum of money deposited as bail and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused are entered.
- (c) The said police official shall forthwith forward a duplicate original of such recognizance to the clerk of the court which has jurisdiction.

The police must give the accused a reasonable opportunity to communicate with his legal representative, family or friends to obtain the bail amount.

#### 10.2.2. Police bail: the limitations

Only cash payments can be received and no sureties can be accepted. Release on police bail can only take place before the accused's first appearance in a lower court.

Discretionary special conditions (conditions other than essential bail conditions), cannot be added by the police when releasing an accused on bail. However, a court may add special conditions to police bail.

Police bail is not possible in respect of offences referred to in Part II and III of Schedule 2 (ie treason, sedition, murder, rape, arson, kidnapping, robbery, theft, fraud and assault etc).

#### 10.2.3. The discretion

An application for police bail should not be frustrated by an excessive amount and should not be refused unless there is substantial cause for such refusal. An action for damages will lie should police bail be refused on malicious grounds or where the police official simply refused to exercise his discretion - **Shaw v Collins (1883) 2 SC 389**.

#### 10.3. **Bail granted by the prosecution**

A DPP or prosecutor may, in consultation with the police investigating officer, authorise the release of an accused on bail, which is referred to as "prosecutorial bail". The effect is that the person in custody will be released upon payment or furnishing a guarantee to pay the sum of money determined. The bail will be subject to such conditions determined by the DPP or prosecutor.

The accused must appear on the first court day at the time determined by the prosecution and the release will endure until the accused's first appearance in court. At the first appearance, the court can extend the bail on the same conditions or add further conditions.

#### 10.4. **Bail applications in court**

##### **Section 60(1) of CPA - Bail application of accused in court**

- (a) An accused who is in custody in respect of an offence shall, subject to the provisions of Section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.
- (b) Subject to the provisions of Section 50(6)(c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

##### **Section 50(6) of CPA – Procedure after arrest**

- (a) At his or her first appearance in court a person contemplated in subsection (1)(a) who -
- (i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60 -
- (aa) be informed by the court of the reason for his or her further detention; or
- (bb) be charged and be entitled to apply to be released on bail, and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or
- (ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.
- (b) An arrested person contemplated in paragraph (a) (i) is not entitled to be brought to court outside ordinary court hours.

- (c) The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.
- (d) The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application 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 in section 60 (11A);
  - (iii) ... [Sub-para. (iii) deleted by s. 8 (1) (c) of Act 62 of 2000.]
  - (iv) it appears to the court that it 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 it is necessary in the interests of justice to do so.

#### 10.4.1. Appeal by accused to High Court against a lower court's decision concerning bail

##### **Section 65(1) of CPA - Appeal to superior court with regard to bail**

- (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.
- (b) The appeal may be heard by a single judge.
- (c) A local division of the Supreme Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

Leave to appeal where the trial is still pending, is not required. When the accused has already been convicted and sentenced, leave to appeal will be necessary.

The accused must serve a copy of the notice of appeal on the DPP and Magistrate, which notice must set out the specific grounds of appeal. The Magistrate must then furnish the reasons for his decision to the court or judge.

An appeal shall not lie in respect of new facts which arise, unless such new facts are first placed before the Magistrate against whose decision the appeal is brought and such Magistrate gives a decision against the accused on such new facts. The court shall not set aside the decision against which the appeal is brought unless it was wrong, in which event it will give the decision which in its opinion should have been given. If the High Court refuses to change the decision, further appeal is possible, but only with the leave of the High Court that heard the appeal and bail appeals are *prima facie* urgent.

#### 10.4.2. Appeal by the DPP against decision of court to release accused on bail

The DPP may appeal to the High Court against the decision of a lower court to release the accused on bail; or against the imposition of a condition on bail; or against the decision of a superior court to release the accused on bail. In the case of a successful appeal against release, the court shall issue a warrant for the arrest of the accused.

#### 10.5. **The risks and factors which must be considered in determining a bail application**

**Main question:** Will the interests of justice be prejudiced if the accused is granted bail?

Four subsidiary questions arise:

- Will the accused stand his trial if released on bail?
- Will he interfere with State witnesses or police investigation?
- Will he commit further crimes?
- Will his release be prejudicial to the maintenance of law and order and security of the State?

