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INYUVESI YAKWAZULU-NATALI

A critical analysis of the role of the presiding officer in the process of evaluating evidence in bail proceedings

By

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Declaration

I, Mondli Alex Mthethwa, do hereby solemnly declare that:

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(ii) This dissertation has not been submitted for the purposes of fulfilment of any other degree or examination at any university except for the University of KwaZulu-Natal.

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As the candidate's supervisor, I agree to the submission of this dissertation for examination. To the best of my knowledge, the dissertation is primarily the student's work and that the student has acknowledged all reference sources.

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Name of the supervisor: Nicci Whitear-Nel

Signature: …….

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Friends and foes, life is a marathon; let us run.

To God, you are the pillar that holds my life, master Jesus, you are the pillar that holds my life…

Dedications

This research is dedicated to the judiciary. Wherever they are, in their hot seats. Cheers

Abstract

This dissertation critically analyses the function of presiding officers in assessing evidence during bail petitions, emphasising the interpretation of "interest of justice" and its influence on the review process. The research uses an extensive literature analysis to examine the intricacies of bail hearings, including delays, extraordinary circumstances, and bail based on fresh evidence. The research examines the procedural elements of bail hearing postponements, using Section 50(6)(d) of the Criminal Procedure Act and the State v Majali decision, contending that the state's entitlement to postponement is not unconditional and requires court examination. The research examines the contradictory meaning of "interest of justice" concerning many clauses in the Criminal Procedure Act and the Constitutional Court's decision in State v Dlamini. The research promotes a more expansive interpretative framework that takes into account the interests of all stakeholders, including the accused, the victim, and the public. The research recommends enhancements to the review process, including legislative modifications to Section 60 of the Criminal Procedure Act to expressly adopt a more expansive meaning of "interest of justice." The dissertation contends that presiding magistrates need to assume an inquisitorial role in bail processes, soliciting evidence as needed to provide informed judgements. It underscores the need of reconciling the right to liberty with public safety considerations and advises that courts rigorously observe legislative time limits for delays. The research seeks to enhance the coherence and equity of the judicial framework for bail procedures by addressing these critical concerns, hence improving the capacity of presiding officers to assess evidence and provide fair judgements in bail petitions.

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CHAPTER 1: INTRODUCTION

1.1. Background

Bail originates in medieval England.[1] The accused person had to exercise his right to freedom by being released to a friend who would vouch for his return and undertake to present himself or herself if the accused absconded.[2] The Sheriff had to decide whether or not a person should get bail. The judiciary had no role at all in this question.[3] The focus shifted to the security that would have to be provided to ensure the accused would attend the trial. In South Africa, the pre-trial release of an accused person was introduced by the then government of the Cape in Ordinance 40 of 1828 (Cape).[4]

This study seeks to critically analyze the role of presiding officers in the evaluation of evidence during bail applications. It seeks to identify the challenges they face, examine current practices and procedures, and assess how these impact bail outcomes. By investigating the strengths and limitations of the existing legal framework, the study aims to provide recommendations for reform, ultimately enhancing the fairness and effectiveness of the bail application process in South Africa. This analysis is crucial given the increasing complexities surrounding the interpretation of justice, the rights of the accused, and societal expectations in a rapidly evolving legal environment.

Times have evolved with changing laws, and constitutional supremacy abolished parliament supremacy in 1993. Under constitutional supremacy, judicial authority vests in courts, and as such, the courts must decide on the question of bail. "The courts are independent and [only] subject to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice."[5] The separation of powers doctrine is a valuable tool that limits intrusion by other state organs in the terrain of the judiciary.[6] It is submitted that the court requires the executive to implement their orders and judgments. This includes government departments such as the police, the Department of Social Development, Home Affairs, etc. These were the words of former Chief Justice Ismail Mahomed:

> "Unlike Parliament and the executive, however, judicial officers do not have the powers of the purse, the army, and the police to execute their will. All the courts put together in a country do not have a single soldier. These would be important to protect the Constitution or to execute the law"[7]

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[1] A.L. Russell & R.G. Morris, 'History of Bail' in G. Bruinsma & D. Weisburd (eds), Encyclopedia of Criminology and Criminal Justice (2014).

[2] DJ Freed & PM Wald, 'Bail: An ancient Practice Reexamined' (1964) 70 *Yale Law Journal* 966.

[3] Ibid.

[4] J Van der Berg *'Bail: Practitioners Guide'* 3 ed (2012) 3.

[5] The Constitution of the Republic of South Africa Act 108 of 1996.

[6] The separation of powers doctrine refers to the division of state government into "branches," each with separate, independent powers and responsibilities so that the power of one branch does not conflict with those of the other branches. The typical division into three branches of government sometimes called the *triad political model,* includes a legislature, an executive, and a judiciary.

[7] P Devos, W Freedman, Z Boggenpoel, L Draga, C Gevers, K Govender, P Lenaghan, S Mnisi, W Catherines, S Nmakula, N Nthlama, D Mailula, K Moyo, S Sibanda, L Stone 'South African constitutional law in context' ed (2022).

Currently, in South Africa, the crime rate is high. 6 289 people were murdered in the first three months of 2023: the period from January to March of 2023. There is an increase when comparing the same period in 2022. In 2022 between January and 6 March 083 people were murdered. There is a 3.4% increase when these two periods are compared.[8] Judges and magistrates must make decisions on the question of bail. The public needs more understanding of the question of bail and often criticizes the court if bail is granted on a serious matter.

The victims require answers from courts regarding the release of the accused if bail is granted. The prosecution rarely appeals against the judiciary's decisions regarding bail. When courts refuse bail, applicants often exercise their right to appeal, and higher courts frequently grant bail.[9] The higher courts highlight the errors made by the judges and magistrates in the courts' quo. The Constitutional Court judgment in the case of *S v Dlamini and others, S v Joubert, S v Schietekat*[10] did not assist judges and magistrates with clarifying the amendments embodied in section 60(4), which deals with the factors to be considered by the court in determining whether the interest of justice permits the release of the accused on bail, and sections 60(11) a and b which deals with offences listed in schedule 5 and 6.[11] Presiding officers needed their roles to be clarified. In the judgment, Kriegler J found that:

> "… an important aim of this judgment is to show that the application of constitutional norms to the law and practice of bail does not complicate the task of judicial officers but clarifies it."[12]

However, the judgment focuses on ensuring that the prosecutors, accused, and legal practitioners understand their role, leaving the judicial officers in the dark. Judicial officers are still determining their role, while the accused and the national prosecuting authority are given a better understanding of their role.[13] It is submitted and it will be later shown in detail in chapter 3 that even the words interest of justice used in section 60 in different sub-sections must be interpreted differently. The case of S*tate v Dlamini*[14] favoured the narrow approach when interpreting section 60(4),[15] which only considered the interest of society to the exclusion of the rights of the accused. In section 60(1), the words interest of justice are interpreted to include the accused's rights.

The court further stated that it was unclear whether section 60 left any space for the common law to be used as a source, and this is what the court had to say.

Kriegler J said:

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[8] A Mitchely 'Crime Stats: more than 6 200 people murdered in just 90 days in SA' available at 'https://www.news24.com/news24/southafrica/news/crime-stats-more-than-6-200-people-murdered-in-just90-days-in-sa-20230530 accessed on 30 May, 2023.

[9] *S v Kula* 2023 (3) SA 218 (NWM).

[10] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

[11] Criminal Procedure Act 51 of 1977.

[12] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

[13] Ibid at para 6.

[14] Ibid.

[15] Criminal Procedure Act 51 of 1977.

> "Judicial pronouncements on the topic [of bail] have been called labyrinthine. There is murkiness even at the elementary level of the source(s) of South African judicial power to grant bail, i.e., whether the power derives exclusively from-and is circumscribed by-chapter 9 of the Criminal Procedure Act or whether there is a parallel reservoir of inherent or common law power on which the judge can draw."[16]

The court in S*tate v Dlamini* [17] did not deal with the remainder of the provisions of section of the Criminal Procedure Act 51 of 1977. The court stated that there is little that has to be noted in the other provisions not dealt with in the judgment. These provisions are sections 63, 65, 66, 67, and 68 of the Criminal Procedure Act.[18] The court also did not deal with the postponement of bail applications.[19]

It was imperative for the Constitutional Court to not only concentrate on sections 60(4),60(11), and 60(14) but to deal with all other provisions of the Act, including postponements, appeals, and bail on new facts.[20] It is submitted that the Constitutional Court seeking clarity should have dealt with all the bail provisions, including postponements and appeals and bail on new facts.[21] Judges and magistrates are tasked with dealing with all the provisions relating to bail.

The law relating to the functions of the judiciary during bail applications is scattered throughout the provisions of section 60 of the Criminal Procedure Act.[22] Throughout this dissertation, a discussion of the duties of the presiding officers will be discussed together with the case of *State v Dlamini*.[23] In *State v Hlopane,*[24] the court stated that there is a duty on the judiciary to enquire on the question of bail. This was even before the enactment of the amendments in 1995 and 1997 embodied in section 60 of the Criminal Procedure Act.[25] In terms of section 60(1) of the Act[26] the court should bring up the question of bail should the parties not bring it up. The wording "*the court shall*" clearly indicates the duty of the judicial officers. This wording places the duty on the presiding officers to enquire whether or not the accused wishes to apply for bail.

1.2. Purpose of the Study

The purpose of this study is to critically analyze the evaluation process of evidence presented in bail applications in South Africa, with a view to identifying the challenges and complexities associated with it, examining current practices and procedures, identifying strengths and limitations, investigating the impact on bail application outcomes, and providing recommendations for reform and improvement to enhance the fairness, efficiency, and effectiveness of the bail application process.

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[16] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[17] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[18] Criminal Procedure Act 51 of 1977.
[19] Section 50(6)(d) and 60(3) of the Criminal Procedure Act 51 of 1977.
[20] Section 50(6)(d) and 65 of the Criminal Procedure Act 51 of 1977.
[21] Section 50(6)(d) and 65 of the Criminal Procedure Act 51 of 1977.
[22] Criminal Procedure Act 51 of 1977.
[23] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[24] *S v Hlopane* 1990 (1) SA 239 (O).
[25] Criminal Procedure Act 51 of 1977.
[26] Ibid.

1.3. Postponements

Postponements of bail applications are now a norm in criminal court rolls.[27] There are even prosecutors who believe that the prosecution is entitled to a postponement of a bail application. The case of S*tate v Majali*[28] is used in Chapter 2 of this research to clarify the position with regard to the postponement of bail applications. The starting point is to understand the provision of sections 50(6)(d) and 60(3), which provides for the postponement of bail applications.[29] These sections give the court the power to postpone the bail application. This power can be used by the court when an accused person appears in court under the Act; the court can exercise its discretion and postpone the matter for a bail application for a period not specified but not exceeding seven (7) days at the time.[30] The following are instances where a postponement can be brought:

(i) "[If] the court believes that it has insufficient information at its disposal to decide on bail application;

(ii) [If] the prosecutor informs the court that the matter has been or is going to be referred to an attorney general for the issuing of the written confirmation referred to in section 60(11) A

(iii) ….

(iv) [If] it appears to the court that providing the state with a reasonable opportunity is necessary.

(aa) to procure material evidence that may be lost if bail is granted, or

(bb) to perform the functions referred to in section 37; or

(v) [If] it appears to the court that it is necessary to do so in the interest of justice." [31]

The above grounds illustrate that there was no intention from the legislature to make the granting of postponements an automatic right in favour of the state. The presiding officers are there to evaluate the evidence presented before them. The argument in this research is that should the granting of postponements in favour of the state not include the evidence by the applicant whose right to liberty is impaired by incarceration, then this will not be in line with the nature of bail applications.[32] In the case of *State v Majali*, the court ruled that an inquiry should be held, and the accused must be given an opportunity to present evidence in respect of a postponement of a bail application.[33]

The first ground is section 50 (6) (d) (i) which deals with the instance where the court believes that it does not have sufficient evidence available to it to determine a bail application. The state

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[27] *State v Majali unreported case no: 41210/2010 of 19 July 2010.*

[28] Ibid.

[29] Section 50(6) (d) of the Criminal Procedure Act 51 of 1977

[30] Section 50(6) (d) of the Criminal Procedure Act 51 of 1977.

[31] Ibid.

[32] *State v Majali* unreported case no: 41210/2010 of 19 July 2010*:* The court stated that a bail hearing is inherently a unique urgent formal judicial process.

[33] *State v Majali* unreported case no: 41210/2010 of 19 July 2010

then can apply for the postponement and the evaluation processes should not confuse the presiding officers to think that this amounts to an absolute right to the postponement.[34] This research will show that although there are various similarities, there is a huge difference between section 50(6) d and section 60(3) of the Criminal Procedure Act.[35] Section 60(3)[36] states that if the court is of the view that it does not have sufficient facts on the evidence presented before it or that it needs more information in order to reach a decision on bail, then the court can order that such facts be brought before it reaches a decision whether or not to grant bail. The legislature worded the section as follows:

> "if the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to decide on the bail application, the presiding officer shall order that such information or evidence be placed before the court."[37]

The argument is that sections 50 (6) (i) and 60(3) referred to above are different.

The following are the similarities between section 50(6)(d)(i) and 60(3) of the Criminal Procedure Act 51 of 1977 -

In both instances, the court must believe it has insufficient information to decide on the bail application. It is submitted in this research that the court can only come to this conclusion after both the state and the defence have been allowed to present evidence; both provisions can only be invoked after the inquiry as to whether or not the postponement should be granted or not is already held. The inquiry is mandatory; both parties must present evidence as to whether or not the inquiry should be held.

The difference between section 50(6)(d) (i) and 60(3) is the party who is authorized to initiate the application. It is submitted in this research that the prosecution is authorized to apply in terms of section 50(6) (d), and the court cannot invoke these provisions on its own accord.[38] Section 60(3), on the other hand, is entirely different; the court, without any application, must listen to the evidence presented before it and make a value judgment on whether it has sufficient evidence to reach the bail question.[39] If the court finds that it has insufficient evidence at its disposal, then the court may order that bail be postponed for the purposes of obtaining such evidence that will assist the court in reaching a decision on bail. The section can only be invoked if the court believes it cannot decide on the bail question after the evidence has been presented. In other words, the court believes in the instance of section 50(6)(d).[40]

The Constitutional Court in *State v Dlamini*[41] did not deal with how the interest of justice should be interpreted in section 50(6)(d)(v) of the Criminal Procedure Act.[42] The research believes that the word interest of justice in section 50(6)(d) should be viewed in such a way

[34] Criminal Procedure Act 51 of 1977
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[42] Criminal Procedure Act 51 of 1977.

that it includes the right of a bail applicant to liberty.[43] The broad approach to interpreting what the word means is recommended by the research. This approach takes into account all the parties involved, including the interest of the accused. The other approach used in interpreting the word is a narrow approach that concentrates mainly on the interest of society.

The second ground is in section 50(6)(d)(ii)[44] and this is where the prosecutor advises the court that the case will be referred to the attorney general for a written confirmation that the matter falls within the scope of schedule 5 or 6.[45] The wording of the section could be clearer, but the research favours the approach that the court cannot just grant the adjournment merely because the state has applied for the postponement. The accused's right to liberty and the urgency of the bail application are impaired by the postponement. It is submitted that the accused must be allowed to respond to the application, and the court must base its findings on the evidence presented before it. The court in *State v Majali* did not afford the accused the right to respond to the application for a postponement.[46] In an unreported case of *State v Landela and Another*, the court alluded to the fact that the mere production of a written confirmation referred to section 60(11)A is prima facie proof that the offense falls within the ambit of schedule 5 or 6 of the Criminal Procedure Act.[47] It is submitted that the accused must be allowed to oppose the application for the matter to be referred to the attorney general for written confirmation.

The third ground is in section 50(6)(d)(iv) of the Criminal Procedure Act[48] and refers to an instance where it appears to the court that the state should be allowed to procure evidence that might be lost if the application is not granted.[49] The court can only invoke this provision if it is reasonably necessary to give the state such an opportunity. The state must make the application, and the accused must respond to such an application. Evidence must be led before the conclusion that the evidence might be lost, and the granting of the order is reasonably necessary for either procuring the evidence that might be lost if the application is not granted or for performing the functions referred to in section 37.[50] The second instance is where the state wants to perform the functions referred to in section 37.[51] The courts must be careful when deciding on this application as this application cannot be granted to assist the state in

[43] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) and Criminal Procedure Act 51 of 1977.
[44] Criminal Procedure Act 51 of 1977.
[45] Ibid.
[46] *State v Lindela and Another* unreported case no: A04/2017 of 30 November 2017.
[47] Criminal Procedure Act 51 of 1977.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Section 37 of the Criminal Procedure Act provides that any member of the SAPS may make any person alleged to have been involved in the commission of the offense "available or cause a person to be made available for identification in such condition, position, or apparel" as the SAPS member may determine.

formulating a case against the accused.[52] The application must be granted on the basis that it relates to the bail application.

The last ground is when it appears to the court that it is necessary to grant the application in the interest of justice. The topic of interest of justice is dealt with in this research in chapter 3.

1.4.The interest of justice test

The interpretation of "interest of justice" presents a problem in a bail inquiry. The meaning seems to be broad when it is used in section 35(3) (f) of the Constitution[53] and section 60(1) of the Criminal Procedure Act because it includes the state's and accused's interests.[54] The word bears a broad meaning of a value judgment of what would be fair and just to all the parties concerned. The use of the word, however, in sections 60 (4), (9), and (10), respectively, is used in a different way.[55] The court noted in *State v Dlamini*[56] that these words cannot signify the ultimate evaluation of what is equitable to all the parties concerned, the legislature has used a narrow approach in using the word in these sections. Section 60(4) focuses more on protecting the administration of justice rather than on balancing conflicting interests.[57] This chapter will clarify the meaning of the words "interest of justice" as it is used in the Constitution of the Republic of South Africa[58] and various provisions of the Criminal Procedure Act.[59] The aim is to assist the judicial officers in evaluating the evidence to determine if it is in the interest of justice to permit the release of the accused on bail. It is necessary to give a brief overview of what sections 60(4), (9), and (10) respectively entail without going into details, as these provisions will also be dealt with in Chapter 3.[60]

Section 60(4)[61] deals with the factors the judicial officers must consider in determining whether the interest of justice allows the release of the accused on bail and provides that:

> "The interest of justice does not permit the release from detention of an accused where one or more of the following grounds are established
>
> a) Where there is a likelihood that the accused, if he or she were to be released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offense; or
>
> b) Where there is a likelihood that the accused, if he or she were to be released on bail, will attempt to evade his or her trial; or
>
> c) Where there is the likelihood that the accused, if he or she were to be released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

[52] *State v Majali* unreported case no: 41210/2010 of 19 July 2010.
[53] Constitution of the Republic of South Africa, 1996.
[54] Criminal Procedure Act 51 of 1977.
[55] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[56] Ibid.
[57] Criminal Procedure Act 51 of 1977.
[58] Constitution of the Republic of South Africa, 1996.
[59] Criminal Procedure Act 51 of 1977.
[60] Ibid.
[61] Ibid.

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

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

The legislature instructs the court to evaluate the factors listed in section 60(4) to section 60(5) - (8A); this presents another problem regarding the judicial role. The factors listed in section 60(5)-section 60(8A) are drafted in such a way that they cater only to the determination of the interest of justice and not the interest of the accused.[62] The court is expected to utilize these factors in considering whether the grounds in section 60(4) have been established.[63]

Section 60(9) provides that when dealing with the provisions of section 60(4):

> "the court shall decide the matter by weighing the interest of justice against the right of the accused to his or her personal freedom and, in particular, the prejudice he or she is likely to suffer if he or she were detained in custody, taking into account where applicable, the following factors, namely-
>
> a) The period for which the accused has already been in custody since his or her arrest;
>
> b) The probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
>
> c) The reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delays;
>
> d) Any financial loss which the accused may suffer owing to his or her detention;
>
> e) Any impediment to the preparation of the accused's defense or any delay in obtaining legal representation which may be brought about by the detention of the accused;
>
> f) The state of the health of the accused;
>
> g) Any other factor which, in the opinion of the court, should be taken into account."[63]

In *Bail (A Practitioners Guide),* a book written by Van der Berg, the author criticizes the drafting of this subsection and states that:

> "what immediately strikes one about the wording of the subsection is the requirement that the 'interest of justice' should be weighed up against the 'right of the accused to his or her personal freedom': that is, the inadvertent presumption on the part of the legislature that the interest of justice are likely to be sought and found outside the accused rights to personal freedom. This of course is fundamentally unsound, as it is wholly conceivable that the accused's right to personal freedom should be in the interest of justice (more so in a constitutional democracy)."[64]

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[62] Ibid.

