PRACTICAL VOCATIONAL TRAINING (PVT) STRUCTURED COURSEWORK PROGRAMME FOR CANDIDATE LEGAL PRACTITIONERS (CANDIDATE ATTORNEYS)

Criminal court practice, in terms of Regulation 6(10)(f)

LEGAL PRACTICE COUNCIL

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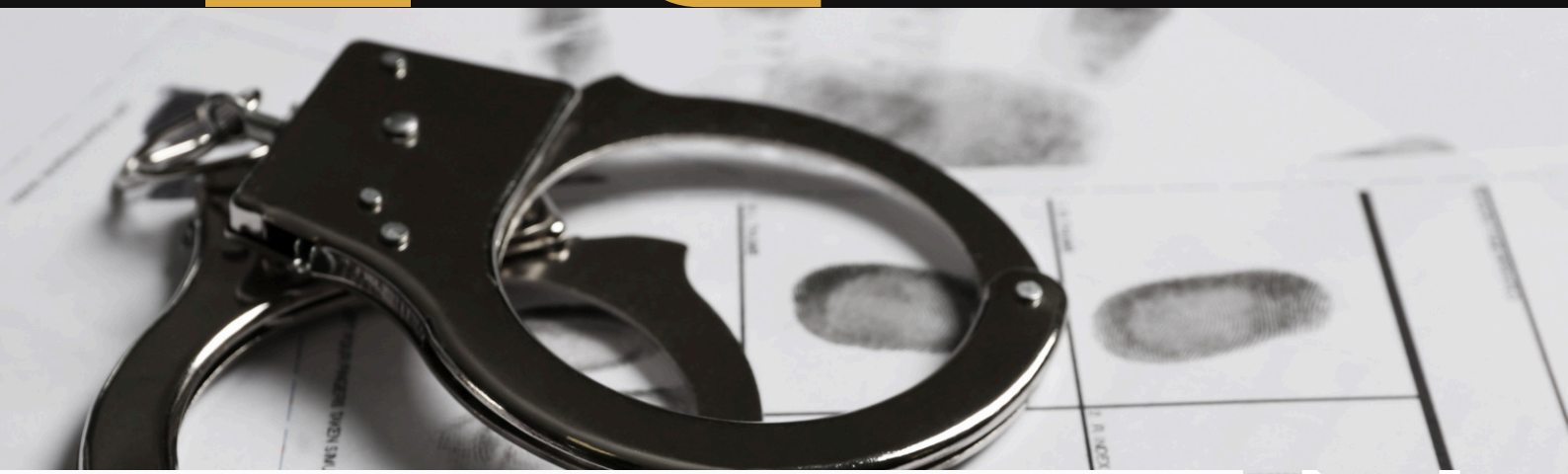

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GUIDE FOR CRIMINAL COURT PRACTICE

Regulation 6 (10)(f)

FIFTEEN GUIDES

There are fifteen guides for practical vocational training of candidate attorneys. This guide deals with the Criminal Court Practice module in regulation 6(10)(f).

OVERVIEW

On 20 September 2014 Parliament assented to the Legal Practice Act 28 of 2014 (LPA). In terms of section 4 of the LPA, the Legal Practice Council (LPC) was established on 31 October 2018. The following day, on 1 November 2018 the bulk of the rest of the LPA came into effect.

The Legal Practice Act regulates all legal practitioners whether on the practising roll or the non-practising roll. There are three forms of legal practice. They are an attorney, an advocate and an advocate with a Fidelity Fund certificate: see section 34 of the LPA.

Under section 109(1)(a) of the LPA, the LPC published GN R921 in GG 41879 of 31 August 2018, as amended by GN R3779 in GG 49104 of 11 August 2023. The compulsory course work required in the regulations for candidate attorneys was standardised by the LPC in terms of the Norms and Standards. Regulation 6(10) reads:

"(10) The programme of structured course work referred to in sub-regulation (1)(a) and (b) must be standardised and uniform throughout the Republic and comprise the following modules:

(a) constitutional practice;
(b) professional legal ethics;
(c) personal injury claims;
(d) high court practice;
(e) magistrate's court practice;
(f) **criminal court practice;**
(g) labour dispute resolution;
(h) alternative dispute resolution;
(i) attorneys' bookkeeping;
(j) wills and estates;
(k) matrimonial law;
(l) legal costs;
(m) drafting of contracts;
(n) information and communication technology for practice, and associated aspects of cyber law; and
(o) introduction to practice management."

The LPC published the Norms and Standards on 11 December 2020 in Government Gazette 43981 under section 3 (g)(i) read with section 6(1)(b)(i) and section 95(1)(n) of the LPA.

Regulation 6(10) requires candidate attorneys to be trained in the modules listed above. The similarity between regulation 6(10) for candidate attorneys and regulation 7(9) for pupils is not an accident. Section 32 of the LPA permits legal practitioners at any time, as determined in the rules and upon payment of the fee determined by the LPC, to apply to the LPC to convert their enrolment as attorneys to that of advocates and *vice versa*. Consequently, the training of candidate legal practitioners must allow for seamless section 32 conversions.

Each guide *per* module deals with the requirements in regulation 6(10). Examiners are required to set questions drawn only from the latest LPC candidate attorneys' curriculum and reading list. The combined curriculum and reading list is referred to as the "syllabus".

Each of the fifteen guides will assist training supervisors, mentors, busy legal practitioners and candidate attorneys to navigate the syllabus. The focus of the syllabus is on practical vocational training.

INTRODUCTION TO EACH GUIDE

Each guide *per* module in Regulation 6(10) is designed to assist candidate attorneys to understand, in real time, the minimum necessary under practical vocational training to become effective attorneys in practice. The essence of effective legal practitioners is the ability to read, to assimilate legal principles from that reading and to apply those principles to the facts of your client's case and in argument before courts, tribunals, disciplinary bodies, and any other forms of formal gatherings and meetings.

The guides avoid prolixity.
However each guide requires dedicated concentration.

For the examinations, candidate legal practitioners (candidate attorneys and pupils) must be up to date with the latest Constitutional Court and Supreme Court of Appeal cases to within one week before the date of each exam.

The guides do not rehash what you studied at University. Your LLB proves your capability. This guide will assist you to prepare for the LPC admission examinations. More importantly, this guide will also equip you to be an effective, competent, calm and (reasonably) confident attorney when you enter the legal profession.

REQUEST TO CANDIDATE ATTORNEYS FOR DUE DILIGENCE

Please read this guide attentively.
Please carry out all recommended court attendances.
Please carry out all the recommended practical exercises.
Please complete reading all the material in the LPC syllabus.
Please note the notional hours to complete all 15 guides are 400 hours.
Please note this guide, like the other fourteen guides, is sufficient for self-study.
Please remember, the exams are based on the LPC's most up to date syllabus (reading list).

- Currently the most up to date syllabus dates from 28 March 2025: Notice 3086 of 2025 published in Government Gazette 52388.
- Matters omitted from the LPC syllabus will not be in the examinations unless the statute, case or article under question is included in your exam paper and you are allowed extra reading time to consider that statute, case or article.
- Matters mentioned in the LPC syllabus are the subject of exam questions.
- You will be required to answer the exam questions from the perspective of:
    - Facts first
    - Law later
- The LPC exams, also referred to as assessments, are practical in nature.
- The questions will proceed from the following perspectives: –
    - What would you, as attorney of record, advise your client to consider?
    - What would you, as attorney of record, advise your client to do?
    - When and why would you refer a matter to another attorney or to counsel?
    - And similar practical questions.

REFERENCES

One of the products of Juta & Co Ltd is Jutastat. Many of the notes to this guide are downloaded from Jutastat. Please read the notes with care and diligence. This guide also relies on the Southern African Legal Information Institute (SAFLII).
SAFLII is free and open access on the Internet.

NOTE WELL

The sequence of this guide follows the sequence in the most recent LPC syllabus of 28 March 2025 for candidate attorneys. The fifteen guides are designed to be updated when the LPC so requires. Bullet points below are drafted to assist you to grasp the material in the reading list. You must decide whether to accept or to amend the bullet points to suit your understanding. When there are no bullet points, you need nonetheless to read the rule or case or article to prepare for your exams.

LPC SYLLABUS AND THE OFFICIAL SOURCE FOR ALL EXAMINATION QUESTIONS AT THE LPC ATTORNEYS' ADMISSION EXAMS

CURRICULUM AND COURSE CONTENT	READING LISTS
Introduction to criminal law and procedure Course Content * How to obtain and analyse the charge sheet and docket. * How to take instructions and obtain your client's version. * How to obtain witness statements & ensure witness presence in court. * How to engage prosecution and client in plea bargaining. * How to do bail applications. * How to plead effectively, including when to make a Plea explanation. * Candidates must know how to draft statements in terms of Section 112 and 115. * How to attend trial and pre-trial conferences. * How to cross-examine state witnesses. * How to present your client's version to a state witness. * How to lead evidence in chief and the decision to call your client. * How to manage experts in criminal cases * How to present argument * How to present sentencing options and evidence in mitigation. * Understand that the onus is on the state and how that onus is discharged. In particular candidates must have a practical understanding of what is entailed with regard to discharging the onus and how it differs from the burden of proof both in criminal and civil cases:	**PRINCIPAL REFERENCES:** • Criminal Procedure Act 51 of 1977 (hereinafter, "CPA") • The Constitution of the Republic of South Africa, 1996 (hereinafter, "Constitution") **ADDITIONAL REFERENCES**: • Du Toit, et al *Commentary on the Criminal Procedure Act* Section 60 in Part VI: Commitment of legal practitioner to an effective court process. The Stalingrad defence is inappropriate. It is a violation of the rule of law. *Zuma v Downer and Another* (788/2023) [2023] ZASCA 132 (13 October 2023) especially at paras [6], [11] and [28] to [30] **1. GENERAL** *Right to legal representation* - Constitution Section 35(3)(f) and (g) - CPA Section 73 *Arrest* - Constitution Section 14, 35(1)(d), 35(2)(a) and 35(4) - CPA Sections 39–53 - *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (E) - *Minister of Safety and Security v Sekhoto and Another* 2010 (1) SACR 388 (FB) *Bail* - Constitution Section 35(1)(f) - Chapter 9 and 10 of the CPA - CPA Sections 307 and 309 - *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) (1999 (2) SACR 51; 1999 (7) BCLR 771; [1999] ZACC 8) *S v Mabena and another* 2007 (1) SACR 482 (SA) paras [3] to [7] *S v Viljoen* 2002 (2) SACR 550 (SCA) paras [10] to [15] *S v Botha and another* 2002 (1) SACR 222 (SCA) (2002 (2) SA 680 paras [2] to [21] *S v Bruintjies* 2003 (2) SACR 575 (SCA) ([2003] ZASCA 4) paras [4], [5] and [8] to [10] **2. CRIMINAL TRIAL** 2.1. *Indictments and charges* - General Sections 80 – 104 of the CPA *S v Wannenburg* 2007 (1) SACR 27 (C) at 32J - 34C *S v Whitehead and others* 2008 (1) SACR 431 (SCA) para [10]