**Section 60(4) of CPA - Bail application of accused in court**

The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

In **Dlamini etc** the Constitutional Court held that these Sections were constitutional.

10.5.1. Section 60(4)(a)

**Section 60(5) of CPA - Bail application of accused in court**

In considering whether the ground in subsection (4)(a) has been established, the court may, where applicable, take into account the following factors, namely -

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to any person;
- (c) any resentment the accused is alleged to harbour against any person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
- (h) any other factor which in the opinion of the court should be taken into account.

Bail can be refused if the court is satisfied that an accused has a propensity to commit the crime with which he is charged and that he might continue to perpetrate it if released on bail. Therefore, if there is a risk of repetition of the same criminal conduct, the interests of society will outweigh the rights of the accused.

10.5.2. Section 60(4)(b)

**Section 60(6) of CPA - Bail application of accused in court**

In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely -

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.

The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond.

10.5.3. Section 60(4)(c)

**Section 60(7) of CPA - Bail application of accused in court**

In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors, namely -

- (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed; or
- (h) any other factor which in the opinion of the court should be taken into account.

10.5.4. Section 60(4)(d)

**Section 60(8) of CPA - Bail application of accused in court**

In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely -

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which in the opinion of the court should be taken into account.

10.5.5. Section 60(4)(e)

**Section 60(8A) of CPA - Bail application of accused in court**

In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely -

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardized by his or her release;
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;

- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.

10.5.6. The interests of justice and the personal freedom of and possible prejudice to an accused

**Section 60(9) of CPA - Bail application of accused in court**

In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely -

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account.

The factors imply a proportionality test: The likely harm must be weighed against the deprivation of liberty.

10.5.7. Additional factors to be considered in a bail application pending an appeal against conviction or sentence

The absence of reasonable prospects of success of appeal may justify refusal of bail. An application for bail, pending an appeal against sentence should generally be granted where the accused has been sentenced to less than 1 year's imprisonment.

10.5.8. Amount of bail

An excessive sum, which really amounts to a refusal of bail, should not be fixed. The guideline is to fix bail at an amount that can not only be paid, but will make it advantageous to the accused to stand his trial rather than flee and forfeit his money. Therefore, there must be careful investigation of the means and resources of the accused and individualisation is important. The court is entitled to fix a high amount of bail where the accused is clearly a man of vast financial resources.

10.6. **Bail conditions**

**Section 60(12) of CPA - Bail application of accused in court**

The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

These conditions may be referred to as discretionary special conditions.

**Section 62 - Court may add further conditions of bail**

Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail -

- (a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;
- (b) with regard to any place to which the accused is forbidden to go;
- (c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;
- (d) with regard to the place at which any document may be served on him under this Act;
- (e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;

- (f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

Practical example of such a condition is that the accused must report to a specified police station twice a day, hand over his passport to the police or that he may not leave the magisterial district without informing the police. Bail conditions must always be practically feasible and should be neither vague nor ambiguous nor *ultra vires* nor *contra bonos mores*. The prosecutor or accused can also apply for the increase or decrease of the amount of bail or amend any condition imposed.

#### 10.7. Payment of bail money

The accused must deposit the determined amount with the Clerk of the Magistrates' Court or with the Registrar of the High Court or with a member of the correctional services at the prison where he is in custody or with any police official at the place where he is in custody before he is released.

A third person may pay the bail money for the accused, but the bail money may only be refunded to the accused or the depositor. It is considered unethical if a legal representative should pay bail for the accused.

#### 10.8. Cancellation of bail

##### 10.8.1. Failure to observe conditions of bail

The prosecutor can apply to lead evidence to prove that the accused has failed to comply with a condition of bail and, if the accused is present, the court must proceed to hear evidence. If the accused is not present, the court can issue a warrant for his arrest so that evidence can be heard in his presence. The court can, if the failure is found to be due to fault on the accused's part, cancel the bail and declare the money forfeited to the State. No appeal lies against an order for cancellation of bail.