[63] Ibid.

[64] J Van der Berg *'Bail: Practitioners Guide'* 3 ed (2012) 3.

The research takes the view that section 60(9)[65] should have at least looked into prejudice to the accused only, and no balancing exercise was necessary, as the same is referred to in section 60(10). The question of the interest of the accused is also left unattended as the judicial officer is called upon to balance the interest of justice and the right of the accused to their personal freedom and the prejudice they are likely to suffer when bail is not granted. Section 60(10)[66] instead of being the actual balancing test, becomes an event*, even though the prosecution is unopposed to granting bail*.[67] Section 60(10) provides that

> "Notwithstanding the fact that the prosecution is not opposed to the granting of bail, the court has a duty, contemplated in subsection (9), to weigh up the personal interest of the accused against the interest of justice."

Whilst section 60(9)[68] refers to the weighing of the right to "personal freedom and, in particular, the prejudice the accused is likely to suffer [if he] is detained in custody" section 60(10)[69] refers to the personal interest of the accused and does not in any way include the prejudice the accused might suffer if he is further detained.

It is submitted that the weighing of the interest of justice should have been dealt with exclusively in section 60(10).[70] To open the sentence by stating that "Notwithstanding that the prosecution is not opposed to bail" is unnecessary because whether or not the prosecution is opposed to bail, the court has a duty to weigh the interest of justice against the interest of the accused. Section 60(9)[71] should exclusively deal with the personal freedom of the accused and the prejudice he might suffer if he is further detained. It is submitted that the legislature should have only enumerated the factors the court may consider when determining the prejudice the accused is likely to suffer if bail is denied. This would allow the court to look at the factors favourable to the accused independently before weighing them in the interest of justice.

The research argues that there should be no balancing of the interest of justice against the right of the accused in s 60 (9),[72] but the focus should be more on the interest of the accused, his right to liberty, and the prejudice that he is likely to suffer if bail is refused. Section 60(10)[73] should have been the test, and the evaluation exercise should commence in section 60 (10).[74] The factors in section 60(4)[75] read with section 60(5) -(8A)[76] must be balanced against those in section 60(9).[77] It is submitted that the evaluation process should be dealt with in this section. The section must not be limited to the situations where the state does not contest the release of the accused on bail.

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[65] Criminal Procedure Act 51 of 1977.
[66] Ibid.
[67] Ibid.
[68] Criminal Procedure Act 51 of 1977.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.

In *S v Mvambi* [78] the court stated that a court is vested with the discretion to grant or refuse bail. In exercising its discretion, the court has to consider all the evidence presented by the parties furthered by the submissions by the parties. It is submitted that whether or not the prosecution is opposed to bail is not relevant. The granting or refusal of bail is a judicial function. The court is not bound by the decision of the state not to oppose bail. The legislature should be clear in creating laws. The right to liberty is an important right and must be clearly protected and easily interpreted by the court. To enact legislation that requires the use of both a narrow and a broad approach doesn't conform with justice and might actually lead to injustice.

1.5. Exceptional Circumstances

There have been many different views from courts and writers as to what is meant by the words exceptional circumstances as envisaged in section 60(11) a of the Criminal Procedure Act.[79] Section 60 (11) deals with offences referred to in Schedule 6 of the Criminal Procedure Act,[80] and provides that:

> "notwithstanding any provision of this Act, where an accused is charged with an offence referred to in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exists which in the interest of justice permit his or her release".[81]

The case of *State v Mabena*[82] will assist the judicial officers with the correct application of the provisions of section 60(11)a of the Criminal Procedure Act.[83] The starting point is the case of *State v Dlamini*, where the constitutional validity of this subsection was challenged, and the court found that these provisions were valid.[84] The court, however, did not define what exceptional circumstances were.

The court stated that it was not convinced by the argument that the term exceptional circumstances was unclear to the extent that the applicants in a bail application did not know what to prove, and the court added that:

> "An applicant is given a broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, personal circumstances of the applicant, or anything else that is particularly cogent." [85]

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[78] *S v Mvambi* unreported case no A 113/2021 of 4 February 2022
[79] Criminal Procedure Act 51 of 1977
[80] Ibid.
[81] Ibid.
[82] *S v Mabena* 2007(2) SA 137(SCA).
[83] Criminal Procedure Act 51 of 1977.
[84] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[85] Criminal Procedure Act 51 of 1977.

The court stated that after establishing these circumstances, which are exceptional, the applicant must show that in the interest of justice permit that he be released on bail. The research takes the view the applicant can prove exceptional circumstances in three ways:

Firstly, the applicant can rely on the nature of the offence. Secondly, the applicant can rely on their personal circumstances; thirdly, the applicant can rely on anything particularly cogent.[86] Kriegler JA further confirmed that he disagreed with the approach that exceptional circumstances are circumstances different from those listed in section 60 (4)-(9) of the Criminal Procedure Act.[87] He alluded to the fact that the applicant can also rely on his or her emotional condition, which causes it to be in the interest of justice that he be granted bail. The research

[86] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[87] Criminal Procedure Act 51 of 1977.

takes the view that ordinary circumstances can be considered exceptional, depending on each case's facts. The case of *State v Coetzee*[88] also adopted the approach favouring that ordinary circumstances can be viewed as exceptional circumstances.[89] This is contrary to the approach adopted by the court in *State v Peterson.*[90]

In *State v Peterson*,[91] Judge Van Zyl stated that:

> "on the meaning and interpretation of exceptional circumstances in this context there have been wide ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking, exceptional is indicative of something unusual, extra ordinary, remarkable, peculiar or simply different. There are of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or deference. This depends on the context and peculiar circumstance of the case under consideration."[92]

Judge Van Zyl had a different view about exceptional circumstances, as stated above, and his view is not new in South African law. The same approach is found in the judgment by Holmes AJ in the case of *State v Jonas*.[93]

Holmes AJ in the *State v Jonas*[94] case stated that the word exceptional means something out of the ordinary and stated that:

> "the term exceptional circumstances are not defined. There can be as many circumstances which are exceptional as the term in essence imply. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another.it would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence he did not commit could be viewed as an exceptional circumstance. Where a man is charged with a schedule 6n offence when everything points to the fact that he could not have committed the offence because, e.g. he has a cast iron alibi, this would likewise constitute an exceptional circumstance."[95]

The circumstances used to elaborate what will constitute exceptional circumstances in the case of *S v Jonas*[96] relates to something unusual, peculiar, or different, as stated in the case of *State* v *Peterson.*[97] The research believes that this approach needs to be revised to conform to constitutional norms, and it needs to be in line with the judgment of S*tate v Dlamini.*[98] Ordinary circumstances can be viewed as exceptional circumstances; the judgment in the case of *State v Coetzee* confirms this.[99] The court stated, "There is no reason to believe that courts will find it impossible to find that release on bail is justified where an ordinary circumstance is present to

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[88] *S v C* 1998 (2) SACR 721 (C).
[89] Ibid.
[90] *S v Peterson* 2008(2) SACR 355 (C).
[91] Ibid.
[92] Ibid.
[93] *S v Jonas* 1998 (2) SACR 673 (SE).
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] *S v Peterson* 2008(2) SACR 355 (C).
[98] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC)
[99] *S v C* 1998 (2) SACR 721 (C).

an exceptional degree."[100] The court stated that the word exceptional can have two meanings, namely, a primary and a secondary meaning.

- "The primary meaning is unusual or different.
- The secondary meaning is markedly unusual [and significantly] different."

The court believed that both meanings were applicable and no one meaning should not be preferred over the other.

Conradie J found that:

> "the ordinary circumstances-those I have enumerated above-apparently no longer suffice. An alleged offender must now be detained even though he can conclusively show that he will stand trial, will not interfere with the administration of justice, and will not offend further."[101]

Conradie AJ disagreed with the approach that ordinary circumstances do not suffice anymore and took the approach that if the applicant can prove that he will not abscond but will attend his trial, that he will not interfere with the administration of justice, and that he will not commit further offences, this would suffice to constitute exceptional circumstances. Conradie AJ stated that requiring more from the applicant for bail will defeat the purpose of bail, which is securing the attendance at court of an accused on bail.

The research concurs with the case of *State v C*[102] which holds that to accept that the bail applicant must prove something out of the ordinary would defeat the whole purpose of bail. Bail cannot be refused where the applicant has shown, to the satisfaction of the court, that:

- He will return to court on a specific date and time stipulated by the court
- He will not interfere with the state witnesses
- He will not "interfere with the administration of justice or [undermine] the criminal justice system, including the bail system."[103]

If the accused is required to prove more than what is needed for bail, then this will be impairing on his rights to a fair trial, which include:

- The right to be presumed innocent until proven guilty by a court of law;
- The right to be released on bail if the interest of justice permits;
- The right not to be detained without trial.[104]

The gravity of the offence is indeed a factor to be considered by the court but cannot stand as the decisive factor in refusing bail.

Another way to show exceptional circumstances is when the accused is able to prove that he will be acquitted in the subsequent trial. The standard of proof that he must meet is proof

[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Section 60(4) d of the Criminal Procedure Act 51 of 1977
[104] Section 12 of the final Constitution of the Republic of South Africa,1996.

beyond a balance of probabilities. In this instance, the accused proves that the state's case against him is lacks merit.[105] In *State v Mazibuko*[106] the court stated that to prove exceptional circumstances based on the quality of the accused's defence to the charge, he would have to prove that his defence stood an exceptionally good chance of succeeding at trial.

The applicant who relies on the weakness of the state case as an exceptional circumstance cannot just allege that the state case is weak; he must show that he is likely to be acquitted in the subsequent trial.[107] In *S v Botha en 'n Ander*[108] the court held that to "successfully challenge the merit of the state case in bail proceedings, the applicant needs to go further; he must prove on the balance of probabilities that he will be acquitted of the charge."

The court further stated: "nor is an attack on the prosecution case necessary to discharge the onus; the applicant who chooses to take that route must make his own way and not expect to have it cleared for him." [109]

This research will undertake a critical evaluation of the concept of exceptional circumstances within the context of the evidence evaluation process in bail applications. The case of *State v Mabena*[110] is the main focus in the analyses of the term exceptional circumstances and the clarification of the procedure to be followed in leading evidence.

1.6. Bail on new facts

Granting or refusing bail is discretionary. The court may refuse bail where it finds that the interest of justice does not permit the release of the accused on bail or where the court finds that exceptional circumstances, which in the interest of justice permit the release of the accused on bail, do not exist.[111]

The court, in the case of *State v Davis*[112] confirmed that there is no absolute right in favour of the accused to be released on bail. The release of the accused is subject to the interest of justice.[113] In *State v Davis* court stated as follows "the Constitution doesn't grant an offender an absolute right to personal freedom. Liberty is qualified and circumscribed."[114] In my view, the duty of those presiding over bail applications has become far more onerous since 1994 since judicial officers are now expressly enjoined by the provisions of section 60 of the Act not to be passive."[115] The right in section 12 of the Constitution, like all other rights in the Bill of Rights can be limited in terms of section 36 of the Constitution.[116]

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[105] *S v Mazibuko and others* 2010 (1) SACR 55 (KZP).
[106] Ibid.
[107] Ibid.
[108] *S v Botha en 'n Ander* 2002(1) SACR 222(SCA).
[109] Ibid.
[110] *S v Mabena 2007 (2) SA 137 (SCA)*
[111] Section 60(4) and section 60(11) a and b of the Criminal Procedure Act 51 of 1977.
[112] *State v Davis* unreported case no: 2888/2015 of 8 May 2016.
[113] Section 60(4) of the Criminal Procedure Act 51 of 1977.
[114] *S v Davis* unreported case no: 2888/2015 of 8 May 2016.
[115] *State v Davis* unreported case no: 2888/2015 of 8 May 2016.
[116] Final Constitution of the Republic of South Africa.

Section 65 of the Criminal Procedure Act deals with bail on new facts and bail appeals.[117] The case of *State v Davis*[118] will be used in Chapter 3 to show the difference between bail on new facts and bail appeals. The requirements that must be met to determine whether the facts are indeed new will also be dealt with in Chapter 3. This chapter will, however, set out the provisions of section 65 of the Act.

Section 65 of the Criminal Procedure Act also deals with bail on new facts.[119] The Criminal Procedure Act does not directly provide for the procedure to be followed when an accused person wishes to apply for bail. However, section 65(2) provides that:

> "An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts."[120]

Section 65(2) of the Criminal Procedure Act compels an applicant who wishes to lead new evidence supporting his bail application, which was previously refused, to present it before the presiding officer who refused his initial bail application.[121] It is submitted that the applicant must first present that evidence to the court that refused bail to lead new evidence in the appeal proceedings.

Although the Act does not set out what constitutes a new fact, the legal principles have long been formulated by courts. New facts must be interpreted in the sense that these are facts that arise after the initial bail is refused. They must not have existed at the time of the refusal of the first bail application.

The case of *State v Davis*[122] and *State v Peterson*[123] will be used to outline the requirements that must be met to determine new facts. The court in *State v Peterson*[124] stated that where an accused alleges that he has new facts, the court must be satisfied "firstly that such facts are indeed new and secondly, that they are relevant to purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it."[115]

The case of *State* v *Davis* is also used in this research to analyze how South African courts are applying the requirements relating to bail on new facts. The focus will be to show that the evidence must be evaluated together with the evidence presented in the initial bail application.

1.7. Research questions

i. How must section 50(6) d read with 60(3) be applied, and how must a presiding officer deal with bail postponements?
ii. What does the term interest of justice mean how must it be interpreted to give it the correct meaning intended by the legislature?

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[117] Criminal Procedure Act 51 of 1977.
[118] *S v Davis* unreported case no: 2888/2015 of 8 May 2016.
[119] Criminal Procedure Act 51 of 1977.
[120] Section 65 of the Criminal Procedure Act 51 of 1977.
[121] Criminal Procedure Act 51 of 1977.
[122] *State v Davis* unreported case no: 2888/2015 of 8 May 2016.
[123] *S v Peterson* 2008 (2) SACR 355 (C).
[124] Ibid.

iii. What do exceptional circumstances mean, and how must the court evaluate evidence in deciding on this issue?

1.8. Research Objectives

- To examine the application of Section 50(6)(d) read with Section 60(3) in the context of bail postponements and the role of the presiding officer in such cases.
- To interpret the term "interest of justice" within the legal framework and analyze how it should be understood to align with the intended meaning of the legislature
- To explore the meaning of "exceptional circumstances" and evaluate how courts assess and interpret evidence when deciding on this issue.

1.9. Review of the related literature

While existing literature has extensively explored the legal framework and procedures surrounding bail applications in South Africa, there is a notable gap in research examining the evaluation process of evidence presented in bail applications. Specifically, few studies have investigated the challenges and complexities presiding officers face when assessing evidence in bail applications, or the impact of these evaluations on bail outcomes. Moreover, existing research has not adequately addressed the role of presiding officers in evaluating evidence, nor have they provided recommendations for improving the evaluation process. This study aims to fill this gap by exploring the evaluation process of evidence in bail applications, identifying challenges and complexities, and providing recommendations for reform.

In Bail (A Practitioners Guide), a book written by Van der Berg,[117] there is no chapter dealing with the duties and functions of the court in a bail application. The authors in different chapters state these duties in a scattered and vague fashion. The research takes the view that these duties and functions are scattered, confusing what is expected from a presiding officer. The author should have included the judicial role in the topic.

The interim Constitution[118] and final Constitution[119] do not expressly refer to the duties of the court during the bail application. Section 25(2) d of the interim Constitution[125] provided

> "that every person arrested for the alleged commission of an offence has a right to be released with or without bail unless the interest of justice requires otherwise."[126]

No clear guidelines as to the functions of the court during the application were stated, and the guidelines as to postponements of bail applications, what would be viewed as the interest of justice, and the meaning of exceptional circumstances were not stated. The current Constitution in section 35(f) provides that:

> "everyone who is arrested for allegedly committing an offense has the right to be released from detention if the interest of justice permits, subject to reasonable conditions."[127]

[125] The interim Constitution of the Republic of South Africa.
[126] Ibid.
[127] Constitution of the Republic of South Africa, 1996.

The Criminal Procedure Act also has the same provisions in section 60(1) a and section 60(4) also refer to the interest of justice.[128] The Act does have duties for judicial officers regarding bail and associated issues, but they are scattered. The research takes the view that the implementation of these duties will become easier if they are harmonized.

The court must balance the interest of justice and the right of liberty of the applicant in terms of section 60(10) of the Criminal Procedure Act.[129] The balancing process is left to the judicial discretion, presenting problems in practice. The research takes the view that section 60(9) should have dealt with the interests of the accused exclusively.[130]

The modus operand of failing to give proper guidelines to the judges and magistrates is evident in the Constitutional Court case of *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat.*[131] The court lays the guidelines everywhere in the judgment and does not in any way help in looking deeply into what is required from the judicial officers. The research believes that this is a problem, especially in practice, which was resolved through this research. It would be an incorrect approach to assume that by the duties both in legislation and common law in the judgment that presiding officers know what to do. What is clear, though, is that the court, "when interpreting any legislation and developing the common law, must promote the spirit, purport, and objects of the Bill of Rights" (section 39(2) of the Constitution).[132] This goes to the crux of the evaluation process.

Mahlubandile Ntontela in 'Striking a balance in bail proceedings: how does the court determine the interest of justice?'[133] looks at this topic from a different view. He looks at the duties of the court during a bail application but only where the interest of justice must be determined. The author analyses these duties briefly and does not look at the shortcomings of the Constitutional Court in *S v Dlamini,*[134] nor does the author examine the scattered duties to clarify the position or make recommendations. Mr. Ntontela repeats the position in law and analyses the amendments. I respectfully submit that so much was left out. The research believes this does not help the judiciary in any way. The article further does not view the provisions of section 60 as problematic.[135] This research will close the gap created in the article.

Mzwandile Reuben Matshoba in "Bail and the Presumption of Innocence: Critical analysis of section 60(1-11) of the Criminal Procedure Act"[136] concentrates mainly on the analysis of the provisions of the Act and the right to presumption of innocence. In his thesis, he excellently deals with the provisions of section 60(1-11) but doesn't look at the implementation of these provisions by the judiciary.[137] There is no topic on the judicial role, with the author thereby making the same error that the Constitutional Court and the Legislature did. Mr. Matshoba outstandingly analyses the right to presumption of innocence in general. The court's duty is

[128] Criminal Procedure Act 51 of 1977.
[129] Criminal Procedure Act 51 of 1977.
[130] Ibid.
[131] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[132] Constitution of the Republic of South Africa,1996.
[133] Criminal Procedure Act 51 of 1977.
[134] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[135] Criminal Procedure Act 51 of 1977.
[136] M R Matshoba *Bail and the presumption of innocence: Critical analysis of section 60(1-11) of the Criminal Procedure Act 51 of 1977 as amended* (Unpublished LLM thesis, University of western cape)2012.
[137] Criminal Procedure Act 51 of 1977.

also highlighted, but only in so far as it relates to the presumption of innocence. This research goes beyond and above the argument in his thesis. It highlights the shortcomings in the constitutional court's judgment and section 60 of the Criminal Procedure Act.[138] The concern of this research is not the assessment of the presumption of innocence but the judicial role in the bail application.

The journal article by Clement Marumoagae & Boyane Tshehla[139] looks at the prejudice towards the accused, not the judiciary. The research is almost the same as the previously discussed research, but the authors illustrate the prejudice towards the accused created by the amendment to the Criminal Procedure Act. While this research agrees with the journal article in many respects, it goes without saying that if the accused is prejudiced, then the judiciary is not only compromised but that the court has been left in the darkness. The research is concerned with the clarity of the constitutional judgment when this journal article sides with accused persons, and it is of the view that the scales are not balanced. The judiciary's function is to decide the undefined exceptional circumstances while the scales are unbalanced. If the accused person is charged with a Schedule 6 offence he must prove something "unusual, rare, or peculiar" to be granted bail, then the task of the judiciary is even more complicated; since the court must determine what is not defined, the court must make the findings of what has not been found, balance something which has no balance, determine the impossible.

The judiciary has its voice silenced by a judgment with scattered demands. The court's authority is affected by the failure of the judges and magistrates to speak in the instances where they are being suffocated.

1.10. Research Methodology

In this desktop research, a critical analysis methodology will be implemented. The primary sources of information will be legislation, case law, journals, and textbooks. It is a non-empirical study. The dissertation is qualitative research.

1.11. Structure of the dissertation

Chapter 1: Introduction and Overview

This chapter introduces and summarizes each chapter. The chapter entails the research methodology applied in the dissertation, particularly the literature review. This chapter will focus on the objectives, essential questions, reason for the research, and recommendations. In short, the chapter will pave the way for all other remaining chapters.

