Penalised for poverty

The unfair assessment of 'flight risk' in bail hearings

Jameelah Omar*

jameelah.omar@uct.ac.za

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The purpose of bail must be evaluated in light of the purpose of pre-trial detention. Bail is not intended as a punitive measure. The Criminal Procedure Act of 1977 contains various elements that guide a court in determining whether it is in the interests of justice to grant bail. Unfortunately, courts have been known to deny bail by giving undue weight to some factors and ignoring others, including the denial of bail on the basis that a lack of sufficient assets owned by accused persons means that they are likely to be flight risks. Additionally, the denial of bail on the basis of a lack of a verifiable fixed residential address has also affected the assessment of potential to abscond trial. Both of these issues: ownership of assets and a fixed residential address, while distinct factors, stem from a similar indicator – that of the economic standing of the accused. This is arguably discriminatory in terms of relevant constitutional rights.

A well-known Anatole France quote reads, 'The poor have to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'. France's point was that an indigent accused is destined to suffer at the hands of the criminal justice system more than a wealthy accused. Despite assistance provided to an accused, structural inequalities exist in almost every aspect of South African life. This includes the criminal justice system, where legal representation is more difficult to obtain, and the value of the legal representation may differ, based on the amount an accused is able to pay for it.[1] In the context of bail, an accused who is able to demonstrate close ties to a community and family, who has permanent employment, and who owns assets, is less likely to be deemed a potential flight risk than an accused without these. Section 60(6) of the Criminal Procedure Act 1977 (Act 51 of 1977, or the CPA) attempts to balance this by considering the extent to which an accused can afford to forfeit the bail amount and the means and travel documents that would enable him or her to leave the country. The latter two considerations will, in most cases, affect a wealthier accused rather than a poorer one. This article considers the South African courts' approach to establishing whether an accused person is a 'flight risk'. It argues that this process can prejudice an indigent accused.

* Jameelah Omar is a lecturer in the Public Law Department at the University of Cape Town. The author would like to thank Ruvarashe Samkange for assistance with the court observations reflected in the research.

My interest in this issue was sparked in 2013 while conducting research in the Johannesburg and Randburg magistrate's courts.[2] Building on that work, I have more recently observed 37 first appearance bail decisions in two magistrate's courts in Cape Town.[3] In this article I draw on these anecdotal observations, and review judgments from high courts (matters appealed from magistrate's courts), to argue that bail inquiries are not always fairly assessed.

Legislative ambit

It has been more than 15 years since the important Constitutional Court judgement in *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat,* which pronounced on the constitutionality of some of the bail provisions contained in section 60 of the CPA.[4] This textual review of bail in South Africa's criminal procedure was an important one in outlining the legal framework within which the application of bail should operate. Although section 60 of the CPA was generally constitutionally endorsed, each provision was not individually tested. Rather, the court took the view that the factors were merely a codification of the common law position in terms of the judicial approach to the granting or denial of bail.[5] The practical impact of these provisions are yet to be appraised with respect to their equal and fair application. Prior to the amendment of bail in the CPA, the statutory provisions were largely restricted to the procedural requirements for bail. No guidance was provided to a court regarding what it ought to consider in determining whether bail should be granted.

Section 12 of the Constitution protects everyone's right 'not to be deprived of freedom arbitrarily or without just cause'.[6] In terms of section 35 of the Constitution, which deals specifically with the rights of accused, arrested and detained persons, all accused persons have the right to be presumed innocent until proven guilty.[7] Section 35(1)(f), in particular, enshrines the right 'to be released from detention if the interests of justice permit, subject to reasonable conditions'. It is in this light that the purpose of bail under the criminal justice system must be understood, and the bail process is governed primarily in chapter 9 of the CPA.[8] The purpose of bail must also be considered in light of the purpose of pre-trial detention, which is to ensure that an accused presents himself at court for trial. Sections 58 to 70 of this chapter deal with a number of aspects relating to the system of bail, including the effect of bail (section 58), the procedure of applying for bail and the factors to be considered by the court (section 60), conditions of bail that a court may set (sections 62 and 63), failure of accused released on bail to appear for trial (section 67), and cancellation of bail (section 68). Section 50(6) requires specific mention. Although it falls outside of the bail chapter, section 50 generally contains the procedure after arrest and subsection (6) contains the procedures relating to bail.

