

**PROTRACTED BAIL:
A JUSTIFIED HINDERENCE
OR
AN UNWARRANTED DELAY?**

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I hereby declare that I have read and understood the regulations governing the submission of the LLM dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

Dated at CAPE TOWN on this the 13th day of SEPTEMBER 2005

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1. INTRODUCTION

Over the decades, the courts have released accused persons on bail pending the outcome of their criminal trial. The Criminal Procedure Act 51 of 1977 (CPA) regulates the process in criminal courts and also deals with the arrest and detention of accused persons. This Act states that a person, following his arrest, may be detained for a period prior to his first appearance in a lower court¹.

During the 1980's², the Supreme Court of South Africa interpreted these sections to such an extent that it allowed the accused to apply for bail during this period of detention preceding his or her first appearance in court. This was also confirmed by the Appeal Court in the 1990's³, which was, at that stage, the highest court in South Africa. Accused persons were permitted to apply for bail outside normal court hours and on weekends.

After the release of former President Nelson Mandela and once our country had become a democracy, South Africa adopted a Constitution and Bill of Rights which entrenched the fundamental rights of an accused person. One of the primary rights established in these texts was the right of an accused person to be released on bail as soon as reasonably possible⁴.

At the time of this new dispensation, the courts in South Africa acknowledged the rights that had been granted to accused persons under the "Old Regime". From 1993 to 1996, when the Interim Constitution came into being, accused persons were allowed to apply for bail outside normal court hours. During 1996, the Final Constitution of South Africa was adopted, and the law pertaining to after hour bail applications remained the same as it had been since 1986.

¹ Section 50(1)(c) of the Criminal Procedure Act (CPA) reads "he or she shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after his arrest."

² *Twayie v Minister van Justisie* 1986 (2) SA 101(O); *S v Du Preez* 1991 (2) SACR 372 (Ck).

³ *Minister van Wet en Order v Dipper* 1993 (2) SACR 221 (A).

⁴ Section 25(2)(b) of the Interim Constitution Act 2000 of 1993. Section 35(1)(f) of the Final Constitution Act 108 of 1996.

Unfortunately, the law was amended on 1 August 1998⁵.

Since the adoption of this amendment to the law, accused persons are only allowed to apply for bail outside of normal court hours for lesser offences⁶, and are not entitled to approach a court of law to adjudicate bail applications outside of normal court hours⁷. The situation is currently that prosecutors⁸ and police officials⁹ preside over bail applications and an accused person has no recourse should the application be disputed.

The right to bail was further hindered with the inclusion of sections in the CPA which allow the prosecutor to adjourn a matter for up to seven days at the first appearance in a lower court¹⁰, not taking into account the time spent incarcerated after the arrest.

The rights that were granted to accused persons by the common law, which were recognised through the Supreme Court and Appeal Court decisions over the years, and which were reflected in the Interim and Final Constitutions, have been summarily confiscated by the amendment of the CPA which is unconstitutional and demands scrutiny, or even revision.

~ * ~

⁵ The Criminal Procedure Second Amendment Act 85 of 1997 came into operation on the 1st of August 1998.

⁶ Section 59A of the Criminal Procedure Act 51 of 1977.

⁷ Section 50(6)(b) of Act 51 of 1977.

⁸ Section 59A of Act 51 of 1977.

⁹ Section 59 of the Criminal Procedure Act 51 of 1977.

¹⁰ Section 50(6)(d) of the Criminal Procedure Act 51 of 1977.

2. THE ORIGINS OF THE RIGHT TO BAIL

The development of bail proceedings and the right to bail also entail the development of the common law pertaining to bail. The common law plays an important role in the Constitutional interpretation of statutes and the Bill of Rights. The Bill of Rights acknowledges rights and freedoms that are conferred by common law¹¹ and the Constitutional court has inherent power to develop the common law¹².

(i) Anglo-Saxon

The right to apply for bail originates in England. The procedure of granting bail to an accused in a criminal case can be traced back to 673 AD¹³.

During the rule of the English kings Hokhaere and Eucric, an accused was required to deposit a sum of money (borh). The accused was then released on condition that he or she return to stand his or her trial. Only then was the bail money refunded to the depositor upon the acquittal of the accused.¹⁴

During the early Norman period, sheriffs were given the discretion to release an accused on pledging of security¹⁵. This practice became the norm during this period, even for offences as heinous as homicide.

Bail proceedings gradually changed and the bail granting function was largely transferred to justices of the peace. The justices of peace were creatures of statute¹⁶.

During the 17th century and onwards, various statutes were enacted, regulating bail pertaining to a variety of specific offences¹⁷.

¹¹ Section 39(3) of the Constitution Act 108 of 1996.

¹² Section 173 of the Constitution Act 108 of 1996.

¹³ J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 2.

¹⁴ *Ibid.*

¹⁵ N Corre & S D Wolchover *Bail in Criminal Proceedings* (1999) at 11.

¹⁶ *Ibid* at 14.

¹⁷ *Ibid* at 16.

The right to be granted bail pending the outcome of a trial was well entrenched in the English law. The right to liberty of a person was protected by statute.

The refusal or delay by any judge or magistrate to grant bail to any person entitled to be bailed was not seen as a trifle. It constituted a violation of the *Habeas Corpus* Act 1679 and of the Bill of Rights 1688 and was also a common law offence against the liberty of the subject¹⁸.

During the 19th century the power to grant bail became a judicial function. As it was not ministerial or administrative, no action could be brought against a magistrate if bail was refused. Action could only be taken against the magistrate with proof of malice on the side of the magistrate during the decision-making process¹⁹.

However Lord Runel in *R v Rose*²⁰ remarked and said:

“It cannot be too strongly impressed on the magistracy that bail is not to be withheld as a punishment. Since this is a truism which needs no expressing, it can hardly be imagined that it would be malicious for any magistrate or judge to deny bail out of such a motive.”

During the mid 1800's, the Indictable Offences Act 1848 came into operation and remained in force until the 20th century. Section 23 of this Act gave the presiding justice an unfettered discretion to grant or refuse bail of any offence.

The history of bail in England needs no further explanation in respect of its relevance to South African law. During the 1800's, Britain invaded South Africa, South Africa became a British colony and English procedural law became part of South African law²¹.

¹⁸ N Corre & S D Wolchover *Bail in Criminal Proceedings* (1999) at 11.

¹⁹ *Ibid.*

²⁰ (1898) 78 LT119.

²¹ C W H Schmidt & H Rademeyer *Bewysreg* 4 uitg (2000) at 12.

Although the South African common law is based on the Roman-Dutch law, no mention is made therein to the procedure of bail in a criminal trial.

It has been argued²² that:

“perhaps surprising that the concept of bail did not suggest itself to early Roman-Dutch lawyers nor, for that matter, to the Romans, for the idea of blood money (*palisi de taliene redimenda*) to exclude the application of *talio* or retaliation in kind was already established in the Twelve Tables.”

With the British rule of the Cape, the right to bail pending the outcome of a criminal trial was transplanted to South African criminal procedures²³.

(ii) South Africa

The right to bail in South Africa can be traced as far back as 1828. Ordinance 40 of 1828 (Cape) made provision for bail pending the outcome of a criminal trial. The Boer Republics adopted similar provisions to grant bail to awaiting-trial prisoners²⁴.

The Criminal Procedure Code Ordinance 1 of 1903 (Transvaal) dealt with the release of an arrested person on bail.

Section 97 reads:

“Every prisoner committed for trial in respect of any offence except treason or murder is entitled as soon as the warrant of commitment for trial or sentence is made out to be admitted on bail.”

²² J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 2.

²³ *Ibid*, Ordinance 40 of 1828 (Cape).

²⁴ Sections 97 and 98 of the Criminal Procedure Code Ordinance 1 of 1903 (Transvaal).

Section 98 reads:

“It shall be competent for the prisoner at the time of the commitment to apply verbally to the magistrate or judge granting the warrant of commitment to be immediately liberated on bail.”

Section 101 grants the Supreme Court jurisdiction to grant bail at any stage of the proceedings for any offence. Section 101 reads, “the Supreme Court has power at any stage of the proceedings to admit to bail in all cases whatever, whether capital or not.”²⁵

It is evident from these sections that parliament acknowledged that every person has the right to apply for bail when indicted for a criminal offence.

It is my understanding that this right to bail could have been exercised immediately after the warrant for commitment was made out. The phrases in sections 97 and 98 “entitled as soon as” and “immediately liberated on bail” indicate that this right was not suspended. The prosecution was not, in terms of this ordinance, entitled to an adjournment to prepare for the bail applications.

In addition to the right to bring a bail application, parliament acknowledged the urgency of bail applications. Section 100 reads:

“Every magistrate to whom an application for bail is made shall within twenty four hours after such application of the offence bailable by him fix the amount of bail to be given and failing to do so shall be liable in the penalty of a sum not exceeding one hundred pounds.”²⁶

²⁵ Criminal Procedure Code Ordinance 1 of 1903 (Transvaal).

²⁶ Ibid.

The Ordinance 1 of 1903 (Transvaal) was used as a model for the Criminal Procedure and Evidence Act 31 of 1917. Chapter 8 of this act dealt with the bail after preparatory examination is concluded. Section 99 of this act was a reproduction of section 97 of Ordinance 1 of 1903, except that rape was included as a non-bailable offence. It appears from the Act that any person could apply for bail for any offence, however in terms of section 109 of Act 31 of 1917, only a Superior Court, not a Magistrate, could grant bail for the non-bailable offences.

This section reads:

“A superior court having jurisdiction in respect of an offence has power at any stage of any proceedings taken in any court or before any magistrate in respect of that offence, to admit the accused to bail, whether the offence is or is not one of the offences specifically excepted in section ninety-nine.”

This act was later repealed by the Criminal Procedure Act 56 of 1955, and the Act currently dealing with bail pending the outcome of a criminal trial is chapter 9 of the Criminal Procedure Act 51 of 1977.

The Criminal Procedure Act 51 of 1977 (CPA) came into effect prior to the constitution of South Africa. During the last decade, bail applications and the rules that govern them became more and more complex.

Krigler J noted:

“The origins of bail are obscured in the mists of Anglo-Saxon history, and its modern dimensions remain an incoherent amalgam of old and new ideas, serving to defeat than to achieve the aims of criminal process. In South Africa, judicial pronouncements on the topic have been called labyrinthine. There is a murkiness even at the elemental level of the source(s) of South African judicial power to grant bail, ie whether the power derives exclusively from – and is

circumscribed by – chapter 9 of the CPA or whether there is a parallel reservoir of “inherent” or “common law” power on which a judge can draw.”²⁷

During the pre-Constitution era, the bail proceedings were primarily governed by the provisions of the CPA. During the post-apartheid years, South Africa gained a Constitution which provides the “principal template against which chapter 9 of the CPA must be measured.”²⁸

~ * ~

²⁷ *S v Dlamini* and others 1999 (2) SACR 51 (CC) at 57 para 3.

²⁸ *Supra* at 57 para 5.

3. CHAPTER 9 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

Chapter 9 of the CPA deals with bail proceedings. This chapter has undergone far-reaching changes in the last two decades which have impacted on an accused's right to bail, and more particularly the right to apply for bail outside normal court hours and on an urgent basis.

To illustrate this, one must differentiate between the wording of certain sections of chapter 9 before 1 August 1998 and the current wording of these sections.

I distinguish the two stages of incarceration of an accused person and the right to bring a bail application during these periods:

1. The **FIRST STAGE** is from the time of arrest until the time the accused appears in the lower court;
2. The **SECOND STAGE** is from the time the accused appears in the lower court until such time that the matter is finalised.

3.1 Chapter 9 before 1 August 1998

Before 1 August 1998, bail applications were governed by section 60 of the CPA which read:

“An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail in respect of such offence.”

Section 59 of the CPA also authorises police officials with the rank above non-commissioned officers to grant bail for less serious offences. This section reads:

“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 first appearance in a lower court, be released on bail in respect of such offence by a police official of or above the rank of non-commissioned officer.”

Sections 59 and 60 dealt with the procedure of applying for bail. These two sections must be read together to fully understand the procedure of applying for bail before 1998. With regard to the discussion above, one must apply these two sections to the two stages before and after the first appearance of an accused in court.

As previously mentioned, the first stage is from arrest until first appearance in a court and the second stage from first appearance until the finalisation of the case.

3.1(a) First Stage

When a person is arrested by the police, the provisions of section 50 of the CPA apply to the detainee.

This section allows the police to detain a person for forty-eight hours from the time of arrest until his or her first appearance. When the provisions of this section are applied literally, it can become nearly a week in some instances before an accused is brought to court.

Section 50(1) reads:

“Provided that if the period of forty-eight hours expires:

- (a) on a day which is not a court day or on any court day after four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock the afternoon of the court day next succeeding.

- (b) On any court day before four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of such court day.
- (c) At the time when the arrested person is outside the area of jurisdiction of the lower court to which he is being brought...the said period shall be deemed to expire at four o'clock in the afternoon of the court day next succeeding the day on which such person is brought within the area of jurisdiction of such court.”

Without further discussion of all the subsections of section 50 of the CPA, it is clear that if the forty-eight hour rule is applied to the letter of the word it is open for abuse by the police.

If a person is arrested on a Monday in Johannesburg and is brought down to Cape Town and the time of arrival is past four o'clock on the Wednesday, the forty-eight hours will only lapse at four o'clock the subsequent Monday afternoon.

It is evident that a person whose liberty was taken away must be able to bring a bail application.

It is very important to understand that these bail applications are urgent applications. The right to bail will be invalidated if the application cannot be heard.

Bail applications were heard at any hour of the day during the first stage of detention pre-1998.

In dealing with bail applications, the court, in *Hurley v Minister of Law and Order*²⁹, stated “the matter is one of the utmost urgency as it concerns the liberty of the subject.”

²⁹ 1985 (4) SA 709 (D) at 715B.

The Supreme Court of Appeal reiterated this position recently, saying, “It is evident that the finalising of an application for bail is always a matter of urgency.”³⁰

When a detained person wished to bring a bail application under the pre-1998 CPA, he could apply to the police officer for bail immediately. The police officer could then have dealt with the application in the following manner:

- (a) The officer could set bail in an amount if it falls within his jurisdiction to set bail; or
- (b) The officer could indicate that the nature of the offence falls outside of his jurisdiction in terms of section 59 of the CPA; or
- (c) Although the offence falls within his jurisdiction to grant bail, he could refuse to do so or indicate to the applicant that he is opposed to bail.

If bail was granted as stated in (a), the problem was resolved and needed no further discussion. Should the position be as set out in (b) or (c) above, the accused could have approached a magistrate to grant bail.

The Supreme Court, as it was then known, ruled in more than one instance that an accused had the right to bring a bail application as a matter of urgency, even outside normal court hours³¹.

The first decision from the Supreme Court with regard to the urgency of bail applications and the right to bring a bail application before the first appearance in a lower court was in *Twayie en 'n Ander v Minister van Justisie*.³²

³⁰ *Magistrate Stutterheim v Mashinga* 2004 (5) SA 209 (SCA) at 215 para [16].

³¹ *Twayie v Minister van Justisie* 1986 (2) SA 101(O).

³² *Supra*.

In this matter, the accused wanted to bring a bail application after the arrest. The police had no objection to the granting of bail and were even prepared to release the accused on bail. The police officer to whom the matter was assigned could not set bail³³.

The Applicant approached the local magistrate to set bail, however he was informed by the Chief Magistrate that the application could not be heard. The magistrate's reasons were:

- (i) that the application is "onwettig" (illegal); and
- (ii) that the court may not hear the application after hours.

