

# Possibly unconstitutional?

## The insistence on verification of address in bail hearings

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*Arrestees have the right to apply for bail and to be released pending their trial, where circumstances require it. There is a practice of requiring people to verify their addresses prior to bail being granted, and this is implemented in various ways by different magistrates' courts; from a magistrate refusing to hear a bail application until there is a verified address, to a magistrate hearing the application but holding the decision over until a verifiable address is supplied. This practice is widespread, and unfairly prejudices the homeless and poor, whose addresses are difficult to verify. It also means that their pre-trial incarceration might be lengthier than their sentences. This article will argue that this practice should be subject to the interests of justice criteria, and that its current form does not meet this standard. We will also investigate what this practice might look like if carried out in compliance with the interests of justice criteria. Lastly, this article will argue that this practice in its current form fails to meet rule of law standards. These arguments will be made in the context of the right to equality, and discrimination against those living in poverty. It will be concluded that, in its current form, the practice is unconstitutional.*

Courts of law are frequently criticised for denying bail to accused persons. Critics argue that the courts place too much weight on some factors, and completely disregard others.<sup>1</sup> These include denying an accused bail because s/he does not own satisfactory assets, and is therefore considered a flight risk in the view of the presiding officer.<sup>2</sup> In addition, the lack of a verifiable and/or fixed address affects the judge's assessment of whether such an accused is

likely to evade trial.<sup>3</sup> Accused persons who can provide information about community and family ties, or who are permanently employed, or who can prove ownership of assets, are much less likely to be deemed a flight risk than those who cannot.<sup>4</sup> A fixed residential address and the ownership of assets, while different, are both indicators of an accused's economic status, and adjudicating bail applications on this basis discriminates against accused persons and runs counter to international human rights provisions and constitutional rights.<sup>5</sup>

South Africa already has a very high number of people in remand detention. Approximately

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one third of persons detained in correctional facilities are on remand detention, and this number has grown more than 100% since 1995.<sup>6</sup> These growing numbers of remand detainees result from the lack of correctional centres, unnecessary detention (in instances of petty crimes), prohibitively high bail, incorrect application of the two-pronged bail inquiry, and lack of access to legal representation.<sup>7</sup> Depending on how harsh the prison conditions are, remand detainees are exposed to many life-threatening diseases, suffer loss of employment, lose contact with family members, and have a number of their constitutional rights violated daily.<sup>8</sup>

Denying bail exacerbates the already unacceptable levels of overcrowding in prisons by detaining high numbers of people who have not yet been found guilty of the crimes for which they stand accused.<sup>9</sup> Research has shown that setting a high bail essentially amounts to a denial of bail – it discriminates against people living in poverty and means that large numbers of people remain in detention merely because they cannot afford to pay the set bail amount.<sup>10</sup> This has prompted interventions such as ensuring reasonable bail calculations in order to prevent pre-trial punishment.<sup>11</sup> Research (discussed later in this article) has also shown that judicial officers more often consider the nature of the crime rather than the personal circumstances of the accused during the bail inquiry. Little attention has been paid to the way in which presiding officers rely heavily on a lack of assets ownership and lack of a verified address to justify denying or postponing bail, and how this not only discriminates against accused people living in poverty but also contributes to the growth of the remand detention population.

This article argues that placing too much emphasis on these factors when determining arrestees' flight risk (and setting bail amounts)

violates South African law, international human rights law and regional instruments. The article sets out how the courts assess flight risk by considering an accused's fixed address and/or ownership of assets in the determination of bail, and the important role that presiding officers' attitudes play in this regard. We then discuss what is required under an interests of justice criterion, how the courts should treat arrestees, given either an absence of assets or the failure of the prosecution to verify the physical address of an accused, and how the courts should assess whether an arrestee poses a flight risk. The article proposes some recommendations and suggests alternative strategies to enable bail for arrested persons without violating their human rights.