Chapter 2: Postponements in Bail Proceedings

This chapter will focus on postponements of bail proceedings in court to allow the state to verify the details of the accused. The focus will mainly be on section 50(6)d of the Criminal Procedure Act[140]. The case of S*tate v Majali*[141] will be used to illustrate how the court should deal with postponements of bail. The case of S*tate v Majali*[142] will be used to critically analyses

[138] Criminal Procedure Act of 1977.
[139] C Marumoagae & B Tsehla Right to bail? Odds Stacked against the Accused in South African bail *law* 2019 35(3) *South African Journal on Human Rights* 257.
[140] Criminal procedure Act 51 of 1977.
[141] *State v Majali* unreported case no: 41210/2010 of 19 July 2010.
[142] Ibid.

the procedure to be followed in the application for a postponement and how the court should evaluate the evidence. The research will favour the view of giving both parties an opportunity to be heard in the application before the ruling is made as opposed to the approach that the state is entitled to a postponement for bail.

Chapter 3: Interpreting Key Concepts in Bail Proceedings

Chapter 3 deals with the interpretation of the term interest of justice and exceptional circumstance. This chapter critically analyses the term interest of justice, and how it should be interpreted by presiding officers and will further deal with the provisions of sections 60(4) and 60(9) of the Criminal Procedure Act.[143] The broad approach and the narrow approach are canvassed. Both these approaches will be dealt with in chapter three. The research will critically analyse both these terms with the intention of showing the reader that they are very simple and straightforward. The case of S*tate v Mabena*[144] will also illustrate how presiding officers still need to properly apply the provisions of section 60(11) a of the Act.[145]

This chapter will further critically analyse bail on new facts. It will state the basic principles which the Constitutional Court left out in the case of *State v Dlamini*[146] on the question of bail on new facts. The case of *State v Davis*[147] will be used to critically analyses the provisions of section 65 of the Criminal Procedure Act.[148] This chapter will only concentrate on instances where bail has been refused and the applicant wishes to apply for bail on new facts.

Chapter 4: Conclusion and Recommendations

Chapter 4 is the conclusion, and recommendations will be made to the legislature to simplify the evaluation of evidence in bail applications; a task undertaken by the presiding judicial officers.

[143] Criminal Procedure Act 51 of 1977.
[144] *S v Mabena* 2007(2) SA 137(SCA).
[145] Criminal Procedure Act 51 of 1977.
[146] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[147] *State v Davis* unreported case no: 2888/2015 of 8 May 2016. [145]
[148] Criminal Procedure Act 51 of 1977.

CHAPTER 2: POSTPONEMENT OF BAIL HEARINGS

2.1. Introduction

This study examines the evaluation process of evidence presented in bail applications in South Africa, a critical stage in the criminal justice system where the use of evidence is often contentious. Despite its importance, the bail application process has been criticized for being complex and unpredictable, with concerns raised about the reliability and admissibility of evidence presented. This research aims to investigate the challenges and complexities surrounding the evaluation of evidence in bail applications, with a focus on the roles and responsibilities of presiding officers, to identify areas for improvement and inform efforts to enhance the fairness, efficiency, and effectiveness of the bail application process.

Postponements of bail applications often bring a problem in practice, especially when viewed together with the urgency of the application. They delay the determination of whether or not a bail application should be granted. Postponements also tend to frustrate a person accused of committing an offense. The right to be presumed innocent is also impaired because the Constitution provides the right to be presumed innocent.[149] By postponements of bail applications, the accused remains in prison pending their bail application before being found guilty of any offence. The courts are tasked with deciding whether or not to grant postponements and ensuring that bail applications remain urgent.[150] Section 50(6)(d) of the Criminal Procedure Act[151] deals with bail postponements; however, this section must be read in conjunction with section 60(3) of the Criminal Procedure Act.[152]

The research will critically analyse the provisions of section 50(6) d of the Criminal Procedure Act. The case of *Hans v District Court Magistrate, Cape Town and Others*[153] will be discussed to show that the legislature sets a time limit for presiding officers tasked with postponing bail applications. It is submitted that the time period guides the court to determine how long the postponement will be. The court when evaluating evidence that relates to the period of postponement must ensure that the period of a postponement does not exceed seven (7) days at a time.[154]

The research will also deal with the ruling in the case of *State v Majali*.[155] In *S v Majali*[156] the court dealt mainly with the principles of law relating to postponements of bail applications.

[149] Section 35(3)(h) of the Constitution of the Republic of South Africa, 1996.
[150] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[151] Criminal Procedure Act 51 of 1977.
[152] Ibid.
[153] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).
[154] Section 50(6)d of the Criminal Procedure Act 51 of 1977.
[155] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[156] Ibid.

The research favours an approach that respects the right to liberty and the urgency of the application when dealing with postponements and bail applications in general. In this chapter, a critical analysis of the various cases on the topic will be explored, and the research takes a firm view that the urgent nature of bail applications should always be noted and respected. The state and the defence should be afforded equal opportunity to present evidence, and the presiding officer is tasked with evaluating such evidence before granting or refusing a bail application. The starting point is to examine the provisions of section 50(6) d of the Criminal Procedure Act.[157]

Section 50(6)(d) of the Criminal Procedure Act[158] provides that bail applications can be postponed and sets out the criteria for evaluating the evidence relating to such a postponement. The court must decide whether or not the bail application should be postponed. This chapter will deal with what the provisions of section 50(6)(d) of the Criminal Procedure Act[159] entail and will discuss the criteria to be used in deciding whether or not to grant the postponement.

Section 50(6)(d) of the Criminal Procedure Act[160] confers power on presiding officers to postpone bail applications. A bail application must be heard urgently by the court.[161]

The opening words of section 50(6)(d) of the Criminal Procedure Act are important and must be critically analysed during the discussion of the case of *State v Majali*.[162]

Section 50(6)(d) of the Criminal Procedure Act states that:

> "[the] lower court before which a person is brought in terms of this subsection may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not [inconsistence] with this Act."[163]

2.2. Period of the postponement

The court is empowered to postpone a bail application to any date or court, and the postponement must be for a period not exceeding seven (7) days at a time.[164] In the case of *Mashilo v Princeloo,*[165] the court stated that an arrested person must be brought to court as soon as reasonably possible after being arrested and also so that they can apply for bail. It is submitted that bail applications are urgent and should be dealt with as soon as reasonably possible. It is for that reason that section 50(6)(d) of the Criminal Procedure Act[166] empowers the court to postpone the bail application and limits the period for which bail can be postponed, namely seven (7) days at a time.

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[157] Criminal Procedure Act 51 of 1977.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[162] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[163] Criminal Procedure Act 51 of 1977.
[164] Section 50(6)(d) of the Criminal Procedure Act 51 of 1977.
[165] *S v Mashilo* 2013 (2) SACR 648 (SCA).
[166] Criminal Procedure Act 51 of 1977.

In *Hans v District Court Magistrate, Cape Town and Others*[167] the court dealt with an application for review of the postponement of bail for more than the period of seven (7) days at a time, as contemplated in section 50(6)(d) of the Criminal Procedure Act.[168]

2.3.Facts: Hans v District Court Magistrate, Cape Town and Others

The applicant was arrested on 04 October 2019 and first appeared in court on 07 October 2019.[169] The state informed the court that his release on bail was opposed and alleged that the charge fell within the ambit of schedule 6 of the Criminal Procedure Act.[170] The matter was then adjourned by agreement to 12 November 2019 for the formal bail application.[171] The applicant decided to change his lawyer and was then advised of the provision of section 50(6)(d) of the Criminal Procedure Act,[172] in particular, that it was incorrect for the court to postpone his bail application for more than seven (7) days.[173]

The new attorney approached the senior magistrate on 23 October 2019 to have the accused requisitioned for bail.[174] The magistrate was convinced he was not empowered to requisition an accused and advised the attorney to approach the senior public prosecutor.[175] The prosecution should have entertained the request by the attorney on 24 October 2019 to have the accused brought to court the following day.[176] The attorney then drafted a written request for the accused to be brought to court on 28 October 2019 for a date to be set for bail within a week.[177] In the request, the defence averred that should the state fail to comply with the request, the applicant would approach the High Court urgently to compel the prosecution to comply.[178] On 28 October 2019, the defence approached the High Court after the state had failed to comply with their request.[179]

The order sought by the applicant was a rule nisi calling upon the respondent to show cause on 01 November 2019 why the interim order could not be confirmed. In the interim order, the applicant prayed that:

> "The decision by the magistrate to postpone the bail application until 12 November 2019 was set aside.[180]

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[167] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).
[168] Criminal Procedure Act 51 of 1977.
[169] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC) at para 3.
[170] Criminal Procedure Act 51 of 1977.
[171] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC) at para 3.
[172] Criminal Procedure Act 51 of 1977.
[173] Ibid.
[174] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC) at para 5.
[175] Ibid at para 5.
[176] Ibid at para 5
[177] Ibid at para 5.
[178] Ibid at para 5.
[179] Ibid at para 6.
[180] Ibid at para 6.

> An order compelling the respondent to take steps and ensure that the applicant's bail application is heard before 01 November 2019.[181]
>
> An order that should the respondent fail to comply and take steps to ensure that the bail application is heard, the applicant is to be released and warned for 12 November 2023."[182]

The order was granted in favour of the applicant, and the applicant was requisitioned for 31 October 2019.[183] The defence proceeded with the application on 31 October 2019, and the state could not proceed as there was no docket in court and the investigating officer was not present.[184]

The court extended the rule nisi until 05 November 2019. On 04 November 2019, the applicant was brought in late, and the matter was rolled over until 05 November 2019.[185] On 05 November 2019, the bail application proceeded and was postponed for judgment on 06 November 2019.[186]

2.4. Findings of the Court

The court relied on the case of *Minister of Law and Order v Hurley and Another,*[187] and concluded that for a postponement to be lawful, it must be on reasonable grounds.[188] The court stated that the presiding officer should have sufficient information to exercise its discretion on whether or not to postpone a bail application over the stipulated limit, which is seven days at a time.[189]

The court emphasized that continued detention over the stipulated period is unlawful unless it is necessary to allow the court to be furnished with sufficient information to decide on bail.[190] Thulare AJ stated that the presiding officer was expected to apply her mind to the postponement properly.[191]

The court alluded to the fact that the power to postpone a bail application lies solely with the presiding officers.[192] The presiding officers are tasked with deciding whether there is sufficient evidence to determine the bail question.[193] It is submitted that the magistrate must exercise discretion regardless of whether the postponement sought is by way of an agreement between the state and the defence.

Thulare AJ can be quoted stating that:

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[181] Ibid at para 6.
[182] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC) at para 6.
[183] Ibid at para 7.
[184] Ibid at para 7.
[185] Ibid at par 7.
[186] Ibid at para 7.
[187] *Minister of Law and Order v Hurley and Another* 1986(3) SA 568 (AD) at para 6.
[188] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC) at para 12.
[189] Ibid at para 12.
[190] Ibid at para 13.
[191] Ibid at para 13.
[192] Ibid at para 13.
[193] Ibid at para 1.

> "[w]hat is required from a magistrate is an honest exercise of a judicial discretion. A magistrate's decision cannot be impeached unless the court is satisfied, in all the circumstances of the case, that she did not properly apply her mind to the matter. In my view, it was not proper for the magistrate to postpone the bail application because of the agreement between the parties."[194]

The court was shocked by the postponement period but found that there was no mala fide motive that could be attributed to the magistrate in granting a postponement for more than seven (7) days. The period of bail postponement must be at most seven (7) days.[195]

It is submitted that the legislature gave the state the right to apply for a postponement. Still, the exercise of this right must be tested against the accused's interest to have his bail application heard as a matter of urgency. The accused must be allowed to oppose the application if he so wishes. The court must consider whether it has sufficient information at its disposal to reach the question of bail. The court must weigh the interest of justice against the accused's interest to be released on bail.[196]

The court remarked that it believed that detention of an accused person for a period longer than seven (7) days at a time was unlawful.[197] The court ordered that bail be heard as a matter of urgency. It is submitted that this approach is correct and that the accused's bail must be heard urgently.[198] The period of the adjournment in this matter is highly shocking and wrong.[199] The court should have considered the provisions of section 50(6)(d) and postponed the matter to any date within seven (7) days of the instant date.[200]

2.5. Section 50(6)(d)(i) of the Criminal Procedure Act 51 of 1977 provides that the court may postpone the application if:

> "[the court believes] that it has insufficient information at its disposal to [decide] on bail application."

The section is applicable where the state applies for the postponement and alleges that it has insufficient information to deal with bail application. The information usually relates to the accused previous convictions and pending cases, the verification of his address, and employment status. In *S v Majali*,[201] the court granted the application for the investigating officer to verify whether there were other pending cases against the accused.[202]

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[194] *Minister of Law and Order v Hurley and Another* 1986(3) SA 568 (AD) at para 14.
[195] Criminal Procedure Act 51 of 1977.
[196] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[197] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).
[198] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[199] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).
[200] Criminal Procedure Act 51 of 1977.
[201] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[202] Ibid.

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

Section 50(6)(d)(ii) of the Criminal Procedure Act[203] refers to the instance where the prosecutor informs the court that the matter has been referred to or will be referred to the Attorney General for issuing the written confirmation in terms of section 60(11) of the Criminal Procedure Act.[204] Section 60(11A)(a) of the Criminal Procedure Act[205] deals with a written confirmation which is issued by the Attorney-General, where he intends to charge the accused with an offence referred to in Schedule 5 or 6. The difference between the two sections is that section 50 (6)(d)(ii) deals with the application for a postponement of bail to obtain a written confirmation referred to in section 60(11)(A), while section 60(11)(A) provides a mechanism which seeks to make it easier for the prosecution to establish that the offence falls within the ambit of schedule 5 or 6 of the Criminal Procedure Act.[206] This certificate can be issued at any time during the criminal proceedings but before the accused pleads to the charge.[207] This certificate must be handed in court to be part of the court record and it amounts to prima facie proof that the offence either falls within the ambit of schedule 5 or 6 of the Criminal Procedure Act.[208] In *State v Mohammed*[209] the written certificate was issued and the defence argued that the certificate lacked details and the defence argued that the appellant should be allowed a reasonable opportunity to adduce evidence in line with the provisions of section 60 (11) of the Criminal Procedure Act.[210] The written confirmation is not peremptory, and the court confirmed this in the case of *State v Botha,*[211] where the court remarked that in the absence of the written confirmation, other avenues could be explored by the state to prove that the offence falls within the ambit of schedule 5 or 6.[212] Binns-Ward AJ in the case of *State v Joseph*[213] was reluctant to answer the question of whether compliance with section 60 (11A) of the Criminal Procedure Act[214] was peremptory but remarked that section 60 (11A) of the Criminal Procedure Act[215] must be closely adhered to. The failure to produce a written confirmation which, if produced, amounts to a prima face proof that the offence falls within the ambit of schedule 5 or 6 of the Criminal Procedure Act[216] does not complicate the work of the state. If

[203] Criminal Procedure Act 51 of 1977.
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Section 60(11A) (a) of the Criminal Procedure Act 51 of 1977.
[208] *S v Nwabunwanne* 2017(2) SACR 124 (NCK*)* and section 60(11A)(c) of the Criminal Procedure Act 51 of 1977, which provides that "whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offense referred to in schedule 5 or 6, a written confirmation issued by attorney-general under paragraph (a) shall, upon mere production at such application or proceedings, be prima facie proof of the charge to be brought against that person."
[209] *S v Mohammed* 1999 (2) SACR 507 (C).
[210] Criminal Procedure Act 51 of 1977.
[211] *S v Botha and Another* 1995 (2) SACR 605(W).
[212] *S v Botha and Another* 1995 (2) SACR 605(W).
[213] *S v Joseph* 2001(1) SACR 659(C).
[214] Criminal Procedure Act 51 of 1977.
[215] Ibid.
[216] Ibid.

no written confirmation is produced, the state must provide evidence to prove that the offence falls within the ambit of schedule 5 or 6.[217]

The researcher now turns to dealing with an application by the prosecutor to postpone a bail application to refer the matter to the attorney-general for the issuing of a written confirmation.[218] It is submitted that section 50(6)(d)(ii) of the Criminal Procedure Act[219] needs to be correctly drafted and must be revisited. The accused must be given a chance to lead evidence opposing the application for a postponement. Section 50(6)(d)(ii) of the Criminal Procedure Act[220] does not refer to the bail applicant or give any remedy as such to bail applicants; all the section does is give the right to the state to apply for a postponement to obtain the written confirmation. The right to be released on bail is tested against the interest of justice, not by what the prosecution informs the court. In the case of S*tate v Jaipal*[221] the court found that the right to a fair trial requires fairness to the accused, including those close to the accused, as well as to the state, which includes the public and those who are victims of crime. It is submitted that the right to a fair trial includes the right of those who are close to the accused, including his family and friends, who will be affected by the postponement of the bail application.

The legislature cannot take over the court's discretion on whether or not to grant the postponement. The wording "where the prosecutor informs the court[222]" in section 50(6)(d)(ii) of the Criminal Procedure Act[223] cannot be in line with the provisions of section 35(3)(f) of the Constitution.[224] The inquiry must be conducted, and evidence must be led. The court should be informed with certainty why the matter is being referred to the Attorney-General for the written certificate, and the applicant must be allowed to respond to such application and lead evidence if necessary. If it had to be accepted that by merely informing the court that the matter is or will be referred to the Attorney General, then a postponement must be granted, two problems as follows might arise.

Firstly, this would temper the court's discretion and duty to decide on postponements for bail applications. In *State v Majali,*[225] the court emphasized that whether or not to postpone the matter is discretionary. The legislature should not be allowed to dictate to the court what findings to be made in exercising the discretion of the court but rather recommend how the discretion should be applied. If the legislature were allowed to dictate to the judiciary in determining the postponements, this would amount to the intrusion by the legislature on the judicial authority, and that would not be in accordance with the separation of powers

[217] *S v Joseph* 2001(1) SACR 659 (C).
[218] Section 50(6) (d) of the Criminal Procedure Act 51 of 1977.
[219] Criminal Procedure Act 51 of 1977.
[220] Ibid.
[221] *S v Jaipal* 2005 (4) SA 581 (CC).
[222] Section 50(6) (d) (ii) of the Criminal Procedure Act 51 of 1977.
[223] Criminal Procedure Act 51 of 1977.
[224] Constitution of the Republic of South Africa, 1996.
[225] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.

doctrine.[226] The court should be allowed to apply its mind to the postponements and make a value judgment.[227] It is submitted that the approach where the legislature is seen to intrude on the judicial authority should be avoided.

Secondly, it will create a situation where the prosecutors can abuse these provisions, and the applicants would be prejudiced. The prosecution cannot decide on a postponement. Section 50(6)(d)(ii) of the Criminal Procedure Act[228] is drafted so that the court must do what the prosecutor says, and this approach is unfair to the accused. The case where the *audi alterum patem*[229] rule is neglected should be frowned upon and not accepted. The right to liberty must be unrestricted by what the state informs that court without evaluating such information against what the accused might say in response. It is suggested that the proper drafting of the provisions of section 50(6)(d)(ii) of the Criminal Procedure Act[230] should at least read as follows: 'notwithstanding the provisions of section 60(3) of the Criminal Procedure Act[231] the court may postpone a bail application to allow the State to obtain a written confirmation from the attorney-general confirming that the offence falls within the ambit of schedule 5 or 6 of the Criminal Procedure Act.'[232] Including section 60(3) of the Criminal Procedure Act[233]would allow the judiciary to have its authority intact without the intrusion by the legislature. Moreover, it will allow the accused to present evidence to oppose the application.

Thirdly, legal practitioners would have no choice but to accept the assertion by the prosecutor that the offence falls within the ambit of schedule 5 or 6 to avoid the postponement being granted.

The research takes the view that failure to address bail postponements in the case of *State v Dlamini*[234] does not help the judiciary, and this needs to be clarified. The Constitutional Court tasked with clarifying the question of bail should have addressed the postponements of such applications. The Constitutional Court in *State v Dlamini*[235] caused this confusion. In *State v Dlamini*[236] the court should have dealt with the requirements for a postponement or how the postponements should be dealt with.

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

Section 50(6)(d)(iv) of the Criminal Procedure Act 51 of 1977 states that the court may grant a postponement if:

> "[It appears to the court that providing] the State with a reasonable opportunity [is necessary].
>
> (aa) procure material evidence that may be lost if bail is granted or

[226] *Glenister v President of the Republic of South Africa and others* 2009 (1)SA 287 (CC).
[227] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[228] Criminal Procedure Act 51 of 1977.
[229] *Mdwaba v Nonxuba* unreported case no (5051/2015) delivered on 19 March 2018.
[230] Criminal Procedure Act 51 of 1977.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[235] Ibid.
[236] Ibid.