The Applicant then approached the Supreme Court (High Court) with an urgent application seeking an order to be released on bail. In terms of s 60 of the CPA, the court ruled that:

"at his first appearance in a lower court ... apply to such court ... to be released on bail'. The words "first appearance" are not indicative of an intention on the part of the Legislature that voluntary applications for bail may not be brought before the compulsory first appearance in the lower court or of an intention to circumscribe the court's powers. The words, therefore, do not only apply to the first compulsory appearance in terms of s 50 of the Act but include the first appearance at the request of the accused. A lower court is consequently

³³ This was due to the provisions of s 59 of the CPA. The section allows any police official of or above the rank of non-commissioned officer to set bail after hours. Section 59(1)(a) of the Criminal Procedure Act 51 of 1977 reads "...any offence, other than an offence referred to in part II or part III of Schedule 2..." PART II reads, "Treason, sedition, murder, rape, robbery, assault, breaking or entering any premises..., theft...if the value involved in the offence exceeds R2500. Any offence...relating to illicit dealing in or possession of precious metals or...stones, any offence under any law relating to the-(a) possession of - (i) dagga exceeding 115 grams; or (ii) any other dependence-producing drugs, (b) conveyance or supply of dependence-producing drugs. Any offence relating to the coinage, any conspiracy, incitement or attempt to commit any offence referred to in this part." PART II also includes contravening of the provisions of sections 1 and 1A of the Intimidation Act 2 of 1982.

competent, as well as obliged, to hear and decide bail applications outside normal hours on non-court days.”³⁴

It is very important to bear in mind that at the time of this ruling, parliamentary sovereignty prevailed and the courts could not rule on the constitutionality of any statutory provisions.

This judgement paved the way for the right to bail after hours. This right was also given to every citizen of South Africa. This judgement must have been music to the ears of every human rights lawyer, especially as it was given in the dark days of apartheid.

The court ruled, “Elke verhoorafwagende is ’n potensieële onskuldige en onnodige inperking van die burger se vryheid druis teen alle beskaafde regsgevoel in.”³⁵

This is the correct approach to any bail application. If it is accepted that an accused is presumed to be innocent, it becomes important that the person’s right to liberty is respected and consequently their right to apply for bail.

It is also not only the duty of the court to respect a citizen’s right to freedom and the right to bring a bail application; it is also the duty of the State and the State’s machinery.³⁶

On a daily basis, the police receive complaints about crimes and persons get investigated. The police then contact the suspect to report to the police station. The suspect should then, with or without legal representation, report to the police station or Investigating Officer. If an arrest follows, one would assume that the police would assist the accused in bringing a bail application or at least take the accused to court as soon as possible.

³⁴ *Twayie v Minister van Justisie* 1986 (2) SA 101 (O) at 101H-I.

³⁵ *Supra* at 104E.

³⁶ *S v du Preez* 1991 (2) SACR 372 (Ck) at 377f.

Sadly history and case law have taught us that from time to time members of the South African Police Services have unlawfully delayed bail applications³⁷. This abuse of power frustrates a person's right to bring a bail application.

Without overemphasising the point, it must be understood that as soon as a person is arrested, he must be entitled to bring a bail application on an urgent basis. In addition to this right, he should be assisted by the State (the police, the prosecutor and court personnel) to be heard by a magistrate. It cannot be expected of an accused or his attorney to negotiate his release with the police or the prosecutor for the State.

Should the prosecutor or police be unable to agree to an amount of bail, the accused should immediately be brought before a court to argue his release.

Although it will be addressed more fully hereunder, it must be stressed that the right to bail has little value if an accused does not have the right to bring a bail application³⁸.

In addition to these issues, the applicant should be assisted by the State in bringing the application³⁹.

The facts in *S v du Preez*⁴⁰ are a classic example of the difficulties with which accused persons and attorneys have to deal in criminal matters. The accused was sought in a criminal investigation of stock theft.

³⁷ *S v du Preez* 1991 (2) SACR 372 (Ck); *Novick v Minister of Law and Order and Another* 1993 (1) SACR 194 (W); Die Burger of Monday 27 June 2005: "JOHANNESBURG – Die dae is getel dat polisiebeamptes verdagtes "moedswillig" op Donderdae of Vrydae in hegtenis neem sodat die verdagtes vier dae pleks van die wetlike voorgeskrewe twee dae in aanhouding moet bly. [n] situasie wat dekades al grimmigheid onder die publiek en regslui veroorsaak, ..."

³⁸ *S v du Preez* 1991 (2) SACR 372 (Ck) at 378a-b.

³⁹ *S v du Preez* 1991 (2) SACR 372 (Ck) at 377f.

⁴⁰ *Supra*.

The attorney for the accused contacted the prosecutor for the State and a senior police officer confirming that the accused would report to the police on his own accord. The police once again, before the accused reported, reassured the suspect that the purpose for his reporting was to make a statement only. On his arrival, the suspect was arrested.

The attorney immediately arranged for a bail application and the prosecutor informed the attorney that bail would not be opposed. For the first and the second day after the arrest the police manoeuvred, not bringing the accused to court.

Thereafter the accused brought an application and the Supreme Court requisitioned the court to release him.

Three of the issues the court considered were⁴¹:

- A The effect of the provisions of s 50 of Act 51 of 1977 and the question whether police are entitled and obliged to detain a person that has been arrested for at least 48 hours.
- B The question whether a person who has been arrested is entitled to apply for bail after his arrest and before the aforesaid 48 hours have lapsed.
- C Whether a police officer is entitled to refuse or fail to make a person in custody available to attend court for an application for bail and the effect thereof should he refuse and/or fail to do so.”

On question A, the court ruled:

“It is clear from the provisions of s 50(1) that an arrested person can be detained, but that he may not be detained for a

⁴¹ *S v du Preez* 1991 (2) SACR 372 (Ck) at 375c-d.

period longer than 48 hours... There is no indication that the police are obliged to detain such an arrested person for at least 48 hours.”⁴²

With regards to questions B and C above, the court ruled:

“The effect of this is that a person who is in custody and before expiry of the 48 hour period as envisaged by s 50 is entitled, on his own initiative, to arrange ‘a first appearance’ in court in order to bring a bail application... A magistrate and prosecutor would, therefore, also be obliged to arrange for a bail application to be heard outside normal court hours... Police officers are in fact part of the legal machinery and will, therefore, also be obliged to co-operate and make themselves available in order to make it possible for a court to entertain a bail application.”⁴³

This judgement empowered an accused with certain rights that are of paramount importance to the criminal justice system in any country.

These rights are:

- (i) The right to be released on bail pending the outcome of a criminal case;
- (ii) The right to be heard by a court as soon as possible, even before the lapse of the 48 hours after arrest; and
- (iii) The right to be assisted by the State machinery to bring the application notwithstanding the State’s view relating to the release of the accused on bail.

⁴² *S v Du Preez* 1991 (2) SACR 372 (Ck) at 376c.

⁴³ *Supra* at 377d-e

One must accept that this view held by the court is correct, however it is disturbing that it is not the norm in the post-apartheid constitutional era in South Africa. It will be more fully discussed in the comparison with the post-1998 position pertaining to the right to bail in South Africa.

The rights mentioned above were confirmed by the Supreme Court in *Novick v Minister of Law and Order and Another*.⁴⁴

The facts in this matter are similar to those in *S v Du Preez*⁴⁵; once again the suspect was requested to report to the South African Police and the suspect reported to the notorious Brixton Murder and Robbery unit with his attorney. In this instance the suspect and his legal advisor expected that an arrest may follow on arrival at this unit of the police. Nonetheless the suspect reported to the police as undertaken by his legal advisor. This behaviour indicates that the suspect had no intention not to stand his trial.

The arrest followed and the legal representative requested the opportunity to bring a bail application. As this person was still a candidate attorney, he requested to contact an attorney to arrange for an urgent bail application. The use of a telephone was refused, and other arrangements were made by the candidate attorney to contact an attorney.

On return, the accused and the policeman had disappeared. It later appeared that the police had deliberately hidden the accused.

The attorneys for Dos Santos, the accused, tried for two days to bring a bail application for him. The response from the Investigating Officer was, “Ek ontken dat toegang tot ‘n borgeansoek geweier is op enige stadium. Sodanige aansoek moes net inpas binne die raamwerk van my ondersoek.”⁴⁶

⁴⁴ 1993 (1) SACR 194 (W).

⁴⁵ 1991 (2) SACR 372 (Ck).

⁴⁶ *Novick v Minister of Law and Order* 1993 (1) SACR 194 (W) at 196g.

(I deny that access to a bail application is refused at any time. Application must simply fit into the framework of my investigation).

The Supreme Court was once again approached and reconfirmed the principles as set out in *Twayie v Minister of Justice*⁴⁷ and *S v Du Preez*⁴⁸ namely the right of an accused to bring a bail application within the 48 hours as envisaged in s 50 of the CPA. The court also placed a duty on the State to co-operate and to make it possible for a bail application to take place.⁴⁹

The court went further and gave the accused the right to be heard by a court and disallowed the police (State) to be the arbiter as to whether the accused was entitled to bail or not. Burman AJ ruled, “leave it to the court to consider whether the accused is entitled to bail.”⁵⁰

This right has been limited to a great extent as a consequence of the post 1998 amendment to the CPA, which will be discussed more critically later.

During the first stage of detention pre-1998, an accused person had certain rights to bail. These rights were:

- (i) to be brought to court before the expiry of the 48 hours referred to in s 50 of the CPA;
- (ii) to bring a bail application during the 48 hour period with the assistance of the State;
- (iii) to be released on bail should the court deem it fit;
- (iv) to have the court decide over the release on bail and not for the State to be the arbiter regarding the release; and
- (v) to bring a bail application for any offence after hours before a magistrate.

⁴⁷ *Twayie v Minister van Justisie* 1986 (2) SA 101 (O).

⁴⁸ *S v Du Preez* 1991 (2) SACR 372 (Ck).

⁴⁹ *Novick v Minister of Law and Order* 1993 (1) SACR 194 (W) at 197.

⁵⁰ *Supra* at 197g.

3.1(b) Second Stage

The second stage in which an accused may apply for bail is from the first appearance as envisaged in s 60 of the CPA until the criminal case is finalised.

The principles as set out in the *Twayie* case also apply to the second stage.⁵¹ All the rights granted to an accused at his or her “first appearance” during the first stage remained the same during the “first appearance’ at the second stage.

The issue pertaining to the right to bail becomes a more practical issue. If the wish of the accused was to bring an urgent bail application, he was entitled to do so after the arrest. If he did not bring a bail application, he had the right to apply for bail at his first appearance. Section 60 of the CPA reads, “An accused who is in custody in respect of any offence may...at any stage after such appearance apply to such court...to be released on bail.”

It becomes more of a practical issue when the accused elects not to bring a bail application, and after the adjournment and in prison he decides to bring a bail application.

Should an accused decide to bring a bail application, one cannot expect that it should be heard after hours or on weekends. However, if the accused wants to bring a bail application, he can be requisitioned to appear on the same or next court day as there is no longer a 48 hour rule.

When the accused appears in court after the requisition and the bail application commences, it would appear that the right to continue after normal court hours exists. In the *Twayie* case⁵², Kotze J, obiter, dealt with duties of State officials and stated, “Die aanduiding...is dat dit van hierdie mense, net soos van ander normale mense, verwag word om soms ook ‘na ure’ te werk.” The court further noted, “Dit is so goed soos die argument...dat daar op ’n

⁵¹ *Twayie v Minister van Justisie* 1986 (2) SA 101 (O).

Vrydag tot een minuut voor middernag borg verleen mag word maar nie twee minute later nie.”

It must be accepted that the situation of an accused may change whilst in custody. At the time of his arrest the accused might not have been able to afford legal representation and might have decided only to bring a bail application with the assistance of a legal representative. One cannot argue that this should result in his bail application not be viewed as an urgent one.

3.1(c) Summary

The practice of bringing bail applications after hours or proceeding with bail applications after hours was a common practice in District and Regional Court before 1998.

Section 50 was substantially amended in the last decade. As a result of the decision in the *Twayie*⁵³ case, parliament added two subsections – 50(6) and 50(7). In terms of these sections, bail applications could be brought outside of normal court hours.

Section 50(6) reads:

“When a person is arrested for the alleged commission of an offence, he or she shall be informed as soon as possible of his or her right to institute bail proceedings and, if he or she is not granted bail under section 59, he or she shall at his or her request be brought before a lower court as soon as it is reasonably possible for consideration for his or her bail application.”

⁵² *Twayie v Minister van Justisie* 1986 (2) SA 101 (O) at 104.

⁵³ *Twayie v Minister van Justisie* 1986 (2) SA 101 (O).

Section 50(7) reads:

“If a person is arrested on suspicion of having committed an offence, but a charge has not been brought against him or her because further investigation is needed to determine whether a charge may be brought against him or her, the investigation in question shall be completed as soon as it is reasonably possible and the person in question shall as soon as it is reasonably possible thereafter, and in any event not later than the day after his or her arrest contemplated in subsections (1) and (2), be brought before an ordinary court of law to be charged and enabled to institute bail proceedings in accordance with subsection (6) or be informed of the reason for his or her further detention, failing which he or she shall be released.”

It is evident from the text of these two sections that a right to bail was entrenched in the legislation. During this period both the legislature and Parliament acknowledged this right to liberty.

Sadly both these sections have been amended or repealed. Act 85 of 1997 has amended s 50(6) which will be discussed hereunder, and s 50(7) was repealed by the same legislation.

J van der Berg⁵⁴ wrote extensively on bail in South Africa and voiced his dissatisfaction with the amendment, noting:

“The irony inherent in this reactionary measure is, of course, striking: a procedural human right deemed under the old order through creative and enlightened judicial interpretation has been summarily taken away by decree of the new order.”

Any human rights lawyer cannot but wholeheartedly agree with this statement of the writer.

⁵⁴ J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 11.

Up to this time in our history, the right to bail was acknowledged by our courts and legislature. The courts also viewed bail applications as urgent applications before or after the first appearance in a lower court by the accused.

3.2 Chapter 9 after 1 August 1998

The Criminal Procedure Second Amendment Act 85 of 1997 amended various sections in Chapter 9 of the CPA which have direct bearing on the right to be released on bail, to be heard by a magistrate and it influenced the hearing of a bail application on an urgent basis.

Once again these issues will be dealt with in the two stages, namely the periods before and after the first appearance after an arrest of an accused in court.

3.2.1 The First Stage

The most significant amendment made by Act 85 of 1997 is the inclusion of s 50(6)(b) to the CPA.

Section 50(6)(b) of the CPA currently reads, “An arrested person contemplated in paragraph (a)(i) is not entitled to be brought to court outside ordinary court hours.”

This section unequivocally states that the accused has no right to be brought before a court outside normal court hours to be released on bail by a magistrate.

However, it does not mean that no person is allowed to be released on bail after hours. In certain circumstances certain authorized persons are allowed by law to release an accused on bail.

3.2.1 (a) Police Bail

Bail can be granted by any police official of or above the rank of a non-commissioned officer before the first appearance of an accused in a lower court.

This authority is limited by s 59(1)(a) of the CPA to offences other than offences referred to in Part II of Part III of the schedules of the CPA.

This section gives the accused a right to apply for bail to the police for less serious offences. The situation becomes problematic when a person is arrested for an offence for which the police can set bail, but the police are opposed to the release of the accused on bail or refuse to assist the accused.

The arrested person cannot apply to the court after hours to contest the detention. Section 50(6)(b) clearly states that the accused “is not entitled” to apply to a magistrate to be released on bail.

In practice, this would mean that the accused should sit out the 48 hours over weekends until his first appearance in a lower court. This is clearly contrary to the position prior to 1 August 1998 when the accused was entitled to approach a magistrate to be released on bail. During week days, an applicant may be brought in court hours before the 48 hours have lapsed.

This is a direct violation of an accused’s right to be released on bail. The constitutional violation of an accused’s rights will be fully discussed separately.

3.2.1 (b) Bail by the Director of Public Prosecutions

Section 59A of the CPA was inserted by s 3 of Act 85 of 1997. Section 59A reads:

“An attorney-general (Director of Public Prosecutions) or a prosecutor authorised thereto in writing by the attorney-general concerned may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigations, authorize the release of an accused on bail.”

Schedule 7 was added to the schedules in the CPA by s 10 of Act 85 of 1997. Without repeating the contents of schedule 7, it contains less serious offences such as public violence, culpable homicide, bestiality, theft and robbery (without aggravating circumstances) where the value is less than R20 000.00.

This section however poses the same infringements on an accused's right to bail as s 59 of the CPA.

At this stage I will not deal with the constitutionality of this section as it will be fully discussed later.

However, s 59A of the CPA infringes on certain rights of the accused that were given under the old order.

3.3 Infringements on rights of accused

3.3.1 Right to apply to court for bail

If the accused wishes to bring a bail application, the accused or his legal representative must approach the prosecutor to be released on bail.

In terms of s 59A(1), the prosecutor must consult with the investigating officer before bail can be set. If the investigator is opposed to bail, the prosecutor may still set bail. This will only happen in the rare occasions since both the prosecutor and the police are acting for the State.