### **The requirement of a fixed address and/or ownership of assets for bail**

Before a court considers a bail application, the accused's physical address must be verified through documentary evidence or by the investigating officer, who physically has to go to the address in question to confirm whether the accused does in fact live there. The investigating officer will monitor the accused person while s/he is out on bail, and will check the given address in the event that the accused does not attend court on a day that s/he was required to do so.<sup>12</sup> If this address is not yet established in time for the accused's first appearance in court (which is usually when bail applications are heard), the presiding officer may postpone the matter for up to seven days under section 50(6)(d)(i) of the Criminal Procedure Act.<sup>13</sup> (We return to a discussion of the bail provisions in the Criminal Procedure Act, below).

A 2016 study, which observed bail applications at the Cape Town and Wynberg magistrates' courts, showed that 16 out of 37 cases were postponed in accordance with section 50(6)(d)(i), pending the verification of the accused's permanent residential address.<sup>14</sup>

Bail was not granted in five cases because police officers were not able to find and verify the accused's residential address.<sup>15</sup> Bail hearings had been postponed at least once prior to the hearings observed in all of these cases.<sup>16</sup> A 2013 study into how bail hearings affected the remand detention population in Gauteng similarly showed that a large number of bail hearings were postponed in order for the accused's address to be verified prior to the granting of bail.<sup>17</sup> When an accused does not have a fixed or readily verifiable address, the court is unlikely to believe that the accused will appear once the trial commences, or that the correctional officers will be able to locate and monitor the accused person if they do not return to court as required.<sup>18</sup> Presiding officers have acknowledged that the concept of a fixed address is problematic in the South African context, where many people live in informal settlements.<sup>19</sup>

Existing research has also shown that courts often view accused persons who own few or no assets as a possible flight risk.<sup>20</sup> Presiding officers in seven hearings observed and analysed by Omar took the view that a lack of ownership of assets meant that the accused would be a flight risk.<sup>21</sup> In three of these seven cases, the courts characterised the accused as 'likely to abscond',<sup>22</sup> despite the fact that they were employed.<sup>23</sup> The problem with this type of approach by the courts is that, as held in *S v Letaoana*,<sup>24</sup> 'to take into account the minimal assets possessed by an accused as a factor for refusing bail is tantamount to imposing a penalty for poverty'.<sup>25</sup>

The practice of requiring fixed addresses in order to grant bail disproportionately affects black South Africans living in poverty. Accused persons of higher economic standing, who likely live in a residential area, can easily and quickly verify their address by producing a copy of their rates and taxes bill, an account statement or similar document. This is taken as full and adequate

verification of their address. South Africa has many people who reside in informal housing (sometimes unlawfully occupying pieces of land close to prospective places of employment), and who consequently are not able to meet these requirements.

A related concern are the variable ways that courts implement the requirement for a fixed address and/or ownership of assets. From our own observations in magistrates' courts around Johannesburg (which we conducted in order to better understand the requirement in practice), we have seen presiding officers who insist that only an affidavit by an investigating officer is suitable for verification of an address, while others accept testimony by the accused's relatives and family members for the same purpose. Strictly speaking, there is no specific provision in South African law that sets out that a fixed address and ownership of assets is a prerequisite for granting bail (as cases like *Letaoana* have questioned). Instead, there is limited law to guide presiding officers in respect of how addresses must be verified, which creates uncertainty and a lack of uniformity in how the law is applied.

## Legal framework

For an international treaty to be binding in South Africa it must be enacted into law by the legislature, even if South Africa is a signatory to the treaty.<sup>26</sup> However, treaties can act as interpretative tools for understanding rights even before they are enacted into law.<sup>27</sup> International law is therefore important, as it creates obligations for South Africa to develop and enact laws that are in line with international human rights standards.