##### 10.8.2. Failure to appear

#### **Section 67 of CPA - Failure of accused on bail to appear**

- (1) If an accused who is released on bail -
  - (a) fails to appear at the place and on the date and at the time -
    - (i) appointed for his trial; or
    - (ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
  - (b) fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.
- (2)
  - (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.
  - (b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.
  - (c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.
- (3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.

The accused can re-apply for bail if it was withdrawn, but this fact will be taken into account in consideration of the new application for bail.

##### 10.8.3. Cancellation of bail where A is about to abscond

#### **Section 68 of CPA - Cancellation of bail**

- (1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that -
- (a) the accused is about to evade justice or is about to abscond in order to evade justice;
  - (b) the accused has interfered or threatened or attempted to interfere with witnesses;
  - (c) the accused has defeated or attempted to defeat the ends of justice;
  - (d) the accused poses a threat to the safety of the public or of a particular person;
  - (e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
  - (f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or
  - (g) it is in the interests of justice to do so,
- issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.
- (2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that -
- (a) he or she has reason to believe that -
    - (i) an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice;
    - (ii) the accused has interfered or threatened or attempted to interfere with witnesses;
    - (iii) the accused has defeated or attempted to defeat the ends of justice; or
    - (iv) the accused poses a threat to the safety of the public or of a particular person;
  - (b) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
  - (c) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to release the accused on bail; or
  - (d) it is in the interests of justice to do so, issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.

An accused has an automatic right of appeal against withdrawal of his bail.

#### 10.8.4. Cancellation of bail at the request of the accused

##### **Section 68A of CPA - Cancellation of bail at request of accused**

Any court before which a charge is pending in respect of which the accused has been released on bail may, upon application by the accused, cancel the bail and refund the bail money if the accused is in custody on any other charge or is serving a sentence.

#### 10.8.5. Forfeiture and remission

Forfeiture has the same effect as a civil judgment upon the accused and can be executed in the same way.

10.8.6. Criminal liability on the ground of failure to appear or to comply with a condition of bail

**Section 67A - Criminal liability of a person who is on bail on the ground of failure to appear or to comply with a condition of bail**

Any person who has been released on bail and who fails without good cause to appear on the date and at the place determined for his or her appearance, or to remain in attendance until the proceedings in which he or she must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of section 60 or 62, including an amendment or supplementation thereof in terms of section 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year.

10.9. **Procedural and evidentiary rules relating to bail applications**

A court hearing a bail application should not act as a "passive umpire". If the question of the possible release of an accused on bail is not raised by the accused or the prosecutor, the court should of its own accord ascertain from the accused whether he wishes bail to be considered by the court. The court may inquire in an informal manner the information needed for its decision or order regarding bail.

The court has the power to decide who leads evidence first. Where the prosecutor doesn't oppose bail in respect of matters referred, the court must require him to place on record the reasons for not opposing the bail application - this is an inquisitorial feature of bail.

The strict rules of evidence are relaxed for the purposes of bail applications. Hearsay may be received more readily than at trial. The personal opinion of a DPP is a relevant consideration, but his opinion cannot be substituted for the court's discretion.

10.9.1. Proof of previous convictions

Previous convictions may be proved by the state in the course of a bail application. The accused or his legal advisor is also compelled to inform the court whether the accused has previously been convicted of an offence. Any charges pending against the accused must also be disclosed by him. If it is the legal representative who submits the information, the accused is required to declare that he confirms such information. Any accused who willfully fails or refuses to comply with the provisions commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding 2 years.

10.9.2. The subsequent trial and admissibility of the record of the bail proceedings

The record of the bail proceedings, excluding the information relating to the previous convictions, forms part of the record of the trial of the accused and the trial court will have access to all the evidence led at the bail proceedings.

**Section 60(11B)(c)** of the CPA contains a proviso that, if the accused elects to testify during the bail proceedings, the court must inform him that anything he says may be used against him at his subsequent trial. Thus, it must be clear that he was properly informed of his constitutional right to silence and privilege against self incrimination.

The record of the bail proceedings is neither automatically excluded from nor included in the evidentiary material at the trial. Whether or not it is excluded is governed by the principles of a fair trial.

10.9.3. The burden and standard of proof in bail applications

The accused bears the burden of proof in respect of Section 60(11)(a) and (b) and such burden is proof on a balance of probabilities.