(bb) perform the functions referred to in section 37, or…"

These provisions will not be dealt with for this research because they are not usually relied upon in practice. The research mentions them because they also deal with a ground the state can rely on for applying for a postponement. Section 37 of the Criminal Procedure Act[237] gives powers to the police officer to make any person alleged of committing the crime "available, or cause such a person to be made available, for identification in such condition, position or apparel as the police may determine." The is irrelevant in these proceedings as it is rarely used in practice because they overlap with the provisions of section 50(6)(d)(v) of the Criminal Procedure Act.[238] Is submitted that section 50(6)(d)(v) of the Criminal Procedure Act[239] is much broader than section 50(6)(d)(iv) of the Criminal Procedure Act[240] because to allow the state to procure the evidence which is material and could be lost if the accused is released on bail and to perform function referred to in section 37 of the Criminal Procedure Act[241]is also covered by the words 'interest of justice' used in section 50(6)(d)(v) of the Criminal Procedure Act[242] as it will appear in the discussion below.

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

Section 50(6)(d)(v) of the Criminal Procedure Act 51 of 1977 provides that the court may grant a postponement if:

> "It appears to the court that it is necessary [to do so] in the [interest] of justice."

In *State v Block*[243] the court had to deal with a review after the magistrate had granted an application for a postponement in terms of section 50(6)(d) of the Criminal Procedure Act.[244] The state sought the application to present further information opposing the applicant's bail application. The judge made the following remarks;

> "[i]t is striking that both section 35(3)(f) of the constitution and section 50(6) d of the Act contains the interest of justice criterion. What must be determined is whether, in exercising his discretion to conclude that the interest of justice warrants a postponement, the magistrate's decision is reviewable. The interest of justice is a very wide concept."[245]

It is submitted that the narrow approach in interpreting the word "interest of justice" regarding whether a postponement should be granted needs to be corrected because it does not conform with the provisions of the Constitution,[246] where the words "interest of justice" are interpreted

[237] Criminal Procedure Act 51 of 1977.
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] *S v Block* 2011(1) SACR 622 (NCK) para 21.
[244] Criminal Procedure Act 51 of 1977.
[245] *S v Block* 2011(1) SACR 622 (NCK).
[246] Constitution of the Republic of South Africa Act, 1996.

to avoid prejudice to a bail applicant who seeks relief urgently.[247] The correct approach entails allowing both parties to present evidence as to whether or not the postponement should be granted. The legislature must only draw the court to favour the state and grant a postponement after adequately evaluating the evidence presented to it by both parties.

It is stated that the legislature had no intention to create an automatic right in favour of the state for the granting of such an application. An inspecting Judge of prison (Van Zyl) has noted that: "[j]udicial officers should….be careful to ensure that section 50(6)(d) of the Criminal Procedure Act[248] is not abused by the State."[249] It is submitted that the inquiry must be held to determine whether the state must be allowed to lead evidence to support the application for a postponement, and presiding officers must be strict when exercising their discretion. The court must hear evidence from both the state and the applicant, and the application must be substantiated with evidence. The legislature was also fair to the state in including the question of "interest of justice" in deciding the postponement in section 50(6)(d)(v) of the Criminal Procedure Act.[250] It is submitted that the words interest of justice are broad and give the state various grounds to apply for a postponement. The Constitutional Court in S*tate v Dlamini* [251] did not deal with how the interest of justice should be interpreted in section 50(6) (d)(v) of the Criminal Procedure Act.[252] The researcher believes that the words interest of justice in section 50(6)(d) of the Criminal Procedure Act[253] should be viewed in such a way that it includes the right of a bail applicant to liberty unless the right is limited in accordance with the provision of section 36 of the Constitution.[254] To view this section otherwise will amount to an intrusion on the urgency of the bail application. The applicant must be afforded a fair chance to oppose the application and lead evidence supporting his or her case in opposing the application.

Section 60 (2)(a) of the Criminal Procedure Act[255]provides that in a bail proceedings, the court may postpone the matter under section 50(6)(d) of the Criminal Procedure Act.[256]

This section must be read together with section 60(3) of the Criminal Procedure Act[257] which stipulates that:

> "[i]f the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to [decide] on the bail application, the presiding officer shall order that such information or evidence be placed before the court."[258]

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[247] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[248] Criminal Procedure Act 51 of 1977.
[249] Van Zyl 'Pre-trial Detention in South Africa: Trial and error in Van Kempton (ed) Pre-Trial Detention, Human Rights, Criminal Procedural Law and Penitentiary Law Comparative Law (2012) 676.
[250] Criminal Procedure Act 51 of 1977.
[251] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[252] Criminal Procedure Act 51 of 1977.
[253] Ibid.
[254] Constitution of the Republic of South Africa, 1996.
[255] Criminal Procedure Act 51 of 1977.
[256] Ibid.
[257] Ibid.
[258] Ibid.

2.9. The case of *State v Majali*

The approach used by the court in the interpretation and application of section 50(6)d of the Criminal Procedure Act[259] in the case of *State v Majali*.[260]

The case of *State v Majali*[261]is important authority which dealt with postponements and the interpretation of section 50 (6) d of the Criminal Procedure Act.[262] The court emphasised that the court must conduct an enquiry before deciding whether to grant the application for a postponement or not. The case of *State v Majali* [263]is discussed hereunder.

2.9.1. Facts of the case

In the unreported judgment of *State v Majali*, [264] the applicant was arraigned in the Johannesburg Commercial Court on a fraud charge. The state applied for a postponement in terms of section 50(6)(d) of the Criminal Procedure Act 51 of 1977. The purpose of the application was to verify whether the applicant had any previous convictions, pending matters, and outstanding warrants in his name.[265] The prosecution submitted that the applicant had similar cases in other jurisdictions, which include Durban, Johannesburg, Sandton, and Cape Town.[266]

The applicant was arrested after seeing in the Times newspaper that the police were looking for him.[267] He decided to employ the services of an attorney to verify this information.[268] The attorney contacted the prosecutor, who confirmed these allegations.[269] The prosecutor further confirmed that he was not opposed to the applicant's release on bail.[270] It was not in dispute that the applicant submitted himself to the police.[271]

Through his counsel, the applicant decided to lead evidence through an affidavit in his application to be released on bail.[272] In his affidavit, the applicant averred that he was a businessman with a reputation.[273] He had a fixed address and business address.[274] In compliance with section 60(11) B of the Criminal Procedure Act,[275] he submitted that he had

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[259] Ibid.
[260] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[261] Ibid.
[262] Criminal Procedure Act 51 of 1977.
[263] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[264] Ibid.
[265] Ibid at para 4.
[266] Ibid at para 4.
[267] Ibid at para 2.
[268] Ibid at para 2.
[269] Ibid at para 3.
[270] Ibid at para 3.
[271] Ibid at para 3.
[272] Ibid at para 5.
[273] Ibid at para 5.
[274] Ibid at para 5.
[275] Criminal Procedure Act 51 of 1977.

no previous convictions or pending matters.[276] He went on to state that he would not evade his trial and would not interfere with the state witnesses or the administration of justice if released on bail.[277]

The applicant opposed the application by the state for a postponement of the bail hearing in terms of section 50(6)(d) of the Criminal Procedure Act.[278] He requested that he be furnished with the relevant information relating to the offences in Durban, Sandton, Johannesburg, and Cape Town.[279] He further requested to be furnished with the names of the investigating officers and the case numbers of these alleged fraud cases being investigated against him.[280] The applicant's counsel argued that the application was not substantiated and that the state could not lawfully justify the further detention of the applicant.[281] He further argued that the state had ample opportunity to verify whether or not these cases of alleged fraud existed and that such lack of information was due to the negligence of the state and could not be used as a bar to the accused right to bail.[282]

It is submitted that due to judicial confusion regarding the application of section 60(3) of the Criminal Procedure Act,[283] the presiding officer granted the postponement.[284] The granting of a postponement was even though the investigating officer, Captain Nhlapho, was present in court but did not testify in support of the state application.[285] This means the application was granted without a proper inquiry being held. There was no inquiry supporting the granting of the application.[286] It is submitted that the state must provide evidence as to why the application for a postponement should be granted.[287]

The applicant was aggrieved by the order for a postponement in terms of section 50(6)(d) of the Criminal Procedure Act[288] and approached the High Court urgently for an order that he be released on bail.[289] The High Court acceded to this application and granted the applicant bail.[290]

In the High Court, Captain Hlapho gave testimony and confirmed that he was not, *per se*, opposed to the applicant's release on bail.[291] He further confirmed that he had received information that the applicant was linked to other fraud cases.[292] He also alluded that these matters were unrelated to the charges the applicant was facing.[293] The other fraud cases were

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[276] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011 at para 5.
[277] Ibid at para 5.
[278] Criminal Procedure Act 51 of 1977.
[279] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011 at para 6.
[280] Ibid at para 6.
[281] Ibid at para 7.
[282] Ibid at para 7.
[283] Criminal Procedure Act 51 of 1977.
[284] Ibid at para 8.
[285] Ibid.
[286] Ibid at para 8.
[287] Ibid at para 5.
[288] Criminal Procedure Act 51 of 1977.
[289] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011 at para 11.
[290] Ibid at para 1.
[291] Ibid at para 9.
[292] Ibid at para 9.
[293] Ibid at para 9.

being investigated in Sandton, Cape Town, and Durban. The reason for the postponement was to investigate and verify this information.[294]

In his testimony, Captain Hlapho informed the court that he had no information regarding the nature of these cases save to say they were fraud cases.[295] He also had no names of the investigating officer or case numbers.[296] His information was that there were four fraud charges being investigated in Sandton police station and that the complainant was the financial service board.[297] He was not aware of any outstanding warrant of arrest against the applicant.[298]

The applicant requested the court, through his counsel, to exercise its inherent jurisdiction and release the applicant on bail.[299] The exercise of inherent jurisdiction was based on the fact that proceedings were already pending in the lower court. The High Court, by entertaining the matter, was using the inherent jurisdiction it has.[300] The High Court has a duty under common law[301] and also in terms of section 166 of the Constitution[302] to intervene in uncompleted bail applications and also to supervise the conduct of proceedings in the magistrate court.[303] The power to intervene in uncompleted bail applications is exercised in special matters, where grave injustice might occur if the court does not intervene.[304]

2.9.2. Nature of the charges against the accused

The complainants were Dephney Mashile Nkosi and Brain Amos Nkosi and Kalahari Resources (Pty) Ltd and or the majority of the shareholders put out and presented to the companies and Intellectual Property Registration Office. The allegations were that on 27 August 2010, the applicant had committed an offence of fraud by pretending that accused no 6 (South African Community Government Union) was authorized to pass a resolution disqualifying the complainant as a director of Kalahari Resources (Pty) Ltd and appointing the applicant and four other applicants as a director of Kalahari Resources (Pty) Ltd.[305]

The accused and others committed the offence in execution or furtherance of a common purpose.[306]

2.9.3. Legal Principles applicable in this case

Section 60(1) of the Criminal Procedure Act provides that:

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[294] Ibid at para 9.
[295] Ibid at para 8.
[296] Ibid at para 9.
[297] Ibid at para 10.
[298] Ibid at para 10.
[299] Ibid at para 11.
[300] Ibid at para 14.
[301] Ibid at para 14.
[302] Constitution of the Republic of South Africa, 1996.
[303] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011 at para 14.
[304] Ibid at para 14.
[305] Ibid at para 12.
[306] Ibid at para 12.

> "[a]n accused [person] who is in custody in respect of the offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding [their] conviction in respect of such offence if the court is satisfied that the [interest] of justice so [permits]."[307]

It is submitted that the legislature intended to reintegrate the provisions of the Constitution[308] into section 60 of the Criminal Procedure Act.[309]Section 35(3)(f) of the Constitution provides that every person arrested for committing a crime can be released from jail if the interest of justice permits, subject to reasonable conditions.[310] The difference between section 50(6)d of the Criminal Procedure Act[311] and the Constitution[312] is the inclusion of the provisions of section 50(6)(d) of the Criminal Procedure Act.[313] It is submitted that no judicial role is clarified or referred to in section 60(1) of the Criminal Procedure Act.[314] The legislature calls upon presiding officers to determine the undefined interest of justice, which applies even to postponements.

On the other hand, section 60(1)(b) of the Criminal Procedure Act[315] is directed to the judiciary's role and refers mainly to the court's jurisdictional power during the bail application. It is submitted that the jurisdictional powers of the court hearing the bail application were clarified by the legislature. The court of first instance retains the power to hear the bail application regardless of the matter being transferred to any other court. Section 60(1)(b) of the Criminal Procedure Act provides:

> "[t]hat subject to the provisions of section 50(6) c, the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions, and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time."[316]

The question as to whether the court transferring a matter can still entertain a question of bail was answered in the affirmative in the case of *S v Mzatho and others*,[317] where the court held that the court of first instance still possesses a concurrent jurisdiction with the high court or regional court regarding the bail application. It is submitted that even after the accused has appeared in court where the matter was transferred, the court which transferred the matter still retains jurisdiction regarding bail applications.

The legislature speaks directly to the judiciary in section 60(1)(c) of the Criminal Procedure Act.[318] The legislature made it mandatory for the court to descend into the arena and enquire about the question of bail. The duty to enquire whether or not the accused wishes to be released on bail exists regardless of whether the accused or the state brings it up for the court to evaluate

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[307] Criminal Procedure Act 51 of 1977.
[308] Constitution of the Republic of South Africa Act, 1996.
[309] Criminal Procedure Act 51 of 1977.
[310] Section 35(3)(f) of the Constitution of the Republic of South Africa, 1996.
[311] Criminal Procedure Act 51 of 1977.
[312] Constitution of the Republic of South Africa Act, 1996.
[313] Criminal Procedure Act 51 of 1977.
[314] Ibid.
[315] Ibid.
[316] Ibid.
[317] *S v Mzatho and Others* 2007(2) SACR 309 (T).
[318] Criminal Procedure Act 51 of 1977.

that possible release. In *S v Ngwenya*, the court held that the court must enquire from an accused who is not represented whether they wish to apply for bail and to explain the procedure to be followed when the accused wishes to apply for bail.[319] It is submitted that the provisions of section 60(1)(c) of the Criminal Procedure Act[320] are in line with the Constitution.[321] Section 12(1)(a) of the Constitution provides that:

> "Everyone has a right to freedom and security of [a] person [and this] includes the right not to be deprived of freedom [arbitrary] or without just cause."[322]

It is submitted that the court, even before the Constitution[323] came into operation had already developed the law relating to bail by placing a duty upon presiding officers to enquire about the question of bail; the inquisitorial role of the court bestowed on it by common law states that where the prosecution or the defence does not raise the question, the court must enquire whether the accused wishes to apply for bail.[324] The right to freedom of a person is fundamental, taking into account the history of South Africa and section 12 of the Constitution. [325] Section 12 of the Constitution [326] provides that a person cannot be detained without a just cause. The state seeking to apply for further detention of the accused must ensure that they adduced evidence which justifies further detention of the accused. It is submitted that the court must, as a matter of principle, immediately see whether the parties raise the question of bail. It remains the court's duty to ensure that the rights enshrined in the Constitution are observed regardless of whether the question of bail is raised.[327] It is submitted that nothing prevents the court from initiating the question of bail at the first appearance and immediately after the rights of the accused to legal representation are explained.

It is submitted that when the law was developed, everyone was new to the regime of constitutional supremacy, a new legislature, and not just law enforcement officers. The ruling party was new but was obliged to determine democracy and the rights of the people of South Africa. It is fair to argue that the lawyers, prosecutors, and presiding officers, who already knew the law and how it should be implemented, needed clarification. The legislature, as well as the judiciary, was not immune to such confusion.

Section 60(2) of the Criminal Procedure Act[328] provides that:

> "[i]n bail proceedings, the court
>
> May postpone any such proceedings as contemplated in section 50(6) d;

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[319] *S v Ngwenya* 1991 (2) SACR 520 (T).
[320] Criminal Procedure Act 51 of 1977.
[321] Constitution of the Republic of South Africa Act,1996.
[322] Ibid.
[323] Ibid.
[324] *S v Ngwenya* 1991(2) SACR 520 (T).
[325] Constitution of the Republic of South Africa Act, 1996.
[326] Ibid.
[327] Section 60(1)(c) of the Criminal Procedure Act 51 of 1977.
[328] Criminal Procedure Act 51 of 1977.

> May, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;
>
> May, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;
>
> Shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection 11(a) and (b), require the prosecutor to place on record the reasons for not opposing the bail application."[329]

Section 60 (2A) provides that the court must, before deciding on the bail application, consider "any pre-trial [service] report regarding the desirability of releasing an accused on bail if such a report is available."[330] It is submitted that recommendations in the report do not bind the courts. The court must consider the recommendations and make a value judgment after assessing the evidence. The duty to consider the pre-trial report depends on the availability of the report.[331]

2.9.4. The Constitution of the Republic of South Africa, 1996

The High Court possesses an inherent power to intervene in bail applications that have commenced in the Magistrate Court regardless of whether they have been started or not completed. In the case of *State v Majali*,[332] the application was based on those powers.[333] The High Court is also tasked with supervising proceedings in the Magistrate Court, both in criminal and civil cases. The supervision by the High Court is to ensure quality control. The jurisdiction to intervene is also found in common law[334] and section 166 of the Constitution.[335] This power is exercised where grave injustice could occur unless the court intervenes.[336]

The courts must promote "the spirit, purport, and objects of the Bill of Rights" when interpreting the Bill of Rights.[337] It is submitted that promoting "the spirit, purport, and objects of the Bill of Rights" is also mandatory when the court interprets the provisions of the Criminal Procedure Act.[338] Section 39(2) of the Constitution provides that:

> "[when] interpreting any legislation and when developing the common law or customary, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights."[339]

The presiding officers are obliged when interpreting section 12(1)(a) and section 35(3)(f) of the Constitution to promote "the spirit, purport, and objects of the Bill of Rights."[340] They are

[329] Criminal Procedure Act 51 of 1977.
[330] Ibid.
[331] Judicial Matters Second Amendment Act 66 of 2008.
[332] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[333] Ibid.
[334] *Wahlhaus and others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113(A)
[335] Constitution of the Republic of South Africa Act, 1996.
[336] *S v Hlongwane* 1989(4) SA 79(T).
[337] Constitution of the Republic of South Africa Act, 1996.
[338] Criminal Procedure Act 51 of 1977.
[339] Constitution of the Republic of South Africa, 1996.
[340] Ibid.

obliged to do the same when interpreting section 60 of the Criminal Procedure Act 51 of 1977. Section 12(1)(a) of the Constitution provides that:

> "Everyone has the right to freedom and security of [a] person, which includes the right not to be deprived of [liberty] arbitrarily or without cause.[341]

The rights in the Constitution are not absolute and can be limited in terms of section 36 of the Constitution.[342] The Constitution also does not create an absolute right to a person's freedom.[343]

The Constitutional Court in *State v Dlamini*[344] went on to state that the approach to bail by the presiding officers must be considered within the parameters of section 35(3)(f) of the Constitution.[345] The presiding officers are obliged by the constitutional norms of the law and practice to harmonize section 60 of the Criminal Procedure Act[346] with constitutional norms and imperatives. It submitted that this requires that the court, when interpreting the provisions of the Criminal Procedure Act,[347] to continually promote the objects and the values of the Bill of Rights.[348] Bail aims to strike a balance between the interest of society and the liberty of an accused person.

Bail applications are urgent, and courts must ensure they are treated urgently. The Constitutional Court in *State v Dlamini*[349]confirmed that bail applications are urgent. Cameron J stated that:

> "[i]t is [evident] that [finalizing] an application for bail is always a matter of urgency….and if bail is refused, the decision can be appealed. [The right to prompt decision is thus a right independent of whether] the right to liberty [actually entitles] the [accused] to bail."

The judiciary must play an inquisitorial role and not be bystanders. It is submitted that when it comes to the right to liberty, the court must control and supervise the deprivation of the right to liberty.[350]

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[341] Ibid.
[342] Ibid
[343] Ibid.
[344] Section 36 of the Constitution of the Republic of South Africa, 1996 provides that "the rights in the bill of rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society, based on human dignity, equality, and freedom, taking into account all factors, including-

a) The nature of the right;
b) the importance of the purpose of the limitation;
c) the nature and extent of the limitation;
d) the relationship between the limitation and the purpose;
e) and the less restrictive means to achieve the purpose."