In the event of the prosecutor refusing to set bail, the position of the accused is the same as under s 59 of the CPA.

Section 50(6)(b) of the CPA prohibits the accused from bringing a bail application to a magistrate.

This section stands in direct contrast with all the decisions of the High Court pertaining to the right to bring a bail application up until

1 August 1998. In the *Twayie* case⁵⁵ this right to bring a bail application was well-established. In the Appeal Court's decision of *Minister van Wet en Orde en Ander v Dipper*⁵⁶ the court ruled unanimously that:

“An accused, who is in custody, is entitled to make application for his release on bail before the expiry of the period of 48 hours referred to in s 50(1) of the Criminal Procedure Act 51 of 1977, that is before his compulsory first appearance in a lower court in terms of s 50(1) but also includes a first appearance at the accused's own request.”

The legislator attempted to restrict the infringement created by s 50(6)(b) of the CPA by authorizing a Prosecutor to grant bail. This is a poor attempt as it creates various other procedural problems for the accused who wishes to apply for bail.

In terms of s 59 and s 59A of the CPA, an accused can only apply for bail after hours for offences set out in Part I of Sched 2, Sched 3 and Sched 7 of the CPA.

An accused cannot apply for bail for any offence in Sched 1 that is not mentioned in Sched 7. An application for an offence under Sched 5 and 6 of the CPA is also not authorized by the CPA.

This means that an accused can only apply for bail before his first appearance in a lower court, for certain less serious offences. After hour bail applications were permitted for any offence prior to 1 August 1998. Magistrates and prosecutors convened at any hour of the day to hear the application.

The current legal position creates a problem for the accused who is in custody for an offence, *viz* the right to be heard during the proceedings.

⁵⁵ *Twayie v Minister van Justisie* 1986(2) SA 101 (O).

⁵⁶ 1993(2) SACR 221 (A).

3.3.2 The *audi alteram partem* rule

A person who is in custody for a bailable offence may apply to a prosecutor to be released on bail. If the state, being the investigator and the prosecutor, refuse to hear the application or oppose the application, the accused may not apply for bail to a magistrate.

Section 59A makes no provision for the *audi alteram partem* rule⁵⁷. Section 59A(1) of the CPA only refers to “consultation with the police official.” There is no duty on the prosecutor to liaise or consult with the accused or his legal representative in determining whether or not bail should be granted.

The section does not even make mention that the prosecutor, in any manner, has to entertain representations for the accused or his legal representative to persuade the prosecutor to grant bail. The situation is the same pertaining to the amount of bail, in the event of the prosecutor setting bail.

It has been suggested⁵⁸ “that an accused can – where appropriate – bring an application for release on bail in terms of s 59A and that the *audi alteram partem* rule should apply.”

One must agree with this view that the *audi alteram partem* rule should apply in bail applications. This however is not attainable if an application to court is not permitted. The two opposing parties are the police, represented by the prosecutor, and the accused, represented by an attorney or advocate.

One must raise the question of who will apply the *audi alteram partem* rule?

The prosecutor has a clear conflict of interest. It is expected of the prosecutor to represent the interest of the State and apply his/her mind to the submissions of the opposing party being himself/herself

⁵⁷ Just administrative action is considered in detail in ch 6(ii) below.

⁵⁸ F de Jager *Commentary on the Criminal Procedure Act Service 28* (2002) at 9 – 14.

and those on behalf of the accused. This procedure is most undesirable in law and particularly in criminal procedural law.

Section 59A of the CPA does not prescribe to, nor authorise the prosecutor to apply the *audi alteram partem* rule.

The right to be heard is indisputably infringed upon by s 59A of the CPA⁵⁹. These statutory provisions infringe upon the liberty of the detained person who is presumed innocent.

It has been argued⁶⁰:

“Where a provision in a statute, or a proclamation or a notice issued under an enactment, prejudicially affects the liberty or existing rights, or possibly property, of a person affected by the statute or proclamation or notice, the maxim *audi alteram partem* (literally translated to “hear the other side”) rule would generally be implied.”

Section 59A of the CPA is a very useful amendment to the criminal procedures relating to bail. However it needs amendment to deal with the situation when the State is opposed to the release of an accused person on bail. The usefulness of this section only refers to unopposed bail applications. The State should not be the arbiter as to whether bail should or should not be granted to an accused.

3.3.3 The right to an independent arbiter⁶¹

Section 59A of the CPA removes the function of the court to hear a bail application in terms of this section, and allows the prosecutor to be the arbiter.

⁵⁹ See discussion in ch 6 below.

⁶⁰ E A Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) at 195.

⁶¹ Just administrative action is considered in detail in ch 6 below.

Our courts ruled, pre the 1998 period, that the function of hearing bail applications is a judicial one. In the *Novick* case⁶², the court ruled:

“The State, in that context the relevant policeman, is not entitled to be the arbiter as to whether an accused is entitled to bail or not. At the very least the police must make the accused available for a bail application and make it possible for him to apply for bail and so leave it to the court to consider whether an accused is entitled to bail or not.”

Without dealing with the constitutional implications pertaining to s 59A of the CPA⁶³, one must accept that an accused had a right pre-1998 and pre-constitutional era to be heard by an independent arbiter in a bail application.

3.3.4 The right to be released on bail

As discussed above, it is evident that bail can only be set for an accused in terms of s 59 and 59A of the CPA.

A prosecutor is not authorized to set bail, even if it is unopposed, for an accused if the offence falls in the ambit of Schedule 1 and not in Schedule 7. Furthermore the release on bail for a Schedule 5 or 6 offence in terms of the CPA is unauthorized.

The reason for this is that only a court can set bail for these scheduled offences. These offences are non-bailable in terms of s 59 and s 59A of the CPA until the first appearance in terms of s 50 of the CPA in a Magistrate’s court.

As previously discussed, s 50(6)(b) reads: “An arrested person...is not entitled to be brought to court outside ordinary court hours.”

⁶² *Novick v Minister of Law and Order and another* 1993(1) SACR 194 (W) 197f-g.

⁶³ Both these sections appear to be inherently unconstitutional and a violation of the right to just administrative action in s 33 of the Constitution of the Republic of South Africa Act 108 of 1996. Section 33 is considered in detail in ch 6 below.

The right to be released on bail is to a great extent affected by the schedule of the offence. The right to be released on bail will not be infringed when a person is arrested for a sched 7 offence and released. However, when a person is arrested for a sched 1 offence and not released purely based on the schedule of the offence, a violation of these rights will occur. The violation will be even greater in the event of an unopposed application⁶⁴.

3.3.4 (a) The onus in relation to the right to be released on bail

It is of the utmost importance, before bringing a bail application after hours, to establish whether the offence falls withinailable offences.

An accused person is not entitled to bring a bail application after hours for a schedule 1, 5 or 6 offence as set out in the CPA.

It is of importance to note that the burden of proof is different between schedules 1, 5 and 6 of the CPA. This is a clear indicator of the procedural difficulties created with the implementation of s 59A of the CPA.

Section 57 and 57A of the CPA make no mention of an onus on any party when applying for bail. Section 57A(7) reads:

“for all purposes of this Act...bail granted in terms of this section shall be regarded as bail granted by a court in terms of section 60.”

Section 60(1)(a) of the CPA reads:

“An accused who is in custody in respect of any 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.”

Section 60(1)(a) must be read with section 60(11), which reads:

⁶⁴ See discussion above.

“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 interest of justice permit his or her release;

(b) in schedule 5, but not in schedule 6...adduces evidence which satisfies the court that the interests of justice permit his or her release.”

Section 60(11)(a) and (b) place an onus on the accused to satisfy the court in schedule 5 offences that it is in the interest of justice to be released on bail. In schedule 6, an additional requirement is to show or prove exceptional circumstances by the applicant.

Section 60(11) places a burden on the accused when applying for bail. This burden only pertains to offences referred to in schedules 5 and 6 of the CPA. The CPA does not place a burden of proof on the accused in the other instances when a bail application is brought.

It has been argued⁶⁵ that the onus should rest on the State when an accused applies for bail, excluding the situations which are covered by s 60(11) of the CPA.

This view was also held in the full bench discussion of *S v Tshabalala*⁶⁶.

⁶⁵ F de Jager *Commentary on the Criminal Procedure Act* Service 30 (2003) at 9-37.

⁶⁶ 1998(2) SACR 259 (C) at 256f-h.

Comrie J ruled:

“Leaving s 60(11) aside for a moment, s 60(1)(a) entitled an arrested person to be released on bail unless the court finds that it is in the interest of justice that he or she be detained in custody...; it seemed that there had to be a practical burden on the State to adduce evidence or information going to show that such a likelihood existed... If this was not an onus or proof, then surely it was something very close thereto.”

The applicant applying for bail before his first appearance in court is faced with certain procedural problems.

When applying for bail for a schedule 7 offence, he does not bear any onus to show why he should be released on bail. However, the applicant must apply to the respondent to be released on bail. The State (respondent) who bares the onus to show why the applicant may not be released or why a higher amount of bail is required may refuse bail or set an amount of bail.

If the accused (applicant) wishes to contest the decision of the prosecutor, he may not be able to do so. Section 50(6)(b) of the CPA prohibits the applicant from approaching a court after hours. Schedule 1 of the CPA contains all the offences referred to in schedules 5, 6 and 7.

Any offence that falls within the ambit of schedule 1 but not schedules 5, 6 and 7 for the purpose of bail applications can be deemed as a schedule 1 offence, ie attempted murder not involving the infliction of grievous bodily harm. This would mean that when a person is arrested for such an offence, it would be deemed as a schedule 1 offence for the purpose of a bail application and the onus would rest on the State⁶⁷.

⁶⁷ *S v Tshabalala* 1998 (2) SACR 259 (C).

When a person is arrested for a schedule 1 offence, he would not be allowed to bring a bail application. Bear in mind that the onus to show why the release of the application is not permissible rests on the State (respondent).

The reasons for this procedural point at issue are:

- (i) the prosecutor may not, in terms of s 57A of the CPA, hear the bail application; and
- (ii) Section 50(6)(b) of the CPA prohibits an arrested person from bringing a bail application outside normal court hours.

Once again, an accused is in the same position as he or she would have been should he or she have been charged with a schedule 7 offence for which the prosecutor had refused to grant bail.

This situation is in a sense more untenable as there may very well be situations where the State feels bail should be granted on an urgent basis but due to the statutory provisions be prohibited from bringing the accused to court.

This statutory prohibition is a direct violation of an accused's right to bring a bail application and to be released on bail. There are various constitutional infringements of an accused's right which will be dealt with separately hereunder.

At this point, it is important to acknowledge that rights were granted to detained persons under the old order that have summarily been taken away by the legislature. These sections, in particular sections 50(6)(b) and 57A of the CPA need to be tested by constitutional court as well-established rights are being infringed.

3.3.4 (b) Schedules 5 and 6

The offences under schedules 5 and 6 are different, as discussed above, in that a burden of proof is cast on the applicant to show why

his or her release is in the interest of justice. An additional burden is placed on the applicant in schedule 6 bail applications in that one must show exceptional circumstance why his release is in the interest of justice.

In *S v Dlamini*⁶⁸ the Constitutional Court held the provisions 60(11)(d) of the CPA to be constitutional. However, the issue for the purpose of this discussion is not the constitutionality of s 60(11) of the CPA but the infringement of the right to bring the bail application on an urgent basis and be heard by a court outside normal court hours.

An accused person's legal position is similar to what it would have been should the charge have been for an offence under schedule 1.

The only difference is that the accused now has the duty to show why he should be released. As a matter of principle it could be accepted that a person who stands to be arraigned for a serious charge bears the onus to show why he should be released. However it does not mean that such a person may not be heard immediately.

Schedule 5 offences were included in the CPA with the enactment of Act 75 of 1995. Prior to 1995, the onus rested on the applicant to show that his or her release on bail was in the interest of justice⁶⁹.

“The onus is upon the accused (in his capacity as applicant) to prove on a balance of probability that the court should exercise its discretion in favour of granting bail and, in discharging this burden, he must show that the interest of justice will not be prejudiced, namely that it is likely that he will stand his trial and that he will not tamper with State witnesses or otherwise interfere with administration of justice or the investigation of the case against him.”⁷⁰

⁶⁸ *S v Dlamini; S v Dladla & Others: S v Joubert; S v Schietekat* 1999(2) SACR 51 (CC).

⁶⁹ F de Jager *Commentary on the Criminal Procedure Act* Service 30 (2003) at 9.38.

If this was the accepted legal position at the time, one must accept that the fact that an accused person bears an onus did not preclude him from bringing an application for bail outside normal court hours under the old order.

In fact all the jurisprudence pertaining to bail pre 1995 was dealt with as if the accused bore the onus to show that his release was in the interest of justice.

The onus placed on the accused by schedule 5 offences as referred to in s 60(11) is similar to, if not exactly the same as, the position prior to the enactment of legislation that created schedule 5 and 6 offences.

The legal position should be that an accused is entitled to bring a bail application after hours with the understanding that in certain instances as set out in s 60(11) of the CPA the accused will bear the onus to prove why he must be released on bail.

3.3.5 The right to an appeal or review

The prosecutor, as respondent in the applications, also becomes the adjudicator in the proceedings. This situation is very undesirable and cannot be seen as a fair process in the criminal justice system. In addition, it would appear that the applicant cannot appeal the decision of the prosecutor.

Section 59A(6) reads:

“The provisions of s 64 with regard to the recording of bail proceedings by a court apply, with the necessary changes, in respect of bail granted in terms of this section.”

Section 64 reads:

⁷⁰ *De Jager v Attorney-General Natal* 1967 (4) SA 143 (D) at 149.

“The court dealing with bail proceedings as contemplated in section 50(6) or which considers bail under section 60 or which imposes any further condition under section 62 or which, under section 63 or 63A, amends the amount of bail or amends or supplements any condition or refuses to do so, shall record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof, or shall cause such proceedings to be recorded in full, and where such court is a magistrate’s court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, shall, on its mere production in any court in which the relevant charge is pending, be *prima facie* proof of such conditions or any amendment or supplementation thereof.”

One must accept that the prosecutor becomes the “court” in the decision-making process pertaining to the accused release on bail⁷¹. If the aggrieved applicant wishes to appeal the proceeding or the finding of the prosecutor, he would not be able to do so. The reason for this is that there will be no court record to on which to appeal or judgement against which to appeal. The record of bail proceedings in terms of s 57A of the CPA is only kept according to ss (6) “in respect of bail granted in terms of this section.”

This situation is a clear violation of the accused person’s right to appeal or review of the decision⁷².

Section 65(1)(a) of the CPA gives an accused the right to appeal. An accused does not have to obtain leave to appeal when bail is refused.

⁷¹ Section 59A(7) of the Criminal Procedure Act 51 of 1977 reads “for all purposes of this Act...bail granted in terms of this section shall be regarded as bail granted by a court in terms of section 60.”

⁷² The right to just administrative action⁷² is considered in ch 6 below.

It was also held by our high courts that no leave to appeal is required in terms of s 309B of the CPA⁷³.

Leaving the constitutional violations aside regarding the right to appeal or review, it is evident that the provisions of s 59A are a procedural violation of an accused person's right to appeal. However an accused may still apply for bail in terms of s 60 of the CPA at his first appearance in a lower court. The Magistrate will then hear the application *de novo*⁷⁴.

3.4 The Second Stage

At the first appearance of an accused in a lower court

Bail proceedings in court at and after an accused person's first appearance is covered by s 60 of the CPA subject to s 50(6) of the same Act.

Section 60(1)(a) currently reads:

“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.”

The position of an accused person appears to be the same as it was pre 1998 in relation to s 60 of the CPA. However the release of an accused person is currently subject to the provision of s 50(6) of the CPA. This section frustrates the right to be released on bail. Urgent bail applications are primarily postponed on the basis of s 50(6)(d) of the CPA.

It is well established that bail applications are always urgent applications.

⁷³ *S v Mohammed* 1992 (2) SACR 507 (C); *S v Siwela* 1999 (2) SACR 685 (W); *S v Potgieter* 2000 (1) SACR 578 (W).

⁷⁴ See discussion below.

Leon ADJP clearly illustrated the urgency in bail applications and ruled “the matter is one of utmost urgency as it concerns the liberty of the subject.”⁷⁵

⁷⁵ *Hurley v Minister of Law and Order* 1985 (4) SA 709(D) at 715B.