Bail: Chapters 9 and 10 of the CPA. Section 35(1)(f) of the Constitution of the Republic of South Africa, 1996. **The charge**: ss 80 to 104 of the CPA **The plea**: ss 105 to 122 of the CPA How pleas are drafted (form and content) and plea and sentence agreements **Conduct of proceedings**: ss 144 to 146 and Chapter 22 of the CPA **Discharge applications** at the close of the State's case: section 174 of the CPA **Competent verdicts**: Chapter 26 of the CPA **Sentencing**: Chapter 28 and 29 of the CPA **Appeals and reviews**: Chapters 30 and 31 of the CPA (sections 302-324) Chapter 24 evidence **Private prosecutions**: s 7 of Chapter 1 of the CPA Section 8(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and section 426 of the Companies Act 61 of 1973 read with section 224 of the Companies Act 71 of 2008 and section 63 (1)(i) of the Legal Practice Act 28 of 2014. This section on private prosecutions will not be examined. National Prosecuting Authority Act 32 of 1998 Representations in terms of section 22 How to make representations	o CPA Chapter 14, particularly sections 54 & 55 & 144 o *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC) (1996 (1) SA 725 the headnote and para [72] containing the order - Joinder of Persons and Counts o CPA Sections 81, 155, 156, 157 - Splitting of Charges o CPA Sections 336, 83 - Particulars of Offence o CPA Sections 84, 85, 86–92, 104 Representations Section 22 of the National Prosecuting Authority Act 32 of 1998 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras [15] and [16], paras [23] to [26] and especially paras [35] to [38]. Consider also the remarks in para [44]. 2.2. *Pleas* - Ordinary Pleas o Constitution Section 35(3)(h) o CPA ss 105, 106, 112, 113, 114, 115, 116, 117 Inclusive of how pleas should be drafted (form and content) and plea and sentence agreements - section 105A *S v Esterhuizen* 2005 (1) SACR 490 (T) - Exceptional Pleas o CPA Sections 57, 77, 79, 109, 85 - Autrefois Acquit and Convict o Constitution Section 35(3)(m) o CPA Sections 106 and 324 - Unreasonable delay/ permanent stay o CPA Sections 168 and 342A o *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) the headnote o *DPP, Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA) the headnote o *Magmoed v Janse Van Rensburg and Others* 1993 (1) SACR 67 (A) the headnote o *S v Basson* 2004 (1) SACR 285 (CC) the headnote o *S v Basson* 2007 (1) SACR 566 (CC) the headnote 2.3. *The conduct of the trial* - Conduct Sections 144 - 146 and Chapter 22 of the CPA - Discharge: CPA section 174 *Commentary on the Criminal Procedure Act* by Du Toit *et al* *S v Lubaxa* 2001 (2) SACR 703 (SCA) paras [8] to [23] - Specific issues around admissibility of evidence Entrapment ▪ Section 252A of Act 51 of 1977 Law of Evidence Amendment Act 45 of 1988, section 3

	Kapa v The State 2023 (1) SACR 583 (CC) at paras [18], [77] and [99] to [108] Admissions and confessions ▪ Constitution Sections 35 and 36 ▪ CPA Sections 217 to 220 o Unlawfully obtained Evidence ▪ *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) the headnote ▪ *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA) the headnote ▪ *S v Mthembu* 2008 (2) SACR 407 (SCA) the entire case ▪ *S v Tandwa and Others* 2008 (1) SACR 613 (SCA) the headnote ▪ *S v Shaik and Others* 2008 (1) SACR 1 (CC) the headnote and paras [16] to [23] and [65] to [68] 2.4. *Conclusion of the trial* - Competent Verdicts o CPA Chapter 26 - Previous Convictions: CPA Chapter 27 - Procedure of Judgment o CPA Sections 152, 274, 275–299 o *S v Lubaxa* 2001 (2) SACR 703 (SCA) **3. SENTENCING** 3.1. *Principles of sentencing* Chapter 28 and 29 of the CPA Sections 51-53 of the Criminal Law Amendment Act 105 of 1997 *S v Malgas* 2001 (1) SAR 469 (SCA) *S v Karolia* 2006 (2) SACR 75 (SCA) *S v Mthimkulu* 2013 (2) SACR 89 (SCA) 3.2. *Types of sentences* - Section 276 - Imprisonment - Committal to a treatment centre - Fine - Correctional supervision - Sentencing of juveniles o Sections 290 and 297 of the Code o Suspension of sentence of various conditions o Conditional/unconditional postponement of sentence o Caution and discharge 3.3. *Sentencing discretion* - Mandatory minimum sentencing: Criminal Law Amendment Act 105 of 1997 - *S v Malgas* 2001 (1) SACR 469 (SCA) - Mitigating and aggravating factors **4. APPEALS AND REVIEWS**

	4.1. REVIEW - Constitution Section 35(3)(o) - CPA Chapter 30 (i) the difference between appeals and reviews (ii) powers of the court on appeal and review *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706 *S v Rabie* 1975 (4) SA 855 (A) *S v Van Aswegen* 2001 (2) SACR 97 (SCA) – all evidence to be taken into account *S v S* 1999 (1) SACR 608 (W) - review *S v Bogaards* 2013 (1) SACR 1 (CC) – paras [37] and [41] 4.2. APPEAL - Constitution Section 35(3)(o) - CPA Chapters 30 and 31 - From Lower Courts o CPA Sections 309 and 310 o Magistrates' Courts: Rule 67 - From the High Courts o CPA Sections 315–322 **5. THE ADMISSIBILITY/ INADMISSIBILITY OF RELEVANT EVIDENCE** 5.1. *Hearsay evidence* - Common law exceptions - The Law of Evidence Amendment Act 45 of 1988 5.2. *The parol evidence rule* - Hoffmann & Zeffertt, chapter 14 *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) at para [39]. 5.3. *Similar fact evidence* (SFE) (SCH – CHP 7) (ZEF - CHP 9) - Rationale for the exclusion of SFE - Rule for the admissibility of SFE: the Makin formulation & the Boardman formulation 5.4. *Character evidence* (SCH – CHP 6) (ZEF – CHP 8) - Introduction to character evidence - Character in criminal cases o Sections 197, 211 of the CPA - Character in civil cases 5.5. *Opinion evidence* (SCH – 8)(ZEF - CHP 10) - The Hollington rule - Opinion of a lay person - Expert witness *Menday v Protea Assurance Co Ltd 1*976 (1) SA 565 (E) the headnote *Coopers (SA) Pty Ltd v Deutsche Gesselschaff Fur Schadlingsbekampfung Mbh* 1976 (3) SA 352 (A) the headnote *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) at 211J – 212B

	5.6. *Previous consistent statements* (PCS) (SCH – CHP 9) (ZEF - CHP 14) - Reason for the exclusion of previous consistent statements - Exceptions to the general rule o To rebut a suggestion of recent fabrication o Complainant in a sexual case o Identification **6. EVIDENCE** 6.1. *Confirmation or cautionary rules in regard to***:** (i) Single witnesses: Section 208 of the CPA; (ii) Evidence of identification: *S v Mthetwa* 1972 (3) SA 766 (A) at 768A—C (iii) Complaints in matters of a sexual nature: *S v Jackson* 1998 (1) SACR 470 (SCA); (iv) Children; (v) Confessions: Section 209 of the CPA; (vi) Accomplices; (vii) Traps See, generally, the commentary on the cautionary rule in *Commentary on the Criminal Procedure Act* by Du Toit *et al* under Section 208 of the CPA 6.2. *Presumptions* (i) Onus (on criminal cases in respect of defences pleaded); (ii) Particular presumptions (a) Drugs and Drug Trafficking Act 140 of 1992; (b) The CPA; (c) Sections 65(3) and (4) of the National Road Traffic Act 93 of 1996; (iii) The effect of Section 35 read with Section 36 of the Constitution, 108 of 1996, and statutory presumptions. *S v Coetzee and others* 1997 (3) SA 527 (CC). 6.3. ***Admissions and confessions*** (i) Sections 217—220 of the CPA; (ii) The effect of Section 35 read with Section 36 of the Constitution on admissions and confessions. 6.4. *Documentary evidence* Section 212, particularly ss 212(1), (4), (8), (9), (11) and (12); and Sections 213, 221, 233, 234 and 236 of the CPA. 6.5. *Mental capacity of accused persons* Chapter 13 of the CPA; Criminal Law Amendment Act 1 of 1988. 6.6. Search and seizures Sections 20-22 of the CPA 6.7. *Entrapment*

	Section 252A of the CPA. Case law references in the commentary (Du Toit *et al*), including: 6.8. *The status of evidence illegally obtained* (Having regard to Sections 35 and 36 of the Constitution and the commentary under Section 225 of the CPA in Du Toit *et al*) 6.9. *Unreasonable delay / Permanent stay* Sections 168 and 342A of the CPA **7. LEGISLATION** 7.1. Constitution of the Republic of South Africa, 1996 Sections 35 and 36 7.2. The Law of Evidence Amendment Act 45 of 1988 (Hearsay) *Kapa v The State* 2023 (1) SACR 583 (CC) at paras [18], [77] and [99] to [108] 7.3. Accused's right of access to information contained in the State brief / Police docket (Having regard to the provisions of Sections 35 and 36 of the Constitution.) *Shabalala and others v Attorney General, Transvaal and another* 1996 (1) SA 725 (CC) 1995 (2) SACR 761 (CC) the headnote 7.4. Preservation, confiscation, restraint and forfeiture orders Sections 34 and 35 of the CPA

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CRIMINAL COURT PRACTICE

Introduction

For a practicing attorney it is essential to be able to represent a client in the criminal courts. This is reflected in the norms and standards as well as in regulation 6(10)(f). This guide will assist you to become competent in the conduct of criminal trials. We will also deal with aspects of the rules of evidence in criminal trials and some aspects of trial advocacy skills for criminal courts.

You are expected to complete the recommended reading from your curriculum and reading list. With legislation, concentrate on the sections the reading list prescribes; similarly, you must read the recommended cases and, where applicable, concentrate on the recommended paragraphs in the judgement.

Undertaking a criminal trial places a great deal of responsibility on you. Your client could possibly face a long term in jail. It is your duty to act in the best interests of the client. A high level of competence is called for.

Understanding how the criminal justice system works is crucial. You must, during your PVT, attend at the magistrate's courts, at this stage concentrate on the district and regional courts where you will do most of your criminal law work. Observe how prosecutors conduct the role and understand how matters are postponed and trial dates set.