[345] Constitution of the Republic of South Africa, 1996.
[346] Criminal Procedure Act 51 of 1977.
[347] Ibid.
[348] Section 39 of the Constitution of the Republic of South Africa Act, 1996.
[349] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[350] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.

When applying for a postponement, the prosecutor must place before the court all relevant information to assist the court in deciding on whether to grant or refuse the postponement of bail. Bail applications are a unique judicial process, and processes are inherently urgent. Criminal proceedings are adversarial, but in a bail application, the inquisitorial power of the court is more significant.

The accused enjoyed the right to be presumed innocent under section 35 of the Constitution.[351]It is submitted that in a bail application, the presumption of innocence favours the applicant even when there is a strong prima facie case against the applicant. The court must always grant bail whenever possible because, at this stage, the accused is presumed innocent.[352]

In *S v Majali,*[353] the court had to consider the interpretation and applicability of section 50(6)d of the Criminal Procedure Act[354] having regard to the constitutional template of maximizing an accused person's right to liberty. It is submitted that the proper interpretation and application of section 50(6)d of the Criminal Procedure Act[355] cannot be done without the applicant who must place the information opposing the application. It is further submitted that the court must not decide on the application in terms of section 50(6)d of the Criminal Procedure Act[356] without the applicant being allowed to cross-examine and test the reliability of the evidence.

It is submitted that the court, by referring to cross-examination, meant that there must be an inquiry where the applicant can challenge the evidence by the state. The postponement without such an inquiry and based on the mere say-so of the state impairs the right to challenge evidence through cross-examination and leading evidence in opposition to such an application.[357] The reliability of the evidence tendered by the state must be tested through correct mechanisms established in law.

In *State v Majali,*[358] the court further states that an application for a postponement by the state in the bail proceeding is not for the asking.[359] The state ought to make an application and furnish the court with convincing, sustainable, persuasive reasons justifying granting such an application.[360] Whether or not this is happening in the lower courts in South Africa must be appropriately investigated and is beyond the scope of this research. It remains open for research in future.

The application calls for the court to utilize its inquisitorial power in an inquiry after the proper application by the state, which is substantiated by reasons justifying the postponement. The court must determine whether the state has placed all relevant information or evidence before it to exercise its discretion to postpone the bail application. It is submitted that judicial officers should not allow themselves to be dictated to by the legislature but must exercise their

[351] Constitution of the Republic of South Africa, 1996.
[352] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[353] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[354] Criminal Procedure Act 51 of 1977.
[355] Ibid.
[356] Ibid.
[357] Section 35 (3) (i) Constitution of the Republic of South Africa Act,1996.
[358] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[359] Ibid at para 24.
[360] Ibid at para 14.

discretion independently from any sphere of government.[361] In the case of *Glenister v President of the Republic of South Africa and Others,*[362] the court held that:

> "[t]his principle is not simply an abstract notion; it is reflected in every structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflect the separation of powers."[363]

The court must ensure that all material factors are investigated and established in the inquiry.[364] The court conceded that the form the inquiry should take is not prescribed in section 60(3) of the Criminal Procedure Act.[365] Still, a court reasonably informed of the constitutional imperatives applicable to it should know the essential form such a judicial inquiry should take. It is submitted that the presiding officer must judge whether granting such a postponement is in the interest of justice. The court must exercise its discretion after considering the information advanced by the state and the defence and further determine whether it has sufficient information to decide on bail. The postponement should be granted if the court finds insufficient information to decide bail.

The researcher believes that the court, in *S v Majali,*[366] should have at least formulated a test to be applied in such an inquiry and further should expressly have given the onus to the state. 'He who alleges must prove': this principle must be the starting point. It is submitted that adequate opportunity to present evidence must be afforded to both parties. The researcher recommends that the onus in such an inquiry should be on the state to show, on the balance of probabilities, that substantial grounds warrant the postponement to be granted in the interest of justice and that those grounds outweigh the rights to liberty.

In this case, the only information the court *a quo* in *S v Majali* [367] had was that of the state. The state had applied for a postponement to establish whether the applicant had previous convictions, pending matters, and/or outstanding warrants. The court found that the onus was on the state to establish that it was in the interest of justice to postpone the bail application.[368]

There is a possibility that the applicant had previous convictions of a similar nature, pending criminal investigations or charges or warrants of arrest against him.[369] These factors have a direct bearing and consequences on the charges the applicant is facing.[370] His release on bail

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[361] *Glenister v President of the Republic of South Africa and others* 2009 (1) SA 287 (CC).
[362] Ibid.
[363] Ibid.
[364] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011. The court held that it must determine the content and the reliability of the circumstances warranting the application for a postponement and evaluate these circumstances against the constitutional imperatives and traditional primary objectives.
[365] Criminal Procedure Act 51 of 1977.
[366] *S v Majali unreported case no* (41210/2010) delivered 19 July 2011.
[367] Ibid.
[368] Ibid.
[369] Ibid at para 28.
[370] Ibid at para 28.

was not in the "interest of justice" as it may affect or impede the administration of justice.[371] It is submitted that the court was correct in finding that the state had the onus to establish the existence of the pending matters against the applicant because the applicant had already denied that he had pending matters.

The applicant opposed the application and deposed to an affidavit where he was attacking and disputing the basis and the essence of the state's invocation of the postponement in terms of section 50(6)(d) of the Criminal Procedure Act.[372] The applicant was impugning and disputing the reliability of the state's information supporting the application for a postponement. The court found that upon the applicant challenging the state's application, the presiding officer has to invoke the provisions of section 60(3) of the Criminal Procedure Act.[373] The court further held that this is peremptory; the court must order that reliable or sufficient information be placed before to enable the court to decide on the bail application.[374] This includes the decision on a postponement, the refusal, or the granting of bail. Discretion can be exercised after such information has been placed before the court and considered adequately by the presiding officer.

A bail inquiry is a judicial process that must be conducted impartially, judicially, and following relevant statutory and constitutional prescripts. A postponement or refusal of bail without lawful justification is an unlawful deprivation of a person's liberty. The discretion to postpone a bail application should not be influenced by untested notions predicated on a premise to investigate an applicant's previous convictions, pending criminal investigations or charges where the applicant, under oath, states that he has no previous convictions and is not aware of any pending criminal investigations or charges or warrants of arrest issued against him.

2.9.5. The findings of the court

The court believed that the failure of the investigating officer to order that reliable or sufficient information be placed before the court by the state in terms of section 60(3) of the Criminal Procedure Act[375] and the subsequent postponement of bail application proceedings in terms of section 50(6)(d) of the Criminal Procedure Act,[376] was a serious misdirection, which resulted in the infringement of the applicant's right to a fair trial, which includes a bail application.[377]

The Criminal Procedure Act[378] further fails to provide for the consequences of failure to comply with the provisions of section 60 of the Criminal Procedure Act[379] by the presiding officer. The researcher views this as complicating the judiciary's role during the bail application because the court is directed to weigh up the interest of justice against the liberty of a person, and no consequences of the failure to comply with these provisions are stipulated in section 60

[371] Ibid at para 28.
[372] Criminal Procedure Act 51 of 1977.
[373] Ibid.
[374] Section 60(3) of the Criminal Procedure Act 51 of 1977.
[375] Criminal Procedure Act 51 of 1977.
[376] Ibid.
[377] Section 35 of the Constitution of the Republic of South Africa, 1996.
[378] Criminal Procedure Act 51 of 1977.
[379] Ibid.

of the Criminal Procedure Act 51of 1977.[380] It is recommended that failing to comply with the provisions of section 60 must lead to an automatic review.

2.10. Conclusion

The postponements of bail affect the rights contained in the Constitution, particularly the right to liberty of a person.[381] The presiding officers must adequately evaluate the evidence presented in support of the application for a postponement.[382] The state must provide evidence supporting the application, and the defence must be allowed to respond.[383] The defence must also be allowed to challenge the evidence presented by the state to support the application for a postponement. The court is expected to listen to both parties and exercise its discretion on whether or not the application for a postponement must be granted. The court must determine whether it has sufficient reliable information to grant or refuse bail.[384] In the application for a postponement, the court must play an inquisitorial role, which requires the court to call for the evidence it requires to decide on a postponement.[385]

The postponement for a written certificate referred to in section 60 (11)A of the Criminal Procedure Act[386] should be granted after a proper inquiry is held and not because of what the prosecutor informs the court. The prosecutor must lead evidence in support of the said application. The limitation of the right to liberty[387] and the right to apply for bail must be respected because the accused is presumed innocent at this stage.[388]

It is submitted that the postponement of bail application must be refused whenever the court has sufficient evidence to decide whether bail should be granted. The prosecution cannot use postponement to buy time to investigate the matter. The research believes that the issue of postponements of bail must be clarified as it has a bearing on bail applications, and unlawful detention claims usually come from the postponements.

In exercising discretion, the court must ensure that the bail application retains its urgency. In *Hans v District Court Magistrate, Cape Town and Others,* the court made it mandatory that the period not exceeding seven (7) days is adhered to.[389] It is submitted that it is a statutory duty to postpone the matters to any date but not exceeding the seven (7) days period is placed on presiding officers and must be complied with.

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[380] Ibid.
[381] Section 12 of the Constitution of the Republic of South Africa, 1996.
[382] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[383] Ibid.
[384] Section 60(3) of the Criminal Procedure Act 51 of 1977.
[385] *S v Majali unreported case no* (41210/2010) delivered on 19 July 2011.
[386] Criminal Procedure Act 51 of 1977.
[387] Section 12 of the Constitution of the Republic of South Africa
[388] Section 35 of the Constitution of the Republic of South Africa, 1996.
[389] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).

CHAPTER 3: INTEREST OF JUSTICE

3.1. Introduction

This chapter will deal with the terms 'interest of justice,' and 'exceptional circumstances.' The focus will be limited to the use of the term interest of justice in section 50(6)(d) and sections 60(1),(4)(9) and (10) of the Criminal Procedure Act.[390] The term is used with a different meaning in all the provisions mentioned above. What was confirmed in the case of *State v Dlamini*[391] was that the term is used multiple times in the same legislation whilst bearing a different meaning. The broad and narrow approach to the interpretation of the term interest of justice is discussed in this research to illustrate the contradictions made in the judgment of *State v Dlamini*.[392] The broad approach to the interpretation of the term interest of justice includes the personal interest of the accused, while the narrow approach to the interpretation of the term interest of justice is limited to the interest of society. The disadvantages of the narrow approach, which concentrates mainly on the rights of the victims and the administration of justice, will be outlined in this chapter. The research favours the broad approach in interpreting what amounts to the interest of justice. The term's definition requires what is fair and just to all parties involved. The court is tasked with making a value judgment that includes the personal interest of the accused. A value judgement is defined as a judgement on the rightness or wrongness of a thing or a person or of the usefulness of a person or something based on a comparison or other relativity. It will be shown in this research that the case of *State v Dlamini*[393] is partially correct. It is submitted that section 60(4) of the Criminal Procedure Act.[394] should be interpreted using the broader approach, which considers the accused's right to liberty as envisaged in section 12 of the Constitution.[395]

3.2. Section 60(1) of the Criminal Procedure Act

In section 60(1)(a) of the Criminal Procedure Act,[396] the term interest of justice is used in a broader sense to incorporate the interest of the accused. Section 60(1)(a) of the Criminal Procedure Act[397] provides that:

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[390] Criminal Procedure Act 51 of 1977.
[391] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[392] Ibid.
[393] Ibid.
[394] Criminal Procedure Act 51 of 1977.
[395] Constitution of the Republic of South Africa, 1996.
[396] Criminal Procedure Act 51 of 1977.
[397] Ibid.

> "an accused person who is detained for committing an offence is entitled to be released on bail [at any stage before he or she is found guilty for the committing that offence]."[398]

The release of the accused is subject to the provisions of section 50(6)(d) of the Criminal Procedure Act.[399] This was discussed at length in Chapter 2 of this research. The court is called upon to release an accused if the court is satisfied that the interest of justice permits the release.

Section 60(1)(a) of the Criminal Procedure Act[400] is in line with section 35(3) of the Constitution.[401] This confers the right to be released on bail if the interest of justice permits the accused to be released on bail. The research concerns what is meant by the words interest of justice.[402] In *State v Dlamini*[403] the court stated that the interest of justice:

> "…is a useful term denoting in broad and evocative language a value [judgement] of what would be fair and just to all concerned. But while its strength lies in its [sweeps], that is also [a] potential weakness. Its content depends on the context and applied interpretation."[404]

It is submitted that the term in 60(1)(a) of the Criminal Procedure Act[405] is used in its original form of a value judgment as to what is fair to all interested parties. There is no problem with how the term is used in this section. The term under section 60(1)(a) of the Criminal Procedure Act[406] is used with a broad meaning of what a value judgment entails, and it considers the right to liberty of an accused person charged with an offence and who wishes to apply for bail. The presiding officers are expected to use a broad interpretation of the term and make a value judgment of what is fair to all interested parties.

The research favours this approach as it conforms with the separation of powers doctrine and prevents the intrusion by the legislature on the discretion of the judiciary.[407] It further compliments and acknowledges the impartiality in evaluating evidence by the presiding officers. It gives each party a reasonable opportunity to convince the court whether or not the interest of justice permits the release of the accused on bail.

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[398] Criminal Procedure Act 51 of 1977.
[399] Ibid.
[400] Ibid.
[401] Constitution of the Republic of South Africa, 1996.
[402] Ibid.
[403] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[404] Ibid.
[405] Criminal Procedure Act 51 of 1977.
[406] ` *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[407] *Glenister v President of the Republic of South Africa and others* 2009 (1) SA 287 (CC).

3.3. Sections 60(4), (9), (10) of the Criminal Procedure Act

The point of departure arises in the manner in which the court in *State v Dlamini*[408] dealt with the use of the term interest of justice in section 60(4) read with (9) and (10) of the Criminal Procedure Act[409] and confirmed that a narrow approach is used in section 60(4) of the Criminal Procedure Act.[410] Section 60(1),(9) and (10) of the Criminal Procedure Act[411] are to be interpreted using the broader approach.[412] It is submitted that even with section 60(4) of the Criminal Procedure Act,[413] the court in *S v Dlamini*[414] should have utilized the broader approach which takes into account the right to liberty of a person as opposed to the narrow approach which concentrates on the rights of the victim.

The Constitutional Court, in the case of *State v Dlamini*[415] seems to have taken a different approach to the broader approach when interpreting the term interest of justice and adopted the narrow approach in the interpretation of the term interest of justice. It is submitted in this research that when interpreting the phrase interest of justice, a broader approach should always be used to allow the presiding officers to properly evaluate the evidence. The broad approach allows the court to take into account the right of the accused to liberty. The court in *State v Dlamini*[416] also acknowledged that the narrow interpretation of the words interest of justice is problematic, and stated as follows:

> "[where the word is used in section 60](4), (9) and (10) that meaning does not make sense, however. For instance, in sub-s (9) the court is ordered to weigh the [interest] of justice against the right of the accused to his or her personal freedom. Obviously there the [interest] of justice cannot signify the final evaluation of what is best all round, because that would include consideration of the liberty [interest] of the accused."[417]

It is submitted that it is the use of the same term in the same legislation that is causing the improper interpretation of the term. The legislature should use terms that can be interpreted in the same way when enacting legislation.[418] It is submitted in *State v Dlamini*,[419] the

[408] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[409] Criminal Procedure Act 51 of 1977.
[410] Ibid.
[411] Ibid.
[412] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[413] Criminal Procedure Act 51 of 1977.
[414] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[415] Ibid.
[416] Ibid.
[417] Ibid.
[418] Ibid.
[419] Ibid.

Constitutional Court should have recommended the broader approach to assist the court in the interpretation of the law. It is further submitted that using both the narrow approach and the broader approach might cause confusion for the presiding officers. The court noted that using a word that must be interpreted differently in the same legislation is unusual.[420] It is submitted that the way the term interest of justice is used requires presiding officers to be aware of where and how the term interest of justice is used when evaluating the evidence.

What does the term interest of justice entail as used in these sections? The legislature answers this question in section 60(4) of the Criminal Procedure Act.[421] and guides courts to assess whether one or more factors listed in section 60(4) exist. It is submitted that if the court finds that one of the factors listed in section 60(4) of the Criminal Procedure Act[422] exists, then it will not be in the interest of justice to release the accused on bail. Section 60(4) of the Criminal Procedure Act[423] states that:

> "[t]he interest of justice does not [permit] the release from detention of an accused where one or more of the following grounds are established:…"[424]

The word 'likelihood' found in section 60(4) of the Criminal Procedure Act[425] must be examined to determine the meaning of the provisions of section 60(4) of the Criminal Procedure Act.[426] In terms of section 60(4) of the Criminal Procedure Act, the court should not grant bail where one or more of the grounds listed in section 60(4) of the Criminal Procedure Act[427] exist. The first ground found in section 60(4) of the Criminal Procedure Act,[428] is the likelihood of the accused posing a danger to the public or any person committing a Schedule 1 offence. Section 60(4)a of the Criminal Procedure Act[429] provides that bail must be refused:

> "Where there is [a] likelihood that the accused if he or she were to be released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offense."[430]

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[420] Ibid.
[421] Criminal Procedure Act 51 of 1977.
[422] Ibid.
[423] Ibid.
[424] Section 60(4) of the Criminal Procedure Act 51 of 1977.
[425] Ibid.
[426] Ibid.
[427] Ibid.
[428] Ibid.
[429] Ibid.
[430] Section 60(4)(a) of the Criminal Procedure Act 51 of 1977.

The court is directed to consider the factors listed in section 60(5) of the Criminal Procedure Act[431] and from the outset, section 60(5) of the Criminal Procedure Act[432] refers to the word "violence" in the charge the accused faces. It is submitted that the lesser the degree of violence implicit in the charge, the lesser the risk of the accused endangering the public's safety or any particular person. The degree of violence is limited to violent offences, it is submitted that the legislature should have used the word 'harm'. The word harm is broader than that of violence as it is submitted that it also includes financial and emotional harm. This research concentrates on the use of the term degree of violence in relation to violent crimes.

The presiding officers must determine the likelihood of the accused endangering the safety of the public. This is a challenging task. In *State v Nangutuula*[433] the court held that the unsubstantiated fear or a mere suspicion that the accused will commit further offences would not suffice to justify the presiding officer refusing bail. In *State v Nangutuuala*[434] the court held that evidence must be led which convinces the court that the accused has the propensity to commit offences. It is submitted that the previous convictions of the accused will play a role in determining whether or not the release of the accused will likely lead to the accused committing further offences.

3.4. The possibility of the accused absconding

The court has to further look at whether or not the accused will stand his trial if he is given bail. Section 60(4)(b) of the Criminal Procedure Act provides that bail should not be granted:[435]

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[431] Section 60(5) of the Criminal Procedure Act 51 of 1977 provides that "in considering whether the grounds in sub-section 4(a) has been established, the court may, where applicable, take into account the following factors, namely-

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

[432] Criminal Procedure Act 51 of 1977.
[433] *S v Nangutuuala* 1973(4) SA 640 (SWA) at para 15.
[434] Ibid.
[435] Section 60(4)(b) of the Criminal Procedure Act 51 of 1977.

> "[where] there is a likelihood that the accused if he or she were to be released on bail, will attempt to evade his or her trial."[436]

Whether or not a person will run away from the court after bail is granted is not easy to determine. It is submitted that the presiding officer determining whether or not the accused will not stand trial must evaluate the evidence given to him and must also take into account the provisions of section 60(6) of the Criminal Procedure Act[437] The legislature has made the evaluation process easy by enacting the provisions of section 60(4) of the Criminal Procedure Act[438] and by instructing the court to consider the factors listed in section 60(6) of the Criminal Procedure Act.[439] It is submitted, and it was confirmed in the case of *State v Kathrada*,[440] that the more serious the offence, the more severe the sentence is likely to be. The court in *State v Nichas*[441] found that if there is a great possibility of a harsh sentence being imposed, the accused may be tempted to abscond if bail is granted. It is submitted that the judgment of *State v Nichas*[442] is correct; the possibility of a heavy sentence may persuade the accused to abscond. However, the likelihood of a heavy sentence for severe offences should not be an automatic bar for the court to grant bail.[443] It is submitted that the court must look at the provisions of section 60(9) of the Criminal Procedure Act[444] which provides that in determining whether the

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[436] Section 60(4)(b) of the Criminal Procedure Act 51 of 1977.
[437] Criminal Procedure Act 51 of 1977.
[438] Ibid.
[439] Section 60(6) of the Criminal Procedure Act 51 of 1977 provides that in assessing the risk of abscondment the court must consider the following factors:

(a) "the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
(b) The assets held by the accused and where such assets are situated;
(c) The [names], and travel documents held by the accused, which may enable him or her to leave the country;
(d) The extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
(e) The question whether extradition of the accused could readily be effected should he or she flee across borders of the Republic in an attempt to evade his or her trial;
(f) Nature and gravity of the charge on which the accused is to be tried;
(g) The strength of the case against the accused and incentive that he or she may in consequence have to evade his or her trial;
(h) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted on the charges against him or her;
(i) The binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
(j) Any other factor which in the opinion of the court should be taken into account."