## International instruments

### *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR) is considered the foundation of international human rights law.<sup>28</sup> The UDHR

was adopted in 1948, and precedes a number of international human rights treaties, which are legally binding instruments to signatory states.<sup>29</sup> The UDHR recognises that all human beings have basic rights and fundamental freedoms, and that such freedoms and rights are applicable to everyone.<sup>30</sup> Further, through the UDHR the international community made a commitment to uphold dignity and justice for all, regardless of people's 'nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or any other status'.<sup>31</sup> Detained persons as a vulnerable group have human rights that are protected under the UDHR, and, like all other human beings, are entitled to their fundamental freedoms.<sup>32</sup>

Article 3 of the UDHR guarantees the right 'to life, liberty and security of the person'.<sup>33</sup> Article 11 provides the right of accused persons to be presumed innocent until proven guilty in accordance with the law,<sup>34</sup> and Article 9 protects against being subjected to arbitrary arrest and/or arbitrary detention.<sup>35</sup>

### ***International Covenant on Civil and Political Rights***

Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), to which South Africa is a party,<sup>36</sup> guarantees the right to liberty and freedom of security, and outlaws arbitrary arrest and detention.<sup>37</sup> To comply with article 9 of the ICCPR, states may not deprive people's liberty in a manner that is not authorised by the law, and where they do deprive a person of liberty this 'must not be manifestly unproportional, unjust or unpredictable'.<sup>38</sup> Omar argues that the courts' practice of placing too much weight on the unavailability of a fixed address or ownership of property, which proportionally impacts on the lives of people living in poverty, means that the practice is unjust.<sup>39</sup> Further, because the practice is not strictly found in any specific legislation, it is unpredictable.

The United Nations (UN) Human Rights Committee holds that the definition of arbitrariness is not limited to conduct that is contrary to the law but rather, arbitrariness is inclusive of inappropriate, unjust actions or omissions, which are unpredictable.<sup>40</sup> People must therefore only be arrested for lawful reasons, and must also be detained only under circumstances that are reasonable, otherwise the detention is unlawful.<sup>41</sup>

Article 9(3) of the ICCPR provides that detention 'shall not be the "general rule"' and advocates for remand detainees to be released from prisons, subject to conditions, which may include bail money or other types of guarantees.<sup>42</sup> Although the Human Rights Committee has consistently said that the general rule is subject to the exception where there is a possibility that the accused would abscond,<sup>43</sup> an inability to show ownership of assets and/or to provide a fixed address does not automatically mean the accused will evade trial.<sup>44</sup> Accused persons who do not own property or have a fixed address should still be released from prison during the pre-trial period, subject to bail conditions and/or other guarantees.

This position is further amplified by the UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules),<sup>45</sup> which require that pre-trial detention should only be used as a measure of last resort and should not be longer than necessary.<sup>46</sup> Presiding officers should as a matter of principle always consider non-custodial measures, which may include conditions such as periodically visiting the local police station. Of course, these conditions may pose an additional burden to accused persons who cannot afford regular transport to the police station.

Detained persons also have the right to be treated equally, equality being characterised as 'the most important principle imbuing and inspiring the concept of human rights'.<sup>47</sup> Article

26 of the ICCPR provides that everyone is equal before the law and that everyone is equally entitled to the protection of the law.<sup>48</sup> Article 2(1) of the ICCPR disallows discrimination in the context of all rights and freedoms listed under the ICCPR, including the right to liberty.<sup>49</sup> Accused persons without any fixed address or ownership of assets should therefore not be treated any differently than any other accused just because of their financial circumstances. The law, for them too, requires that detention be a measure of last resort.