Observe how investigating officers conduct the case and how they assist prosecutors. Learn how to interact with investigation officers, especially where you are required to apply for bail. Always maintain a professional relationship with the prosecutors and investigating officers. Never adopt an unnecessary adversarial approach. It is in the best interests oof your client that you maintain a good relationship with all the court officials and staff. This includes clerks, registrars, interpreters, social workers, court orderlies, court preparation officers etc.

Note that the criminal justice system is not easy to work with. It is often inefficient, chaotic and frustrating for you and your client. Learn how to navigate this. Find an experienced attorney to take you to court and observe how things get done. You cannot learn this from a book. It is also important to observe how magistrates conduct procedure in court. Note that they are not always right, nor do they always act according to the acceptable norms and standards. Note that this is a robust environment, nothing like you learned at university. Persevere and you will learn how the whole system works; and what does not work. If you do not know your way around the criminal courts, you will find yourself lost and frustrated with the whole system.

The right to legal representation

- Read Chapter 2 of The Constitution – Bill of Rights; in particular section 35 (2) (c) and Section 35 (3) (f) and (g).
- The established practice in our courts is that if an accused or detained person appears in court without representation, it is the duty of the presiding officer to advise the person of their right to representation. The process is usually triggered by the prosecutor informing the court that the accused is not represented. The presiding officer can, nevertheless, act *mero motu* and advise the accused or detainee of their rights to representation. The right to legal representation is a Constitutionally protected right.
- Where an accused was not advised of his/her rights to representation and the judicial officer allows the trial to proceed, this is an irregularity which will result in the proceedings being set aside. In such an instance, the matter will commence *de novo*.
- Read section 73 of the CPA. You must be familiar with the whole of Section 73; each of the provisions therein are aimed at how accused persons often conduct themselves, either by choice or due to ignorance of their rights.

What to do (Post Arrest Procedures)

The South African Police Service may arrest an individual upon reasonable suspicion of a crime. Please take note that a person who has been arrested, otherwise known as a detainee, is not formally referred to as an accused person until he/she is formally charged.
For purposes of this Guide, we will use the term "accused", but it is important to be aware of the aforementioned and to refrain from using the terms "suspect", "detainee" and "accused" interchangeably as each of these terms has a specific, '*technical legal*' meaning.

As an attorney, you will be the first port of call for an accused or detainee (as the case may be). This is because accused persons, on arrest, do not typically first seek out legal advice from an advocate. The accused will instruct you, being the attorney. It is therefore important that you know what to do when an accused person reaches out to you. Consider the following:

- Find out where client was arrested and where he/she is being detained. If so, the client will most likely be detained at a police station;
- Immediately find out why client was arrested and on what charge. This will assist you in determining if you can obtain bail from the police station, otherwise known as a police bail, or whether you will have to bring a formal bail application to court. If a formal bail application is required, you must establish which magistrates court your client will be taken to;
- Consult with your client as soon as possible to work on a strategy to obtain bail for client, preferably on first appearance;
- Obtain as much personal information from client as possible, including the amount of bail he/she can afford. Further, have a discussion with your client regarding the usual bail conditions one can typically expect the court to impose. An accused person is deemed a

"flight risk", thus your client will be required to hand in their passport as a condition to being granted bail. This bail condition is imposed by a court to prevent accused persons from fleeing the Republic of South Africa.

- Find out who the investigating officer (IO) is and make contact as soon as possible. The IO will tell you if bail will be opposed by the state or not;
- Where your client is taken to a prison and kept in the "awaiting trial" section, contact the prison and place yourself on record and establish if your client has been requisitioned to appear in court;
- At first appearance, find out if your client was transported to court by the police or prison; you may have to enlist the assistance of the prosecutor or IO or the clerk to bring your client to court;
- Then establish if the IO is present, the prosecutor will not proceed in the absence of the IO, especially if your client is charged with a scheduled offence;
- Meet with the IO, with the permission of the prosecutor, and discuss the possibility of bail and what conditions will be acceptable to the IO; and
- Where bail is being opposed, we deal with that below.

Arrest

From time to time, you may be instructed to represent a client during the arrest procedure. You must be aware of the following procedures:

- In a post constitutional democracy, the police must act according to their powers as prescribed in the CPA. Much abuse takes place during arrest. In this regard, you are expected to know the contents of: The whole of Chapter 2 of the CPA, specifically sections 19 to 36.
- It is important for you to know how the police may obtain or harvest bodily tissues, finger prints and various body samples. Read Sections 36A to 37 of the CPA in this regard.
- Your knowledge and understanding of the CPA could just make a significant difference in the outcome of the trial.
- Chapter 5 is essential reading and could become highly relevant to a bail application by your client. Read Sections 39 to 53 of the CPA.
- If you are unfamiliar with the abovementioned two chapters (Chapter 2 and Chapter 5), you are likely to be misdirected in an opposed bail application. [i]

Bail

Bringing bail applications is part of an attorney's work. You must be competent in this regard. Besides, a poor performance from you could result in client being held in custody unnecessarily. First let us consider some practical suggestions:

- Always find out who the investigating officer is, then deal with the officer politely and professionally. Never make an enemy out of the investigating officer.
- It goes without saying that you must have a similar professional relationship with the prosecutor. Do not adopt an adversarial position with the prosecutor and the investigating

officer. If you do, they will make you regret it. As you gain experience you will learn to appreciate the importance of collegiality in our profession.

- Note that in a bail application it is the duty of the prosecutor to place **all the relevant facts** before court, even facts bad for the state's case.

The legal framework

For purposes of a bail application, the following provides you with the legal framework:

- The Constitution of the Republic of South Africa, 1996. See in particular the following sections: 12(1), 34, 35(1) and 35(3).
- The CPA, sections 58 to 74.
- The Common Law – refer to the relevant decided cases. [ii]
- The basis for any bail application can be stated as follows:

"An accused person cannot be kept in detention pending trial as a form of anticipatory punishment. The presumption of law is that he is innocent until his guilt has been established in Court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."
See S vs. Acheson 1991 (2) SA 805 (Nm)

"The court should always grant bail where possible and should lean in favour of the liberty of the subject provided that the interests of justice will not be prejudiced." See S v Branco 2002 (1) SA 531 at 535 CC

Adversarial or Inquisitorial

Our courts ordinarily use the adversarial system of dispute resolution. This means that the presiding officer plays a passive role and makes findings of fact based on what the parties present in court.

In bail applications, however, the magistrate *may* assume an inquisitorial role. However, in doing so, the magistrate is expected to exercise restraint. The magistrate cannot '*bully*' an accused or indulge in cross examination of witnesses. The magistrate is confined to asking questions and leading any inquiry only for the purpose of obtaining the relevant facts which will ultimately assist the magistrate in make a just decision regarding whether or not to grant bail.
Consider the following helpful suggestions:

- Although the magistrate has some inquisitorial function, this is nevertheless an adversarial court.
- This means that it is still your duty to persuade the magistrate to find in favour of your client. You can only do this by **presenting the facts in a manner that is persuasive.**
- The inquisitorial function that a magistrate exercises in bail applications does not stem from any inherent powers. It comes from provisions of the CPA.
- Section 60(2)(b) of the CPA provides that the magistrate may acquire *in an informal manner* relevant information in *matters that are not in dispute.* This can happen in both opposed and unopposed applications. This usually happens in the form of factual statements made in

open court. It might even take the form of informally questioning the investigating officer. This must be confined to the *undisputed facts.* Do not tolerate this if the magistrate attempts to elicit or obtain information regarding facts that are in dispute.

- Section 60(2)(c) deals with the disputed facts, here the magistrate is confined to requesting the parties to *adduce evidence.* This subsection has nothing to do with the question of onus; it is there merely to resolve a dispute of fact that might arise during the course of a bail application, whether opposed or unopposed. The magistrate needs to resolve the dispute in order to make a decision regarding bail. The evidence may be presented in the form of documents, affidavits and oral evidence. Note that this does not mean that the magistrate can 'take over' the bail application by inserting himself into the proceedings. During bail application proceedings the magistrate merely adopts a role akin to that of an umpire in a sporting event.
- It was intended that a magistrate make a decision on bail only after **all the relevant facts** are available. The decision must be made by a well-informed magistrate. Section 60(3) gives the magistrate powers to order the presentation of further information or evidence. This is not different to the provisions of section 186 of the CPA. The magistrate is encouraged to act pro-actively and even inquisitorially where appropriate. Note however, that the whole procedure remains adversarial in nature.

  Consider the following cases:

  Ellish vs. Prokureur-Generaal 1994 (4) SA 835 (W)
  S vs. Mbele 1996 (1) SACR 212 (W)
  S vs. Dlamini 1999 (2) SACR 51 (CC)

Onus and Duty to Begin

In the past the onus was on the accused to satisfy the court, on a balance of probabilities, that justice requires his release on bail. This has changed, post Constitution.

Section 35(1)(f) of the Constitution provides that your client "*be released from detention **if the interests of justice permit**, subject to reasonable conditions."*

Section 60(1)(a) of the act provides that your client is "*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(4) of the act sets out when, *"the interests of justice **do not** permit the release from detention of an accused."*

Ordinarily the onus will be on the state to show that the interests of justice require the continued detention of your client. The duty to begin in an opposed bail application will thus be on the state. This position is reversed where your client is charged with an offence referred to in schedule 5 and schedule 6 of the act. In other words, if your client is charged with a schedule 5 or schedule 6 offence, then in the onus will be on the defense to prove why the client *should* be granted bail.

Consider the following:

- Whichever sub section of section 60 applies, there is a question of *onus* to be decided, whether this lies with the state or the accused.
- *Onus* must be given its ordinary meaning within an adversarial context, viz. "the *duty which is cast on the litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defense, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent."* See the Ellish case.
- Section 60(11) has effectively created a reverse onus.
- The general rule set out in section 60(1)(a) is that your client is entitled to be released on bail unless the court finds that it is in the interests of justice that he be detained. The onus is on the party who asserts that your client should *not* be released, viz. the state.
- In respect of schedule 5 and 6 offences, section 60(11) provides that ***the accused*** must satisfy the court that the interests of justice permit his release. Here the onus and the duty to begin are firmly with your client. The onus is on a '*balance of probabilities*' rather than '*beyond reasonable doubt*', as will be the case during the criminal trial itself.