This well established right was nullified with the enactment of s 50(6) of the CPA. The right to bring a bail application outside court hours is prohibited by s 50(6)(b). One would expect that a detainee would be able to insist that his application be heard after the expiry of the 48 hours contemplated in s 50 of the CPA.

At his or her first appearance in a lower court, an accused person is faced with the provisions of s 50(6)(d) of the CPA, which reads:

“(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.”

After scrutinising s 50(6)(d) and the subsections, most scholars in criminal procedure will argue that the provisions of this section are proper in any criminal justice system.

The argument will probably be supported by the perception that the remand of a period not exceeding seven days will only be granted “on the terms which the court may deem proper”.

This is however not the case in practice. When this issue was investigated in practice, it appeared that this section is misused by the State and the application is rubber stamped by our court. All the applications by the State are brought in the lower courts and more particularly in the Magistrate’s Courts⁷⁶.

Our High Courts have never ruled on the provisions of s 50(6)(d) and no appeal has been lodged against the granting or refusal of an application in terms of this section.

During research in Cape Town Magistrate’s Court and particularly court 16 which deals with opposed bail applications, it was found⁷⁷ that applications brought in terms of s 50(6)(d) are always granted by the courts.

It appears that when the application by the State is opposed by the accused person or legal representative, the courts respond that the State is entitled to such an adjournment.

In analysing the subsection of s 50(6)(d)(i)-(v) of the CPA, it is evident that a remand should only be granted if the court deems it necessary. However, I could not find any case in court 16 where the State had led evidence in terms of ss 50(d)(i) to warrant an adjournment.

I could also not find that any application was brought by the State in terms of ss 50(6)(d)(iv) to justify such an adjournment.

⁷⁶ Section 50(6)(c) of the Criminal Procedure Act 51 of 1977.

⁷⁷ 100 cases counted at Cape Town Magistrate’s Court between the period April 2005 to June 2005.

I could not find any matter where written confirmation was sought or given by the Director of Public Prosecutions.

The standard request from the State appears to be that the State requests a remand for seven days as the State does not have sufficient information to release the accused person on bail.

It appears to be the interpretation of the State and the lower courts that the State is entitled to such a postponement.

S van der Merwe is of the view⁷⁸ that:

“Although the decision to postpone bail proceedings apparently lies entirely with the lower court, it has no choice but to postpone such proceedings where it is informed by the prosecutor either that the matter is or has been referred to a Director of Public Prosecutions for the issuing of a written confirmation in terms of s 60(11A).”

If the courts accept the standpoint that the State is entitled to adjournments, it will definitely infringe upon the accused person's right to have his bail application heard on an urgent basis.

Section 50(6) grants the court the discretion as to whether a postponement should be granted, stating, “The lower court before which a person is brought in terms of this subsection may postpone any bail proceeding or bail application.”

It can never be said that the court has no choice but to postpone the proceedings. The provisions are not peremptory, but give a discretion to the courts as to whether or not it is prudent to grant or refuse remands. The current interpretation of the lower courts in Cape Town indicates that section 50(6)(d) of the CPA is open to abuse by the State.

⁷⁸ S van der Merwe *Commentary on the Criminal Procedure Act* Service 31 (2004) at 5 - 40.

Unfortunately it never happens that the decision to grant remands by the lower courts is appealed.

The reason for this is that the bail application is finalised before a date of an appeal can be given in the High Court.

It is also very costly to litigate in the High Courts and very few people have the funds to do so; they rather wait for seven days.

J van der Berg proposes the correct approach towards adjournments in terms of s 50(6) of the CPA, which recognizes the urgency of bail applications.⁷⁹

When a person appears before a lower court for the first time and the State requests a remand in terms of s 50(6)(d), the court should proceed as follows:

Firstly, the court should read s 50(6) in conjunction with s 50(3) and 60(2)(a)-(c) of the CPA before granting or refusing a remand in terms of s 50(6).

Section 50(3) of the CPA reads as follows:

“Subject to the provisions of subsection (6), nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court.”

⁷⁹ J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 52.

When the accused person appears, the court should act in terms of s 60(2), which reads:

- “(2) In bail proceedings the court –
- (a) may postpone any such proceedings as contemplated in section 50(3);
 - (b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;
 - (c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;”

Only after the court has exhausted all the avenues in ss 60(2)(b) and 60(2)(c) and is still not in the position to grant or refuse bail may they act in terms of s 60(3) of the CPA which reads:

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

It must be understood that s 50(6)(d) of the CPA is not preemptory and that the State is not entitled to a remand.

Section 60(3) of the CPA is preemptory and only after the court has dealt with the accused person in terms of s 60(2) of the CPA, and after the court is of the opinion that it has insufficient information, may it adjourn the proceedings to obtain the necessary information.

During my research in the criminal court in Cape Town, I found that the norm is that at the first appearance the State will request a

remand in terms of s 50(6)(d) of the CPA. It is never stated for what reason and the remand is always granted.

This interpretation is a direct violation of an accused person's right to be heard on an urgent basis.

Unfortunately adjournments in terms of s 50(6)(d) of the CPA are not subject to automatic review of the High Court and have never been reported in law journals as having been appealed.

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4. THE CONSTITUTION AND THE CRIMINAL PROCEDURE SECOND AMENDMENT, ACT 85 OF 1997

The exposition of an accused person's rights, prior to the enactment of the Criminal Procedure Second amendment Act, accentuates the rights of a detainee.

These rights are:

- (i) The right to liberty coupled with
- (ii) the right to be released on bail on an urgent basis.⁸⁰
- (iii) The right to have a bail application heard by a court outside normal court hours.⁸¹
- (iv) The right to appear in a court and to have her case heard by a court.⁸²

It is evident, with reference to the reported case ⁸³ that these rights were established and granted to a detainee in the pre-constitutional era of South Africa.

The drafters of our interim Constitution Act 200 of 1993 and the final Constitution 108 of 1996 acknowledged these rights and entrenched them in our Constitution.

4.1 Entrenched rights in bail proceedings in the interim constitution

Section 25 (2) of the interim constitution⁸⁴ reads:

Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she as a detained person, has the right – (b) as soon as reasonably possible, but

⁸⁰ *Hurley v Minister of Law and Order* 1985 (4) SA 709 (D) at 715B.

⁸¹ *Twayie v Minister van Justisie* 1985 (2) SA 101 (O).

⁸² *Novick v Minister of Law and Order and other* 1993 (1) SACR 194 (W).

⁸³ *Supra* 49-50.

⁸⁴ Act 200 of 1993.

not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released.”

This section alone acknowledges three of the rights that were established pertaining to bail.

- (i) the detained person has the right to be released on bail.
- (ii) The urgency of bail applications and the right to bring such an application outside court hours was entrenched with the word “as soon as reasonably possible, but not later than 48 hours after the arrest.”
- (iii) The words “brought before an ordinary court” acknowledge the right to have the bail application heard by a Magistrate of Judge.

Section 22 of the Interim Constitution also strengthens the right to an independent and impartial forum. The section reads:

“Every person shall have the right to have justicible disputes settled by a court of law or, where appropriate, another independent or impartial forum.”

- (iv) Lastly section 11(1) acknowledged the right to freedom and security of a person, particularly the right not to be detained without trial.

One may now surely argue that the rights granted under the old apartheid order pertaining to bail were firmly entrenched into our interim Constitution.

4.2 Entrenched rights in bail proceedings in the final constitution, Act 108 of 1996

The final Constitution was signed into law by the former President Nelson Mandela at Sharpville on the 4th of February 1997.

The 34 Constitutional principles set out foundations of our democratic republic. The Constitution is now the supreme law of our land and fundamental rights and freedom of all citizens are protected.

These rights included the rights in the interim Constitution. The liberty of a subject is also protected by the final Constitution which includes the right of an accused person to be released pending his / her fair trial in a criminal court.

These rights will be fully discussed, however need to be mentioned.

- (i) Section 12 deals with the freedom and security of a person.
- (ii) Section 33 enshrines the right to just administrative action.
- (iii) Section 34 grants everybody access to courts.
- (iv) Section 35 grants specific rights to arrested, detained and accused persons, more particularly to be released on bail pending a criminal trial.

These rights granted to all citizens during the years of apartheid through judgments by Supreme and Appeal Courts and acknowledged by the interim Constitution are now entrenched in the final Constitution of South Africa.

Unfortunately these rights are infringed upon by the enactment of the Criminal Procedure Second Amendment Act 85 of 1997.

These rights will be discussed fully, followed by the infringement upon it, and whether these infringements are justifiable in an open and democratic society.

5. THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON (SECTION 12 OF ACT 108 OF 1996)

This section is a combination of the right to freedom and security of a person and the person's right to bodily and psychological integrity. With this discussion, the emphasis will be on ss 12(1)(a)-(e) which deal with the freedom and the security of a person.

Section 12 reads:

“Everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

It has been argued that the definition of s 12 should not end with the word “freedom”.

Freedom is only the beginning of the enquiry and “freedom” is the threshold of the enquiry⁸⁵.

The existence of both these components in the application of s 12(1) was confirmed in the Constitutional Court decision of *De Lange v Smuts*⁸⁶.

⁸⁵ J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 7 ed (2001) at 248.

⁸⁶ *De Lange v Smuts* NO 1998 (3) SA 785(CC).

Ackerman J confirmed both components and ruled⁸⁷:

“s 12(1), in entrenching the right to freedom and security of the person, entrenches the two different aspects of the right to freedom referred to above. The one that O’Regan J... called the right not to be deprived of liberty ‘for reasons that are not acceptable’ or what may also conveniently be described as the substantive aspect of the protection of freedom, is given express entrenchment in s 12(1)(a) which protects individuals against deprivation of freedom ‘arbitrarily or without just cause’. The other, which may be described as the procedural aspect of the protection of freedom, is implicit in s 12(1) as it was in s 11(1) of the interim Constitution ... The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur ‘arbitrarily’; there must in other words be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or ‘cause’ for the deprivation must be a ‘just ‘one... Although paragraph (b) of s 12(1) only refers to the right ‘not to be detained without trial’ and no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a ‘fair’ trial, but not that such trial must necessarily comply with all the requirements of s 35(3). This was the Court’s unanimous holding in respect of s 11(1) of the interim Constitution in *Nel’s* case and is equally applicable to s 12(1)(b) in the context of the entrenchment of the ‘right to freedom and security of the person’ in s 12(1) of the 1996

⁸⁷ *De Lange v Smuts NO* 1998 (3) SA 785(CC) at para 22-24.

Constitution, there being no material difference between the two provisions.”

There is a school of thought that argues, in the light of the Constitutional Court’s jurisprudence, that the standard set by s 12(1)(a) may be particularized in three questions⁸⁸, these three questions being:

- 1) Has there been a deprivation of physical freedom?
- 2) Is the reason for the deprivation of freedom acceptable?
- 3) Is the manner of deprivation of freedom procedurally fair?

The question at hand is whether a person who is arrested for an offence may rely on the protection of his or her right to freedom in terms of s 12(1) of the Constitution.

According to these authors, the deprivation of physical freedom is a threshold enquiry. Both the substantial as well as the procedural protection granted by s12(1) should be applied.

The argument is thus that once it is showed that a person’s liberty is deprived by any law or conduct, it must be shown that the reason for the deprivation is acceptable (substantive protection). In addition, the manner of depriving must be procedurally fair (procedural protection).

Once it has been established that the State did not comply with the reason or the manner of the deprivation, the State has to prove that the infringement is justifiable under s 36 (limitation clause) of the Constitution.

5.1 Application

The question now remains whether or not the arrest and detention of a person for any offence violates his or her constitutional right to freedom and security. One should also consider the implications of

⁸⁸ J de Waal, I Currie & G Erasmus *Bill of Rights Handbook* 4 ed (2001) at 249.

the Criminal Procedure Second Amendment Act 85 of 1997 on a detained person and the contribution towards the violation of the right envisaged in s 12(1) of the Constitution.

The answer to this question lies in the application of the three formulated questions already discussed.

(i) The threshold : deprivation of physical freedom

In answering the question posed as to whether a deprivation of physical freedom exists, one should consider whether the action constitutes a deprivation of physical freedom.

There is a school of thought that argues that one must consider the duration, degree and the intensity of the constraint that has been imposed in determining whether a person has been deprived of liberty⁸⁹. In addition, one should further assess “the situation of the person affected and the degree of freedom prior to the restraint.”⁹⁰

The arrest of a person for any offence is a definite deprivation of physical freedom. When a person living from day to day is arrested for an offence, particularly a schedule 7 or 1 offence, and is placed in a cell, this constitutes a deprivation of physical freedom.

Ackerman J, when considering the provisions of s 12(1) of the Constitution, ruled “In its ordinary grammatical sense, ‘detention’ is a word of wide meaning and relates to ‘keeping in custody or confinement, arrest’”.⁹¹

This view held by the Constitutional Court is correct and further that one should accept an arrest to be a deprivation of physical freedom. In doing so, one does not place the threshold too low in that it will hinder essential and effective police activities.

⁸⁹ J de Waal, I Currie & G Erasmus *Bill of Rights Handbook* 4 ed (2001) at 250.

⁹⁰ Ibid.

⁹¹ *De Lange v Smuts NO* 1998(3) SA 785 (CC) para 28.

If the level of the threshold is higher, it may mean that one is not protected against arbitrary conduct. The enquiry does not end, however, when it is established that a person is deprived of physical freedom.

The enquiry proceeds with the application of the substantive and procedural protection elements.

(ii) Substantive Protection

One should question the reason for the deprivation to establish whether it is acceptable.

The gist of the substantive protection appears to be that the deprivation of a person's freedom should be for a just cause.

Ackerman J ruled⁹²:

“It is not possible to attempt, in advance, a comprehensive definition of what should constitute a ‘just cause’ for the deprivation of freedom in all imaginable circumstances. The law in this regard must be developed incrementally and on a case by case basis. Suffice it to say that the concept of ‘just cause’ must be grounded upon and consonant with the values expressed in s 1 of the 1996 Constitution...and gathered from the provisions of the Constitution as a whole. I wish to say no more about ‘just cause’ than is necessary for the decision of the present case.”

O'Regan J dealt with this issue⁹³ and ruled:

“Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution...even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional

⁹² *De Lange v Smuts NO* 1998 (3) SA 799 (CC) para 30.

⁹³ *Bernstein v Bester* 1996 (2) SA 751 (CC) at para 146.

because the grounds upon which freedom has been curtailed are unacceptable.”

Generally speaking, this means that the cause for the deprivation of freedom should be ‘just’ and based on grounds that are fair according to lawful procedures.

In general one may accept that it is just to arrest a person where reasonable grounds exist to believe that an offence was committed by the arrested person and a summons will not suffice. Once a person is arrested, it must be established whether there is reason for further detention.

“Stricter scrutiny will be employed when the deprivation of freedom amounts to longer periods of detention or imprisonment.”⁹⁴

The primary aim of bail is to ensure that an accused person presents himself / herself at court.⁹⁵ Should no likelihood exist, as contemplated in s 60(4)(a) – (e) of the CPA *viz* that the release of the accused will allow him to endanger the safety of the community, commit further offences, tamper with evidence, influence witnesses or should the release not be in the interest of justice, then the accused should be released on bail immediately.

Ackerman J in the De Lange decision ruled⁹⁶:

“In this sense the imprisonment mechanism is very closely tailored to the purpose it is intended to serve and goes no further than is absolutely necessary to achieve its objective.”

When a person is arrested for a scheduled offence and the State and the accused are *ad idem* that he or she should be released, even after court hours, it should be done on an urgent basis.

⁹⁴ J De Waal, I Currie & G Erasmus *Bill of Rights Handbook* 4 ed (2001) at 253.

⁹⁵ J van der Berg *Bail: A practitioners Guide* 2 ed (2001) at 1.

⁹⁶ *De Lange v Smuts* 1998 (3) SA 799 (CC) para 41.

However the right to freedom and security of a person is infringed by s 50(6)(b) of the CPA that clearly prohibits any bail applications outside normal court hours. The result of this section is that a person for must wait for 48 hours or more before his or her release, and unwarranted detention is the consequence of the section and does not meet the requirements of substantive protection. Further deprivation of freedom may result in a violation of the right to freedom.