**Section 60(11) of CPA - Bail application of accused in court**

Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -

- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused,



having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

Section 60(11)(a) is constitutional even though it places a formal onus on the accused. The "exceptional circumstances" limitation was deemed to be a permissible limitation in **Dlamini etc.**

In Section 60(11)(b) the additional "exceptional circumstances" has been excluded and thus, the test for Section 60(11)(a) is more rigorous than that contemplated by Section 60(11)(b).

#### 10.9.4. The meaning of "exceptional circumstances" as used in Section 60(11)(a)

In **Dlamini etc** the Constitutional Court observed that an accused could establish the requirement by proving that there are exceptional circumstances relating to his emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case.

In **Jonas 1998 (2) SACR 677 (SECLD)** the court gave the following examples of what would constitute "exceptional circumstances":

- Bail applicant's terminal illness;
- Urgent medical operation; or
- Cast-iron alibi.

"Exceptional circumstances" are present where an accused has adduced acceptable evidence that the prosecution's case against him is non-existent or subject to serious doubt.

In **Siwela 1999 (2) SACR 685 (W)** it was held that the following factors taken together constituted "exceptional circumstances":

- Failure of the State to adduce evidence contradicting the accused's denial of guilt;
- Lengthy period of incarceration
- Good conduct of the accused during a period of release after an initial period of detention.

The standard of proof that an accused must satisfy in proving "exceptional circumstances", is proof on a balance of probability. The following facts do not constitute "exceptional circumstances":

- Postponement of trial for 5 months
- Prior release on bail of co-accused
- Value of goods appearing to be far less than value initially alleged by prosecution
- The fact that the applicant's business was suffering because of his detention.

#### 10.10. **Release other than on bail**

Persons under 18 may be released, but if not released, they should be placed in a place of safety according to the Child Care Act, or under supervision of probation officer or correctional official.

Any accused can also be released on warning to appear before a specified court at a specified time and date.

#### 10.11. **Section 63: Release on warning or on bail on account of prison conditions**

South African prisons are overcrowded and prisoners awaiting trial are part of the problem. A further number of these people have been granted bail, but can't afford to pay it. Over-population poses a threat to the dignity, health and safety of its inmates.

Section 63 of the CPA provides that if the head of the prison is satisfied that the prison population is reaching such proportions that it constitutes a material and imminent threat to the dignity, health or safety of an accused, he may apply to a lower court for the release of such an accused on warning in lieu of bail or the amendment of his bail conditions.

### 11. **PRETRIAL EXAMINATIONS**

#### 11.1. **Introduction**

Once the investigation into an offence has been completed and steps have been taken to ensure the presence of the accused at the trial, the charges against the accused will be formulated and the trial will normally commence.

A trial is referred to as a summary trial when:

- it is not preceded by a preparatory examination;
- the DPP may designate any court which has jurisdiction as the forum of a summary trial;
- the accused will be brought before that court and the trial will commence.

When the accused is in custody, he must first be brought before a lower court even though that court may not have jurisdiction to try him and if this happens, Section 75 applies. At the prosecutor's request, the accused is then referred for a summary trial to a court with jurisdiction, which may be a Regional Court or a High Court.

Before the summary trial commences in a Regional Court or a High Court, the DPP may either order that a preparatory examination be held or that the accused be required to plead in the Magistrates' Court although that court does not have jurisdiction to try the offence or impose a punishment.

### **11.2. Plea in Magistrates' Court on charge justiciable in the Regional court**

When the accused appears in the Magistrates' Court and the alleged offence may be tried by a Regional Court but not by a Magistrates' Court, or the prosecutor informs the court that he is of the opinion that the offence is of such a nature that it merits punishment in excess of the jurisdiction of the Magistrates' Court, the prosecutor may put the relevant charge and any other charge to the accused, who shall be required by the Magistrate to plead to it – Section 112A of CPA.