See the following cases:
S vs. Vermaas 1996 (1) SACR 528 (T) at 530
S vs. Shezi 1996 (1) SACR 715 (T) at 718
S vs. Tshabalala [1998] 3 All SA 411(C)
S vs. Dlamini 1999 (2) SACR 51 (CC)

Some Rules of Evidence

Although bail applications are largely dealt with in an informal manner, this applies mostly to unopposed applications. In an opposed application, the basic rules of evidence apply.
Consider the following:

- If you routinely fall foul of the rules of evidence, you will not be persuasive and your application will fail. Read sections 208 to 253 of the CPA.
- The most basic rule is that the evidence you present must be **relevant, admissible and must not be excluded by a rule** (the golden rule of evidence**).** The common law applies as the act is silent on the nature of the evidence adduced in bail applications. Read section 210 of the CPA.
- To be persuasive, the version of your client's facts must also be **probable.**
- **Hearsay** evidence is, as a general rule, excluded. However, in bail applications our courts have adopted a more informal approach and hearsay is often accepted. The approach is to allow hearsay evidence but the court will afford it less weight on account of the fact that it has not been tested.
- **Hearsay and cross examination.** If the state calls the investigating officer to give evidence, be cautious about what you ask in cross examination. Steer away from asking details about the crime your client allegedly committed. The IO will give you damaging hearsay

evidence. Also remember that the record of the bail application is admissible at the trial. Note that hearsay will be admissible against you if you elicit it under cross examination.

- In introducing hearsay, the provisions of section 3 of the Law of Evidence Amendment act apply.
- **Opinion** evidence is generally excluded on the grounds that it is both irrelevant to the issues and might usurp the function of the court. However, in bail applications, the investigating officer's opinion that the accused is a bail risk has been regularly accepted.
- Do not accept the investigating officer's mere assertion that the accused is "a flight risk", or that in his opinion the "accused will commit further crime" etc. Such vague and bald assertions are not admissible merely because the IO says so. Such opinion may only be admitted on the basis that it is supported by reasons which in turn are rooted **in fact**. The IO must be cross examined on this basis.
- **Similar fact** evidence is admissible in bail applications **only** to show that the accused has a propensity to commit certain acts or has a propensity for certain conduct.
- Thus, your client's record is admissible. This is recognized in the CPA. The basis for admitting similar fact evidence is that the accused's past conduct may be relevant to the issue of risk.
- The previous convictions are relevant as it might point to a risk of abscondment (where the previous convictions indicate that the accused might receive lengthy imprisonment), or to a risk of the accused repeating the offensive conduct.
- Note that section 211 does not apply to bail applications.
- **Character** evidence is usually excluded as it is not sufficiently relevant and might unfairly prejudice the accused. However, in bail applications evidence of the accused's character (bad character) is admissible.
- For character evidence to be admissible in a bail application it must be relevant to an issue. The accused's character may be relevant to his propensity for crime. The accused's general character may be relevant in assessing the accused as a bail risk.
- Equally, in a bail application, evidence of the accused's good character is admissible in his favour.
- **Admissions and confessions** are not admissible unless they were made voluntarily. This is the general rule. In bail applications, the fact that the accused made a confession is admissible. The court need not consider the voluntariness thereof. It is admitted as part of the general body of evidence that the court will weigh in assessing bail risk.
- **Privilege against self-incrimination**, this remains intact in bail applications. The accused must be informed that he does not have to answer questions that might incriminate him.

<u>Having a Strategy</u>

As an attorney, you do not rush headlong into a bail application. Obviously, your client will instruct you to bring an application as soon as possible. In a bail application, **you must have a strategy.** Do not take your eye off the main object, being a successful outcome in the impending trial.
Consider the following practical suggestions:

- Consult with client to get as much **fact** as possible, note that at this stage the docket will not be available but you will at least have a charge sheet or indictment (as the case may be). See section 60(14).
- First talk to the prosecutor and investigating officer, find out what their attitude is. Find out what the state says is the bail risk. See if the risk is a material one. If it is, you may have to apply your mind to special conditions. This can save a great deal of time. The attitude of the director of public prosecutions is important but cannot be allowed to usurp the function of the court.
- Find out when the alleged offence took place i.e. try to identify a date. This is crucial to your decision to apply for bail. This is important where the investigating officer refuses bail pending "further investigation" and where your client has been in custody for a long time. An incomplete investigation does not always support the refusal of bail. It also helps to note how many times the matter was postponed and what the prospects are of the trial starting on the next court date.
- Check for previous convictions. Look for the SAP 69, as your client will not always tell you all the details. Point out to client that it is an offence to lie about this or to mislead the court regarding previous criminal convictions. You will most likely not have access to the SAP 69 at this stage. See section 60(11B).
- Where the charge is one which will not attract imprisonment, bring a bail application immediately. Usually, the state will agree.
- Where your client faces a charge that will attract lengthy imprisonment, do not rush and consider an appropriate strategy. Consider what impact a bail application will have on the outcome of the trial. Note that, at the first court appearance you will not have the benefit of the docket. Therefore, you may not be able to consider the strength of the state's case. In certain circumstances, such as charges involving scheduled offences, you may want to wait until the docket becomes available or when more information is available. Timing is crucial. If the investigating officer needs more time to complete his/her investigation, it may be prudent to give him/her time rather than risk a failed application for access the docket.
- Canvas with client the reason for his arrest and get his version of the facts. Do not accept vague responses from client, such as "*I don't know why I was arrested".*
- Spend a little time explaining to client what happens in a bail application. Explain the consequences of cross examination. In some cases, your strategy may well be to avoid a bail application or to avoid putting your client to the risk of cross examination. Explain to client that the record of the bail application will be admissible in the trial and that anything that he says in the bail application can be used against him in the trial. You may want to bring the application only on paper, i.e., affidavits. This is not always successful but will spare your client any cross examination.
- Obtain all the relevant personal details that you require for a bail application. Again, do not tolerate vague responses. Make sure you have all the facts and all the witnesses you need. If you cannot finish a bail application **don't start it.** Part heard bail applications are to be avoided.

- Weigh the prospects of success, discuss this with client. There is no point in damaging your prospect of success for the trial by exposing your client to a failed bail application. Your client may well be better off without having to bring a bail application and remain incarcerated while awaiting trial and for the duration of the trial.
- Where you present facts on affidavit, please take the time to write it neatly or, preferably, type it out at the office and take it to court. Magistrates appreciate this.

The Issues

Let us deal with the issues you will face in a bail application.
Remember that a magistrate does not enjoy any inherent powers regarding bail applications. This is a special power derived from the CPA.
The procedure and the decision-making process is set out in the CPA. The CPA sets out the guidelines for the magistrate in weighing bail risk.
Your focus must be on these factors as herein lay the issues before the court. Especially where bail is contested by the state.
Look at the following practical suggestions:

- Make a copy of section 60(4), (5), (6), (7), (8) and (9), take this to court whenever you have a bail application, as you can then use these sections of the CPA as a checklist.
- Where the state bears the onus, see which factors are being presented as a bail risk. You will have to rebut the state's averments in this regard.
- Where you bear the onus i.e. for schedule 5 and 6 offences; ask the prosecutor which of the factors in section 60(4) the state considers to be the risks. Then present evidence that the accused is not a bail risk.
- In any bail application apply your mind to the factors in section 60(4), the "*five likelihoods"*. "Likelihood" means on a **preponderance of probabilities**. The CPA requires the court to consider the following five factors:
  i) Endangering public safety or a particular person or will commit a schedule 1 offence;
  ii) The danger of abscondment;
  iii) Interference with witnesses and tampering with evidence;
  iv) Prejudice the proper functioning of the criminal justice system; and
  v) Disturbing or undermining public order and peace.
- In your daily bail applications in the lower courts you will usually have to deal with factors i), ii) and iii), but you are not likely to encounter iv) and v).
- In preparing for the bail application use the guidelines in section 60(5), (6) and (7).

In respect of i), note the following:

a) Bail may be refused if **a real likelihood exists** that your client will commit further offences while on bail.
b) The offences in question must be of a serious nature and will usually be confined to acts involving violence.

c) A mere unsubstantiated fear or suspicion that the accused will commit further offences is not enough to warrant a refusal of bail. For example, the IO's opinion alone is not sufficient. The state must substantiate this risk by adducing evidence; the facts must support the conclusion that the accused has a propensity to commit crime.
d) Although a court has an unfettered discretion as to the factors it may consider in granting or refusing bail, the legislation provides guidelines in section 60(5). Should any of these factors exist, the court may be persuaded to refuse bail.

In respect of ii), note the following:

a) Where your client is charged with an offence where he is likely to face imprisonment, the risk of abscondment will be present. This, however, does not mean that your client has no chance of success in a bail application.
b) Look at the guidelines in section 60(6) and prepare to address them. If any of these factors is shown to exist, bail will be refused.
c) If the state's attitude is that your client is a flight risk, consider the various options you have in terms of bail conditions; such as surrender of travel documents and/or weekly reporting to a police station etc. consult and take instructions carefully.
d) Always offer the prosecutor the least onerous of the available bail conditions first.

In respect if iii), note the following:

a) The approach here is to ask whether it is likely that the accused ***will*** **(not *may*),** interfere with state witnesses.
b) The guidelines appear in section 60(7), and you should use this to prepare for the application.
c) Usually, the prosecutor will tell you that this is the risk the state is concerned about. Consult with client and check if there is any substance in this.
d) The court will usually want to know if there was **actual** interference with state witnesses. Persuasive evidence of this will reduce your chances of obtaining bail.
e) In the absence of **actual** interference, the court will look for a **well-grounded fear** of interference. A mere suspicion or the unsubstantiated opinion of the IO will be insufficient. The state must provide evidence that the accused **will** interfere with witnesses.
f) If this is a well-grounded fear then the identity of the witness/s must be disclosed to the accused. It will be unfair to expect the accused to speculate about the identity of potential witnesses.
g) The most acceptable practice is for the state to provide the accused with a list of witnesses he may not approach. See S vs. Dockrat 1959 (3) SA 61 (D). Do not allow the prosecutor to ambush your client by disclosing the identity of the witness, for the first time, during cross examination.
h) Remember that in this regard it is the accused's conduct that is in issue and not that of his friends and associates.

i) Regarding the fear of tampering with evidence, consider the stage of the investigation. Where the investigation is at an advanced stage, this is not a fear likely to materialize. If the investigation is at an early stage, this might become a real factor. It might be prudent to wait before launching a bail application.

In respect of iv), consider the following:

a) This is a wide provision that must nevertheless be established by evidence of substance. The IO's opinion will not be sufficient.
b) The Constitutional Court had this to say, that the sub section is "*directed at protecting and promoting the integrity of the investigation and presentation of the case in respect of which the detainee has been arrested. Those are undoubtedly the primary and most commonly expressed objectives of pre-trial detention."*
c) The factors or guidelines are set out in section 60(8).

In respect of v), consider the following:

a) The guidelines are set out in section 60(8A).
b) This is an unusual factor and is not likely to be encountered in the lower courts. This subsection has been roundly criticized as "lynch law". Thus, it is applicable only in "*exceptional circumstances",* in those rare cases where it is clearly justified.
c) See Dlamini's case, paragraph [57].

Factors Personal to the Accused

You must obtain all your client's relevant personal details.
Section 60(4) sets out in what circumstances the *interests of justice* do not permit the release from detention of your client. The CPA then sets out a series of factors to be taken into account, which factors, if present, either individually or cumulatively, will prevent the release of the accused.
It can equally be said that in the absence of these factors, or where these factors can be addressed, the accused is entitled to release on bail.