The provision of particular relevance is section 60. Section 60(1)(a) elaborates on the section 35 right to be released where the interests of justice permit, and states as follows:

> 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.* (own emphasis)

There is nothing to criticise in this provision. In fact, it is a progressive section that clearly aims to give effect to the relevant constitutional rights. The essential question is, therefore, in what circumstances and on what basis does a court determine that the interests of justice permit the release of a person on bail?

When do the interests of justice permit release?

A value judgement by a court is required to determine whether there are factors that

constitute release, based on the dictates of the 'interests of justice'.[9] Such a value judgement must include an analysis of three categories of interests, which may or may not conflict with each other. The court must balance the rights of the accused to be presumed innocent and to not be deprived of his or her liberty without just cause, with the rights of society in general to safety and security. Both the rights of the accused and those of society must be balanced alongside the interests of the criminal justice system to ensure that the investigation and prosecution of criminal matters are not impeded.[10] This is illustrated in the following bail judgement:

> The common law and the Constitution demand an equilibrium between the importance of freedom and the broad interest of justice. The primary objective of the criminal process regarding the phase before the trial is to bring the accused before a court, and there to confront him or her with the allegations of the prosecution. For that reason the court gives its support, where necessary, to steps aimed at preventing flight, obstruction of the police investigation, interference with State witnesses or concealment/destruction of real evidence. The courts have done this by means of bail conditions and criteria which have been thrashed out judicially over the years.[11]

Section 35(1)*(f)* (read with the general limitations clause in section 36) of the Constitution, which includes the caveat that release is contingent on the interests of justice, implicitly recognises that the continued detention of a person suspected of having committed an offence may be a justifiable limitation on an accused's right to liberty.[12] Section 60(4) of the CPA sets out the grounds on which a court must establish if release should not be permitted:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

These are factors that the court must take into account when determining if the interests of justice permit the release of the accused. Thus, where there is no likelihood that the accused poses a potential danger to individuals or their community, and there is no reason to believe the accused will interfere with witnesses, abscond from trial or otherwise impede the administration of justice, there is no justifiable limitation on the accused's freedom. The court should make use of these factors as guidelines, and be flexible to give effect to fairness and justice.[13] In other words, the factors contained in section 60(4) are not a closed list that excludes other potentially relevant considerations.[14] Ideally, these factors should be balanced against each other, and one factor being present should not automatically result in a denial of bail.

None of the above is cause for alarm. In fact, the list of grounds contains important considerations that indisputably relate to the interests of justice. Subsections (5) to (8A) include more detail about what must be considered for each of the grounds above. Section 60(4)(b) (and the

expanded considerations under subsection (6)) is also, unlike the other factors of section 60(4), intrinsically connected to the primary purpose of pre-trial detention, which is to ensure that the accused will stand trial. Thus, whether the accused is a likely 'flight risk' is a relevant factor when determining if the granting of bail is in the interests of justice. Section 60(6) is the most relevant for the purposes of this article because it expands on the factors that can assist in assessing the possibility that an accused will evade trial.

Does a lack of assets make one a flight risk?

Bail may be legitimately refused if there is a likelihood that the accused will attempt to evade his or her trial.[15] Which factors are considered in assessing the risk of absconding trial, and how they are weighed up, are relevant in determining whether the bail provisions are being fairly implemented. In this regard, this article specifically considers two of these factors, namely section 60(6)*(a)* and *(b)*: 'the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried' and 'the assets held by the accused and where such assets are situated'. The argument is tendered here that the factors in section 60 that relate to whether the accused is a flight risk, namely familial and community, relate (albeit not exclusively) to the existence of a verified fixed address and ownership of assets, and are subject to criticism for their potentially prejudicial effect on economically vulnerable and poor people.

Establishing proof of residential address is required before bail will be considered by the court.[16] The failure to have established this by the time of the accused's first appearance in the district magistrate's courts where bail hearings ordinarily take place, can result in bail hearings being postponed for up to seven days under section 50(6)*(d)*(i) of the CPA. This makes sense, because if an accused were to be released on bail the absence of a known address would make it difficult, if not impossible, to find him or her again.[17] This seems to be how the matter is decided in practice. Between the Cape Town and Wynberg magistrate's courts, 16 of the 37 cases observed were postponed in terms of section 50(6)*(d)*(i), pending verification of a permanent residential address by the South African Police Service (SAPS). In five separate cases, bail was denied on the basis of the SAPS being unable to locate the address provided by the accused as a residential address. In all of these cases the bail hearing had been postponed at least once before.