[440] *S v Kathrada* 1961 (3) SA 593 (T) at para 13.
[441] *S v Nichas* 1977 (1) SA 257 (C) at para 31.
[442] *S v Nichas* 1977 (1) SA 257 (C).
[443] *R v Mtatsala* 1948 (2) SA 585 (E).
[444] Criminal Procedure Act 51 of 1977.

interest of justice permit the release of the accused on bail, the court must weigh the interest of justice against the liberty of the accused, specifically the prejudice the accused is likely to suffer if bail is refused. [445]

It is submitted that the strength of the state's case against the accused is not a decisive factor.[446] The state must refrain from turning a bail application into a trial rehearsal by relying on the strength of the state's case against the accused.[447]

The researcher is of the view that the Constitutional Court in *State v Dlamini*[448] was wrong in saying that the section 60(4) of the Criminal Procedure Act[449] should be interpreted using a narrow approach. The argument is that when one looks at the factors listed in section 60(6) of the Criminal Procedure Act[450] the legislature took into account the interest of the accused and therefore the broader approach must be used in interpreting section 60(4)(b) of the Criminal Procedure Act,[451] which provides that bail should be refused if there is a likelihood that the accused will abscond. Section 60(6) (a) of the Criminal Procedure Act[452]states that the court must look at the interest of the accused and it does so by referring to the ties that the applicant has to the place that he will be tried at. The assets held by the accused is a factor also listed in section 60(6) of the Criminal Procedure Act.[453] The assets held by the accused cannot be said to be in the interest of the victim or the public at large, they remain the interest of the accused and it follows that the broader approach which takes into account the interest of the victim and the interest of the accused must be used when interpreting the term interest of justice. It is submitted that there is no room for the narrow interpretation of section 60(4)(b) of the Criminal Procedure Act[454] which considers the right of the victims and the public and not the accused, if in assessing the evidence the court must look at the assets of the accused. It is submitted that the interest of the accused was taken into account by the legislature when enacting section 60(4) of the Criminal Procedure Act.[455] In *State v Dlamini*,[456] the Constitutional Court failed to

[445] Constitution of the Republic of South Africa, 1996.
[446] *S v Haartman* 1968 (1) SA 278 (T).
[447] State v Viljoen 2002(2) SACR 550 (SCA).
[448] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[449] Criminal Procedure Act 51 of 1977.
[450] Ibid.
[451] Ibid.
[452] Ibid.
[453] Ibid.
[454] Ibid.
[454] Ibid.
[455] Ibid.
[456] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

interpret section 60(4)(b) of the Criminal Procedure Act[457] together with section 60(6) of the Criminal Procedure Act,[458] which states that the court must consider the assets held by the accused. It is submitted that the assets of the accused are in the interest of the accused and not the victim. The argument is that in *State v Dlamini*,[459] the Constitutional Court should have recommended that the broader approach be used in interpreting the term interest of justice. The broader approach does not only look at the interest of the victim but also the interest of the accused. It is further submitted that reading section 60(4)b of the Criminal Procedure Act[460] in conjunction with section 60(6) of the Criminal Procedure Act,[461] it becomes clearer that the legislature intended that the broader approach be used in interpreting the term interest of justice The research favours the approach which is broad in evaluating the evidence.

3.5. The interference by the accused with the evidence held by the state or the possibility of influencing the state witness.

The research now turns to deal with the refusal of bail based on the possibility that the accused will interfere with the state witness or conceal and destroy evidence. It is submitted that without witnesses there is no case and without evidence the state does not have a case. Section 60(4)(c) of the Criminal Procedure Act[462] provides that the interest of justice does not permit the release of the accused from prison:

> "[w]here there is the likelihood that the accused if he or she were to be released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence."[463]

[457] Criminal Procedure Act 51 of 1977.
[458] Criminal Procedure Act 51 of 1977.
[459] Ibid.
[460] Ibid.
[461] Ibid.
[462] Criminal Procedure Act 51 of 1977
[463] Ibid.

Section 60(4)(c) of the Criminal Procedure Act must be read together with section 60(7) of the Criminal Procedure Act.[464] The Constitutional Court in the case of *State v Dlamini*[465] erred in finding that the narrow approach should be used when interpreting the term interest of justice section 60(4) of the Criminal Procedure Act.[466] In *State v Bennert*[467], the court held that where there has been no actual interference with the state witnesses, the proper approach should be that, unless the State shows that there is a real risk that the accused will and may not interfere with the state witness, then there can be no reasonable possibility of interference. It is submitted that the real risk of interference with the state witnesses must be supported by evidence. In *State v Hlongwa*[468] the court held that if, on the evidence adduced, it appears that there is a reasonable possibility that the accused will interfere with the state witnesses bail must be refused. It is submitted that this approach is correct: the court must refuse bail when there is evidence that the accused will and not may interfere with the state witnesses. Release of the accused will be detrimental to the criminal justice system and the law in general.

The other important factor is section 60(4)(d) of the Criminal Procedure Act[469] which must be read together with section 60(8) of the Criminal Procedure Act.[470]

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[464] Section 60(7) of the Criminal Procedure Act 51 of 1977 provides that for the court to find that the accused will be a threat to the state witnesses or will try to destroy evidence must first consider the following factors

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

[465] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

[466] Criminal Procedure Act 51 of 1977.

[467] *S v Bennert* 1976 (3) SA 652 (C).

[468] *S v Hlongwa* 1979 (4) SA 112 (D).

[469] Criminal Procedure Act 51 of 1977.

[470] Section 60(8) of the Criminal Procedure Act 51 of 1977 provides that the court must take into account the following factors:

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

Section 60(4)(d) of the Criminal Procedure Act[471] deals with an instance where the release of the accused will be detrimental to the criminal justice system and the law in general. Section 60(4)(d) provides that bail should not be granted:

> "[where] there is [the] likelihood that the accused if he or she were to be released on bail, will undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system."[472]

Public opinion does not play a role in the assessment of evidence.[473] It is submitted that the Constitutional Court in the case of *State v Dlamini*[474] was incorrect in finding that the narrow approach should be applied in the interpretation of section 60(4) of the Criminal Procedure Act[475] and this error is haunting the judiciary in particular. The factors listed in section 60(8) of the Criminal Procedure Act[476] show that the focus is on the accused rather than the victim. The argument in this research is that the Constitutional Court, in *State v Dlamini*,[477] should have read section 60(4) d of the Criminal Procedure Act[478] in conjunction with section 60(8) of the Criminal Procedure Act[479] and recommended that the term interest of justice be interpreted using the broader approach. The legislation was misinterpreted by the Constitutional Court in the case of *State v Dlamini.*[480] It is submitted that the term interest of justice cannot be correctly interpreted using an interpretation that excludes the liberty of the accused. Section 60(8) of the Criminal Procedure Act[481] speaks directly to the interest of the victim but also includes the interest of the accused.

Section 60(8) of the Criminal Procedure Act[482] is different to other subsections which must be considered by the court in determining whether the grounds listed in section 60(4) of the Criminal Procedure Act[483] exist. In section 60(8) of the Criminal Procedure Act[484] the legislature begins by looking at the public at large, the attitude of the community, in considering the factors listed in section 60(4)(d) of the Criminal Procedure Act.[485] Section 60(8) of the

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[471] Criminal Procedure Act 51 of 1977.
[472] Ibid.
[473] *State v Mankwanyane* 1995(2) SACR 1(C).
[474] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[475] Criminal Procedure Act 51 of 1977.
[476] Ibid.
[477] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[478] Criminal Procedure Act 51 of 1977.
[479] Ibid.
[480] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[481] Criminal Procedure Act 51 of 1977.
[482] Ibid.
[483] Ibid.
[484] Ibid.
[485] Ibid.

Criminal Procedure Act[486] leans more to the side of the general public. It is submitted that it looks at the interest of the public rather than the interest of the accused. Section 60(8)(c) of the Criminal Procedure Act[487] calls upon presiding officer to assess the safety of the accused if released on bail. The argument in this research is that the legislature by referring to the safety of the accused was calling for a broader approach even when interpreting the interest of the public in general. The narrow approach excludes the interest of the accused and should not be used to interpret section 60(4) of the Criminal Procedure Act.[488]

3.6. Disturbance of public order or undermining public peace or security

Section 60(4)(e) of the Criminal Procedure Act[489] provides that bail should not be granted:

> "where in exceptional circumstances, there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."[490]

The prosecution when opposing bail must prove that one or more of the grounds listed in section 60 (4) of the Criminal Procedure Act[491] exist. It is submitted that failure by the state to establish one of the grounds listed in 60(4) of the Criminal Procedure Act, will result in the accused being released on bail It is submitted that it is not necessary for the prosecution to prove all the grounds listed in section 60 (4) of the Criminal Procedure Act[492] because one ground is sufficient. The proof is on a balance of probabilities.[493] For example, once the prosecution has been able to show that the accused will flee if release on bail, that ground alone is sufficient for the court to refuse bail.

The Constitutional Court in *State v Dlamini*[494] confirmed that the term interest of justice does not create a problem in the evaluation process in section 60(4) of the Criminal Procedure Act.[495]

In *State v Dlamini*[496] the court stated that section 60(4) of the Criminal Procedure Act[497] must be read together with sections 60(9) and (10) of the Criminal Procedure Act.[498] The court in

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[486] Ibid.
[487] Criminal Procedure Act 51 of 1977.
[488] Ibid.
[489] Ibid.
[490] Ibid.
[491] Ibid.
[492] Ibid.
[493] Ibid.
[494] Ibid.
[495] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[496] Ibid.
[497] Criminal Procedure Act 51 of 1977.
[498] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

State v Dlamini[499] found that section 60(4) of the Criminal Procedure Act[500] and section 60(9) and(10) of the Criminal Procedure Act[501] forms part of a functional unit and reflects the actual evaluation process which must be used by court in determining the interest of justice.[502] It is submitted that the court contradicts itself in the following passage, by favouring the narrow approach which does not take into account the right of the accused:

> "If it is read first and the interest of justice bears the same narrow meaning akin to the interest of society (or the interest of justice minus the interest of the accused), falls neatly into place."[503]

In this passage the court contradicts itself because the court criticised the legislature in the way section 60 of the Criminal Procedure Act is drafted. The court alluded to the fact that the use of both the narrow and the broader approach in the same legislation causes confusion to the judiciary.

It is submitted in this research that a value judgement of what is fair to all interested parties should not be read using the narrow approach. The applicant's right to freedom and security of a person as envisaged in section 12 of the Constitution[504] must also be taken into account when deciding on what is fair to all interested parties. It is submitted further that the applicant is more interested than all other parties as his right to liberty is infringed by incarceration. The research believes that interest of justice cannot be minus the interest of the accused and be said to fall neatly into place as was held in the case of *State v Dlamini*.[505]

The Constitutional Court in *State v Dlamini*[506] confirmed that the presiding officer must weigh the interest of justice and in weighing the interest of justice presiding officers are guided by section 60(5)-(8A) of the Criminal Procedure Act.[507] The interest of justice must be weighed against the personal interest of the accused.[508] To clarify whether the narrow or the broader approach should be used it is necessary to deal with what is entailed in section 60 (9) and (10) of the Criminal Procedure Act.[509]

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[499] *Ibid.*
[500] Criminal Procedure Act 51 of 1977.
[501] Ibid.
[502] Ibid.
[503] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[504] Constitution of the Republic of South Africa, 1996.
[505] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[506] Ibid.
[507] Criminal Procedure Act 51 of 1977.
[508] Ibid.
[509] Ibid.

Section 60 (9) of the Criminal Procedure Act[510] requires the courts to evaluate the evidence yet it names the factors favourable to the accused for bail to be granted. The evaluation of the interest of justice in section 60(4) of the Criminal Procedure Act[511] and the use of the factors favourable to the accused in section 60(9) of the Criminal Procedure Act[512] is a cause for concern. If the narrow approach is to be used in interpreting the term interest of justice, then section 60(9) of the Criminal Procedure Act[513] is the only section which the court must look at the factors favourable to the accused. The argument is that the broader approach must be used in all the provision of section 60 of the Criminal Procedure Act.[514] It is further submitted that there is a need to refer to the personal interest of the accused independently from the evaluation process. The accused's personal interest is as important as that of the interest of society which the courts are required to view independently under section 60(4) of the Criminal Procedure Act.[515] It is important to zoom into the provisions of section 60(9) of the Criminal Procedure Act.[516]

The manner in which the section is drafted requires the court to consider the interest of justice and weigh it against the interest of the accused. The interest of the accused should have been dealt with without weighing the conflicting interests as same is catered for in section 60(10) of the Criminal Procedure Act.[517] There is no use for section 60(10) of the Criminal Procedure Act[518] if evidence must be weighed in terms of section 60(9) of the Criminal Procedure Act.[519]

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[510] Ibid.
[511] Ibid.
[512] Ibid.
[513] Ibid.
[514] Ibid.
[515] Criminal Procedure Act 51 of 1977.
[516] Section 60(9) of the Criminal Procedure Act 51 of 1977 provides that: "In considering the question in subsection (4), the court shall decide the matter by weighing the interest of justice against the right of the accused to his or her personal freedom and in particular, the prejudice he or she is likely to suffer if he or she were detained in custody, taking into account, where applicable, the following factors, namely-

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

[517] Criminal Procedure Act 51 of 1977.
[518] Ibid.
[519] Ibid.

The legislature was specific that section 60(10) of the Criminal Procedure Act[520] deals with instances where the state is not opposed to the release of the accused on bail, and fails to address an instance where the state is opposed to the release of an accused. It is submitted that both the judgement of *State v Dlamini*[521] and section 60 of the Criminal Procedure Act[522] did not deal with the provisions of bail adequately. It did not clarify the interest of justice but complicated it. This is seen in section 60(10) of the Criminal Procedure Act[523] which provides that:

> "[notwithstanding] the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal [interest] of the accused against the [interest] of justice."[524]

It is submitted that this section would be unnecessary if the correct approach was that of *State v Dlamini*.[525] From the wording of the section the following can be noted:

1. It deals with the instances where bail is not opposed;
2. It further places the obligation to the court to comply with the provisions of sub-s (9) regardless of the fact that bail is not opposed.
3. It also calls upon the presiding officer to evaluate the evidence, by weighing the personal interest of the accused against the interest of justice.

It is submitted that the court in *State v Dlamini*[526] started by stating that all the sections are a functional unit in the evaluation process and further pointed out that section 60(9) of the Criminal Procedure Act[527] is the main subsection in the evaluation process. The contradiction lies here, where the court refers to section 60(10) of the Criminal Procedure Act[528] as section 60(9) and section 60(10) of the Criminal Procedure Act[529] are to be relied upon in the evaluation process. The use of the term interest of justice in section 60(4) of the Criminal Procedure Act[530] clearly refers to the interest of the society and the victim. The accused's interest is excluded by the narrow approach.

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[520] Ibid.
[521] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[522] Criminal Procedure Act 51 of 1977.
[523] Ibid.
[524] Ibid.
[525] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[526] Ibid.
[527] Criminal Procedure Act 51 of 1977.
[528] Ibid.
[529] Ibid.
[530] Ibid.

The use of the term interest of justice in section 60(9) of the Criminal Procedure Act[531] is in such a way that it does not mainly concentrate on the interest of the accused only. Section 60(9) of the Criminal Procedure Act[532]calls upon the court to weigh the interest of justice against the interest of the accused. The legislature called upon the court to weigh the interest of justice against the rights of the accused. In other words, to come to the conclusion that the interest of justice permits the release of the accused on bail, the interest of justice must be weighed against the interest of the accused. The legislature could have avoided this confusion by correctly using the interest of the society in section 60(4) of the Criminal Procedure Act[533] and the interest of the accused in section 60 (9) of the Criminal Procedure Act.[534]

3.7. Exceptional circumstances

This chapter will also consider the correct approach in determining what the term exceptional circumstances mean as intended by the legislature. The focus will be to critically analyse the case of *State v Mabena*[535] in conjunction with the case of *State v Dlamini.*[536]

The error by the judge in the case of *State v Mabena*[537] is another example of the confusion that exists in the judiciary regarding the proper application of the provisions of section 60 of the Criminal Procedure Act.[538] In order to properly illustrate the relevance of this case, the following summary of facts is necessary.

3.7.1. How the court interpreted the evidence in the case of State v Mabena and Another

3.7.1.1. Facts

This was an appeal by the State against the judgment of the High Court, Pretoria.[539] The respondents were charged with housebreaking, robbery, attempted murder, and murder.[540] The incident occurred on 19 November 2003 at the complainant's home.[541] The allegations were that the accused forcefully entered the property of Mr and Mrs. de Lange. The accused gained

[531] Ibid.
[532] Ibid.
[533] Ibid.
[534] Ibid.
[535] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[536] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[537] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[538] Criminal Procedure Act 51 of 1977.
[539] Criminal Procedure Act 51 of 1977.
[540] Ibid at para 10.
[541] Ibid at para 9.

entry by cutting the burglar guards and they overpowered Mr and Mrs de Lange. The accused further tied Mr and Mrs de Lange with cables and stole their items. The accused thereafter fled the scene.[542]

Mrs de Lange died of strangulation, while Mr de Lange survived the ordeal.[543] The respondents were arrested soon after the commission of the offence.[544]

The respondents, about a month after their arrest, applied for bail.[545] They admitted to being the perpetrators.[546] However, they averred that they did not intend to cause the death of Mrs. de Lange and that Mrs. de Lange was alive when they left the scene.[547] Both the respondents were represented during their bail application.[548] The offences fell within Schedule 6 of the Criminal Procedure Act.[549] The court had found that nothing exceptional favoured the release of the applicants on bail.[550]

In about October 2004, the presiding officer directed that Mr. Mabena be referred in terms of sections 77 and 78 of the Criminal Procedure Act[551] for mental observation.[552] Sections 77 and 78 of the Criminal Procedure Act[553] permit the court to conduct an inquiry:

> "[whenever] it appears to the court at any stage that the accused is by reason of mental illness or mental [defects] not capable of understanding the proceedings so as to make a proper defence, or it is alleged at criminal proceedings that the accused by reason of mental illness or mental [defects…]not criminally responsible for the offence charged, or it appears to the court at criminal proceedings that the accused might for such reason not be so responsible."[554]

In terms of section 77(6)(a) of the Criminal Procedure Act,[555] the trial cannot proceed when an accused person is incapable of understanding the proceedings; in such a case, the accused must be referred to a psychiatric hospital or prison until the judge directs otherwise.[556]

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[542] Ibid at para 9.
[543] Ibid at para 9.
[544] Ibid at para 9.
[545] Ibid at para 11.
[546] Ibid at para 11.
[547] Ibid at para 11
[548] Ibid at para 11.
[549] Criminal Procedure Act 51 of 1977.
[550] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 10.
[551] Criminal Procedure Act 51 of 1977.
[552] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 12.
[553] Criminal Procedure Act 51 of 1977.
[554] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 12.
[555] Criminal Procedure Act 51 of 1977.
[556] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).