Section 60(9) states that the court can decide the matter *by weighing* ***the interests of justice*** *against the right of the accused to his or her freedom and in particular the prejudice he or she is likely to suffer* as the result of continued detention.

Note that the words *interests of justice* appears in both sections 60(4) and 60(9), and appear to be in different context. Similar wording appears in section 60(10). What does it mean for your client?
Consider the following practical suggestions:

- The impression created by the wording of this section is that the requirement of "interests of justice" should be weighed *"against"* the right of the accused to personal freedom. It appears that the interests of justice are likely to be found outside the accused's right to

personal freedom. This reasoning is wrong. The accused's right to freedom, in itself, should be in the interests of justice.

- Consider the case of S vs. Dlamini where the following is stated:

  "Bail *serves not only the liberty interest of the accused, but the public interest by reducing the high number of awaiting trial prisoners clogging our already overcrowded correctional system, and by reducing the number of families deprived of a breadwinner."*

- The words "interests of justice" must be given a broad interpretation and includes the accused's right to liberty. The words cannot be interpreted as there being the interests of justice on the one hand and the rights of the accused on the other. The likely harm must be weighed against the deprivation of liberty.

- Sections 60(9) and 60(10) require the magistrate to give proper weight to the accused's personal circumstances. Section 60(9) sets out some guidelines. Again, you should have this as a checklist and use it in consultation with your client.

- Where bail is opposed, you may want to consider setting out your client's personal circumstances in an affidavit. When drafting the affidavit use this section as a checklist. This is admissible and will prevent cross examination.

- Remember that in every case the court has to take into account the personal circumstances unique to the accused. Please **treat each client as a unique individual**, take the time to consult properly and get all the facts. Do not present the court with standard or precedent based affidavits, as an affidavit that has not been tailored to the unique facts at hand is not persuasive.

- Your function is to persuade the court to release your client. The best approach is to consider each factor, in favour of your client, and present this on the basis that this **must uniquely** be weighed in favour of release. For example, do not merely state that the accused is married and has three children, tell the court why, in the accused's particular circumstances, this must count in his favour.

Note that, even if you can satisfy the court that one or more of the section 60(9) factors are present; this is not a guarantee that your client will get bail.

- The evidence you present must be persuasive. Choose witnesses carefully and consult fully. Do not call witnesses who might present bad facts under cross examination. With every witness, consider reliability and apply the test of relevance, admissibility and probabilities. *Calling the IO is to be avoided.*
- Call the accused only if you are satisfied that serious damage will *not* be done under cross examination. If client insists on taking the stand, explain the dangers and the impact on

the forthcoming trial. Remember to warn him that he does not have to answer questions that might incriminate him.

- The age of your client is important, particularly where the accused is a minor. In this case find means to prove that your client is a minor, the state or the court might not accept a statement from the stand. You will need an ID book or birth certificate, or you may have to call a parent or relative. Beware of mothers as they do not typically make the best witnesses. Use an affidavit instead.
- A minor, should ordinarily be released in the custody of a parent or relative. In serious cases, ask that the client be kept in a place of safety or other places of detention suitable for minors. Point out that as far as possible, our courts prefer to keep minors out of jail. See S vs. Budlender 1973 (1) SA 264 (C) at 270
- Be wary of a prosecutor who will decline bail only to get an opportunity to cross examine the accused. Do not fall for this trick. The prosecutor will know that the state has a weak case.
- Be prepared to cross examine the IO or other state witnesses. Undo all the hearsay and speculation that is typical of the evidence they give. Undermine the vague and general averments they make, e.g. "this type of crime is highly prevalent in the area."
- In serious cases you may want to consider the use of experts such as medical doctors, psychiatrists, social workers etc. The advantage here is that you can get relevant facts before the court without having to call the accused. In this case get a report as you may not have to lead oral evidence.
- In any opposed bail application, limit the number of witnesses you call and remember to **keep it short.**

Bail Conditions

As an attorney you will have to apply your mind to the issue of bail conditions. A court cannot set bail conditions that are so onerous that it amounts to a refusal of bail. Equally, as an attorney, you cannot agree to conditions nor tender them on behalf of client where your client is not likely to comply.

- The general peremptory conditions of bail are set out in section 58 and do not require any explanation. It is the special discretionary conditions that require you to apply your mind.
- The general rule is that every bail condition must be **reasonable, practically feasible, clear and neither *contra bonos mores* nor *ultra vires.***
- In determining the amount of the bail, the court is obliged to take into account the accused's unique circumstances. It is your job to place the facts before the court. Do not leave the magistrate to speculate about the accused's personal finances. It is your duty to assist the court in arriving at an appropriate amount.
- It is trite that the court cannot set an amount that is so excessive as to amount to a refusal of bail. See S vs. Mohammed 1977 (2) SA 531 (A)
- Make sure that you get all the facts you need from client in order to assist the magistrate. The magistrate will engage you as to a reasonable amount. If you cannot meaningfully

address the court, you are of no assistance and your client will be left with the consequences of speculation. Get this right now and do not rely on a possible application to reduce the amount at some future time.

- Typically, the magistrate will be looking for an amount that your client can afford or be able to raise, without the amount being so low that your client can easily afford to pay the bail. There must be no incentive for the accused to forfeit the bail amount due quantum being to low. Equally so, the bail amount should not by implication be so excessively high that the practical implication is a *de facto* denial of the bail. The court must strike a balance in this regard.

Specific Conditions

- This is dealt with in section 62. Again, a set of handy guidelines is set out. A useful checklist for you.
- A magistrate is under a duty to investigate alternatives to bail. It is a misdirection to ignore the possibility of bail conditions as an alternative to refusing bail.

See the following cases:
S vs. Ramgobin 1985 (4) SA 130 (N) at 132
S vs. De Abreu 1980 (4) SA 94 (w) at 101
S vs. Branco 2002 (1) SACR 531 (W)

- It is your duty to help the court decide upon reasonable conditions that your client can comply with. You should only suggest bail conditions where your client cannot afford a reasonable amount of money or where you have to address a bail risk such as interfering with witnesses. Do not initiate the option of bail conditions, rather wait to see what the state's attitude is to bail risk.
- Before presenting conditions or before you accept conditions, consult with client and see that he can reasonably comply. Never tender conditions that your client will find onerous or difficult to comply with.
- Do not agree that your client will not interfere with or approach witnesses unless your client knows the identity of the witnesses.
- Do not agree to restrictions of mobility unless client can comply without compromising his ability to work and carry out his usual functions.
- Only agree to reporting conditions that your client can conveniently comply with.
- Note that bail conditions must be clear and unambiguous in order to be valid. See Budlenders case.

Some Sections of the CPA which an attorney is likely to encounter

The sections dealt with below are important and from time to time you will have to apply your mind to them.

Section 60(14)

- This is the section which causes "docket privilege" to apply to bail applications. This was outlawed in respect of trials in the case of Shabalala and others vs. Attorney-General Transvaal 1995 (2) SACR 761 (CC).
- Despite severe criticism, on the basis that the right to a fair trial must also extend to bail applications, this section was not found to be unconstitutional, see S vs. Dlamini.
- This means that, for purposes of a bail application, you have no access to the docket unless the prosecutor directs otherwise. This creates difficulties for you especially in schedule 1, 5 and 6 offences. You will not be able to assess the strength of the state's case and identify witnesses who implicate your client. This will prejudice your client in his bail application.
- The section prevents access to the docket; however, you may request certain information from the prosecutor. If the prosecutor refuses a reasonable request, you may apply to the magistrate who can compel the state to provide the relevant information.
- The basis of such an application lies in section 60(11) which provide that an accused be given a "*reasonable opportunity"* to show that he should be released on bail. This must then include access to certain information. Note that you will not be applying to get physical access to the whole docket.
- This section does not prevent the use of information in a docket in a bail application. Thus, the contents of the docket can be used for a bail application at a later stage. This may well be a good strategy to follow.
- If your client made a statement, you are entitled to a copy and the prosecutor cannot withhold it in terms of this section. In this event see section 335.
- If, during the bail hearing, a witness for the state contradicts his written statement when giving oral testimony, the prosecutor is ethically bound to make the written statement available to you.

Section 63

- This provides for the amendment of conditions of bail where changed circumstances require appropriate amendment(s).
- This procedure is available to both you and the state.
- The application can only be brought in the presence of the accused.
- The CPA does not prescribe the method or form to be used in the presentation of evidence. You may present the facts by handing in an affidavit or by means of statements / oral testimony from the witness stand.
- If the state applies to impose more onerous terms, insist that oral evidence be lead so that you can test it.

- The court's decision in terms of section 63 is subject to appeal.

Section 65A

- This section provides for the state to take a decision granting bail on appeal. This includes an appeal against the conditions of bail imposed by the presiding officer in the court *a quo*.
- This section was meant to be used sparingly and is not to be abused.
- The section provides for the awarding of costs against the state i.e. in favour of the accused should an appeal by the state against the granting of bail to an accused fail.
- If the state, in such an appeal, fails to show any material benefit if the appeal were to succeed, then the appeal will not be upheld.

Section 68

- This section provides for the cancellation of bail by the state.
- The factors to be present are set out in section 68(1).
- Draw your client's attention to this in serious matters where the state might be expected to closely monitor your client.
- Should the state apply for cancellation, it must be based **on credible fact.** The prosecutor will have to lead oral evidence. Oral statements in open court from the prosecutor him/herself and/or affidavits are not good enough. The CPA specifically provides for "...*information on oath*…" which implies that witnesses must be called by the state to testify in open court under oath and to undergo cross-examination.
- If the state proceeds in terms of 68(2) and obtains a warrant, you can set the matter down, after execution of the warrant, to challenge this and here the state will have to lead evidence in open court.

In any bail application, do not take your eye off your main outcome, being **winning in the trial**. It is a poor strategy to compromise the upcoming trial in a bail application.

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[i] *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (E) at pages 675 and 676; and *Minister of Safety and Security v Sekhoto and Another* 2010 (1) SACR 388 (FB), the entire case.

[ii] - *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC);
S v Mabena and another 2007 (1) SACR 482 (SA) paras [3] to [7];
S v Viljoen 2002 (2) SACR 550 (SCA);
S v Botha and another 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; and
S v Bruintjies 2003 (2) SACR 575 (SCA) paras [4], [5] and [8] to [10].

The Criminal Trial

Read Chapter 14 of CPA. This is essential reading.

Indictments and Charges

In any prosecution, the facts are more important than the law. A good attorney will obtain the FACTS FIRST. Note that the charge sheet / indictment does not only define the charges/offences. It sets out the material facts that the state will rely on to prove the offence and obtain a conviction (Read section 87 and 144 of the CPA in this regard).