Where a fixed address is not present, a court will be less likely to believe that an accused's trial attendance is secure.[18] It would be onerous for the state to attempt to contact or monitor an accused for the purposes of a trial where no fixed address is verified. However, the mere possibility that one or more of the factors in section 60(4) may arise, is not sufficient.[19] A finding of a probability of a section 60(4) factor is necessary before it can be declared that the interests of justice permit bail to be denied.[20] Moreover, the court in *S v Pineiro* held that any concerns relating to section 60(4) factors could be dealt with by attaching relevant bail conditions in terms of section 60(12).[21] Therefore it is argued that there must be something more that renders a person a flight risk in order for bail to be denied in the interests of justice. The absence of a fixed address cannot be the sole basis for that assessment.

Courts have also emphasised that a lack of sufficient assets owned by accused persons may be viewed as an indicator of possible flight. In seven of the cases observed in the Cape Town courts a lack of assets was deemed an indicator of the likelihood of flight. In three of these cases, although the accused were employed, they were still deemed 'likely

to abscond'.[22] None of the seven cases considered the use of conditions to ameliorate the risk of flight.

The court in the case of *S v Mazibuko and Another* considered the assets owned by the accused, as submitted into evidence, to show that they were not flight risks:[23]

> As far as their personal circumstances are concerned, the appellants stated in their affidavits that they were self-employed, earning R7 000 and R6 000 per month respectively, that they had permanent residences, in the case of the first appellant that he owned an immovable property, that they both owned vehicles and household possessions, and that they had dependants. However, the evidence of Pillay, which was not contradicted, cast serious doubt on the truthfulness of these assertions. Firstly, he stated that the first appellant had told him that he was unemployed. Secondly, despite being requested to do so, the second appellant was unable to supply Pillay with the registration number of the vehicle which he allegedly owned and used in his taxi business. Pillay was therefore unable to verify that the second appellant in fact owned a motor vehicle. Thirdly, Pillay established that the first appellant did not in fact own the property he claimed to own.

The court goes on to say:

> In the circumstances, I am by no means satisfied that the appellants made out a case that they were not flight risks, let alone a case that there was an exceptionally good chance that they would stand trial.[24]

Although this case deals with schedule 6 offences, where the person applying for bail must show that exceptional circumstances exist for the bail to be granted, the reasoning of the court is nonetheless relevant to cases outside of schedule 5 or 6 to which bail applies. The court considered the employment status and asset ownership relevant and important to whether the accused were flight risks.[25] The court in *S v Porthen* held that showing that an accused does not fit any of the section 60(4) factors, which would include that the accused is not a flight risk, can be an exceptional circumstance in the context of the facts.[26] In that light, the court's assessment of 'flight risk' factors is appropriate and relevant outside of schedule 6 situations.

In *S v Masoanganye and Another,* the facts were based on three accused, where one of them was tried separately. The accused tried separately was granted bail, but the other two co-accused were not. The Appeal Court criticised the court *a quo* for focusing primarily on a lack of assets by the accused in question, saying:

> On a conspectus of the judgment as a whole it seems that what the learned judge had in mind was that the appellants could produce further evidence concerning their assets — the only matter that she dealt with in her judgment. Her judgment boils down to this: *she was not satisfied that the appellants were not a flight risk because they did not have sufficient assets.* Ahmed, who had sufficient assets, was held not to be a flight risk for that reason only.[27] (own emphasis)