Arguments may also be made that in certain circumstances, for example where a person was arrested after he avoided the police deliberately to avoid arrest, it may be just. Such an argument is correct and does not constitute a violation of the rights in s 12 (1) of the Constitution.

(iii) Procedural Protection

The third aspect that forms part of the enquiry is whether fair procedures were followed when a person's liberty was curtailed. In *Nel v Roux* the court ruled that the circumstances under which the liberty was taken away forms the bases of the enquiry. The nature of the fair proceedings pertains to the circumstances⁹⁷.

It is important to bear in mind that the right to bail will have no effect without the right to be heard.

Ideally, the hearing should be conducted by judicial officers on an urgent basis and not by prosecutors who are part of the State's machinery. When a person is arrested and detained and no further pre-trial detention is warranted, he or she should be released immediately.

The question of further detention should not be answered by a prosecutor in executing his or her function in terms of s 59A of the CPA, but by a court.

⁹⁷ *Nel v Roux* 1996 (3) SA 562 (CC) at para 14

In practice, one may find circumstances where the procedural unfairness is more explicit than in other circumstances. The common violation that I experience in practice is where persons are detained for a schedule 1 or 7 offence as contemplated in the CPA. In both these instances, the State bears the onus to prove why a person should be detained. The “likelihoods” in s 60(4)(a) – (e) are to be proven by the State.

The first violation is once again covered by s 50(6)(b) which states, “An arrested person...is not entitled to be brought to a court outside court hours.”

The result of this section is two-fold where an accused is arrested outside of court hours:

- 1) an accused person may not be able to bring a bail application for a significant period of time;
- 2) the bail application cannot be heard by a judicial officer for a significant period of time.

The only alternative is to apply to the detective in charge of the case to grant bail in terms of s 59 of the CPA or to the Prosecutor in terms of section 59A of the CPA.

The Prosecutor will then assess the case docket to determine whether the offence falls within schedule 1 or 7 of the CPA.

Once the Prosecutor has made a decision on the schedule, the accused person may or may not apply for bail. If the decision is that the offence falls within the ambit of schedule 1 of the CPA, the accused person will be prohibited to apply for bail. The position will remain the same even if the State is of the view that the release of the accused person is in the interest of justice. A Prosecutor may only grant bail if the offence is a schedule 7 offence as set out in the CPA. The Prosecutor has to consult the Investigating Officer before bail is granted in terms of s 59A(1) of the CPA. The accused person has no

further recourse if the decision after consultation with the detective, is not to grant bail, resulting in an effective refusal of bail.

The refusal of bail in this instance is done by a non-judicial officer. The further detention of the accused person is then ordered by a person, not a court nor an independent or impartial institution.

The practice of having a Prosecutor who is in fact a party to the proceeding hearing a bail application is in violation of a person's right in terms of s 12 of the Constitution. It also does not meet the standards of procedural protection offered by the same section.

Ackerman J ruled:

“Viewed in the light of all the considerations, I would conclude that the ‘(fair) trial’ prescribed by s 12 (1) requires, apart from anything else, a hearing presided over or conducted by a judicial officer in the court structure established by the 1996 Constitution and in which s 165(1) has vested the judicial authority of the Republic.”⁹⁸

This view of the Constitutional Court is also shared by certain writers who argue:

“Only judicial officers may preside over a hearing when a freedom is at stake. It is important to note that, in such matters, it does not help to provide for an appeal or even a full re-hearing of the issue by a court after the deprivation of freedom has taken place.”⁹⁹

It is submitted that the practice of having non-judicial officers to preside over bail proceedings constitutes a violation of the procedural component of the freedom right.

⁹⁸ *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC) at para 57.

⁹⁹ J de Waal, I Currie & G Erasmus *Bill of Rights Handbook* 4 ed (2001) at 256.

The next question that arises is whether the violation is justifiable in terms of s 36 (the limitation clause) of the Constitution. This will be discussed under limitations.

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6. THE RIGHT TO JUST ADMINISTRATIVE ACTION

Bail may be set extra-curially by a police official of or above the rank of non-commissioned officer¹⁰⁰ or prosecutor authorised thereto in writing by the Director of Public Prosecutions¹⁰¹.

Both these sections appear to be inherently unconstitutional. These sections violate the right to just administrative action in terms of s 33 of the Constitution¹⁰². Section 33 entrenches the right to written reason to anyone who has been adversely affected by administrative action¹⁰³ and a right to review such action by a court or independent and impartial tribunal¹⁰⁴.

The rights in s 33 of the Constitution were suspended, pending the enactment of national legislation required by s 33(3) to “give effect¹⁰⁵” to the rights¹⁰⁶. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) came into operation to give effect to the Constitutional rights in s 33¹⁰⁷

“This means that the Act makes the rights effective by providing an elaborated and detailed expression of the rights to just administrative actions and providing remedies to vindicate them.”¹⁰⁸

¹⁰⁰ Section 59 of the Criminal Procedure Act 51 of 1977.

¹⁰¹ Section 59A of the Criminal Procedure Act 51 of 1977.

¹⁰² Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 reads: “(1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

¹⁰³ Section 33(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁰⁴ Section 33(3) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁰⁵ I Currie & J de Waal, *The Bill of Rights Handbook* 5 ed (2005) at 646.

¹⁰⁶ Schedule 6 (transitional arrangements) Bill of Rights 23 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁰⁷ The Promotion of Administrative Justice Act 2 of 2000 came into operation on 30 November 2000 excluding ss 4 and 5 that came into operation on 31 of July 2002.

¹⁰⁸ I Currie & J de Waal, *The Bill of Rights Handbook* 5 ed (2005) at 648.

The rights numerated in s 33¹⁰⁹ exist independently of the PAJA, which gives effect to the rights in s 33 and “retreats to a background role”¹¹⁰.

6.1 Administrative Action

The bail proceedings in terms of ss 59 and 59A of the Criminal Procedure Act 51 of 1977 (CPA) appear to be administrative proceedings¹¹¹. Sections 59 and 59A of the CPA allow the relevant official of the State to make a decision, which is of an administrative nature, in terms of the CPA that may adversely affect the right to bail¹¹², freedom and security¹¹³ which would have a direct legal effect.

This decision-making process falls within the definition of “administrative action”¹¹⁴ in s 1 of the PAJA and the decision making process in bail proceedings conducted by a prosecutor or police official is not specifically excluded by s 1(b)(aa)-(ii) of the PAJA.

6.2 Just Administrative Action

Section 33(1) reads “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”¹¹⁵. This section provides for procedurally fair administrative action.

Procedural fairness should at least include that persons affected by the decision making process be given a fair hearing and be heard (*audi alteram partem*) coupled with an impartial decision-making

¹⁰⁹ The Constitution of the Republic of South Africa Act 108 of 1996.

¹¹⁰ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) at 648 .

¹¹¹ J van der Berg states, “The bail procedure envisaged by ss 59 and 59A...amounts to no more than administrative proceedings with a quasi-judicial flavour” in J van der Berg *Bail : A Practitioners Guide* 2 ed (2001) at 33.

¹¹² Section 35(1)(f) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹¹³ Section 12(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹¹⁴ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) at 654 summarises s 1 of the PAJA as an action that will qualify as an administrative action written in the PAJA as “1. a decision (including a proposed decision) 2. of an administrative nature 3. made under empowering provision 4. by an organ of the State (or a private person when exercising a public power) 5. that adversely affects rights 6. that has direct external effect 7. that is not specifically excluded by the list of exclusion in subparas (aa) to (ii) of the definition of ‘administrative action’”.

¹¹⁵ The Constitution of the Republic of South Africa Act 108 of 1996.

process (*nemo index in sua causa*)¹¹⁶. These principles were once again confirmed by the Constitutional Court¹¹⁷.

Section 3(1) of the PAJA echo's these rights, stating "Administrative action, which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair."

One would expect that bail ought to be granted when a person is arrested for a fairly trivial offence such as shoplifting. A person may also have a legitimate expectation to be released on bail in such circumstances. The refusal to grant bail by the relevant official in terms of ss 59 and 59A will adversely affect the right to bail, freedom and security of a person.

Section 3(1)(b) of the PAJA states,

"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right to review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons..."

During the decision-making process, the police official in terms of s 59 and prosecutor in terms of s 59A of the Criminal Procedure Act 51 of 1977 has no obligation to entertain any representation on behalf of the accused¹¹⁸. The opposing party (the State) presides over the bail proceedings and may make a decision without applying the *audi*

¹¹⁶ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) at 663.

¹¹⁷ *De Lange v Smuts NO* 1998(3) SA 485 (CC) at para 131.

¹¹⁸ J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 32.

alteram partem rule. This procedure is unconstitutional¹¹⁹ and procedurally unfair¹²⁰.

Sections 59 and 59A of the Criminal Procedure Act 51 of 1977 do not prescribe the keeping of a proper record of proceedings¹²¹. The prosecutor only has to keep a record “in respect of bail granted in terms of this section”¹²². The indirect effect of the failure to keep a record is that an affected person cannot take the proceedings on review or appeal, which is contrary to the provisions of s 3(2)(b)(iv) of the PAJA as discussed above.

The impugned sections of the CPA do not provide that reasons be given to the affected party¹²³. This failure is unconstitutional¹²⁴ and does not adhere to the provisions of the PAJA¹²⁵.

Sections 59 and 59A thus appear to be inherently unconstitutional, however the issue may be resolved with the amendment to s 50(6)(b) of the Criminal Procedure Act 51 of 1977 which prohibits an accused from approaching a court outside normal court hours.

Once an administrative dispute has arisen, an accused will be allowed to apply to a Magistrate for bail.

The limitation of s 33 of the Constitution¹²⁶ may be justified by s 36 of the Constitution¹²⁷. The aim of s 59 and 59A of the CPA is to enable arrested and detained persons to be released on bail at all hours prior to their first appearance in a lower court. However, at this stage the limitation may be somewhat too extensive and should

¹¹⁹ Section 33(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹²⁰ Sections 3(1) and 3(1)(b) of the Promotion of Administrative Justice Act 3 of 2000.

¹²¹ J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 33, T J Nell *Borg handleiding* (1987) at 8

¹²² Section 59A(6) of the Criminal Procedure Act 51 of 1977.

¹²³ T H Nel *Borg handleiding* (1987) at 8.

¹²⁴ Section 33(2) of the Constitution of the Republic of South Africa Act 108 of 1996 reads, “Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons”.

¹²⁵ Section 3(2)(b)(iii) of the Promotion of Administrative Justice Act 2 of 2000.

¹²⁶ The Constitution of the Republic of South Africa Act 108 of 1996.

¹²⁷ *Ibid.*

be amended to allow the accused or his legal representative an opportunity to be heard and to entitle the accused to request reasons for the decision of the person hearing the application.¹²⁸

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¹²⁸ The limitation of constitutional rights is discussed in detail in ch 10 below.

7. ACCESS TO COURTS

Section 34 of the Constitution 108 of 1996 reads:

“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.”

The provisions of s 59A of the CPA violate the rights in s 34 of the Constitution.

Section 59A reads:

“An attorney-general or a prosecutor... may, in respect of the offences referred to in schedule 7 and in consultation with the police official charged with the investigation, authorize the release of an accused on bail.”

The issue of bail after arrest consists of two stages.

The first stage is the period from arrest until the first appearance in a lower court. This period is the “48-hour” period as referred to in s 50 of the CPA. As discussed before, the 48 hours may in practice be more than 80 hours.

The second stage is from the first appearance in a lower court until the matter is finalised.

This argument only pertains to the first stage. Firstly it should be established whether the provisions of s 34 of the Constitution apply to bail applications.

7.1 Application

It may be argued that s 34 of the Constitution does not apply to bail applications as it forms part of criminal proceedings and falls outside the protection offered by this section.

It has been argued ¹²⁹ that s 34 does not apply to criminal proceedings. This argument is based firstly on the Constitutional Court's decision of *S v Pennington*.¹³⁰ The author's interpretation of the judgement is ¹³¹ "criminal proceedings are not ordinarily referred to as 'disputes'".

In addition to this, it is argued that s 35 of the Constitution, and not s 34, is desired to protect the rights of an accused person during criminal proceedings.¹³²

I partially disagree with the interpretation of the *S v Pennington* decision where Chaskalson P ruled:

"The words 'any dispute' may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That s 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that s 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted."¹³³

It is my interpretation of the judgement that s 34 does not exclude criminal proceedings *per se*. It is evident from the wording "wide enough to include" that there may very well be instances where criminal proceedings may fall within the framework of s 34 of the Constitution.

Section 35 is specifically aimed at criminal proceedings and is designed to protect an accused person's rights during a criminal trial. However it must be qualified in the same way that one would presume that such interpretation would only be acceptable with the

¹²⁹ Ibid at 555.

¹³⁰ *S v Pennington* 1997(4) SA 1076 (CC).

¹³¹ J de Waal, I Currie & G Erasmus *Bill of Rights Handbook* 4 ed (2001) at 555.

¹³² Ibid.

¹³³ *S v Pennington* 1997 (4) SA 1076 (CC) at para 46.

understanding that the presiding officer is a judicial officer as contemplated in s 165 of the Constitution Act 108 of 1996.

When a bail application is brought at the first stage, the decision-making is left to the Prosecutor. It could not be argued that an arrested person's rights will be protected by s 35 of the Constitution during after hour bail applications in terms of s 59A of the CPA.

When it is accepted that bail application proceedings are criminal, it will fall within the ambit of s 34, and the accused person will be entitled to the protection afforded by this section.

If the argument is that s 34 of the Constitution is only applicable to non-criminal proceedings, s 34 will still apply to bail proceedings.

It has been argued that bail proceedings in terms of s 59 (police bail) and s 59A (bail by the Director of Public Prosecutions or an authorized Prosecutor) are administrative proceedings in nature¹³⁴.

The conclusion is that bail applications of s 59 and 59A of the CPA fall outside the definition of 'criminal proceeding' or for that matter judicial proceedings.¹³⁵

I agree with the view that bail applications in this manner are not criminal proceedings, however am of the view that it is still a judicial proceeding.

J Burchell defines criminal law as:

“Criminal law is the branch of national law that defines certain forms of human conduct as crimes and provides for punishment of those persons with criminal capacity who unlawfully with a guilty mind commit a crime.”¹³⁶

¹³⁴ J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 29.

¹³⁵ *Supra*.

¹³⁶ J Burchell *Principles of Criminal Law* 3 ed (2005) at 1.

Bail applications do not fall within the realm of criminal law. Bail proceedings and bail are non-penal in character.¹³⁷ The purpose of a bail application is not to establish whether the accused is guilty of an offence or not.¹³⁸

In *S v Mohammed*¹³⁹ the Appeal Court ruled:

“It would seem at first glance that the proceedings are civil...the proceedings...are closely associated with the accused’s arrest, detention and prosecution for a criminal offence. Hence, although they are civil in form, they are criminal in substance...”

The proceedings conducted by a prosecutor in lieu of bail are not criminal. The prosecutor fulfills an administrative action. In addition, I would qualify the administrative action as an administrative action with a judicial character.

In *S v Nomzaza*¹⁴⁰ the Appeal Court ruled that there can be no doubt that bail applications are judicial proceedings. This was reconfirmed by the Constitutional Court¹⁴¹.

Bail proceedings in terms of s 59 and 59A are not criminal proceedings and thus a detainee entitled to have any dispute relating to his or her release by an application of law by an independent and impartial presiding officer. Should the argument not be accepted, I will still argue that even if the proceedings are viewed as criminal, s 34 will still apply for reasons argued above.

7.1.1 Discretion of the Prosecutor

In terms of s 59A of the CPA, a prosecutor may set bail after hours or outside the normal court hours. The prosecutor may set bail if it is

¹³⁷ *S v Stanfield* 1997 (1) SACR 221 (C) 239 g – i.

¹³⁸ *S v Nyengane & andere* 1996 (2) SACR 520 (EC), *S v Dlamini* 1999 (4) SA 623 (CC) para 11.

¹³⁹ *S v Mohammed* 1977 (2) SA 531(A) 539G – 540A.

¹⁴⁰ 1996 (2) SACR 14(A) at 16f “[d]aar kan geen twyfel wees dat ‘n borgaansoek geregtelike verrigtinge is nie.”

¹⁴¹ *S v Dlamini* 1994 (4) SA 623 (CC) para 11.

deemed to be in the interest of justice that the accused not be detained further.