The docket contains the relevant evidence that the state needs to discharge the onus of proving each material fact that makes up the charge, beyond reasonable doubt. [ii]

In preparation of your defence you need to ask the following questions:

- Identifying all the offenses allegedly committed by the accused;
- What are the material facts required to prove each charge;
- Are there witnesses and other evidence that is needed to provide the court with proof;
- Is the evidence in the docket sufficient for the state to discharge the onus?
- Can the available evidence reach the standard of "proof to the satisfaction of the court"?
- Do the undisputed facts support the state's case?
- Your analysis of the docket is crucial BEFORE you advise client how to plead.

What about your client's case?

You have to apply a similar test. But first, consider whether you have obtained **all** the relevant available facts? If not, you are not ready to proceed.

When you apply your mind to your own client's case, consider the following:

- Does your client have a response to each of the material facts the state relies on in the charge sheet / indictment ? Never accept a mere or bare denial. There must be a factual response or even a legal one to a material fact as nothing less will suffice;
- Work out what the state's case concept/theory of the case is? What happened according to the state's version of the facts. Then ask client what he/she believes *actually* happened. Consider whether client's version constitutes a viable defence;
- Make a list of all the undisputed facts between the state and client. Then ask yourself which facts support your client's version and which facts support the state. This is an important indicator as to whether or not your client's version is probable and persuasive.
- Listen carefully, without interrupting, to your client's version of what happened. Then test the version in the light of the facts relied on by the state. Consider whether client's version is likely to have happened? *Never go to trial with a version YOU find to be improbable, you will lose if you do.* It is certainly not a bad idea to sit client down and tell her/him that you have difficulty in accepting the version. Also tell client why you consider the version to be improbable and why a judicial officer will not be persuaded by it.

- Go through all documentation and other exhibits the state will use. Ask client for a response. *i.e. Explain how your fingerprints came to be found at the scene?* Again, a bare denial is not acceptable.
- Can your client account for the material facts relied on by the state? i.e. *Why would this eye witness falsely implicate you?* There must be an explanation why a material fact is in dispute.

Method in reading a docket

As an attorney, you never read a docket passively, always read actively. Apply your mind as you read. The following questions will assist you:

- What is the relevance of this witness' version?
- What are the material facts that emerge?
- If this version is accepted by the judge, how does it advance the state's case?
- This version provides proof of what fact/s in relation to what potential charge?
- Is the version likely to have happened given the facts and circumstances of the case? Is the version probable. Note, no prosecutor should rely on the evidence of a witness whose version is improbable.
- Where does this witness fit into the chronology of the offence? It is always advisable for prosecutors and defence attorneys to call witnesses in a sequence, judges find this to be persuasive as it makes it easier for them to understand what happened according to the respective versions.
- Does this witness require supporting evidence in the form of documentation and corroborating witnesses? If so, is this available in the docket? If not, how can you exploit this to your client's favour.
- Based on a witnesses' version, is there contemporaneous documentation or a potential for such documents. Note that contemporaneous documents are highly persuasive as proof of a fact. Commercial fraud is typically based on historic fact, which means that the state will require documents to prove their case. You will require documents to prove your case.
- Having identified such documents, now ask if you will be able to prove authenticity if the document is not admitted in court. Have you obtained the meta data? Can you safely obtain and preserve electronic documents? Failure to prove a document into evidence is fatal to the state's case and is also used as a strategy by defence lawyers. Please become familiar with how to obtain, preserve and authenticate electronic documents. Where will you find the meta data and how will it assist you? What can you do if the meta data is no longer available?
- A good attorney will always be alive to the potential for digital evidence to support your case. Look for CCTV camera footage, cell phone records, digital recordings, satellite

imagery, access to hard drives, codes and passwords; access to emails and social media networks etc.

Note that asking questions, such as the ones above, is what fuels critical thinking, an ability absolutely essential for defence attorneys.

Other relevant sections of the CPA

You are expected to read the following sections of the CPA, Note that they require no explanation and are clear to understand.

- Joinder of Persons and Counts

- CPA Sections 81, 155, 156, 157

- Splitting of Charges

- CPA Sections 336, 83

- Particulars of Offence

- CPA Sections 84, 85, 86–92, 104 [ii]

Pleas

Before continuing, please read the following chapters in the CPA: Chapter 15; Sections 105, 105A, 106, 112, 113, 114, 115, 116, 117.

Read section 106 as it states how an accused may plead to a charge along with the various options that an accused person has. Note that, if your instructions are to make a plea other than guilty or not guilty, you are required to give the prosecution reasonable notice thereof. If you fail to give notice, it does not mean you will be prohibited from making such a plea, it simply means that the matter will be delayed as the court will grant the state a postponement. Read section 324 which deals with institution of proceedings *de novo*.

As an attorney you will be instructed to negotiate with the state in a "plea and sentence agreement". This is an option you will always keep in mind, especially where you have little faith in the merits of your client's defence. It is better known as plea bargaining.

Just a word of warning; as an attorney you never embark on this procedure without clear instructions from client to do so. It is preferred that you obtain a written and signed mandate from the client. The procedure for the formal plea-bargaining process is stated in Section 105A of the CPA. Read it, it requires no explanation. Also ensure that the prosecutor is duly authorised, in writing, by the NDPP.

You must be familiar with the prescribed process to be followed by a prosecutor which includes consulting with the IO and victims of the offence. All set out in section 105A.

A plea represents the start of the criminal trial and further defines the issues for trial. The onus is on the state to prove each material fact relied on in the indictment or charge sheet (as the case may be), beyond a reasonable doubt. It bears the onus of proving each material fact denied by the accused. The plea provides further clarity of what the state has to prove in order to discharge the onus. See section 108 of CPA.

Read section 35(3)(h) of the Constitution it provides for the presumption of innocence and the right to remain silent. Forms part of the right to a fair trial.

Plea of guilty Sections 112 to 114.

As an attorney, note the following:

- It is your duty to ensure that your client pleads from an informed position;
- Ensure that client understands the charge and understands each material fact the state relies on;
- Client will have to admit each of the material facts (elements of the offence) as stated in the charge sheet;
- It is important to explain to client exactly what to expect after a plea of guilty, what are the possible sentencing options. Establish whether client is willing to accept the punishment;
- Where a fine is anticipated, check if client has the means to pay it;
- To the extent that you can, ensure that your client elected to plead guilty freely and voluntarily and without undue influence.

Section 112 provides for the procedure where the accused desires to plead guilty to a charge. This can be done where you can address the presiding officer in open court, or you may prepare a written statement in terms of section 112(2) which will be signed by the accused. Addressing the court from the bar may trigger a series of questions from the bench. You have no control over what the accused might say. To avoid the questions, it is best to hand up a written statement. Note that the judicial officer may still ask questions. This happens where a poorly drafted statement is handed up.

You are expected to know how to draft this statement (the CPA uses the word 'plea explanation' to describe a statement of this nature. Take not, however, that this 'plea explanation' is not necessarily an affidavit). Here are a few pointers:

- Identify the accused, stating names and other personal information;
- State that the statement is being made freely and voluntarily;
- Present a very brief background as to how the offence took place;
- Then deal with the elements of the offence as stated in the charge sheet;
- There must be an admission of each element of the offence (nothing less will do);
- Make certain that each of the material facts are admitted;
- The purpose of this statement is to set out the *factual* basis supporting a plea of guilty (see section 112(2)).

Section 112 (1)(b)

Understand this subsection. A prosecutor is entitled to ask the magistrate to question an accused who pleaded guilty. However, this led to the debate as to whether or not this questioning violated the right to remain silent. It is recommended that you read

DPP v Viljoen 2005 (1) SACR 505 (SCA)

- If you prepared a well drafted statement in terms of section 112(2) the magistrate will refrain from asking questions. If the magistrate does have questions, they should be directed at you. It is better that you deal with the questions instead of your client. Some advice: if the magistrate directs any question at the accused, make sure that the questions are NOT leading questions. Leading questions can result in a violation of the right against self-incrimination. Intervene and ask the magistrate if you can be of assistance. In doing so, you will protect your client.

A common mistake in drafting a plea of guilty in terms of section112:

An attorney is often tempted to include a number of, what they believe to be, mitigating factors. When this is overdone, the judicial officer begins to doubt if a plea of guilty can be accepted. This will result in the accused being questioned by the judicial officer. Keep the section 112-statement simple and straight forward, remember there will be an opportunity for you to present mitigating factors before sentencing. The idea is to avoid for your client to be questioned by the judicial officer. Nor do you want the prosecutor to lead evidence (see section 112(3)).

Note that your plea, in the form of a written statement MUST be accepted by the prosecutor; especially where your client pleads to a lesser alternative charge. If the prosecutor is not happy, he/she will tell you why and you may have to amend the guilty plea. [ii]

Plea of Not Guilty

Section 115 states the procedure where an accused pleads not guilty. For an attorney, this is a very important procedure and must be treated with care. One of the purposes of this plea process is to establish for the court the issues for trial. This can be achieved by the judicial officer asking questions. This process must be read with Section 35(3)(h) of the Constitution. Judicial questioning in terms of section 115(2) is not a violation of the accused's right to remain silent. The process of questioning must be controlled by you. You do not want the magistrate to extract dangerous and unintended admissions from your client that will result in your client incriminating himself/herself.

The Plea Explanation

- One method of keeping control of this process is for you to make an explanation of your client's plea of not guilty. You can do so *viva voce* (verbally) in open court or hand up a written explanation which your client will confirm.
- The plea process is more than merely settling the issues for trial. It also provides the court with a factual basis for an accused's plea. There is a disclosure of a defence. In the event

that the accused pleads without an accompanying statement setting out the basis for the defence, then the state has to discharge the onus of proving the material facts alleged in the charge sheet or indictment (as the case may be).

- The decision to make an explanation of the plea can be troublesome and is not easily made. The rule is simple: if, after you have obtained all of the available facts from your client, you are not satisfied with the merits of his/her defence or material parts of the defence, then do not make a statement.
- If you find your clients version to be improbable, then you will certainly not make a statement unless expressly instructed otherwise by the client.

To make or not to make a Statement?

Note that a plea explanation is made after the accused pleads not guilty and before the state begins to lead evidence. It has become a practice in our courts that a judicial officer should inform an accused that he/she is under no obligation to make a statement indicating the basis of the defence.