The court in the 1997 case of *S v Letaoana* said that 'to take into account the minimal assets possessed by an accused as a factor for refusing bail is tantamount to imposing a penalty for poverty'.[28] This was said in the context of an accused who resided with his parents and was still at high school. In this case, the detective investigating the matter had testified at the bail hearing that: *'Ek is nie seker nie, as hy miskien ... nie terug hof toe kom nie, sal ek nie weet waar om hom op te spoor nie,'*[29] which

loosely translates as 'I'm not sure, if he does not return to court I would not know where to find him.' He further testified as to the amount of clothing that the accused had at his parents' house, and that it could easily be removed if the accused decided to abscond. The appeal judge stated that there were various reasons that pointed to the granting of bail to be in the interests of justice, namely that at the time of the accident the appellant was 20 years old, he was a scholar at Landula High School in Standard 10, he lived with his parents, he was not in possession of a passport, and he had no previous convictions.[30] The basis of denying bail in the trial court was based on an assessment of danger to the accused himself, but arguably largely focused on the testimony of the detective as well as the magistrate's view that the accused 'has no real assets of value, no fixed property, and only a bed and his clothing'.[31] The appeal judge overturned the denial of bail, stating that a number of factors should be considered together.

As the court in *Letaoana* said, the assets held by the accused outside the country may be relevant to a consideration of the practical possibility that they would have somewhere to go should they evade trial. As argued above, a single factor that points to the possibility of a flight risk is not sufficient to deny bail in the interests of justice. There must be some other factor(s) that point to such a likelihood, such as the ownership of property, which would support other considerations. The argument is even more poignant in the case of a lack of assets. Unless there is some reason to believe that the accused will abscond, a lack of ownership of assets is a discriminatory basis for denying bail. Even if it is accepted that the lack of assets in section 60(6) is sufficient to deem an accused a flight risk, the bail inquiry requires that the accused's likelihood of absconding trial would still have to be evaluated in terms of section 60(9) of the CPA, balancing the interests of justice with the right of the accused to personal liberty. The court in *Prokureur-Generaal* stated the following in this respect:

> Even when it is found that grounds justifying detention in the interest of justice exist, then such grounds are merely provisional grounds justifying refusal of the application. Subsection 60(9) specifically provides that the 'matter' must be determined 'by weighing the interests of justice against the right of the accused to his or her personal freedom'. To a certain extent, the provisions of s 60(9) are confusing, but they make sense if one reads the words 'prima facie' into the introductory sentence of s 60(4) so that the sentence would read as follows:
>
> > '(4) The refusal to grant bail and the detention of an accused in custody shall be prima facie in the interests of justice where one or more of the following grounds are established.'[32]

It seems from the cases (both those observed and the reported judgements) described herein, however few, that the number and value of assets an accused owns is a relevant consideration for magistrates in assessing whether the interests of justice permit release. The extent of the primacy of this one factor as it is applied in courts gives rise to the need to refocus the purpose of bail and the impact of the factors evaluated. While it may not be necessary or desirable to remove ownership of assets from the list of factors that point to whether an accused is a flight risk or not, more thought must be given to the interplay of the various factors.

There are other ways of mitigating the lack of a fixed permanent address or no ownership of assets. Section 60(2B)*(a)* and *(b)* and section 60(12) of the CPA provide the possibility of imposing alternative bail conditions that can be used to minimise the risk of the accused absconding.[33] For example, requiring an accused to report at a police station, daily, bi-weekly or

weekly, as the case requires, can ensure that the accused can be located. Commentators in foreign states with similar concerns have proposed the use of state-run hostels, which would allow an accused without a residence to be released on bail without the risk of absconding.[34]

The undue weight given to the above issues, especially an accused's lack of a fixed residential address, is arguably an infringement of the right to equality and to equal treatment before the law.[35] Given South Africa's history, it is no accident that most poor people are black.[36] As such, an economically vulnerable group is impacted by the black-letter enforcement of the provisions of the CPA. Due to the apartheid state having forced people to move into informal settlements without adequate urban planning or streets and street names, an argument can be tendered that it amounts to discrimination on one of the grounds listed in section 9 of the Constitution, namely race.[37] There is also clear discrimination on an unlisted ground, namely poverty.[38] While some wealthy persons may not have a fixed address, this would be for reasons of travel and residency, and in most cases its prejudice could be easily restricted by other factors such as employment and willingness to surrender travel documents.

Judging from the discussions observed in court relating to addresses in informal settlements, the concern is less aimed at the accused moving around and more at the SAPS's difficulties accessing the areas and obstacles to verifying addresses. Courts' failure to interpret and conduct a bail assessment in a manner that reflects the reality of South Africa is to ignore the need for justice and fairness in what remains a very unequal society. The use of bail conditions is a clear way to ameliorate the competing interests of risk of absconding with fairness to the accused, a method which should be better used in future bail hearings.