However this discretion of the prosecutor entails more than just an enquiry to determine whether or not to set bail. Bail may only be set outside court hours if the offence is one referred to in schedule 7 of the CPA.

It would then mean that the prosecutor has to determine the schedule of the offence. However, it is frequently difficult to determine the schedule of the offence.

For example, a person is charged with the killing of another person and an application for bail is brought.

Murder falls within the ambit of schedule 5 of the CPA. The effect on bail application is that firstly the detainee is prohibited from being released from custody by a director of prosecutions or prosecutor. Secondly, the onus is now on the accused person to prove that his or her release is in the interest of justice.

Section 60(11)(b), in schedule 5, reads:

“...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.”

Culpable Homicide falls within the ambit of schedule 7. This means that the prosecutor has to decide on the culpability of the accused to determine whether bail may or may not be set. During this process of decision-making, the prosecutor may only take into account the view of the State. The prosecutor may also err on the side of caution in concluding that the offence is not a schedule 7 offence, leaving the function to grant bail to a court during court hours.

Section 59A only allows for “consultation with the police official charged with the investigation.” It has been argued that, where appropriate, the accused person should be given an opportunity to put his or her argument before the prosecutor when the issue of the schedule or bail is considered. This would also adhere to the *audi alteram partem* rule.¹⁴² I fully agree with this view, however the provisions of s 59A of the CPA do not authorize such input from or consultation with the accused. There is no duty on the prosecutor to hear the side of the accused or to consult with the legal representative of the accused. The result is that the decision-making is unilateral.

7.1.2 Dispute

When a bail application is heard in terms of s 59A of the CPA and bail is granted by the prosecutor, no dispute will arise and s 34 of the Constitution does not apply. Section 34 will apply when bail is refused on the basis of a prosecutor’s ruling regarding the schedule of the offence, or due to the fact that the prosecutor deems it not to be in the interest of justice that the accused be released on bail.

This can be illustrated by the following example:

“A licence application to a government department will, for example, not trigger the protection of s 34. This is because there is no legal dispute even if the officials who decide the application have a discretion and a hearing is held to decide on the application. If, however, the licence is denied and the denial results in a dispute that can be resolved by the application of law, s 34 will become operational.”¹⁴³

Once the prosecutor and the legal representative of the accused are in dispute over the schedule of the offence or whether the release of the accused is in the interest of justice, s 34 will become operative.

¹⁴² S van der Merwe *Commentary on the Criminal Procedure Act Service 28* (2002) at 9 – 14.

¹⁴³ J de Waal, I Currie & G Erasmus *Bill of Rights Hand Book* 4 ed (2001) at 555.

De Waal et al remind us that when any legislation is challenged, the objective remains to determine consistency with the Constitution.¹⁴⁴

It is in line with the Constitution to grant bail wherever possible and an unfounded detention of an accused is in violation of s 12(1) of the Constitution which I have already discussed.

The objective of section 35(1)(d) – (f) of the Constitution is also to release an accused person on bail as soon as reasonably possible if the interest of justice permits. This I will discuss fully under the right to bail.

Section 59 (police bail) of the CPA is in nature the same and does not need further discussion. The arguments pertaining to s 59A of the CPA can apply *mutatis mutandis* to police bail.

The crux of both sections is that s 34 of the Constitution will only come into operation once a dispute arises out of the discretion of the “presiding person” in the bail application. If there is no dispute, bail will be granted and s 34 of the Constitution has no relevance.

7.1.3 Tribunal or Forum

Once the dispute arises, the effective person has the right to have the dispute resolved.

Section 34 provides the right to have the dispute resolved by the application of law decided in a fair public hearing.¹⁴⁵ The hearing may be before a court or where appropriate another independent or impartial tribunal or forum.

As discussed above, bail applications are divided into schedules which once again deal with and regulate the *onus* during the bail proceedings.

¹⁴⁴ Ibid.

¹⁴⁵ The Constitution of the Republic of South Africa Act 108 of 1996.

The State bears the onus during sched 7 bail applications. The *onus* would then be on the State to prove on a balance of probabilities that further detention of an accused person is in the interest of justice. Unfortunately the prosecutor also needs to hear the matter. This position is unattainable, especially with the provisions of s 50 (6)(b) of the CPA which prohibits an accused from approaching a magistrate outside normal court hours.

This section violates the rights granted in terms of s 34 of the Constitution. The section¹⁴⁶ unequivocally states that an accused person “is not entitled to be brought to court outside normal court hours.”

Section 50(6)(b) of the CPA should be amended in that it at least allows the accused person to have the *disputes* heard by an impartial tribunal or forum, but preferably a Magistrate’s Court in light of the fact that bail proceedings are judicial in character.¹⁴⁷

In conclusion, I am of the view that s 59 and 59A of the CPA are not in violation of any rights in the Bill of Rights. The violation is only triggered by s 59 and 59A of the CPA¹⁴⁸.

The real violation of s 34 of the Constitution in particular is caused by s 50(6)(b) of the CPA which prohibits the accused person from approaching a court to have the disputes resolved, whether on the schedule of the offence or if the release is in the interest of justice.

The position before 1998 was the correct position of the law. Once the State was of the view that bail should not be fixed, a court of law could have been approached. The CPA should be amended to the position prior to 1998.

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¹⁴⁶ Section 50(6)(d) of the Criminal Procedure Act 51 of 1977.

¹⁴⁷ *S v Nomzaza* 1996 (2) SACR 14 (A) at 16(f); *S v Dlamini* 1994 (4) SDA 623 (CC) para 11.

¹⁴⁸ See discussion above in ch 6.

8. SECTION 35 – THE RIGHT TO BAIL

The right to be granted bail has been entrenched into the final Constitution of South Africa¹⁴⁹. The Constitution acknowledges the rights granted to arrested, detained and accused persons under the old order¹⁵⁰. These rights stipulate that an accused person may be brought before a court as a matter of urgency and be released on bail if the interest of justice permits such a release.

Section 35(1)¹⁵¹ reads:

“Everyone who is arrested for allegedly committing an offence has the right – ...

- (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 expiring 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.”

Section 35(1)(d) entrenched the provisions of s 50(1)(c) and (1)(d) of the CPA. Section 35(1)(e) entrenched s 50(6)(a) and s 35(1)(f) entrenched s 60(1)(a) of the CPA into the final Constitution. Section 35(1)(d) – (f) are in essence a repetition of ss 50(c), (d), 50(6)(a) and 60(1)(a) of the CPA. With the entrenching of these sections, it has

¹⁴⁹ S 35(1)(d) – (f) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁵⁰ *Twayie v Minister van Justisie* 1986(2)SA 101 (O), *Hurley v Minister of Law and Order* 1985 (4) SA 709 D, *Minister van Wet en Order v Dipper* 1993 (2) SACR 221 (A).

¹⁵¹ The Constitution of the Republic of South Africa Act 108 of 1996.

become part of the higher law of our country and part of the Bill of Rights in the Constitution.

This also entrenched the rights granted to an accused person under the old order in the *S v Twayie* decision¹⁵².

These sections entitle a person to bring a bail application as a matter of urgency and to be released on bail if justice permits.

Section 35(1)(d) of the Constitution grants the accused person the right to bring an bail application as soon as reasonably possible. This means that a person is allowed to bring a bail application outside normal court hours. Once accepted that the provisions of s 50(1)(c) and 50(1)(d) of the CPA are entrenched into the Constitution, one should also accept that the jurisprudence pertaining to s 50(1)(c) and (1)(d) applies *mutatis mutandis* to s 35(1)(d).¹⁵³

This means that an accused person is entitled to be brought before court as soon as reasonably possible, even before the 48 hours have expired. The jurisprudence on s 50(1)(c) and (1)(d) of the CPA grants the accused person the right to be brought before court with the help of the police and the Prosecutor as a matter of urgency¹⁵⁴.

It was common practice in criminal courts during the period 1986 to the 1st of August 1998 to bring bail applications after and outside normal court hours. This practice did not change during the interim Constitution¹⁵⁵. Section 25(2)(d) granted the right “to be released from detention with or without bail, unless the interests of justice require otherwise.”

The procedure to apply for bail after hours also continued during the final Constitution. It must be accepted that the right to apply for bail outside normal court hours is well entrenched in our interim and

¹⁵² 1986 (2) SA 101 (O).

¹⁵³ *Twayie v Minister van Justisie* 1986 (2) SA 101 (O), *Minister van Wet en Order v Dipper* 1993 (2) SACR 221 (A).

¹⁵⁴ *Supra*.

¹⁵⁵ Act 200 of 1993.

final constitution. The jurisprudence, as discussed above, also acknowledged these rights that are now part of our Bill of Rights in the final constitution.

Unfortunately these rights are now violated by the enactment of the Criminal Procedure Second Amendment Act 82 of 1997 which came into operation on the 1st of August 1988.

8.1 Section 50(6)(b) of the CPA

This section is probably the greatest intrusion into an accused person to bring a bail application on an urgent basis.

This section states: An arrested person contemplated in para (a)(i) is not entitled to be brought to court outside ordinary court hours”

This section prohibits the release of a person on bail even in instances where the State (police and Prosecutor) feels that it is in the interest of justice that the person should be released. Once it is established that the likelihoods in s 60 (4), (9) and (10) of the CPA are all in favour of the accused, person, he or she should be released even if the offence falls outside the ambit of schedule 7 of the CPA.

A practical example:

A person gets arrested for theft of a motor vehicle on Wednesday afternoon at 17h00. The person was not brought to court Thursday or Friday as the 48 hours only expires on Monday in terms of s 50 of the CPA. Saturday morning the accused gets charged, he gives an explanation to the investigator. This explanation can only be verified on Monday. The value of the vehicle is R22 000.00.

An application for bail is brought in terms of s 59A of the CPA. The Prosecutor consults with the investigator and agrees that it is in the interest of justice to grant bail.

Unfortunately theft to the value of more than R20 000.00 is a schedule 1 offence and bail may only be set for offences of R20 000.00 or less by the Prosecutor.

Bail is therefore refused.

On Monday morning, the investigator confirms the explanation given as true and the case gets withdrawn.

Thus it appears that s 50 (6)(b) of the CPA violates the right of an accused person to bring an application as soon as reasonably possible.

There is no basis or need for this section in our law and the enactment is without foundation. There is no reason why a person should be detained if all parties are *ad idem* that the detainee's release is in the interest of justice.

This may also apply to sched 6 bail applications where the requirement is much higher¹⁵⁶.

The value of a person's liberty in relation to s 50(6)(b) of the CPA has been questioned¹⁵⁷. Section 50(6)(b) does not value the right to bail. This single section has summarily removed the right to bail after normal court hours. This section has also been criticized as a step backwards for the rights of detained persons¹⁵⁸.

Although legislature has acknowledged the right to bail after hours with the enactment of s 59A of the CPA, the application of this section is limited to only certain offences, thereby posing its own constitutional challenges which I have discussed elsewhere.

¹⁵⁶ Section 60(II)(a) of the Criminal Procedure Act 51 of 1977 refers to schedule 6 offences and also requires proof of "exceptional circumstances".

¹⁵⁷ F Snyckers in M Chaskalson et al, *Constitutional Law of South Africa*. Revision Service 5 (1999) at 27-50.

¹⁵⁸ J van der Berg *Bail: A Practitioner's Guide* 2 ed (2001) at 11.

8.2 Section 50(6)(d) of the CPA

At first glance, this section seems unable to violate the right to be released on bail.

The provisions of this section were discussed above under chapter 3.4. I will therefore not repeat these.

In a nutshell, the provisions entail that the State may request a remand at the first appearance of an accused person in terms of s 50 of the CPA.

The section grants the court the discretion to adjourn the bail proceedings for a period not exceeding seven days “on the terms the court may deem proper”. Any postponements under s 50(6)(d) of the CPA are a matter of judicial discretion.

However I have done research at the Magistrate’s Court in Cape Town over the period April 2005 – June 2005, and one hundred charge sheets from different courts were perused wherein the State requested a remand in terms of s 50(6) of the CPA.

The section on which the State normally relies as a basis for the adjournment is s 50(6)(d)(i) of the CPA. This section reads:

“...the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application.”

When perusing the court records, it appears that the postponement is granted to the State merely on the basis that the State seeks a remand. This also appears to be the case even in instances where the onus rests on the State to prove whether the further detention of the accused person is in the interest of justice.

This argument can be illustrated by the following two examples of district court cases:

First Example - Case number 14/241/05

- Accused was arrested on 12 March 2005.
- The accused was unrepresented on the 14th of March 2005, and appeared for the first time in the Magistrate's Court.
- The record of 14 March 2005, at first appearance, reads "S A versoek uitstel vir borginligting? (Prosecutor requests remand for bail information).
- Second appearance on the 29th of March 2005; more than the allowed seven days in terms of s 50(6)(d).
- On the 29th of March the record reads that the case was postponed for bail information.
- The case was once again adjourned for seven days.
- On the 1st of April 2005, the accused was represented. The record then reads, "Bail granted".

During this bail application, no evidence was led, no certificate attached by the Director of Public Prosecutions that indicated the schedule of the offence and no formal charge sheet was completed.

The application appears to be a schedule 7 or 1 offence in the light of the fact that the court did not require the defence to lead evidence.

The accused was in custody for 21 days on request of the State and no information or evidence was requested by the court or given by the State to warrant an adjournment in terms of s 50(6) of the CPA. The court also never granted the accused an opportunity to lead evidence to place "bail information" before the court.

Second Example

Cape Town Magistrate's Court case number 25/420/05

- The accused appeared for the first time in a lower court on the 22nd of April 2005.
- The State requested a remand for "bail information".
- The record does not show the specific section of the CPA on which the State relied, but I presume it must have been s 50(6)(d)(i).

- The matter was adjourned (accused in custody) until the 29th of April 2005 after no information from the State was placed on record and no evidence led by either of the parties to the proceedings.

It is not known whether this practice is common in the rest of South Africa. However I have investigated the proceedings in other courts in the Western Cape such as Wynberg, Stellenbosh, Tulbagh, Atlantis, Simonstown and Bellville Magistrate's Court and the practice appears to be the same.

This practice has the ability to frustrate the right to bail as entrenched in s 35 of the Constitution. The result is that bail applications are not dealt with as a matter of urgency and cases get remanded without an in-depth enquiry by the court in terms of s 50(6)(d) of the CPA.

The provisions of s 50(6)(d) of the CPA are not unconstitutional *per se*, but have the ability to violate the right to bail should the lower court not be more strict with remands in terms of this section.

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9. INTERPRETATION OF THE BILL OF RIGHTS

The Constitution Act 108 of 1996 is the highest law of the land. The question that needs to be answered in relation to the Constitution is whether the impugned sections in the Criminal Procedures Second Amendment Act 85 of 1997 will pass Constitutional muster. Neither the High Courts nor the Constitutional Court have ruled on the impugned sections. These sections are s 50(6)(b) and (d) and s 59 and 59A of the CPA.

The Constitution commands that the interpretation be conducted in the ambit of s 39 of the Constitution which reads:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

9.1 The Values

The Constitution Act 108 of 1996 entrenches the right to freedom and security of persons in s 12 and the right to bail in s 35(1)(f). It also includes the right to be brought before a court as soon as reasonably possible (section 35(d)) and that a dispute may be resolved by the

application of law in a fair public hearing (section 33) before a court (section 34).

Diametrically opposed to these rights in the Constitution, the CPA authorizes the release of a person on bail by a Magistrate's court only on court days and in court hours.

Section 50(6)(b) of the CPA prohibits an accused from being brought before a court and allows the State the opportunity to usurp the court's judicial function in terms of s 59 and 59A of the CPA to adjudicate over bail applications outside of normal court hours.

Will Sections 50(6)(b) and (d), as well as s 59A of the CPA promote the values of an open and democratic society based on human dignity, equality and freedom?

These sections of the CPA will not pass the constitutional muster should the Constitutional Court rule on the provisions in the future. The task of the Constitutional Court is to give effect to the values of the Constitution¹⁵⁹.

It is not the Constitutional Court's function to search for the intention of the Constitutional Assembly¹⁶⁰.

The writer suggests¹⁶¹ that one should, as a starting point, look at the language and the structure of the text itself. For this discussion I will not repeat it as these rights have already been fully discussed under chapter 4.2.