Section 78(1) of the Criminal Procedure Act[557] is also relevant in this case as it states that a person who, because of mental illness or mental defects, lacks criminal capacity is not criminally liable for the commission of such offence.[558] The court must find the accused not guilty and direct that he be detained in prison or be referred to a psychiatric hospital.[559]

The following must be noted regarding the inquiry in terms of sections 77 and 78 of the Criminal Procedure Act 51 of 1977:

Three reports are required and must be done by psychiatrists.[560]

1. If the reports are unanimous and are not challenged by either the State or the defence, a court must base its decision on the reports alone.[561]
2. If the reports are disputed, the court must decide the matter by evaluating the evidence.[562]
3. Mental defects and mental illness are morbid disorders requiring an expert to determine their existence and make recommendations to the court.[563]
4. An inquiry that is embarked upon without guidance from an expert is bound to be without direction and futile.[564]

The psychiatrists who had examined the accused (Mr. Mabena) unanimously believed that Mr. Mabena was fit to stand trial and reported as such.[565] The state and the defence did not dispute the findings initially.[566] Still, on 7 February 2005, the counsel representing Mr. Mabena informed the court that Mr Mabena was not well and made an application that he be declared unfit to stand trial.[567]

An inquiry was conducted, and evidence was gathered, including the evidence of two psychiatrists, the mother and the brother of Mr Mabena.[568] The matter was postponed for the

[557] Criminal Procedure Act 51 of 1977.
[558] Ibid.
[559] Ibid.
[560] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 13.
[561] Ibid at para 13.
[562] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 13.
[563] Ibid at para 16.
[564] Ibid at para 16.
[565] Ibid at para 14.
[566] Ibid at para 15.
[567] Ibid at para 15.
[568] Ibid at para 15.

examination of Mr. Mabena by the neurologist as his counsel had alleged that he had suffered brain damage.[569]

3.7.1.2. Relevance in this research

On 23 September 2005, the matter was on the roll for the sole purpose of a postponement; the parties had already arranged a date of 14 March 2006.[570] Ms Mahanjana was appearing on behalf of the state and standing in for Advocate Mogale, who was not present in court, the docket was also not at court.[571] The judge then enquired from the parties whether the accused had any previous conviction and whether he could grant bail.[572]

The court then brought up the question of bail and did not conduct an inquiry but simply granted bail for both accused.[573] This was after the court had questioned the state regarding whether they had any reasons why bail should be granted, and Ms Mahanjana had made it clear to the court that they would need an opportunity to ascertain facts relating to bail.[574] The investigating officer was present when the court raised this question, but the docket was not.[575] Ms. Mahanjana made it clear that she had been instructed to postpone the matter, was not familiar with the facts of the case, and needed to be in a position to deal with bail application.[576] She requested the court to postpone the matter for bail application and for the docket to be at court.[577] The court refused this application and attacked the state on several grounds, including the following:

1. Ms. Mahanjana should have familiarised herself with the docket, and the failure to do so was not the problem of the court.[578]
2. It was not true that people are said not to have fixed addresses. This was after Ms. Mahanjana informed the court that, amongst other grounds that should be ascertained was the addresses of the accused and that, according to the state, they had no fixed address.[579]

[569] Ibid at para 17.
[570] Ibid at para 18.
[571] Ibid at para 18.
[572] Ibid at para 19.
[573] Ibid at para 19.
[574] Ibid at para 19.
[575] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 19.
[576] Ibid at para 19.
[577] Ibid at para 19.
[578] Ibid at para 19.
[579] Ibid at para 19.

3. The judge stated that he did not have a passport, himself. He further stated that he knew very few black people who owned passports and knew that the accused did not have a passport.[580]
4. He has previously granted bail to accused who were already convicted, and they returned to court and did not default.[581]

The judge then granted bail to the accused for R1000 each regardless of the fact that the state had applied that bail in the form of a formal inquiry.[582] In the judgment, the court stated as follows:

> "[g]entleman, I have on my own terms a duty that falls on me as a judicial officer, or a judge, to see to it that justice is done to all, decided to raise the question of your bail application. You will be released on bail."[583]

It submitted that the court was correct that there is a duty on presiding officers to ensure that justice is done. It further submitted that the court, in ensuring that justice is done, must follow the correct procedure unlike in the case of *State v Mabena*.[584] In *State v Mabena* the offence fell within the ambit of schedule 6; the accused should have adduced evidence, which satisfied the court that exceptional circumstances existed which in the interest of justice permitted the release of the accused on bail.[585] The court said:

> "[i]n some case (whose reference I do not have), R v Hepworth, many many years ago, it is an AD case, and long, long before any of us here came on earth including me, some judges or judge decided that the court cannot sit by and watch indifferently when people suffer, just because they are accused persons."[586]

The prosecution applied for leave to appeal against the order and for the suspension of the order pending the finalisation of the appeal.[587] The judge who had granted bail was not available; the judge president dealt with the matter and suspended the order.[588] The matter was then postponed for leave to appeal which was to be heard in the new term.[589]

The appeal court held that:

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[580] Ibid at para 19.
[581] Ibid at para 19.
[582] Ibid at para 20.
[583] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 21.
[584] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[585] Section 60(11) (a) of the Criminal Procedure Act 51 of 1977.
[586] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 21.
[587] Ibid at para 21.
[588] Ibid at para 21.
[589] Ibid at para 21.

> "[i]t is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing arguments, and decide whether there is a reasonable prospect that the higher court may disagree. The record what occurred in the present case is disturbing. Once more the prosecution, represented by Ms Mahanjana, was not given no proper opportunity to be heard."[590]

The court further commented on the conduct of the judge toward Ms Mahanjana and stated that:

> "...subjected by the judge to a relentless barrage of hectoring questions and assertions, to which she was expected to do little more than acquiesce, designed to demonstrate to those present, and in particular the press, that the judge's decision was justified."[591]

The court further applauded Ms. Mahajana for her professional conduct in a hostile situation and stated that:

> "on the contrary Ms Mahanjana showed remarkable resilience and fortitude, in circumstances which she must have found both difficult and humiliating."[592]

The judge instead of following the procedure laid in section 60(11)(a) of the Criminal Procedure Act[593] turned the whole issue from the inquiry that should be conducted to determine whether exceptional circumstances exist which, in the interest of justice, permitted the release of the accused on bail. The judge further erred in referring to his experiences of life as a black person or as a judge, which should have played no role in the inquiry.[594] The inquiry was not about his experience and should not in any way be construed to be related to his experiences as a judge.[595]

Each matter must be determined according to the fact of that particular matter; to refer to other matters where the accused had already been convicted of serious offences and returned to court after bail was granted is out of line and unwarranted.[596] The judge should have regarded incarceration as a general rule in Schedule 6 of the Criminal Procedure Act[597] unless the accused and not the judge adduces evidence which, in the interest of justice, permitted that he

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[590] Ibid at para 22.
[591] Ibid at para 22.
[592] *State v Mabena and Another* 2007 (1) SACR 482 (SCA) para 22.
[593] Criminal Procedure Act 51 of 1977.
[594] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[595] Ibid.
[596] Ibid.
[597] Criminal Procedure Act 51 of 1977.

be released on bail.[598] Confusion arose regarding the duty to bring up a question on bail in section 60(1) c of the Criminal Procedure Act.[599] It is submitted that the duty of presiding officers to raise the question of bail as envisaged in section 60(1) (c) of the Criminal Procedure Act[600] does not mean that the provision of section 60(11) (a) of the Criminal Procedure Act[601] must be ignored. It is further submitted that the onus is on the accused to adduce evidence that satisfies the court that exceptional circumstances exist which, in the interest of justice, permit their release on bail.[602]

The researcher believes that the error does not lie in raising the question of bail by the judge; the judge is authorized to do so in terms of section 60(1) (c) of the Criminal Procedure Act.[603] Section 60(1) (c) of the Criminal Procedure Act [604]provides that:

> "[if] the question of the possible release on bail is not raised by the accused or the prosecution, the court shall ascertain from the accused whether [the accused] wishes that [the court consider the question of bail]."[605]

In the present case, the court did not ascertain from the accused whether they wanted to apply for bail. The researcher believes that the court cannot apply for bail on behalf of the applicants but can merely enquire whether they wish to apply for bail.[606] The judge's conduct, in this case, did not amount to ascertaining whether the accused wanted to apply for bail. Instead, he made the application for the accused and granted it.

The court further made another error and should have considered the provisions of section 60(11) of the Criminal Procedure Act.[607] The section provides that:

> "[notwithstanding] any [provisions] of this Act, where an accused is charged with an offence referred to in schedule 6, the court [must] order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances [exists] which in the [interest] of justice [permits] his or her release."[608]

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[598] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[599] Criminal Procedure Act 51 of 1977.
[600] Ibid.
[601] Ibid.
[602] Ibid.
[603] Ibid.
[604] Ibid.
[605] Ibid.
[606] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[607] Criminal Procedure Act 51 of 1977.
[608] Ibid.

The court, in the case of *State v Dlamini*[609], stated that:

> "[section 60(11) a] says that for those awaiting trial on the offences listed in [Schedule] 6, the ordinary equitable test of the [interest] of justice determined according to the exemplary list of considerations set in [subsection] (4) to (9) has to be applied differently."[610]

It is submitted that to show exceptional circumstances, the accused can also rely on sections 60(4) to (9) of the Criminal Procedure Act.[611]

> "[Subsection 11(a) clarifies that the] formal onus rests on a detainee to satisfy the court. Compared to other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they have to adduce evidence. In addition, [evaluating] such cases has the predetermined starting point that continued detention is [a] norm."[612]

It is submitted that the following can be noted from the section:

1. Firstly, the detention of the accused charged with a schedule 6 offence is automatic; the court must order that the accused be detained in custody. The research takes the view this is a peremptory provision;
2. Secondly, the applicant must be given a reasonable opportunity to adduce evidence;
3. Thirdly, the evidence adduced by the accused must show that exceptional circumstances exist, which, in the interest of justice, permit the accused to be released on bail.

The conduct of the judge must be assessed along these lines: the judge should have:

- Ordered that the detention of the accused until he is dealt with per the law. The order must have been that of imprisonment. The judge is allowed and should have raised the question of bail but not himself adduced evidence. The applicants did not adduce any proof, which satisfied the court that exceptional circumstances exist, which in the interest of justice, permitted the release of the accused on bail. However, the court relied on its own experiences of life. The research takes a humble view that the inquiry was not adhered to, not done, and neglected;

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[609] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[610] Ibid.
[611] Criminal Procedure Act 51 of 1977.
[612] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

- The attack on Ms. Mahanjana was truly unwarranted; she only requested the inquiry, and the ethical conduct of the judge became the issue in the judgment by the appeal court because of humiliating Ms. Mahanjana.[613]

Judges or even magistrates cannot hide behind section 60(3) of the Criminal Procedure Act[614] and be seen to have adduced evidence or even their experiences to conclude that the person charged with an offence listed in Schedule 6 of the Criminal Procedure Act[615] must be released on bail.

The wording of section 60(11) of the Criminal Procedure Act[616] makes an inquiry necessary, and the court must hold the inquiry. In *State v Mabena*[617] the appeal court said that:

> "[I pointed out earlier in this judgment that what the law requires before bail is granted] in relation to schedule 6 offences [is] a [proper judicial inquiry] to determine [whether] the [provisions of the Criminal Procedure Act[618] have been met. What occurred in the present case did not constitute an inquiry, not least of all because the prosecution was afforded no proper opportunity to be heard.]"[619]

The court must ensure that the evidence is adduced, whether *viva voca* or through an affidavit and such evidence must show that exceptional circumstances exist that, in the interest of justice, permit the release of the accused on bail. It is submitted in this research that evidence from the bar would not suffice in the burden of proof and the onus rests on the accused to adduce evidence which satisfies the court that exceptional circumstances exist, which in the interest of justice, permit his or her release on bail. The case of *State v Dlamini*[620] was ignored and not taken into account. It is submitted that the court must conduct an enquiry and this was confirmed in the case of *State v Dlamini*,[621] when the Constitutional Court found that the enquiry cannot be ignored and stated that:

> "The court cannot ignore the conducting of the inquiry. In *State v Nel and others*[622] the court found that the right of an applicant to apply for bail and the urgency thereof is important, but equally important are the rights of the public and the complainant."[623]

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[613] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[614] Criminal Procedure Act 51 of 1977.
[615] Ibid.
[616] Ibid.
[617] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[618] Criminal Procedure Act 51 of 1977.
[619] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[620] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[621] Ibid.
[622] S *v Nel* 2018(1) SACR 576 (GJ).
[623] Ibid.

The research believes that the accused's rights must be weighed with the interest of justice equally.

3.8. Bail on new facts

An accused person whose bail was refused has a right to appeal the magistrate's decision regarding such refusal.[624] The appeal, however, can only be limited to the evidence presented during the bail application. If the applicant whose bail was refused wants to apply for bail on new facts such an application must be brought before the magistrate who initially dealt with the bail application and refused it.

Section 65(2) of the Criminal Procedure Act[625] provides that:

> "appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought unless such new facts are first placed before the magistrate or regional magistrate whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts."[626]

Section 65(2) of the Criminal Procedure Act[627] does not deal with fresh or renewed applications for bail but merely precludes the right of appeal on new facts not before a court a quo without referral of the matter to that court.[628] Section 65(2) is peremptory.[629]

In the case of *State v Davis,*[630] the court found no new facts where the accused relied on the evidence already led in the initial bail application. The court, in the refusal of bail on new facts, relied on the principles laid down in the case of *State v Peterson*[631] and found that the applicant bringing bail on new facts must not reshuffle or rearrange the evidence already led in the initial bail application.[632]

In *State v Peterson*,[633] Judge Van Zyl held that:

> "[when, as in the present case, the accused] relies on new facts which [came] to the fore since the first, or previous bail application, the court must be satisfied, [firstly], that such facts are indeed

[624] Section 65(1) of the Criminal Procedure Act 51 of 1977.
[625] Criminal Procedure Act 51 of 1977.
[626] Ibid.
[627] Criminal Procedure Act 51 of 1977.
[628] *S v Vermaas* 1996 (1) SACR 528 (T).
[629] *S v Panayiotou* (ECG) unreported case no: 06/2015 of 28 July 2015.
[630] *State v Davis* unreported case no: 2888/2015 of 8 May 2016.
[631] *S v Peterson* 2008(2) SACR 355(C).
[632] Ibid.
[633] Ibid.

new and, secondly, that they are relevant for [the] purposes of the new bail application. They do not constitute [simply] a reshuffling of old evidence or [an] embroidering upon it."[634]

The court went on to state that

"The purpose of adducing new facts is not to address problems encountered in the previous application or to fill the gaps in the previously presented evidence."[635]

The following can be noted from the findings of the court:

- The first step is to determine whether the facts are indeed new; they must be sufficiently different in character from the evidence presented in the previous bail application and cannot amount to the reshuffling of evidence or filling in the gaps in the evidence presented in the initial bail application;
- The new facts must be relevant for the new bail application; this means whether viewed individually or together with the evidence leading to the unsuccessful bail application, these facts must enable the court to consider the question of the release of the accused on bail afresh;
- Considering the evidence presented in the previous bail application, the new facts must favour the applicant's release on bail.

The court, in the case of *State v Telebrance*[636] stated as follows:

"[i]n summary, and based on the aforementioned guidelines and principles, it was submitted for the appellant that the mere fact that the evidence relied on in the second bail application existed at the time of the initial application for bail does not mean that such evidence cannot constitute new facts."[637]

It is submitted that if the evidence existed but was not available to the accused at the initial bail application, such evidence will qualify as a new fact. The rejection of the evidence that existed in the initial bail application but was not available to the accused, as a new fact, was criticized by the judge in *State v Telebrance*.[638] In *State v Telebrance*[639] the court found that:

"[t]he considerable force in these submissions inclines us to conclude, in the circumstances of this matter, that the approach adopted by the magistrate was unsound and erroneous. In our view,

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[634] Ibid.
[635] Ibid.
[636] *S v Telebrance* unreported case no: 05/2022(ECQG) of 4 October 2022.
[637] *S v Telebrance* unreported case no: 05/2022(ECQG) of 4 October 2022.
[638] Ibid.
[639] Ibid.

the evidence procured by the appellant may assume relevance where a court is required to make a determination on the bail issue by weighing the contested versions put up by the respective parties."[640]

3.9. Conclusion

The Criminal Procedure Act[641] was not correctly interpreted by the Constitutional Court in the case of *State v Dlamini*[642] and such misinterpretation by favouring the narrow approach in the interpretation of section 60(4) of the Criminal Procedure Act[643] has resulted in the judiciary making errors in the evaluation process. The narrow approach cannot be justified and is not in line with the provision of section 12 of the Constitution.[644] It is argued in this research that the narrow approach cannot be used in the interpretation of the term interest of justice.

A broader approach is recommended in this research. It is submitted that the broader approach must be used in the interpretation of the term interest of justice. The broader approach takes into account the interest of the victim as represented by the state and also the interest of the accused. The narrow approach only takes into account the interest of the victim and the state. The argument is that by defining the phrase interest of justice as considering what is just and fair to all interested parties, the narrow approach is excluded and cannot be used. The broader approach considers all interested parties, including the public in general, the accused, and the victim. The Constitutional Court in *State v Dlamini*[645] erred in not taking the definition of the term interest of justice into account. If the court in *State v Dlamini*[646] had taken into account the definition of the term interest of justice, then the judicial confusion on how the word should be interpreted would not exist. The interest of justice is a value judgment of what is fair and just to all interested parties.

It is recommended in this research that the legislature should draft a new section to be included in section 60 of the Criminal Procedure Act.[647] The section, that the research recommends, must set out the proper interpretation of the term interest of justice, and the research recommends that the broader approach be expressly included in section 60 of the Criminal Procedure Act. The broader approach includes the interest of the victim and the accused and is

[640] *S v Telebrance* unreported case no: 05/2022(ECQG) of 4 October 2022.
[641] Criminal Procedure Act 51 of 1977.
[642] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[643] Criminal Procedure Act 51 of 1977.
[644] Constitution of the Republic of South Africa, 1996.
[645] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[646] Ibid.
[647] Criminal Procedure Act 51 of 1977.

not one-sided like the narrow approach. The narrow approach is limited to the interest of the victim.

The phrase exceptional circumstance remains another point that the research aimed to discuss. The Constitutional Court, in the case of *State v Dlamini*[648] did not even attempt to define the words exceptional circumstances, and little guidance was given to presiding officers on evaluating evidence. The exceptional circumstances can be found in the accused's personal circumstances, the nature of the offence and how it was committed, and anything which is particularly cogent. It is submitted in this research that the Constitutional Court, in *State v Dlamini*,[649] was correct; the term itself cannot be defined.[650]

In *State v Mabena*[651] the conduct of the judge towards Ms. Mahanjana was found to be unacceptable. The judge in *State v Mabena*[652] failed to apply the proper procedure when dealing with an accused charged with a Schedule 6 offence. No evidence adduced by the accused showed, on the balance of probabilities, that exceptional circumstances existed which permitted their release on bail in the interest of justice. It is submitted that an inquiry is compulsory when a presiding officer deals with an accused charged with an offence listed in Schedule 6 of the Criminal Procedure Act. It is further argued that the state must be allowed to oppose the application. The judge used his own experience as a black person in South Africa; it is submitted that a judge's experience in his personal capacity is irrelevant in deciding whether exceptional circumstances permit the release of the accused on bail.

It is further submitted that the correct approach in dealing with bail on new facts is found in the case of *State v Peterson*.[653] In *State v Peterson*[654] the court stated that for the evidence to qualify as new, the accused must satisfy the court that the facts are indeed new. Secondly, the accused must satisfy the court that they are relevant. It is submitted and supported by the court in the case of *State v Davis* that the new facts must differ from the reshuffling of old evidence.

The case of *State v Telebrance*[655] is essential as it confirms that the evidence that existed in the initial bail application but was not available to the accused can amount to new facts. The research favours the principle in *State v Telebrance*[656] that the evidence that existed can, in the circumstances where it was not available to the accused, amount to new facts. It is further

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[648] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[649] Ibid.
[650] *State v Peterson* 2008(2) SA 355 (C).
[651] *State v Mabena and Another* 2007 (1) SACR 482 (SCA).
[652] Ibid.
[653] *State v Peterson* 2008(2) SA 355 (C).
[654] Ibid.
[655] *S v Telebrance* unreported case no: 05/2022(ECQG) of 4 October 2022.
[656] Ibid.

argued that the new evidence must only come to the attention of the accused after bail was refused.

CHAPTER 4: CONCLUSION

4.1. Overview

Bail laws in South Africa must be revisited and restructured. The Constitution confers the right to be released on bail to a person accused of committing and offence, if the interest of justice permit.[657] Bail is an urgent application which ensure that a person arrested or charged of committing an offence keeps his life intact until he or she is found guilty of committing that particular offence.[658] The presumption of innocence is another right which is entrenched in the constitution which favors the accused who is charged on an offence.[659]

The assessment of evidence in bail procedures is the main area of interest for the research. This includes evaluating the evidence regarding bail hearing postponements and taking the interests

[657] Constitution of the Republic of South Africa, 1996.
[658] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[659] Ibid.

of justice into account. Although it is an important consideration, the study's starting point is not the length of time that bail may be delayed. The starting point is the period for which bail can be postponed. It is submitted in this research that presiding officers are empowered to postpone bail applications. Section 50(6)(d) of the Criminal Procedure Act[660] confirms the period of postponements to any date but at most for a period of seven (7) days at a time. The case of *Hans v District Court Magistrate, Cape Town and Others*[661] is used in this research to illustrate the importance of compliance with the provisions of section 50(6)(d) of the Criminal Procedure Act.[662] The research also dealt with the grounds for postponing the bail application. The case of *State v Majali*[663] was used to emphasise that an inquiry must be conducted, and the accused must be allowed to challenge evidence. The term interest in justice used in section 60(4) of the Criminal Procedure Act[664]was also dealt with in this research, which favoured the broader approach to the interpretation of this term. Section 60(4) of the Criminal Procedure Act[665] sets out the factors that the court should consider in determining whether or not the interest of justice does permit the release of the accused on bail. The broader approach considers the interest of the victim and the accused. The research did not agree with the findings in the case of *State v Dlamini*[666] regarding the interpretation of section 60(4) of the Criminal Procedure Act.[667] The Constitutional Court in *State v Dlamini*[668] recommended the narrow approach in interpreting the term interest of justice. The narrow approach is only limited to considering the interest of the victim in respect of the interpretation of the term interest of justice.