- There are certain defenses which absolutely 'scream out' for a plea explanation. They are as follows:
  - An alibi: where your client relies on an alibi, this is your time to disclose it. The purpose is; firstly, to give the state an opportunity to check on the alibi; and secondly, it is more persuasive to make a disclosure now, rather than during the trial where you run the risk of the judicial officer wondering if this is not a recent fabrication. Put simply, it can be fatal if you fail to disclose your client's alibi. Your attention is also drawn to section 93 of the CPA.
  - Self defence: for an offence involving violent conduct, it is advisable to make a plea explanation where your client claims to have acted in self-defense. Only do so where your client's version is probable and is supported by the undisputed facts of the case. This includes the issue of not exceeding the reasonable bounds.
- The next question, when is it not appropriate to make a plea explanation? There is a simple rule; if you are not convinced about the probabilities of your client's defense or version, then do not make a statement. This is not persuasive, but at least you reduced the danger of your client contradicting the version in the plea explanation and possibly in the trial.
- A well drafted statement in terms of section 115 must do the following:
  - Actually set out a defence to the charge. It must, at least, disclose the basis for disputing some of the material facts relied on by the state in the charge sheet.
  - The statement is more persuasive where it has the effect of reducing the issues for trial by admitting some of the material facts relied on by the state (See section 220 of the CPA in this regard).
- Never prepare a statement which amounts to a mere denial of the state's material facts. It is better not to make any statement rather than one which is of no assistance to the court. Judicial officers hate this approach and you will discredit your client even before you begin the trial. However, it is worth noting that a plea explanation is not evidence.
- A judicial officer cannot cross-examine the accused at this point. If this happens, intervene and stop it. Questions from the bench must be directed only towards establishing the accused's defence and the questioning must not be adversarial. The purpose of the plea

explanation is not about getting the accused to tell what happened, thus it cannot be used in amplification of the factual details of the defence.

- Note that in as much as a plea explanation is persuasive, if the accused chooses to remain silent, that cannot be held against him/her. It merely means that the state has to prove all the material facts of the charge.
- Read section 115(2)(b); it provides the court with a discretion to question the accused to clarify what was stated in the plea explanation. The object of the questioning is to establish which facts are being admitted by the accused. This section must be read with section 220.

Unreasonable Delays in Trials

You can expect to be instructed to represent (i) an accused who has been in custody awaiting trial or (ii) an accused on bail whose trial is repeatedly postponed at the request of the state. We have experienced a number of high-profile prosecutions where the matter was struck from the roll. What are your remedies.

- You can oppose any further postponement on the next hearing date; based on the common law and the accused's constitutional rights, see section 35(3)(d) of the constitution.
- Section 342A can be invoked by you at the next hearing when the state indicates it is not ready to proceed and seeks another trial date. This section places a duty on a court to investigate any delay to proceedings which appear to be unreasonable.
- Section 342A(2)(2) sets out the factors the court may take into account in investigating delays. Read this subsection and use these factors to prepare your client's case. If the court does not, *mero motu,* undertake an investigation of delays, you can trigger such an investigation by addressing the court from the bar. The factors in the act can be highlighted by you.
- Section 342A(3) sets out the types of orders a court can make. Be familiar with same.

The Conduct of the Trial

At the outset, here is a reminder:

- Never begin a trial if you have not obtained ALL the available facts and carried out an analysis thereof. First analyse the facts, then read the applicable law.
- An indispensable step in preparation is to weigh the probabilities of the version your client wants to rely on. First, ask if the version is probable or likely to have happened, bearing in mind the circumstances of the case and the undisputed facts.
- Read the judgement in the SCA in NDPP v Oscar Pistorius (SCA). A trial judge will always test the probabilities of the accused's version.
- You must accept that the state will prove, at least, a *prima facie* case. In which event you may have to put your client in the witness box. This will amount to a fruitless exercise if your client's version is implausible and not reasonably possibly true.
- As a rule, do not lead any witness in chief if you are not convinced about the probabilities of his/her version. You may want to consider a different strategy, such as testing the state's

case and closing your case without calling the accused. This might be a better option, however, you will have to explain this to the accused and get proper instructions.

Trial before Superior Court

You will soon be appearing in your first legal aid case in the high court. Read Chapter 21 of the CPA, in particular sections 144 and 145. They require no explanation.

Be familiar with Chapter 22 of the CPA.

Read section 151; the judge will ask if you intend to lead any evidence in defence. If the answer is in the affirmative, then the judge will ask if the accused intends to testify? If yes, then this section compels the accused to be the first witness.

Proceedings are normally held in open court. Section 153 of the CPA prescribes when a hearing will proceed behind closed doors. Make a note of how the court will treat minors. Also read section 154 of the CPA which provides for prohibition of publication of certain information. It is important for you to understand how this works as circumstances often arise where these sections are triggered.

Section 174

An accused may be acquitted at the close of the state's case. This is a process provided in section 174 of the CPA. It's important for you to understand how this works. Section 174 provides that if, at the close of the prosecution's case, the court is of the opinion that there is no evidence that the accused committed the offence, it *may* return a verdict of not guilty. This is usually triggered by an application by the defence in terms of section 174 when the state closes its case. Often, the judge will *mero motu* grant a discharge at the end of the state's case. Most judicial officers will look to you first as soon as the state closes the case (even where they can see that there is no *prima facie* case against the accused).

The decision to make an application.

The test is: the state must have failed to present evidence upon which a reasonable man acting carefully may convict. This is easy enough for you to work out; yet both legal practitioners and often judicial officers get this wrong.

This is a matter for the discretion of the judicial officer, which discretion must be exercised in a judicial manner. The decision is not appealable.

Consider the following:

- Firstly, do not bring a section174 application as a matter of routine as soon as the state closes its case. Where the state made out a prima facie case, a judicial officer will be annoyed if you bring a section 174 application. It will be treated as a frivolous application and you will discredit yourself and your client.
- Only launch an application where the evidence is such that a reasonable person will not convict.
- Where it was your strategy not to call the accused to testify in his/her defence; do not apply for a discharge; instead close your case. This will avoid the problem where the judicial

officer knows a section 174 is appropriate but nevertheless refuses the application; just to see if you will put your client in the witness box. Where a judge is of the view that putting the accused on his/her defence might strengthen the state's case, a discharge will be refused (one might argue that the traditional two-tier test of State v Shuping 1983 (2) SA 119 (B) being the *locus classicus* until recently is partially unconstitutional as a result of such perception). This is where you will be faced with a difficult decision. Sometimes, even you will be of the view that your client will strengthen the state's case, this is the type of case where you should close your case instead of applying for a section 174. Be careful, if you decide not to call your client, make sure you have clear instructions in this regard.

- There is some debate over whether or not, at this stage, you can argue the credibility of the state witnesses. However, you should stick to the test and stay with your own strategy.
- In many prosecutions, the state will rely on circumstantial evidence where more than one inference can be drawn, and an application for a section 174 will be refused.
- Read S v Lubaxa 2001 (2) SACR 703 SCA Nugent AJA found that an accused person is entitled to discharge if there is no possibility of a conviction except if he gives evidence and incriminates himself. The failure to acquit an accused in such circumstances is a breach of an accused's constitutional rights.
- Read v Ndlangmandla and another 1999 (1) SACR 391(W) the court refers to three practical consequences of a 174 application:
  - The court has a duty *mero motu* to raise the issue of a possibility of a discharge at close of the state's case if it appears to the court that there may be no evidence that the accused committed the offence.
  - Credibility: where the credibility of witnesses is of such poor quality that no reasonable person could possibly accept the evidence, it should be taken into account at this stage.
  - As the former test applied by S v Shuping (see *supra*), where there is a possibility that the accused might supplement the state's case, and that as a result the discharge must be refused, has been declared unconstitutional (See S v Lubaxa *supra*).

Confessions and Admissions

It is essential to read sections 217 to 220 which deals with confessions and admissions. You will have to deal with admissions and confessions in most of the trials you will appear in. Remember to read and apply section 35 (5) of the Constitution.

Section 217

This section states the procedure for the admission of a confession made by the accused. To trigger this section, there must have been a "confession" by the accused. To begin with you must understand what is meant by a "confession" within the context of this section. This is how it was defined in S v Grove-Mitchell 1975 (3) SA 417 (A):A confession can only mean "an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law".

A copy of the confession should be included in the docket discovery. This means you will have time to consult and take instructions. The inquiry is both factual and legal. The following steps must be taken; where client does not want to admit the confession:

- Is this a confession to the offence accused is charged with? If not, section 217 of the CPA does not apply.
- Then ask client to read it and confirm his name and signature. Usually this will not be disputed.
- Next it is important to obtain all the facts regarding the circumstances under which the confession was made.
- If client alleges duress of some type, get full details in a chronological sequence including the names and rank of all police, officials and judicial officers involved;
- Look for medical reports before and after the confession was signed (J88);
- Look for proof that injuries were inflicted;
- Write down, where possible, the actual words used in threatening the accused and find out where and in whose presence the threats were made;
- Look for the occurrence book from the police station or prison to see if any complaints were made by the accused and any entries made pertaining to the accused;
- Establish if there are any witnesses you can call; find people who visited the accused in jail and get statements.
- Most importantly, once you have all the facts, test the accused's version of what happened by considering if it is plausible. Do not go to court with a version that is improbable. If you are not of the opinion that a reasonable person would believe the story, the court never will. We say more about this below.

The requirements

A confession is admissible in terms of section 217 of the CPA if:

a) It was made freely and voluntarily by the accused;
b) While the accused was in his/her sound and sober senses;
c) Without having been unduly influenced thereto; and
d) It was not made to a peace officer, other than a magistrate or justice, unless it was confirmed and reduced to writing in the presence of a magistrate or justice.

Each of the above requirements is discussed extensively in *The South Africa Law of Evidence – D T Zeffertt and A P Paizes.* Read that section.

The onus of proof

The onus of proof rests with the prosecution to prove beyond a reasonable doubt that a confession was freely and voluntarily made by the accused.

Post Constitution the presumption that the accused acted freely and voluntarily where the confession was made before a magistrate is no more. Read S v Zuma and others 1995 (2) SA 642 (CC). Remember that the Constitution is the supreme law and section 217 of the CPA must be read accordingly. This issue is discussed comprehensively in the Zuma judgement.

Trial-within-a-trial

The issue of admissibility is resolved in a trial within a trial (interlocutory proceedings), a mini-trial which is heard separately and is isolated from the main trial. This has a Constitutional basis set on two principles:

a) The right to elect not to testify at the close of the state's case; and
b) The right to challenge evidence adduced against the accused, and, thus, to prevent inadmissible evidence from being received against the accused.

The trial within a trial is held when the accused disputes the admission of a confession or admission. Here are some practical suggestions:

- Where the state's case is not strong, in that it does not have direct evidence implicating the accused, the prosecutor will introduce the trial within a trial at an early stage.
- Where the state has direct evidence, a good prosecutor will first lead this evidence and then introduce the confession. There is a strategic value in this. Can you work it out?
- You have to consider the statement carefully in consultation with the accused, to determine the following:
  - Should you object to admissibility?
  - What is your client's version?
  - Is the version plausible and are there any undisputed facts that support it?
  - Can you establish from this version if the evidence was obtained in a manner that violates any right in the Bill of Rights?
  - Were you intending to close your case and not put the accused in the box? If so, you may have to do the same in a trial within a trial. Note that, if you intend to call the accused to testify during the trial within a trial, the prosecutor cannot cross-examine on the issues in the main case.
  - Do you have a strategy to cross-examine the state witnesses?
  - Did you carry out a fact analysis for the purposes of a trial within a trial?
  - Are you familiar with the most important judgements on the subject?
- In the event that the confession is admitted, be prepared to adapt your strategy.
  It is worth noting sections 225 to 245 of the CPA with regard to various rules of evidence pertinent to the prosecution of certain offences. (Note that this will not be subject to assessment.)