Then one must also investigate the historical context of the rights¹⁶². In chapter one of this dissertation, I discussed at length the history of the right to bail. However it is important to remind oneself that

¹⁵⁹ *S v Zuma* 1995 2 SA 642 (CC) para 14.

¹⁶⁰ N Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (2000) at 7.

¹⁶¹ *Ibid* at 8.

¹⁶² *Ibid* at 8.

notwithstanding the view of the High Courts, the legislature will enact statutes that violate rights granted by the courts.

As discussed, the Supreme Courts (High Court) in the apartheid years ruled that a person is entitled to bail, and that applications may be heard on an urgent basis¹⁶³.

Juxtaposed to the view of the Supreme Court, legislation exists that violated the crux of these rights granted by the Supreme Court.

An example of this legislation is s 29(6) of the Internal Security Act 74 of 1982, which reads:

“No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of this section.”

Section 61 of the CPA (repealed by s 4 of Act 75 of 1995) reads:

“(1) If an accused who is in custody in respect of any offence referred to in part III of Schedule 2 applies under section 60 to be released on bail in respect of such offence, and the attorney-general, either by written notice or in person, informs the court before which the accused applies for bail that information is available to him -

- (a) which, in his opinion, cannot be disclosed without prejudice to the public interest or the administration of justice; and
- (b) which, in his opinion, shows that the release of the accused on bail is likely to affect the administration of justice adversely or to constitute a threat to the safety of the public or the maintenance of the public order;

¹⁶³ *Twayie v Minister van Justisie* 1986 (2) SA 101(O).

and that he on the ground of the likelihood of such adverse effect or of such threat objects to the granting of bail to the accused, the court shall refuse the application for bail.”

These two examples indicate the history of the violation to the right to bail that has been more than a century old. This is also the history of our country. Although the Supreme Courts and the Appeal Court (as it was then known)¹⁶⁴ attempted to guard against the violation of a person’s freedom, security and right to bail, the apartheid government circumnavigated this with ouster clauses and were very often used in security legislation.

Now the Bill of Rights entrenches the right to bail, in addition to which it also entrenched the right to be brought before a court as soon as reasonably possible¹⁶⁵.

Section 50(6)(b) of the CPA must be seen as a violation of the right to bail coupled with the right to have the application heard as soon as reasonably possible by a court of law. This section reminds one of the ouster clauses found in security legislation. The meaning of this section is actually that no court of law shall have the jurisdiction to order the release of any person detained for any offence outside ordinary court hours.

Thirdly, the writer advises that one should investigate the common law¹⁶⁶ “as part of the historical context in which the Bill of Rights is situated”. This will be an important source of interpretation.

In this instance it is important to note the specific wording of s 50 of the CPA. Section 50(1)(c) of the CPA reads:

¹⁶⁴ *Minister van Wet en Orde en ‘n ander v Dipper* 1993 (2) SACR 221 (A).

¹⁶⁵ Section 35(1)(f) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁶⁶ N Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (2000) at 9.

“...he or she shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest.”

Section 35(1) of the Constitution reads:

“Everyone who is arrested...(d) to be brought before a court as soon as reasonably possible, but not later than – (i) 48 hours after the arrest.”

The common law is summarized in *Dipper’s Case* by Hoexter AJ who held:

“An accused, who is in custody, is entitled to make application for his release on bail before the expiry of the 48 hours referred to in s 50(1) of the Criminal Procedure Act 51 of 1977, that is before his compulsory first appearance in a lower court in terms of s 50(1).”¹⁶⁷

The expression “at his first appearance in a lower court” in s 60 of the Act does not only refer to the first compulsory appearance in terms of s 50(1) but also includes a first appearance at the accused’s own request¹⁶⁸.

Our history pre the Constitution indicates that certain legislation violates South Africans’ rights to freedom, security and to be released on bail. The Constitution acknowledges these violations, hence the entrenchment of the rights to freedom, security and protection of rights by the courts.

¹⁶⁷ *Minister van Wet en Orde en ander v Dipper* 1993 (2) SACR 221 (A) at 221g.

¹⁶⁸ *Supra*.

9.2 International Law

Section 39(1)(b) of the Constitution prescribes that a court, tribunal or forum must consider international law when the Bill of Rights is interpreted.

International law in the form of international agreements and customary international law may be used as a yardstick and framework to evaluate and to understand our Bill of Rights¹⁶⁹.

The Court or other forum that uses international law as an instrument of interpretation is not necessarily bound by the law, however it must consider it in the interpretation of the Bill of Rights. Lang J in *S v Williams* said, “we are not bound to follow it but neither can we ignore it.”¹⁷⁰

The international law on the right to bail is clear, but silent on the right to bring a bail application outside normal hours. It is however open for interpretation to allow the inclusion of a right to bail before the first appearance in a criminal court.

Section 9(3) of the International Covenant on Civil and Political Rights (1996) reads:

“...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding...”

The phrase “at any other stage of the judicial proceeding” could be interpreted as the stage before the first appearance in a court of law.

Article 37(b) of the Constitution on the Rights of the Child deals with the arrest and detention of a child and prescribes that arrest and detention of a child should only be the last resort. The section states

¹⁶⁹ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁷⁰ 1995 7 BCLR 861 (CC) para 50.

further that the detention should be “for the shortest appropriate period of time.”

Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that an accused who appears before a court:

“...shall be entitled to bail within a reasonable time or to release pending trial. Release may be conditional by guarantees to appear for trial.”

This section was interpreted by the Court in B v Austria¹⁷¹ and the ruling was that article 5(3) applies from the very moment of arrest.

The international instrument allows for bail immediately after arrest. A person should not be incarcerated unnecessarily or without just cause.

Article 7(5) of the American Convention on Human Rights is worded to the same effect as the sections discussed above and allows the release of an accused on providing guarantees to secure court attendance.

The argument for the release of a detainee is evidently stronger than the unwarranted detention. A person should be released from custody as soon as reasonably possible if justice permits the release.

9.3 Foreign Law

When a court interprets the Bill of Rights, the court may consider foreign law¹⁷². The courts have to have regard for foreign law however Chaskelson P in *S v Makwanyane* states “there is no injunction to do more than this.”

¹⁷¹ *B v Austria* 28 March 1990 Series A no 175 at 39.

¹⁷² S 39(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996. *S v Makwanyane and another* 1995(3) SA 39 (CC) at para 37.

The argument by certain writers is that one should first examine the text and context of the law of the country to which it is compared¹⁷³. The structural differences will determine whether the comparison is relevant or irrelevant. Secondly¹⁷⁴, he suggests that “the underlying rationale and concept or doctrine should be identified.” Lastly¹⁷⁵, one should consider the consequences of applying the foreign law in our context of South African Law.

Our courts have in the past considered foreign law when interpreting our Bill of Rights. Our courts have however investigated and cited some countries’ jurisprudence more than others. The Canadian Charter has greatly influenced the drafting of our Bill of Rights and hence our Courts have investigated the legal position in Canada¹⁷⁶. Our courts have made reference to other jurisprudence of other countries, however it appears that our courts predominantly cite law of the Commonwealth and countries such as the United State, Canada and Namibia¹⁷⁷.

I will thus concentrate on these three countries when I investigate the right to bail and more particularly the right to have a bail application heard outside normal court hours and as a matter of urgency.

9.3(a) Namibia

Namibia’s jurisprudence on the interpretation of the Bill of Rights can be used as an important instrument when one considers the provision of our Bill of Rights and CPA. The text of the Bill of Rights is very similar to ours and the Criminal Procedures Act 51 of 1977 of South Africa is still in force in Namibia. The reason for this phenomenon is before Namibia became independent in 1989, it was governed by South Africa¹⁷⁸.

Section 11 of the Namibian Constitution of 1990 provides:

¹⁷³ N Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa*, 1996 (1998) at 13.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *S v Jordan and others* 2002 (6) SA 642 (CC); *S v Nortje* 1996 (2) SACR 208 (C).

¹⁷⁷ *Supra.*

¹⁷⁸ Until 1989, it was known as South West Africa.

“(1) No person shall be subject to arbitrary arrest or detention...

(3) All persons who are arrested and detained in custody shall be brought before the nearest magistrate or other judicial within a period of forty-eight (48) hours of their arrest or, if this is not possible, as soon as possible thereafter...”

Sections 50(1), 59 and 60 of the CPA of Namibia regulate bail proceedings. For this discussion I will not repeat these sections as the content is similar to the CPA in South Africa and has been discussed in detail in stages one and two of my discussion.

In the High Court decision of *Grace v Fouche and Others*¹⁷⁹, the court had to decide whether a person arrested and detained had the right to apply for bail within the 48 hours after the arrest; also whether such a right includes the right to apply for bail outside normal court hours.

Hannah J ruled that the Constitution of Namibia allows a person to bring a bail application if it is reasonably practical to do so.

He ruled¹⁸⁰:

“Article 11(3) does not, in my view, confer a right on the State to detain a person in custody for 48 hours at its whim if it is reasonably practical to bring that person before a magistrate at an earlier point in time.”

In addition to the above, the court ruled that s 50(1) of the CPA “must be read in the light of the foregoing.”¹⁸¹

¹⁷⁹ 1997 NR 278 (HC).

¹⁸⁰ Supra at 282B-C.

¹⁸¹ Supra.

In his *ratio decidendi*, Hannah J emphasized the importance of a person's liberty their consequent entitlement to apply for bail on his or her own initiative outside normal court hours.

The court relied on the South African decision of *S v Twayie*¹⁸² and endorsed the decision of Kotze J.

It is further important to note that Hannah J found that the applications for bail may be brought without the presence of the prosecutor as long as the Investigating Officer attends the proceedings and will testify¹⁸³.

The court however notes that the right is qualified to bail application where grounds for urgency exist, "For example when an arrested person is found to suffer from some chronic medical ailment..."¹⁸⁴ This does not preclude the accused from bringing the matter before a magistrate as the magistrate must still apply his or her mind on a case by case basis¹⁸⁵.

I fully agree with the interpretation of the Constitution and the CPA by the Namibian High Court. This illustrates the right to liberty and the right to have bail proceedings conducted by a court of law. I do not agree with the requirement that the applicant must show real grounds that urgency exists as all bail applications are deemed to be urgent as a person's liberty is at stake¹⁸⁶.

9.3(b) Canada

The Canadian Bill of Rights 1960, C 44 reads:

"...no law of Canada shall be construed or applied so as to...

- (f) deprive a person charged with a criminal offence of the right...to reasonable bail without just cause..."

¹⁸² *Twayie v Minister of Justice* 1986 (2) SA 101 (O).

¹⁸³ *Grace v Fouche and others* 1997 NR 278 (HC) at 284i.

¹⁸⁴ P J Schwikkard *The Bill of Rights Handbook* 5 ed (2005) at 767

¹⁸⁵ *Grace v Fouche* supra at 285B.

¹⁸⁶ *Hurley v Minister of Law & Order* 1985 (4) SA709(D).

The Criminal Code of 1985 regulates the criminal proceedings in Canada. Section 503(1) of this Code prescribes the bail proceedings when a person is arrested with or without a warrant of arrest.

Section 503(1) states:

“A peace officer who arrests a person... shall cause the person to be detained... and, to be taken before a justice to be dealt with according to law.

(a) ...within a period of twenty four hours after the person has been arrested.”

When comparing the Canadian law and jurisprudence to that of South Africa, we are warned that “the two societies are very different.”¹⁸⁷ On the other hand, it is also said that Canada is an excellent example of a true democracy¹⁸⁸.

The most important difference, in my opinion, between South African law and Canadian Criminal Procedure pertaining to the right to bail after court hours is the fact that the 24 hour period contemplated in s 503 means 24 hours and includes the time that a person is incarcerated during non court hours. The result is an automatic right to bail over weekends and outside court hours.

In the event of a justice not being available to hear the application, the accused has to be brought before a justice as soon as possible or if the time expires, must be released by the Peace Officer¹⁸⁹.

This is a confirmation that the Canadian law acknowledges the right to bail coupled with the right to be heard by a judicial officer on an urgent basis.

¹⁸⁷ W De Villiers *Bail: A discussion of the Canadian Principles and comparison with South African Law* (2003) 66 *THRHR* at 2.

¹⁸⁸ *Ibid* at 17.

¹⁸⁹ *Ibid* at 17.

The Constitutional Court of Canada has stated that bail legislation should be interpreted in a liberal manner¹⁹⁰.

I agree with this view and believe in the event of the Constitutional Court's interpretation of the constitutionality of s 50(6)(b) of the CPA, our Constitutional Court will find this section to be a violation of the right to bail in terms of s 35(1)(f) of the Constitution.

9.3(c) United States of America

The right to bail in America may be drawn from various parts of the American Constitution.

The fourteenth Amendment of the Rights of the People of America states:

“Nor shall any State deprive any person of life, liberty or property, without due process of law.”

According to other authors¹⁹¹, the right to be bail may be read “into the prohibition contained in the Eighth Amendment against excessive bail”.

In the decision of the *United States v Salemo*¹⁹² the court ruled differently and found that the merits to grant bail flow from the due process clause of the Fifth Amendment and not from the “excessive bail provision” of the Eight Amendment.

Rule 5 of the Federal Rules of the Criminal Procedure deals with appearances of an accused after arrest. Rule 5(1)(1)(A) reads:

“A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate, judge or before State or local judicial officer...”

¹⁹⁰ *R v Thompson* (1972) 7CCC (2d) 70.

¹⁹¹ F Frank in M Charskalsen et al *Constitutional Law of South Africa* “Criminal Procedure” Revision Service 5 (1999) at 53 footnote 1.

¹⁹² 107 SCt 2095 (1981).

This procedure allows a person to apply for bail when he or she appears before the judicial officer.

The rule does not allow the police to detain a person for a period of time before the accused's first appearance in court. The accused (defendant) must be taken without delay to appear before a magistrate or judge.

This rule also allows an accused to be released at any hour of the day and on weekends¹⁹³. The courts are obliged to keep a schedule indicating the judge, and clerk who is responsible to deal with the bail applications¹⁹⁴.

Clerks are instructed to accept telephone calls from attorneys and prosecutors after hours and in some instances are also allowed to set bail¹⁹⁵.

The above practice indicates that the right to apply for bail after hours in the USA, especially in Vermont, is a well respected right of an accused.

9.4 The Common Law or Customary Law

Section 39(2) of the Constitution commands that courts and tribunals must promote the spirit and the objectives of the Bill of Rights when interpreting legislation and when developing the common law or customary law.

The common law of our country acknowledges the right to bring a bail application outside normal court hours and before the 48 hour rule expires in terms of s 50(1) of the CPA¹⁹⁶. The common law also provides that an accused is entitled, on his own initiative, to appear before a court of law to apply for bail¹⁹⁷.

¹⁹³ WA Nelson *Vermont Criminal Practice*, www.defgen.State.vt.us/lawbook/ck07.h9m11.06/05 at 4.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Minister van Wet en Order en Ander v Dipper* 1993 (2) SACR 221 (A).

¹⁹⁷ *Supra.*

Section 39 (2) of the 1996 Constitution creates a framework for the harmonization of legislation of parliament with the Constitution¹⁹⁸.

Certain rights were granted to arrested and detained persons pre-constitution and the courts must have regard for these principles of law¹⁹⁹.

The court is not bound by the common law principles²⁰⁰, however the court must consider the common law precedent²⁰¹.

Section 35(3) of the interim Constitution provided that a “court shall have due regard to the spirit, purport and objects of this chapter.”

Section 39(2) of the final Constitution provides that “a court must promote the spirit...”

In *S v Letaoana*, Marcus AJ stated²⁰²:

“To ‘promote’ in this context, means to further or advance. It means more than taking into account.”

The court ruled further that when one interprets the provisions of s 60 of the CPA (bail provisions), the court would be “obliged to ‘promote’ the objects of the Bill of Rights.”²⁰³

The court also stated that a court may reconsider decisions “including those of the Appellate Division handed down before the Constitution came into operation”.²⁰⁴

However I will argue that in the event of the Constitutional interpretation of s 50(6)(b) of the CPA, the court will find that this section is unconstitutional. The correct legal position in relation to

¹⁹⁸ J R De Ville *Constitutional and Statutory Interpretation* (2000) at 160.

¹⁹⁹ *B v Minister of Correctional Services* 1997 6 BCLR 789 (CC).

²⁰⁰ *Bernstein v Bester NO* 1996 4 BCLR 449 (CC).

