

## Vrae en antwoorde-rakende Borgaansoeke

*Deur Sanette Viljoen*

Daar word baie gereeld om 'n braaivleisvuur gesels oor borg. Die een persoon is R50 000 borg opgelê en die ander persoon wat dieselfde misdaad gepleeg het word R5 000 borg opgelê. Hiermee 'n bietjie perspektief rondom die vasstelling van borg.

Die Grondwet van Suid-Afrika bepaal baie spesifiek in Artikel 12 dat elke persoon die reg het op vryheid en sekerheid van 'n persoon, hierby inbegryp die reg om nie arbitrêr of sonder gegronde rede van my vryheid ontnem en aangehou te word nie. Die hof se houding sal dus normaalweg, as gevolg van hierdie bepaling, altyd wees om nie inbreuk te maak op hierdie reg nie.

Indien 'n persoon dus in aanhouding gehou word sonder borg moet daar aanvaar word dat dit 'n nadelige invloed op die gemeenskap sal hê. Dit beïnvloed onder andere die persoon se gesinsverhoudinge, as broodwinner is hy nou afwesig, daar is nie inkomste nie, sy gesin word 'n las vir die gemeenskap (die gemeenskap wat beskerm moes word deurdat hy in die gevangenis is, moet nou finansiëel en maatskaplik vir sy gesin sorg) ens. Daar is ook dalk ander moontlikhede as om hom in gevangenis te hou.

Borg' word vasgestel afhangende van verskillende faktore. Al die faktore word in ag geneem om te bepaal of borgtog aan 'n persoon verleen moet word.

Faktore sluit in: vorige veroordelings, verdere misdade, regsverdeling, besit van 'n vaste adres en vaste werk, sy profiel as mens, vlugrisiko, meer as een paspoort, het hy 'n gesin, sy finansiële stand, ens.

Die doel van borg is om te verseker dat die persoon wel sy verhoor sal bywoon. Borg vorm nie deel van die persoon se straf nie. Eike individuele geval vra elke keer vir individuele beoordeling. Dit kan dus nie teen mekaar opgeweeg word soos 'n straf nie. Dieselfde beginsels van strafoplegging word gebruik by die vasstelling van borg, maar word nie op dieselfde wyse toegepas by elke persoon se individuele omstandighede nie.

Elke borgbedrag gaan dus verskil van persoon tot persoon, ongeag of dit dieselfde misdaad is. SV

## **Kan 'n prokureur hom of haar op borgtog vrygelaat kry na werksure of opnaweke en vakansiedae?**

In gevalle waar iemand aangekla word van misdade soos hieronder gelys, kan 'n prokureur met die die ondersoekbeampte reël dat die persoon voor die eerste hofverskyning op borgtog vrygelaat word. Die SAPS kan borg vasstel vir die volgende misdade:

- Aanranding;
- Diefsta |, waar waarde van die gesteelde goedere onder R2 500 beloop;
- Crimen iniuria (strafbare laster);
- Besit van 'n klein hoeveelheid dagga;
- Dronkbestuur;
- Roekelose of Nalatige bestuur.

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Die SAPS benodig toestemming vanaf 'n Staatsaanklaer om borg vas te stel vir die volgende misdade:

- Publieke geweld;
- Strafbare manslag;
- Bestialiteit;
- Aanranding met die opset om ernstig te beseer;
- Brandstigting;
- Huisbraak;
- Opsetlike saakbeskadiging;
- Roof sonder die gebruik van 'n wapen, mits die waarde van die buit onder R20 000 beloop;
- Diefstal van goeder wat se waarde minder as R20 000 beloop;
- Besit van onwettige dwelmmiddels;
- Bedrog, vervalsing of afpersing waar die betrokke bedrag minder as R20 000 beloop;

### **Waar iemand aangekla is van die volgende misdade, kan slegs 'n hof borg vasstel, en slegs gedurende gewone hoftyd:**

- Moord;
- Verkragting;
- Misdade van seksuele aard, gepleeg teenoor 'n kind of verstandelik gestremde persoon;  
Handel Dryf in mense vir seksuele doeleindes;
- Gewapende Roof;
- Diefstal, Ontvangs van Gesteelde Goedere, Roof, Bedrog of Vervalsing waar die betrokke bedrag meer as R20 000 beloop;
- Onwettige Besit of Handel Dryf in Edelmetale of -stene;
- Ontvoering;
- Menseroof;
- Intimidasie.

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### Questions re: Bail

- Should a state prosecutor present a suspect's criminal record to the court during a bail hearing.
- If a suspect is suspected of other crimes and those crimes are still under investigation, should the court be made aware of those cases during a bail hearing.
- What other facts/ evidence could a state prosecutor present to a court to successfully oppose bail.