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Notes

1 Legal representation is available at state expense where the accused cannot afford it. Due to resource constraints, Legal Aid South Africa is not able to extend uncapped legal services to every indigent accused. For example, each accused is generally only entitled to one bail hearing. In most cases, an accused who has a Legal Aid attorney appointed will not meet the attorney until very shortly before the bail hearing or the trial, as relevant to the type of matter.

2 The observations in Gauteng were noted in the course of a project relating to remand detention, which formed part of the Rule of Law programme at the Centre for Applied Legal Studies.

3 Court was attended on 20 and 21 July 2016 and 4, 12 and 15 August 2015. The observations were in the district courts, in the courtroom in which bail for minor offences is often assessed immediately. The notes of these observations are on record with the author.

4 *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

5 Ibid., 40. J Chaskalson and Y de Jong, Bail, in C Gould (ed.), *Criminal (in)justice,* Pretoria: Institute for Security Studies, 2009, 88.

6 Constitution of the Republic of South Africa, 1996, Pretoria: Government Printer, 1996.

7 Constitution, Section 35(3)*(h)*.

8 Criminal Procedure Act 1977 (Act 51 of 1977), Pretoria: Government Printer, 1977.

9 A Kruger, Bail application of accused in court, in *Hiemestra's criminal procedure,* Durban: LexisNexis, 2008, 10–1.

10 *S v Dlamini,* 11.

11 Kruger, Bail application of accused in court, 9–1.

12 *S v Dlamini,* 49.

13 *S v Branco* 2002 (1) SACR 531 (W), 533; *S v Petersen* 2008 (2) SACR 355 (C), 55.

14 Chaskalson and De Jong, Bail, 89.

15 Criminal Procedure Act, Section 60(4)(b).

16 Angelique Serrao, Show proof of address and you get bail, *IOL News,* 24 July 2013, http://www.iol.co.za/news/crime-courts/show-proof-of-address-and-you-get-bail-1551803 (accessed 26 May 2016).

17 'Ongoing investigation' in practice includes the verification of the residential address of the accused. The court in *S v Kok* 2003 (2) SACR 5 (SCA), para 15, held that an 'ongoing investigation' was not sufficient reason to refuse bail.

18 *S v Diale and Another* 2013 (2) SACR 85 (GNP), 18.

19 *Hiemestra's criminal procedure*, 9–11.

20 *S v Swanepoel* 1991 (1) SACR 311 (O), 313d-f.

21 *S v Pineiro* 1992 (1) SACR 577 (NM), 681.

22 The accused in these cases were employed in various menial jobs, including as a petrol attendant and a car guard at a private butchery. One of the accused was a casual gardener employed once a week.

23 *S v Mazibuko and Another* 2010 (1) SACR, 29.

24 Ibid., 32.

25 The court may have been considering the evidence presented of falsehoods by the accused in relation to employment and assets as relevant to their credibility, but this is not made clear in the judgement.

26 *S v Porthen* 2004 (2) SACR 242 (C), 256.

27 *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA), para 18.

28 *S v Letaoana* 1997 (11) BCLR 1581 (W), 1594.

29 Ibid., 1591.

30 Ibid., 1593.

31 Ibid., 1594.

32 *Prokureur-Generaal, Vrystaat v Ramokhosi* 1997 (1) SACR 127 (O), 139.

33 C Ballard, A statute of liberty? The right to bail and a case for legislative reform, *SACJ,* 25, 2012, 35.

34 Anthea Hucklesby, Bail or jail? The practical operation of the Bail Act 1976, *Journal of Law and Society,* 23:2; 1996, 228. J Richards, The contribution of Correctional Services to the bail process, *bail or remand: proceedings of a conference,* vol. 29, 1988, 87.

35 Section 9(1) read with section 9(3) and 9(5) of the Constitution.

36 'Black' is used here in the broad sense as contained in the Employment Equity Act 1998 (Act 55 of 1998) to include African, Indian and Coloured designated groups, unless the context indicates otherwise.

37 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 41.

38 In the case of *August and Another v Electoral Commission and others* [1999] JOL 4701 (CC), it was argued that accused persons who remained in detention because they could not afford to pay the amount set for bail (sometimes as little as R600) faced unfair discrimination on the grounds of poverty.