Section 252A - entrapment

Evidence obtained as a result of entrapment is subject to section 252A of the CPA. The principal test is that the conduct of the police or State official must not go beyond providing an opportunity to commit an offence. If this type of evidence is admitted, it will compromise the accused's right to a fair trial.

In this respect see the factors stated in 252A (2). If any of these factors is found to be present or any combination of them, the evidence will not be allowed to stand. See section 252A (3).

Some practical suggestions:

- Where the prosecutor intends to use evidence obtained in a trap or undercover operation, you may want to object to it.
- When you object, section 252A (6) requires the accused to state the grounds of his/her objection.
- The onus will then be on the prosecutor to prove admissibility on a balance of probabilities.
- In order to prove admissibility, the state will have to conduct a procedure separately and similar to a trial within a trial.

Unlawfully obtained evidence

From time to time, you will have to object to the possible admission of evidence which, on your instructions, were illegally/unlawfully/improperly obtained.

To begin with, consider the Constitution:

- Every accused person has a right to a fair trial, section 35 (3);
- Section 35 (5) is an important standard: evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice. Sections 35(3) and (5) now govern the rules regarding the admissibility of illegally/improperly obtained evidence.
- The foundation of your objection is based on the above sections.
- Now look at the facts and see if you can fulfill the requirements of these sections.
- You will also be assisted by the common law (case law) in support of your objection. See the cases in your reading list.

You have the law, which is well developed, it is up to you to obtain the facts that can be supported by the law. Again, obtain all the available facts and carry out a fact analysis.

Illegally obtained evidence refers to evidence gathered as a result of gross violation of a person's rights. Improperly obtained evidence may result from some deceit which may be unfair or improper without bearing the additional taint of being illegal- Zeffertt.

The following are the types of cases you will come across and be ready to deal with them:

- Cases where the accused was not properly informed of his/her rights prior to making a statement or pointing out;
- Evidence obtained as a result of illegal searches;
- Evidence obtained as a result of the illegal monitoring or interception of communication;
- Autoptic evidence (real evidence, seen with your own eyes) and other evidence forcibly and involuntarily taken from the person of the accused; and
- Evidence obtained as a result of the improper treatment of witnesses other than the accused.

Hearsay

Means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

There is thus a rule against the introduction of hearsay evidence. However, there is an important statutory exception to the rule against hearsay. You are expected to understand how to apply the Law of Evidence Amendment act no 45 of 1988; section 3 (4).

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless —

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to —

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

When can you use this rule?

- Certainly not during argument. This will amount to an ambush.

"An accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of [s 3 of the Law of Evidence Amendment Act 45 of 1988], and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."

See: Maki Kapa v The State CCT 292/21 [2023] ZACC 1/ 2023 (4) BCLR 370 (CC)

Read:

Metedad v National Employers' General Insurance Co Ltd 1992 (1) SA 494 (W) Van Schalkwyk J at 498I – 499A

S v Ndhlovu and Others 2002 (6) SA 305 (SCA)

Observe the following rules of evidence:

- Relevance
  - ✓ Evidence must be relevant to an issue
  - ✓ There has to be a question to be decided
  - ✓ Evidence must be helpful to the court
  - ✓ Evidence must help the court answer the question.
- Material
  - ✓ Evidence must be relevant and important
  - ✓ Evidence must support your case concept
- Admissibility
  - ✓ - *Relevant evidence is admissible unless excluded by a rule*
  - ✓ - hearsay, character, similar fact, opinion,
  - ✓ - Improperly obtained evidence is excluded.
  - ✓ - Probative value weighed against prejudice – consider this.

Please read paragraphs 5. and 6. of the reading list on admissibility/inadmissibility of relevant evidence, read the references to cases and textbooks.

The suggested topics have been covered in this guide.

Similar Fact Evidence

- Logic dictates that the same conclusions are likely to produce the same results. But in a court room, this presents practical difficulties. One will have to prove that the conditions on both occasions were sufficiently similar. This is where the problem arises in court. To prove this will result in the court having to deal with multiple collateral issues and the trial will become unnecessarily lengthy.
- Thus, our courts will expect a high degree of relevance before considering admission of similar fact evidence. "It should not be admitted unless its value as proof warrants its reception in the interests of justice and its admission does not operate unfairly against

the other party – a particularly compelling consideration in criminal cases." – Lord Denning

- In a criminal case, the rule is: The prosecution may not adduce evidence of improper conduct by the accused if its only relevance is to show that the accused is of bad character and is, therefore likely to have committed the offence – the Makin formulation.

Making findings of fact

In making findings of fact two basic principles must be kept in mind:

- ✓ Evidence must be weighed in its totality, not piecemeal;
- ✓ Probabilities and inferences must be distinguished from conjecture or speculation. The inferences drawn must be supported by the facts.

How does a judicial officer go about making findings of fact based on the evidence before him?

In an adversarial hearing the trier of fact makes a finding only on the evidence presented by the parties.

Findings of fact and probabilities are made by evaluating each witness presented by the parties.

The court will consider the following:

- ✓ Credibility of factual witnesses
- ✓ Their reliability
- ✓ The Probabilities

- Credibility

  Here are some factors used to test credibility:

  - ✓ General impressions
  - ✓ Veracity
  - ✓ Candour
  - ✓ Demeanor
  - ✓ Bias latent/blatant
  - ✓ Internal contradictions
  - ✓ External contradictions of Established facts
  - ✓ His version put to witnesses

- ✓ The probability or improbability of aspects of his version
- ✓ The cogency of his performance compared to other witnesses on the same fact

- Reliability

  Test opportunity to observe or experience an event.

  This is what a judicial officer will look for:

  - ✓ Time
  - ✓ Distance
  - ✓ Lighting
  - ✓ Weather
  - ✓ Unobstructed view
  - ✓ Knowledge

  TEST: the quality and independence of witnesses' recollection.

- Probabilities

  The reasoning:

  - ✓ TEST: what is likely to have happened given THE PROVED FACTS – what is probable?
  - ✓ Evaluate the probabilities or improbabilities of each party's version on each disputed fact.
  - ✓ NOW ask did the party bearing the onus discharge the onus.

Having made this evaluation, the judicial officer will decide which witness's version of the facts is accepted as the truth.

Your function is to present the evidence in such a manner as to persuade the judicial officer to accept your witness's version of the facts.

See NDPP v Pistorius (SCA)

Conclusion of the trial

The state will close its case after concluding its presentation of the evidence. If you are not successful with a section 174 application, or you did not bring one, you will be faced with the following decisions:

- Do you close your case and proceed to argument?
- Do you have to call your witnesses, including the accused, who will have to be your first witness?

These are not easy decisions and you are expected to prepare a strategy *before coming to court.* The following must be borne in mind:

- If you are unconvinced about the probability of the accused's version, it is best not to call the accused and to close your case. Your strategy was to come to court and test the state's case.
- Bear in mind that where the state made out a prima facie case which calls for an answer from the accused, the court will draw the adverse inference against your client should he/she fail to testify.

Whatever decision you make, in consultation with client, you must be prepared to make final argument. You are expected to hand up written heads of argument, this is not a procedural requirement, but good defence attorneys will always write heads of argument.

The court will then proceed to judgement.

Competent Verdicts

You must read Chapter 26 of the CPA, it is self-explanatory. It deals with competent verdicts. Often the state will rely on competent verdicts to craft alternative charges to the main count/s.

This chapter is also useful when preparing final argument, you may want to persuade the court to find your client not guilty of the main count, but you may submit that one of the competent verdicts may be appropriate.

Previous convictions

Before your client pleads, and even as part of docket disclosure, the prosecutor will hand you an SAP 69. This is an extract from the SAPS records of convictions. It is important for you to have this *before* you start the trial. It is not disclosed to the court before conviction but certainly plays a significant role when the court considers an appropriate punishment.

You also expected to check with your client if he/she admits the previous convictions. You will have to comply with section 271 (2) of the CPA.

After conviction, the court will ask you to present mitigation or merely address the court on the issue of appropriate punishment.

Chapter 28 CPA

This section deals with the sentencing procedures. It is so useful that it is recommended that you have a copy available in court. In particular you require section 276 and 276A which sets out the various options available to the judicial officer. The following guide is useful:

- Like everything about the trial itself, sentencing is firstly about the facts, only after the facts are established, then the court considers the law.
- Your purpose is to assist the court in determining an appropriate sentence for your client. You must be of assistance to the court; in that way you will act in the best interests of client.
- What judges really want is for you to present relevant facts that will assist the court. Judges are concerned about doing the right thing and finding an option that suits the needs of society, the accused and serve the interests of justice requires a complex balancing act.
- You have to present the court with evidence of the accused's personal circumstances. You may have to lead evidence, from family, colleagues and even experts. There is no rule that you have to call the accused. With serious offences, calling the accused usually ends badly because in these circumstances the accused is so vulnerable to hostile cross-examination by the prosecutor.
- It is a good strategy to consult with the prosecutor and find means to avoid the state leading evidence in aggravation. You can achieve this by admitting certain facts and possibly agreeing to a sentence that suits your client.
- Once you presented the facts, now engage with the court about the most appropriate sentencing option for your client. Reference cases involving similar circumstances.
- NEVER present the court with an option that is ridiculous and is likely to irritate the judicial officer. Always have a candid and practical approach, as judicial officers find that helpful.
- Remember, judges and magistrate do not want to hear you making copious references to case law that merely deals with general principles. Judges want references to cases that are supported by the facts of the case and are relevant to the issue of an appropriate punishment.
- Be familiar with sections 283 to 285.

Mandatory minimum sentencing

This is a controversial subject and judges see it as an uncalled-for interference with their discretion and can result in punishment that is disproportionate. Read S v Malgas 2001 (1) SACR 469 (SCA).[ii]

When faced with this piece of legislation, do not merely give up, you must still address the court, it is what judges expect. For instance, with reference to the cases, show that an imposition of minimum punishment will result in inappropriate punishment and will not satisfy the interests of justice.

Appeals and reviews

Read Chapters 30 and 31 CPA:

From automatic reviews to the high court from a district court to appeals from the district and regional courts to the high court are dealt with in this chapter.

As a special assignment, work out the appeal and review path an accused must follow from a lower court to the constitutional court. You are expected to motivate your answer with reference to the CPA.

Ismail Hussain SC
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