

[HOME](#)**HOW TO SAY SUCCESS****APPLY NOW****GET A DECISION IN 60 SECONDS****Institute for Security Studies (Tshwane/Pretoria)****South Africa: Parliament Seeks to Change the Law on Bail But Will It Help?**

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ANALYSIS

Little provokes a public outcry in South Africa like a story about a person who while out on bail is charged with another crime. The media will report on these stories along with various commentaries complaining about the how this reflects on the poor state of the criminal justice system. While such incidents do occur occasionally a far bigger problem, and one that does not receive the same amount of public attention, is that of large numbers of people who are imprisoned simply because they are too poor to pay the bail that has been granted to them.

In October last year, Legal Aid South Africa highlighted to the National Assembly Portfolio Committee on Correctional Services that at any given time, as many as 10 000 people were sitting in prisons awaiting trial even though they had been granted bail. As many as 9000 of these awaiting trial detainees had been granted bail below R2500 with over 4 000 having been granted bail of less than R1000. This means that as many as 10 000 people are currently sitting in prison simply because they are poor while many wealthy people who may be charged with far more serious crimes are allowed to stay in the comfort of their homes while they are awaiting trial because they can afford bail.

In South Africa, the amount for bail is the sole discretion of the magistrate and is based on information and evidence presented before him/her. According to the Annual Report of the National Prosecuting Authority, magistrates handled 99,7% of cases in the current financial year 2010/11.

Bail should be granted when the magistrate is of the opinion that the accused person is not a flight risk and does not pose a danger to the community. In this case the bail is simply an incentive for the accused person to appear before the court at a certain date and is not determined by the type of crime the person is alleged to have committed. By not setting an affordable bail, the accused who may well be innocent, is being sent to prison for what may be an extended period of time until their case can be heard before a court of law.

Most awaiting trial prisoners, who as our political leaders frequently remind us when one of their colleagues has been criminally charged, are "innocent before proven guilty." Moreover, most will be released before their cases are finalised before a court of law for various reasons that have little to do with whether they are guilty or not.

It may be because the investigation will fail to find evidence to substantiate a case against them, witnesses will withdraw their allegations or will fail to attend court. In the meantime they and their families will suffer various hardships, which they would not experience if they could afford bail that was granted to them. This situation also contributes to overcrowding in our correctional facilities and burdens the state with unnecessary costs of incarcerating people who do not need to be in prison.

The Committee is aware of this state of affairs and is taking action to try and change the situation. On 20 September it tabled a report to parliament, calling for legislation to make it mandatory for magistrates to consider an affordable bail amount for those awaiting trial. The Committee wants to amend section 60 (2b) (ii) of the Criminal Procedure Act (CPA) which states that the "court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances."

According to Legal Aid South Africa, magistrates should follow a two-stage bail process in making decisions on bail. Firstly, magistrates should determine whether a person is eligible to be released on bail and secondly, if eligible, whether the amount is affordable for the person accused of the crime. The Committee argues that the second consideration is often ignored by magistrates and as such people awaiting trial and were granted bail, remain in the custody of the Department of Correctional Services (DCS).

However in responses to Parliamentary questions on the same day that the Committee tabled its report, the Minister of Justice and Constitutional Development (DoJ), Jeff Radebe noted that the executive was not considering a review of the current legislation on bail, stating that, it had 'considered the current bail legislation and is of the view that the legislative framework is not the challenge.'

The Minister argued that the real challenge was that all required information is not always available for magistrates to make proper or fair decisions on whether bail should be granted and the amounts that should be set.

Previous interventions by various role players support this view and have pointed to existing legislation that could assist magistrates in making decision on bail. For example, the CPA allows magistrates to make an application for the release of an accused who cannot afford bail on the recommendation by a Head of Prisons and approval of the Director of Public prosecutions.

A notable piece of legislation is section 66 (2a) (vii) of the Criminal Law (Sexual Offences and Related Matters) Act of 2007, which requires that court consider pre-sentence reports in a trial. However, a key challenge is that presentence reports are not always available to magistrates.

In 1997, the findings of a successful project, the 'Pretrial Service office' initiated led by the DoJ, demonstrated that pre-trial service reports would assist in reducing the awaiting trial population in prisons as they would provide information on 'the ability of an accused person to access money needed to pay bail and encourage magistrates to use non-financial conditions of release of bail.' Moreover, a report by the United Nations Asia and Far East Institute for the Prevention on Crime and the Treatment of Offenders, noted that 'if no pre-trial services were available in South Africa, this would lead to a doubling of the offenders held in prison awaiting trial. Unfortunately the project was discontinued and remained only in the Eastern Cape's Port Elizabeth's magistrates court.

On 6 September 2000, cabinet approved the release of people who were granted bail of up to R1000 but were awaiting trial in prison because they could not afford it. The release of the accused came as a result of a recommendation from the Judicial Inspectorate of Correctional Services (JICS) and in an effort to implement section 63A of the CPA. By November 2000 the awaiting trial population decreased from 63 964 to 51 581. Subsequently however, the situation did improve much further and as of February 2011 the awaiting trial population stood at 49 695.

It would seem that legislation forcing magistrates to consider whether an accused can afford bail may not be practical unless the relevant information is made available. Various strategies to reduce the overcrowding of prisons have had limited success. It may be time to reintroduce pre-trial screening services at all courts, as the benefits would be many. Not only would it help magistrates make better decisions about bail, but it could also assist the DCS to better assess the needs and possible risks of those that are refused bail.

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