### Adv Veenemans response:

1. Yes the prosecutor should advise the court accordingly **IF** this information is made available to the prosecutor in time and when the previous convictions are relevant to the current crime the accused is facing. So if he is facing a stock theft charge and he has a previous conviction for stock theft, then it will be necessary to advise the court thereof. But if the accused has a previous conviction of *crimen injuria* (totally unrelated minor offence), then such conviction will not have a major impact on the court's decision regarding bail.
2. Pending cases against a suspect is also a major consideration for the court on whether to grant or deny bail. Especially if the pending cases are of similar nature, for example he is facing a charge of stock theft and there are three other stock theft cases pending against him in other courts.
3. The strength or weakness of the State's case against the accused is also a major factor to be considered. That is why the investigating officer should either testify or at least provide a statement to that effect so that the court can determine whether the prosecution has a strong case against the accused. The court has to take into consideration, numerous factors when deciding on bail. Some of the considerations are mentioned below:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or  [Para. (a) substituted by s. 4 (c) of Act 85 of 1997.]	See subsection (5) infra for various specific factors in this regard. "
(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or	See subsection (6) infra for various specific factors in this regard.
(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or	See subsection (7) infra for various specific factors in this regard.
(d) where there is the likelihood that the accused, if he or she were released on bail,	

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will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;	See subsection (8) infra for various specific factors in this regard.
(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; or [sic]  [Para. (e) added by s. 4 (d) of Act 85 of 1997.]	See subsection (8A) infra for various specific factors in this regard. The emphasis in s 60(4)(e) is on the words exceptional circumstances and the facts of each case will be of paramount importance in deciding this question. Factors that may be exceptional at one court may not necessarily be so in another district or region.
(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-	Subsection (5) contains aspects from various cases in the past 'defining' factors that ought to be considered.
(a) the degree of violence towards others implicit in the charge against the accused;	
(b) any threat 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 to 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 his or her past conduct;	
(f) the prevalence of a particular type of offence;	
(g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or	
(h) any other factor which in the opinion of the court should be taken into account.	This is a wide provision and allows for the inclusion of anything not listed.
(6) In considering whether the ground in subsection (4) (b) has been established, the court may, where applicable, take into account the following factors, namely-	Subsection (6) contains aspects from various cases in the past 'defining' factors that ought to be considered. The list is a repetition of the circumstances considered by the court in Acheson 1991(2) SA 805(Nm)

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(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 means, 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 the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;	
(f) the nature and the gravity of the charge on which the accused is to be tried;	
(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt 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 of 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.	This is a wide provision and allows for the inclusion of anything not listed.

(7) In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely-	Subsection (7) contains aspects from various cases in the past 'defining' factors that ought to be considered.
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(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 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.	This is a wide provision and allows for the inclusion of anything not listed.
(8) In considering whether the ground in subsection (4) (d) has been established, the court may, where applicable, take into account the following factors, namely-	Subsection (8) contains aspects from various cases in the past 'defining' factors that ought to be considered.
(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;	
(b) whether the accused is in custody on another charge or whether the accused is on parole;	

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<p>(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</p>	
<p>(d) any other factor which in the opinion of the court should be taken into account</p>	<p>This is a wide provision and allows for the inclusion of anything not listed.</p>
<p>(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely-</p>	<p>With the addition of a further ground for refusal to grant bail (s 60(4)(e)), it became necessary to specify certain factors the court should take into account. There is not much to comment on regarding these specified grounds except to emphasise that the <i>exceptional circumstances</i> referred to in s 60(4)(e) must be borne in mind in regard to each of these factors. <b>See Miselo 2002(1) SACR 649 (C)</b></p>
<p>(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;</p>	
<p>(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;</p>	
<p>(c) whether the safety of the accused might be jeopardized by his or her release;</p>	
<p>(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;</p>	
<p>(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or</p>	
<p>(f) any other factor which in the opinion of the court should be taken into account. [Sub-s. (8A) inserted by s. 4 (e) of Act 85 of 1997.]</p>	<p>This is a wide provision and allows for the inclusion of anything not listed.</p>

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<p>(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests 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 to be detained in custody, taking into account, where applicable, the following factors, namely-</p>	<p>In <b>Vermaas</b> 1996(1) SACR 528 (T) the listed factors were balanced against the facts of the case.</p> <p>See <b>Yanta</b> 2000(1) SACR 237 (Tk) for comments relating to an accused's circumstances and what may be construed as 'exceptional circumstances</p> <p>See too <b>Siwela</b> 1999(2) SACR 685 (W).</p>
<p>(a) the period for which the accused has already been in custody since his or her arrest;</p>	
<p>(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;</p>	
<p>(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;</p>	
<p>(d) any financial loss which the accused may suffer owing to his or her detention;</p>	
<p>(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;</p>	
<p>(f) the state of health of the accused; or</p>	
<p>(g) any other factor which in the opinion of the court should be taken into account.</p>	<p>This is a wide provision and allows for the inclusion of anything not listed.</p>