If the accused pleads not guilty, the Magistrate may question him in terms of Section 115 of the CPA and then commit him for a summary trial to the Regional Court. If the accused pleads guilty, he is questioned in terms of Section 112 and if the Magistrate is satisfied that the accused is guilty, will refer him to the Regional Court for sentencing. Should the Magistrate not be satisfied, he will enter a plea of not guilty and submit the accused for summary trial to a Regional Court, where he will be asked to plead afresh at the subsequent trial, irrespective of whether he pleaded in the Magistrates' Court.

### **11.3. Plea in Magistrates' Court on charge justiciable in the High Court**

This procedure is sometimes referred to as the "curtailed preparatory examination" or the "mini preparatory examination". The purpose of this procedure is to ease the workload of the High Court and of the DPP. It is a sifting process whereby a preparatory examination or superior court trial may be eliminated in certain cases where, at an early stage if the accused co-operates, the charge proves to be of a less serious nature than was originally thought.

When the accused appears in a Magistrates' Court and the alleged offence may be tried by a superior court only or merits punishment in excess of the jurisdiction of the Magistrates' Court, the DPP may instruct the prosecutor to put the charges to the accused in the Magistrates' Court. The Magistrate does not determine the charge upon which the accused must stand trial and the proceedings only serve as an aid to the DPP in determining the charge.

The Magistrate directs the accused to plead to the charge and if he pleads guilty and the Magistrate is satisfied that he is guilty after questioning him in terms of section 112, he stops the proceedings pending a decision by the DPP. The DPP may decide to arraign the accused for sentence before the superior court or any other court having jurisdiction. If the Magistrate is not satisfied with the plea of guilty, he must record in what respect he is not satisfied and enter a plea of not guilty. The Magistrate must advise the accused of the decision of the DPP and if the DPP's decision is that the accused is arraigned for sentence –

- in the Magistrates' Court concerned, the court must dispose of the case and the proceedings continue as though no interruption occurred;
- in a Regional Court or High Court, the Magistrate must adjourn the case for sentence by such court;

If the accused pleads not guilty, Section 122 provides that the Magistrate must ask the accused whether he wants to make a statement indicating the basis of his defence. If he does not make a statement or it is not clear what he admits or denies, the Magistrate may question him. The court may inquire whether any admissions may be recorded as such.

When Section 115 has been complied with, the Magistrate must stop the proceedings and adjourn the case pending the decision of the DPP. The latter may:

- arraign the accused on any charge at a summary trial before a superior court or any other court having jurisdiction;
- institute a preparatory examination against the accused.

The DPP advised the Magistrates' Court of his decision and the court notifies the accused accordingly. The accused must be asked to plead afresh at the subsequent trial.

#### 11.4. Preparatory Examination

##### 11.4.1. What is a preparatory examination?

A preparatory examination is a criminal proceeding, which is not a trial because the final decision rests with the DPP and not with the court. It is an examination which is held before a Magistrate to determine whether the evidence presented justifies a trial before a superior court or any other court.

The accused is not on trial and he is not requested to plead at the commencement of the proceedings, but only at the conclusion after all the evidence has been led.

The Magistrate does not make a finding of guilty or not guilty. If a trial is instituted after the preparatory examination, it is a separate proceeding. If the Magistrate discharges the accused at the conclusion of the examination, this does not have the effect of an acquittal. However, if he is informed that the DPP has decided not to prosecute him, he may, if charged again plead *autrefois acquit* (previously been acquitted).

##### 11.4.2. When is a preparatory examination held?

If a DPP is of the opinion that it is necessary for the more effective administration of justice, he may decide to order the holding of a preparatory examination before the accused is tried in a superior court or other court with jurisdiction as regulated by Section 123. He may take the decision at the following stages:

- following the Section 119 procedure where the accused pleaded guilty and the DPP is in doubt about his guilt;
- following Section 119 procedure in which the accused pleaded not guilty;
- at any stage before conviction during the course of a trial in the Magistrates' Court or Regional Court. In such a case the trial will be converted into a preparatory examination.

The DPP will institute a preparatory examination if he is of the opinion that:

- the crime is too serious to be tried by a lower court ;
- there is a fatal deficiency in the State's case after the closure of the State's case and it would be remedied by converting the trial into a preparatory examination.

##### 11.4.3. Powers of the DPP after conclusion of the preparatory examination

He may arraign the accused for sentence, arraign him for trial, or decline to prosecute.