The term exceptional circumstances were also dealt with in this research. The case of *State v Mabena*[669] was used to show that the judge had failed to conduct an inquiry and granted bail based on his experiences. The research emphasises that for Schedule 6 offenses, the accused must adduce evidence that satisfies the court that exceptional circumstances permit the release of the accused on bail. It is submitted that the inquiry is compulsory and that the accused must adduce evidence and satisfy the court that exceptional circumstances exist which permit his release on bail.

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[660] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).
[661] Ibid.
[662] Criminal Procedure Act 51 of 1977.
[663] *State v Majali* unreported case no: 41210/2010 of 19 July 2010.
[664] Criminal Procedure Act 51 of 1977.
[665] Ibid.
[666] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[667] Criminal Procedure Act 51 of 1977.
[668] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[669] *S v Mabena* 2007 (2) SA 137 (SCA).

The research also dealt with bail on new facts. The two principles that were laid down in *State v Peterson.*[670] were outlined. The court in *State v Peterson*[671] found that for the presiding officer to find that there are new facts the presiding officer must first be satisfied that the facts are new and relevant. The court in *State v Peterson*[672] further stated that the new facts cannot justify the reshuffling of the evidence already presented in the initial bail application. The court in *State v Davis*[673] found that the alleged new facts were familiar and relied upon the findings by the court in *State v Peterson*.[674] The research agreed with the court's finding in *State v Davis*.[675] The alleged new facts in *State v Peterson*[676] were not new and had already been dealt with in the initial bail application.

4.2. Postponement

Bail postponements frustrate the accused; they limit his right to liberty and temper the urgency of the application. The research dealt with the provisions of section 50(6)(d) of the Criminal Procedure Act.[677] and critically analyses these provisions. The case of *State v Majali*[678] was used in this research to show the error by the presiding officer in granting the postponement without any inquiry being held.

Section 50(6)(d) of the Criminal Procedure Act[679] provides that bail applications can be postponed and sets out the criteria for evaluating the evidence relating to such a postponement. It is submitted that section 50(6)(d) of the Criminal Procedure Act[680] gives the power to the court to postpone bail application. The period of the postponement is also regulated in section 50(6)(d) of the Criminal Procedure Act [681] and it is that the hearing of a bail application may be postponed to:

> "any date or court, for a period not exceeding seven days at a time."

In the case of *Hans v District Court Magistrate, Cape Town and Others*[682] the court emphasised that the postponement period must be at most seven days. The court stated that for a

[670] *S v Peterson* 2008 (2) SACR 355(C).
[671] Ibid.
[672] Ibid.
[673] *State v Davis* unreported case no: 2888/2015 of 8 May 2016.
[674] *S v Peterson* 2008(2) SACR 355(C).
[675] *State v Davis* unreported case no: 2888/2015 of 8 May 2016.
[676] *S v Peterson* 2008(2) SACR 355(C).
[677] Criminal Procedure Act 51 of 1977.
[678] *State v Majali* unreported case no: 41210/2010 of 19 July 2010.
[679] Criminal Procedure Act 51 of 1977.
[680] Ibid.
[681] Criminal Procedure Act 51 of 1977.
[682] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).

postponement to be lawful, it must be on reasonable grounds, and it should be as per the statutory requirements regarding the time to which it may be postponed. It is submitted that the presiding officer should consider carefully the time to be given to a postponement and must ensure that it is within seven (7) days as required by section 50(6)(d) mentioned above. It is further submitted that the inquiry as to whether the postponement must be granted is essential to determine the postponement period. The evidence present in the enquiry will assist the court in determining the date, which may be any date but not exceeding seven (7) days at a time. For example the court after the enquiry may decide to grant the state a period of three days, depending on the evidence presented the court.

The court found that the continued detention over the stipulated period was unlawful. The research concurs with these findings of the court. It is submitted that the court must adequately apply its mind to the postponement period. It is further submitted that for the court to decide on the postponement, the court must look at the evidence before it and determine whether it is reliable and sufficient to decide on the question of bail. The court can postpone the matter if it has insufficient evidence to decide bail.[683] The court must apply its mind to the postponement even if there is an agreement between the State and the defence to postpone the matter. In *Hans v District Court Magistrate, Cape Town, and Others*[684] the court found that the discretion of the magistrate must be exercised honestly. In *Hans v District Court Magistrate, Cape Town and Others*[685] the court found that it could not find anything mala fide on the part of the magistrate in granting the postponement. Therefore, the error by the magistrate was innocent. The court however concluded that the period of the postponement must be any date but not exceeding seven (7) days at a time.

Section 50(6)(d) of the Criminal Procedure Act[686] deals with the grounds on which the application for a postponement could be based. The court in *State v Majali*[687] had to decide whether the court a quo should have granted the postponement. The court found that for the application for a postponement to be granted, the state must provide evidence supporting the application. The accused must be allowed to challenge the evidence tendered by the state and present evidence opposing the application. The court further found that it must decide whether it has sufficient information to reach the question of bail. The grounds for a postponement listed in section 50(6)(d) of the Criminal Procedure Act[688] are as follows:

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[683] Section 60(3) of the Criminal Procedure Act 51 of 1977.
[684] *Hans v District Court Magistrate, Cape Town* 2020 (2) SACR 362 (WCC).
[685] Ibid.
[686] Criminal Procedure Act 51 of 1977.
[687] *State v Majali* unreported case no: 41210/2010 of 19 July 2010.
[688] Criminal Procedure Act 51 of 1977.

- Where the court believes that it does not have enough information to decide on bail;[689]
- Where the court finds that the State must be given a reasonable opportunity to get material evidence that may be lost if bail is not granted or to perform the functions in section 37 of the Criminal Procedure Act;[690]
- Where the court finds that the postponement of the bail application is necessary in the interest of justice;[691]
- where the prosecutor informs the court that the matter has been or will be referred to the Attorney General for issuing the certificate in terms of section 60(11) A of the Criminal Procedure Act, the postponement must be granted.[692] It is submitted that an inquiry must be conducted, and the court must be informed why the matter is being referred to the Attorney-General for the written certificate. It is further submitted that the accused must be allowed to respond to the application.

The court can also rely on the provisions of section 60(3) of the Criminal Procedure Act[693] to postpone the bail application. Section 60(3) of the Criminal Procedure Act[694] provides that the court may postpone a bail application where it finds that it does not have sufficient and reliable information to decide on the question of bail.

[689] Criminal Procedure Act 51 of 1977.
[690] Ibid.
[691] Ibid.
[692] Ibid.
[693] Ibid.
[694] Ibid.

4.3. The Term Interest of Justice, Exceptional Circumstances and Bail on New Facts

Chapter 3 dealt with the terms of interest of justice and exceptional circumstances; the chapter went on to deal with bail on new facts. Various cases were used to clarify the evidence evaluation process by the presiding officers. The starting point was the term interest of justice.

4.3.1. Interest of Justice

The errors by the Constitutional Court in the case of *State v Dlamini*[695] must be addressed because they are causing problems for the judiciary in evaluating evidence. It is further submitted in this research that the Constitutional Court did not deal with the postponements of bail in the case of *State v Dlamini*.[696] It is submitted that the term interest of justice is a value judgment of what is fair and just to all interested parties. The term is used in various subsections of section 60 of the Criminal Procedure Act. The research dealt with the Constitutional Court in the case of *State v Dlamini*[697] and how the Constitutional Court interpreted the term interest of justice. In *State v Dlamini*[698] the Constitutional Court used the narrow approach in interpreting section 60(4) of the Criminal Procedure Act.[699] The narrow approach favours the interpretation of the term interest of justice which is only limited to the victim's interest and excludes the accused's interest. The Constitutional Court in *State v Dlamini*[700] recommended that the broader approach to interpreting the term interest of justice be used in section 60(1) and 60(5)-(10) of the Criminal Procedure Act.[701] The broader approach includes the interest of the victim and the interest of the accused. The research argues that the Constitutional Court in *State v Dlamini* should have used a broader approach[702] in interpreting all the provisions of section 60 of the Criminal Procedure Act,[703] including section 60(4) of the Criminal Procedure Act.[704]The research respectfully submits that the Constitutional Court was incorrect in finding that the narrow approach should be used in interpreting the term interest of justice. The argument is that the broader approach must be used in interpreting the term interest of justice, which includes the rights of the victim and the rights of the accused.

It is submitted that a proper evaluation of the evidence to determine whether the interest of justice permits the release of the accused on bail requires that section 60(4) of the Criminal Procedure Act[705] be interpreted using a broader approach. The argument is that for the court to

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[695] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[696] Ibid.
[697] Ibid.
[698] Ibid.
[699] Criminal Procedure Act 51 of 1977.
[700] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[702] Criminal Procedure Act 51 of 1977.
[701] Ibid.
[702] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[703] Criminal Procedure Act 51 of 1977.
[704] Ibid.
[705] Ibid.

judge what is fair to all interested parties, the accused's interest should also be part of the inquiry when interpreting section 60(4) of the Criminal Procedure Act. Section 60(4) of the Criminal Procedure Act[706] provides that it will not be in the interest of justice to release the accused on bail if:

- [There] is a likelihood that the accused [will pose] a danger to [any person] or the public at large or he will commit further crimes;[707]
- There is a likelihood that the accused will not attend his trial and abscond;[708]
- There is a likelihood that the accused will interfere with those who are state witnesses or influence or intimidate the witnesses or that the accused will temper with the evidence.[709]
- There is a likelihood that the accused will not take the criminal justice system seriously and will undermine it, including the bail system.[710]
- In exceptional circumstances, the release of the accused will undermine public safety or cause disorder in the public."[711]

If the likelihood exists that the release on bail will result in any ground listed in section 60(4) of the Criminal Procedure Act,[712] then bail must be refused. The state must only prove that one ground exists for refusing bail.

In sections 60(5) of the Criminal Procedure Act to section 60(8A) of the Criminal Procedure Act,[713] the legislature lists the factors the court must consider in deciding whether the grounds listed in section 60(4) of the Criminal Procedure Act[714] have been established by the state. It is submitted that there is nothing wrong with sections 60(5) of the Criminal Procedure Act[715] to section 60(8A) of the Criminal Procedure Act,[716] but the research believes that in interpreting and implementing these provisions, a broader approach must be used, and the accused's right to liberty must be included in any inquiry regarding whether or not to grant bail to an accused.

Section 60(9) of the Criminal Procedure Act[717] requires the court, in deciding whether the interest of justice permits the release of the accused on bail as envisaged in section 6(4) of the

[706] Criminal Procedure Act 51 of 1977.
[707] Section 60(4)(a) of the Criminal Procedure Act 51 of 1977.
[708] Section 60(4)(b) of the Criminal Procedure Act 51 of 1977.
[709] Section 60(4)(c) of the Criminal Procedure Act 51 of 1977.
[710] Section 60(4)(d) of the Criminal Procedure Act 51 of 1977.
[711] Section 60(4)(e) of the Criminal Procedure Act 51 of 1977
[712] Criminal Procedure Act 51 of 1977.
[713] Ibid.
[714] Ibid.
[715] Ibid.
[716] Ibid.
[717] Ibid.

Criminal Procedure Act,[718] to weigh up the interest of justice against the right to liberty of the accused. The court is directed to specifically look at the prejudice that the accused is likely to suffer if bail is not granted. The research argues that there is no section in section 60 of the Criminal Procedure Act[719] that concentrates mainly on the factors the court must consider when assessing the accused's right to liberty. In *State v Dlamini*,[720] the Constitutional Court stated that section 60(9) of the Criminal Procedure Act[721] and section 60(10) of the Criminal Procedure Act,[722] are the actual evaluation provisions. The Constitutional Court meant that section 60(9) and 60(10) of the Criminal Procedure Act,[723] are the two sections that determines whether bail should be granted or not. The argument is that if section 60(9) of the Criminal Procedure Act[724] and section 60(10) of the Criminal Procedure Act[725] are the actual evaluation provisions, then there are no provisions dealing mainly with the accused.

The research recommends that a broader approach be used in interpreting the term interest of justice because it considers both the interest of the victim and the interest of the accused. The narrow approach is not recommended, it only considers the rights of the victim, and this is prejudicial to the accused who has a right to be released on bail if the interest of justice permit.

4.3.2. Exceptional Circumstances

The term exceptional circumstances used in section 60(11)a of the Criminal Procedure Act,[726] where an accused charged with an offence referred to in Schedule 6 wishes to apply for bail, is still undefined in South African law. The research considered the meaning of the term exceptional circumstances and explained how the court should evaluate the evidence presented. The case of *State v Mabena*[727] was used to illustrate the error by the presiding officer, who failed to follow the correct procedure in section 60(11)(a) of the Criminal Procedure Act.[728] Section 60(11)(a) of the Criminal Procedure Act[729] provides that:

> "notwithstanding any provision of this Act, where an accused is charged with an offence referred to in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances [exists] which in the [interest] of justice permit his or her release".[730]

In *State v Mabena*,[731] the court granted bail to the accused without any evidence being adduced by the accused to show that there were exceptional circumstances that warranted him being

[718] Ibid.
[719] Criminal Procedure Act 51 of 1977.
[720] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[721] Criminal Procedure Act 51 of 1977.
[722] Ibid.
[723] Ibid.
[724] Ibid.
[725] Ibid.
[726] Ibid.
[727] *S v Mabena* 2007 (2) SA 137 (SCA).
[728] Criminal Procedure Act 51 of 1977.
[729] Ibid.
[730] Ibid.
[731] *S v Mabena* 2007 (2) SA 137 (SCA).

released on bail in the interest of justice. The state was also not allowed to respond to the application. The court did not comply with the provisions of section 60(11)a of the criminal Procedure Act,[732] which state that the accused must adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit the release on bail. On appeal the court found that the proper procedure was not followed and issued a warrant of arrest for accused to be detained in custody.[733] The appeal court found that the order granting bail was null and void.[734]

The case of *State v Mabena*[735] will assist the judicial officers with correctly applying the provisions of section 60(11)(a) of the Criminal Procedure Act.[736] It is submitted that the judge failed to follow the proper procedure in the case of *State v Mabena*.[737] The judge, instead of following the procedure laid in section 60(11)(a) of the Criminal Procedure Act[738] and conducted an enquiry and stated that as a presiding officer, he had a duty to see that justice was done to it. The court decided that part of his duty is to not allow a person to be incarcerated for an indefinite period and released the accused on bail without following the proper procedure. In *State v Mabena*,[739] the judge referred to his experiences of life as a black person. It is submitted that the inquiry is not about the presiding officer's personal experiences. The inquiry in a bail application should not be construed as related to his experiences as a judge. The court had to determine whether exceptional circumstances exist in the interest of justice to permit the release of the accused on bail on the basis of the evidence adduced by the state and the accused.

The research also dealt with the definition of the term exceptional circumstances. In *State v Dlamini*[740] the Constitutional Court was not convinced that the word exceptional circumstances was so vague that the applicant did not know what to prove. In *State v Dlamini*,[741] The Constitutional Court further found that the applicant can rely on his circumstances, the nature of the crime of the state, or anything cogent in order to establish exceptional circumstances.

In *State v Dlamini*[742] the Constitutional Court further confirmed that it disagreed with the approach that exceptional circumstances differ from those listed in sections 60 (4)-(9) of the Criminal Procedure Act.[743] The Court found that the factors found in section 60(4)-(9) of the

[732] Criminal Procedure Act 51 of 1977.
[733] *S v Mabena* 2007 (2) SA 137 (SCA) at para 29.
[734] Ibid at para 29.
[735] Ibid.
[736] Criminal Procedure Act 51 of 1977.
[737] *S v Mabena* 2007 (2) SA 137 (SCA).
[738] Criminal Procedure Act 51 of 1977.
[739] *S v Mabena* 2007 (2) SA 137 (SCA).
[740] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[741] Ibid.
[742] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[743] Criminal Procedure Act 51 of 1977.

Criminal Procedure Act[744] can be viewed as exceptional circumstances.[745] The research believes that ordinary circumstances can be considered exceptional, depending on each case's facts. The case of *State v Coetzee*[746] also adopted the approach favoring those ordinary circumstances can be considered exceptional.[747] To say that ordinary circumstances can be viewed as exceptional circumstances contradicts the approach adopted by the court in *State v Peterson.*[748] It is submitted that ordinary circumstances can be viewed as exceptional, depending on the facts of the case this was confirmed in the case of *State v Vanqa*.[749]

4.3.3. Bail on New Facts.

The research also dealt with bail on new facts. Section 65(2) of the Criminal Procedure Act provides that:

> "an appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought unless such new facts are first placed before the magistrate or regional magistrate whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts."[750]

It is submitted that section 65(5) of the Criminal Procedure Act[751] is correct; the court that refused the initial bail application retains jurisdiction for bail on new facts. The court in *State v Peterson*[752] formulated the test for facts to be regarded as new. In *State v Peterson*[753] the court found that the court must first be satisfied that the facts are new and relevant in the new bail application before determining whether the interest of justice, based on the evidence presented in the previous bail application and the new facts, permit the release of the accused on bail. It is submitted that the test laid down *in State v Peterson*[754] is correct. In *State v Telebrance*[755] the court found that even facts that existed before the initial bail application was refused can be regarded as new facts for the purposes of the new hearing if those facts were unavailable to the accused when the initial bail application was refused. In the case of *State v Davis,*[756] the court found that the alleged new facts were not new and that the accused had relied on the evidence already led in the initial bail application. The court, in the refusal of bail on new facts, relied on the principles laid down in the case of *State v Peterson*[757] and found that the evidence stated that the evidence must not amount to the reshuffling of the evidence already led in the initial bail application.

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[744] Ibid.
[745] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[746] *S v C* 1998 (2) SACR 721 (C).
[747] Ibid.
[748] *S v Peterson* 2008(2) SACR 355 (C).
[749] *S v Vanqa* 2000(2) SACR 371 (Tk).
[750] Criminal Procedure Act 51 of 1977.
[751] Ibid.
[752] *S v Peterson* 2008(2) SACR 355 (C).
[753] Ibid.
[754] Ibid.
[755] *S v Telebrance* unreported case no: 05/2022(ECQG) of 4 October 2022.
[756] *State v Davis* unreported case no: 2888/2015 of 8 May 2016.
[757] *S v Peterson* 2008(2) SACR 355(C).

4.4. Conclusion

It is recommended in this research that the provisions of section 60 of the Criminal Procedure Act.[758] should be revisited. The research recommends amendments to section 60 of the Criminal Procedure Act[759] that will enable the court to use the broad approach when interpreting all the provisions of section 60 of the Criminal Procedure Act.[760] The research does not agree with the Constitutional Court findings in *State v Dlamini*,[761] where the court recommended using the narrow approach when interpreting section 60(4) of the Criminal Procedure Act.[762] The use of the narrow approach in the interpretation of the term interest of justice used in section 60(4) of the Criminal Procedure Act,[763] is not in line with the way the term interest of justice is used in section 35(1)f of the Constitution.[764] It is recommended in this research that a broader approach should be used when interpreting the term interest of justice in section 60(4) of the Criminal Procedure Act.[765]

[758] Criminal Procedure Act 51 of 1977.
[759] Criminal Procedure Act 51 of 1977.
[760] Ibid.
[761] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[762] Criminal Procedure Act 51 of 1977.
[763] Ibid.
[764] Constitution of the Republic of South Africa, 1996.
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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Mondli Alex Mthethwa (218075854)
School Of Law
Pietermaritzburg

Dear Mr Mondli Alex Mthethwa,

Original application number: 00025258
Project title: The role of the presiding officer in a bail application: A critical analysis of the evaluation of evidence process.

Exemption from Ethics Review

In response to your application received on 31 May 2024 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Dr Jacintha Deleane Toohey
pp Academic Leader Research
School Of Law