²⁰¹ *Supra*.

²⁰² *S v Letaoana* 1997 (11) BCLR 1581 (W).

²⁰³ *Supra*.

²⁰⁴ *Supra*.

the right to bail after hours is the provision as set out in *Dipper's* case²⁰⁵.

The *ratio decidendi* in this decision promotes the spirit, purport and objects of the Bill of Rights as set out in s 35(1)(d) – (f) of the Constitution. The right to apply for bail after hours is consistent with the provisions of s 35(1)(d) and of the Constitution.

Section 39(3) states:

“The Bill of Rights does not deny the existence of any other rights of freedoms that are recognized or conferred by common law, ..., to the extent that they are consistent with the Bill.”

The impugned legislation does not promote the spirit and the objectives of the Bill of Rights.

Section 50(6)(b) of the CPA prohibits an accused from applying for bail outside normal court hours. Bail applications are currently heard after hours by the prosecutor in terms of s 59A of the CPA and not by judicial officers. These sections should be amended to harmonise it with the Constitution.

I am however of the view that s 50(6)(b) should be declared as unconstitutional as it is not capable of being harmonized with the Bill of Rights. Section 59A needs no amendment in the event of s 50(6)(b) of the CPA being declared unconstitutional. This would mean that an accused may approach a court if any dispute arises in terms of s 59A of the CPA.

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²⁰⁵ *Minister van Wet en Order en ander v Dipper* 1993 (2) SACR(A) as discussed in ch 8 above.

10. LIMITATION OF RIGHTS

Constitutional law authors are in agreement that fundamental rights and freedoms are not absolute²⁰⁶. This also pertains to the right to bail and all states recognise this limitation and the need for the curtailment of the right to liberty, especially in the criminal procedure context²⁰⁷. There may be valid reasons for the arrest and detention of awaiting trial prisoners.

In South Africa, the rights in the Bill of Rights are limited by s 36 of the Constitution which reads:

“(1) The rights in the Bill of Rights may be limited only terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose;
- and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

The contents of s 36 of the Constitution confirm that rights in the Bill of Rights may be limited. Section 36 acknowledges justifiable and unjustifiable infringements of entrenched rights. The infringements will be justifiable and constitutional infringements only when the rights in the Bill of Rights are limited by a law of general application.

²⁰⁶ J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 4 ed (2001) at 144.

²⁰⁷ W De Villiers *Bail: A discussion of the Canadian principles and comparison with South Africa* (2003) 66 *THRHR* at 1.

Further, it must be justifiable in an open and democratic society based on human dignity, equality and freedom, coupled with all the other relevant factors as enumerated in s 36 of the Constitution.

10.1 Law of General Application

The Constitution allows the limitations only by law of general applications.

O'Regan J states that a law of general application, “be stated in a clear and accessible manner.”²⁰⁸

It has been argued that a law of general application should, at the minimum, be applicable to everyone and not be applied arbitrarily²⁰⁹.

The Criminal Procedure Act 51 of 1977 is a law of general application. Sections 39 – 49 of the CPA authorize and prescribe when, by whom and how an arrest may be effected.

This law of general application limits the rights of freedom and security of a person in terms of s 12 of the Constitution.

It is in the interests of justice that wrongdoers be brought before court and, if guilty, be punished for the offence committed. The State also has a duty to protect its law abiding citizens and to preserve our “criminal justice system’s effectiveness as a deterrent to crime”²¹⁰.

The right to bail in the Constitution is also limited. Section 35(1)(f) of the Constitution limits the right to bail in the wording of this section reads, “to be released from detention if the interests of justice permit.”

Section 60 of the CPA has similar wording as s 35(1)(f) of the Constitution and also limits the right.

²⁰⁸ *Dawood v Minister of Home Affairs* 2000(3) SA 936 (CC) para 47.

²⁰⁹ J De Waal, I Currie and G Erasmus *The Bill of Rights Hand Book* 4 ed 2001 at 198.

²¹⁰ *Govender v Minister of Safety and Security* 200(1) SACR 197 (SCA) at para 12.

The arrest and detention of a person are proper when reasonable grounds exist to believe that a crime was committed by that person. However, I disagree with the argument that the minimum time of detention before a first appearance before a court for a bail application should be regulated by statute.

I am of the view that s 50(6)(b) of the CPA violates the right to apply to a court of law for bail, and results in a violation of s 35(1)(f) of the Constitution. It also violates the right to have access to courts in terms of s 34 of the Constitution.

It is my opinion that s 50(6)(b) of the CPA will not pass the constitutional muster. The factors as mentioned in s 36(1)(a) – (e) favour the right to apply for bail as soon as reasonably possible.

10.2 Relevant Factors

I will highlight below the factors most relevant to the limitations on the right to freedom and indeed the right itself, namely:

- (a) The nature of the right;
- (b) The importance of the purpose of the limitations;
- (c) The nature and extent of the limitations;
- (d) The relation between the limitation and its purpose and
- (e) Less restrictive means to achieve the purpose

10.2(a) The nature of the right

The right to freedom is one of the cornerstone rights of democracy in South Africa.

Section 7 states²¹¹:

- “7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people on our country and affirms the democratic values of human dignity, equality and freedom.

²¹¹ Section 7 of the Constitution of the Republic of South Africa, Act 108 of 1996.

- (2) The State must respect, protect, promote and fulfill the rights in the Bill of Rights.”

In *S v Makwanyane*²¹², the Constitutional Court considered the nature of rights and viewed the right to life and dignity as the two most important rights antecedent to all other rights in the Constitution.

Chaskalson P also mentioned that “dignity is inevitably impaired by imprisonment.”²¹³

The rights mentioned in s 7 of the Constitution are the most important rights and weigh more heavily than other rights, the result of which is that an infringement on these rights may not be as justified whereas it may be, in the instance, of less important rights²¹⁴.

10.2(b) The importance of the purpose of the limitation

It is important that guilty people be brought to book. It may also, in certain circumstances, necessitate a person’s arrest.

When a person is arrested for a schedule 1 offence, and it has been established that he will stand his trial, should that person be detained further?

Conradie J ruled: “It could not have been the intention of the legislature that an alleged offender must be detained when he has established conclusively that he will stand his trial, that he will not interfere with the administration of justice and that he will commit no further wrongdoing. As soon as more is required of him, the procedure becomes punitive.”²¹⁵

²¹² 1995(2) SACR (3) SA 391 (CC) at para 326 & 327.

²¹³ Supra at para 142.

²¹⁴ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) at 178.

²¹⁵ *S v C* 1998 (2) SACR 721 (C) 722.

The importance of detention after arrest will become less after the purpose for the arrest is satisfied. It would be unreasonable to detain a person as it would serve no further purpose.

It has been argued that “A limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable.”²¹⁶

There is absolutely no purpose in detaining a person when the requirements for the release on bail in terms of s 60 of the CPA have been met, notwithstanding the schedule of the offence.

Arguments for the detention of arrested persons for longer periods may exist. These arguments would probably be based on the lawlessness and the current climate of violent crime in South Africa. It has been argued that the government is forced to strike a balance between crime and human rights²¹⁷. The result is that the government implemented anti-crime measures notwithstanding the opposition from human rights groups. “The starkest case is the 1998 legislative amendment of the bail law, which makes it all but impossible for those charged with certain violent crimes to get bail.”²¹⁸ However, I cannot agree with this argument as the unnecessary detention of arrested persons aimed at curbing crime would serve no purpose.

The State should concentrate more on achieving successful prosecutions than wasting valuable resources and court time on opposing bail applications with no merit.²¹⁹

²¹⁶ J De Waal, I Currie & G Erasmus *The Bill of Rights Hand Book* 4 ed (2001) at 158.

²¹⁷ K Shubane *Crime Wave: The South African Underworld and its Foes* (2001) at 186.

²¹⁸ *Ibid.*

²¹⁹ R Potenza *Crime Wave: The South African Underworld and its Foes* (2001) at 152 – 154 notes that witnesses spend days at court without being heard. “My case had been postponed once again... I waited in the corridor outside court 19 for the whole morning and was just told before lunch that the case would not be heard that day.”

10.2(c) The nature and extent of the limitations

While I agree that the limitation on an accused's right to freedom imposed by his or her arrest is, by its very definition, mandatory, this limitation should be temporary.

The limitation on an accused's rights, particularly the right to freedom, should do no more damage to these rights than is essential in achieving the purpose of the limitation.

Once the detention of the accused person has served its purpose to ascertain the assurance of the accused not to endanger the community, interfere with the investigation in any way, conceal or destroy evidence, intimidate witnesses nor evade his or her trial, freedom of the accused person, pending the guarantee of appearance in court as required, should be restored.

10.2(d) The relation between the limitation and its purpose

The purpose of the limitation imposed through the detention of an accused person should, simply put, be to ensure his or her appearance at further court appearances with regard to the alleged crime, in the interests of justice.

There is no rationale behind a limitation being enforced – and a right being violated - for the sole purpose of upholding a statute. The essence of the balance between the purpose to be achieved and the limitation imposed is encapsulated by this view:

“Logically, this requires there to be a casual connection between the law and its purpose: the law must tend to serve the purpose that it is designed to serve. If the law does not serve the purpose it is designed to serve at all it cannot be a reasonable limitation of the right.”²²⁰

²²⁰ J de Waal, I Currie and G Erasmus *The Bill of Rights Handbook* 4 ed (2001) at 161.

10.2(e) Less restrictive means to achieve the purpose

To achieve the purpose of serving the ends of justice, an accused person is required to attend court for his or her alleged crime. To ensure that this is achieved, the accused person should be detained, questioned and released.

In my opinion there is very little motive for prolonging the custodial period once the purpose of limiting the right of the accused person to his or her freedom has been met.

Should the possibility exist that the accused person can, in any way, assure a court of his or her future attendance at court proceedings without being detained, the accused should be released. Less restrictive means are to summons an accused to court if possible and in the event of arrest and detention to release a person on bail pending the outcome of the criminal trial.

It must also be said that there may be instances where the release of a person may not be in the interests of justice. In those instances it would be constitutional to detain a person. The most common reason for detention is where bail was granted before and the person had evaded his or her trial.

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11. REMEDIES FOR A CONSTITUTIONAL VIOLATION

When it is established that s 50(6)(b) and (d) or s 59 and 59A of the CPA constitute an unjustifiable infringement of one or more constitutional rights, the claimant is entitled to a remedy.

In terms of s 172 of the Constitution, a court finds the law inconsistent with the provisions of the Constitution, a court must declare it invalid to the extent of its inconsistency²²¹.

The court also has the discretion to grant an order which is “just an equitable” in the circumstances.

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²²¹ Section 172(1)(a) of the Constitution of the Republic of South Africa Act 108 of 1996.

12. CONCLUSION

It is evident from the discussion above that our High Courts²²² and Constitution²²³ acknowledge the right to bail. The CPA also allows the release of an accused on bail outside normal court hours and before her first appearance in a lower court²²⁴.

Both these sections acknowledge and give effect to the Constitutional right of an accused to be released on bail as soon as reasonably possible, even outside normal court hours²²⁵. Extra curial bail applications are however limited to certain less serious offences²²⁶.

In the instance of an accused being charged with a more serious offence, s 50(6)(b) of the CPA²²⁷ suspends her Constitutional right to apply for bail until her first appearance in a lower court. This section is a direct violation of an accused's right to be released on bail as soon as reasonably possible and should not be saved by the limitation clause in the Constitution.²²⁸

Neither the High Court nor the Constitutional Court has yet ruled on the constitutionality of s 50(6)(b) of the CPA. I am of the view that should this provision be tested against the rights in the Constitution, it may not pass the constitutional muster.

In the event of the Constitutional Court declaring this section as being unconstitutional, the violation of the rights of the accused would be eliminated, as the accused would then be permitted to apply for bail outside court hours and on non court days, even before the expiry of the 48 hours in terms of s 50(1) the CPA.

²²² *Twayie v Minister van Justisie* 1986 (2) SA 101 (O); *S v Du Preez* 1991 (2) SACR 372 (Ck); *Minister van Wet en Order v Dipper* 1993 (2) SASV 221 (A).

²²³ Section 35(1)(f) of the Constitution of the Republic of South Africa Act 108 of 1996.

²²⁴ Section 59 and 59A of the Criminal Procedure Act 51 of 1977.

²²⁵ Section 35(1)(d) of the Constitution of the Republic of South Africa Act 108 of 1996.

²²⁶ See discussion in ch 3 above.

²²⁷ Section 50(6)(b) of the Criminal Procedure Act 51 of 1977 states "An arrested person... is not entitled to be brought to court outside ordinary court hours."

²²⁸ Section 36 of the Constitution of the Republic of South Africa Act 108 of 1996 and see discussion in ch 10 above.

However, one should seek a more attainable solution to this violation of the right of an accused to bail.

History has taught us that notwithstanding the right to apply for bail outside court hours, this right was violated by deliberate actions on the part of the police²²⁹.

The Canadian Criminal Code may offer a solution to the situation specific to South Africa²³⁰. Section 50(1)(c) of the CPA should be amended regarding the maximum time of detention before the appearance of an accused in a lower court from 48 to 24 hours. The 24 hours period should be calculated with the inclusion of public holidays and non court days.

The State will not be prejudiced by this procedure as they will still be entitled to request a remand in terms of s 50(6)(d)(i)-(v) of the CPA in the event of more information being needed in establishing whether bail should be opposed or not.

This procedure would also grant the court an opportunity to investigate the further detention of an accused in terms of s 60(2) and 60(3) of the CPA. Further detention would then only be permissible once a court, rather than the police, had found it to be justified.

This may however mean that courts would have to convene on Saturdays, Sundays and public holidays to hear bail applications.

This would still be more cost effective than the pre-1 August 1998 position wherein courts convened on a daily basis outside of normal court hours and at all hours of day and night.

²²⁹ *S v Du Preez* 1991 (2) SACR 372 (Ck); *Novick v Minister of Law and Order* 1993 (1) SACR 194 (W).

²³⁰ Section 503(1) of the Criminal Code of 1985 states "A peace officer who arrests a person... shall cause the person to be detained... and, to be taken before a justice to be dealt with according to law (a) ... within a period of twenty four hours after the person has been arrested."

The protraction of the time spent within the twenty four hours will be justified and not excessive; the constitutional right of an accused to be released on bail as soon as reasonably possible will therefore not be infringed.

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13. BIBLIOGRAPHY

- J Burchell *Principles of Criminal Law* 3 ed (2005), Juta, South Africa.
- N Corre, S D Wolchover, *Bail in Criminal Proceedings* (1999), Blackstone Press, United Kingdom.
- W De Villiers, *Bail: A discussion of the Canadian principles and comparison with South Africa* (2003) 66 *THRHR* Butterworths, South Africa.
- E du Toit, F J de Jager, A Paizes, A Sheen & S van der Merwe, *Commentary on the Criminal Procedure Act Services* 28 – 33 (2004), Juta, South Africa.
- J R De Ville *Constitutional and Statutory Interpretation* (2000) Interdoc Consultants (Pty) Ltd, South Africa.
- J de Waal, I Currie & G Erasmus, *Bill of Rights Handbook* 4 ed (2001), Juta, South Africa.
- I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) Juta, South Africa.
- E A Kellaway, *Principles of Legal Interpretation of Statutes Contracts and Wills* (1995), Butterworths, South Africa.
- T J Nel *Borgtog-handleiding* (1987), Butterworths, South Africa.
- W A Nelson Vermont *Criminal Practice*, www.defgen.State.vt.us/lawbook/ck07.h9m at 4 (accessed on 11 June 2005).
- R Potenza *Crime Wave: The South African Underworld and its Foes* (2001), Witwatersrand University Press, South Africa.

- P J Schwikkard *The Bill of Rights Handbook* 5 ed (2005), Juta, South Africa.
- C W H Schmidt & H Rademeyer, *Bewysreg* 4 uitg (2000), Butterworths, South Africa.
- K Shubane *Crime Wave: The South African Underworld and its Foes* (2001), Witwatersrand University Press, South Africa.
- F Snyckers in M Chaskalson *et al Constitutional Law of South Africa*. Revision Service 5 (1999) at 57 – 50, Juta, South Africa.
- N Steytler, *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (2000), Butterworths, South Africa.
- J van der Berg, *Bail A Practitioner's Guide* 2 ed (2001), Juta, South Africa.