## Regional instruments

The African Charter on Human and Peoples' Rights<sup>50</sup> (the African Charter), to which South Africa is a party,<sup>51</sup> does not have a specific bail provision, which, it has been argued, weakens its ability to adequately protect the rights of people seeking bail.<sup>52</sup> Article 6 of the African Charter provides that 'every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'<sup>53</sup> Although the African Charter does not explicitly set out the right to be presumed innocent, it does provide that people must be protected from arbitrary detention.<sup>54</sup> The African Commission on Human and Peoples' Rights, in a case where accused persons were detained for over three years, held that detaining people without the possibility of bail amounts to arbitrary deprivation of liberty under article 6 of the African Charter.<sup>55</sup>

In addition to article 6 of the African Charter, the African Commission on Human and Peoples' Rights has established a number of standards that protect the right to be presumed innocent.<sup>56</sup> Section M(1)(e) of the Principles on the Right to a Fair Trial<sup>57</sup> provides that states must not keep accused persons in detention pending the finalisation of their trial, unless it is absolutely necessary to do so to

prevent an accused person from fleeing (subject to sufficient evidence).<sup>58</sup> Instead, states should release accused persons on particular conditions and/or guarantees.<sup>59</sup>

The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa<sup>60</sup> seeks to further encourage alternative strategies to imprisonment.<sup>61</sup> The Plan of Action sets out that remand detention should be a measure of last resort and should be for as short a period as possible. The plan mandates that police officers should have and exercise their wider bail powers, including the use of police bail (a process where a police officer can grant bail without a presiding officer), and that presiding officers should involve community members for bail hearings in order to gather more evidence about accused's assets and/or their place of abode.<sup>62</sup>

The African Commission has stated that detention carried out by states based on discrimination amounts to the arbitrary deprivation of an accused's right to liberty and, consequently, is a violation of article 6 of the African Charter.<sup>63</sup> This raises interesting questions in South Africa, where the majority of people living in poverty are black, and where adjudicating bail based on the absence of a fixed address and/or ownership of assets may be considered discriminatory.

## Domestic law

### The Constitution

Section 12(1)(a) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.<sup>64</sup> Section 12 guarantees both substantive and procedural protection of the right to freedom and security of the person. In *S v Coetzee*, Justice O'Regan described the two components of section 12 as follows:

The first is concerned particularly with reasons for which the state may deprive

someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom ... our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner that is procedurally unfair.<sup>65</sup>

Where presiding officers place too much weight on whether an accused person owns assets and/or has a verified address in determining whether to grant bail or not, they unfairly deprive the accused of his or her liberty, for the reasons set out above.<sup>66</sup> Consequently, this practice is inconsistent with section 12(1) of the Constitution.

Section 35(1)(f) of the Constitution provides that 'everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions'.<sup>67</sup> Given prison conditions in South Africa, it should be in the interests of justice to release accused persons who have been denied bail merely because they do not own assets or have a fixed residential address. Failing to do so penalises their poverty (as *Letoana* points out).

Section 1(c) of the Constitution provides 'that the Republic of South Africa is one, sovereign, democratic state founded on the value of supremacy of the Constitution and the rule of law'.<sup>68</sup> The rule of law demands uniformity in the legal system. In *Gcaba v Minister for Safety and Security*,<sup>69</sup> the Constitutional Court, in reference to the binding effect of judgments, held that 'precedents must be respected in order to ensure legal certainty and equality before the law'.<sup>70</sup> It is not uniform for presiding officers to hear testimonies of family members to ascertain flight risk in some bail hearings, while insisting on a police officer's affidavits in others. The

manner in which flight risk is assessed should be flexible and yet uniform to ensure that it does not discriminate against certain groups of people. Discretion allowed to police and judicial officers should therefore be guided to ensure a level of fairness and consistency.<sup>71</sup>

Further, section 9(3) of the Constitution provides that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race ... or social origin'.<sup>72</sup> In *President of the Republic of South Africa v Hugo*, the court held the following regarding substantive equality:

We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

The Constitution therefore protects a number of rights of persons who have been arrested and detained: the right to freedom and security of the person (which includes the right not to be deprived of freedom arbitrarily or without just cause), the right to be released from detention if the interests of justice permit, and the right to not be unfairly discriminated against directly or indirectly, based on one or more grounds, including race and social origin. In addition, the Constitution reminds us that one of the values our state is founded on is the rule of law. It is in

this constitutional framework that we need to protect and interpret the rights of persons who have been arrested and detained.

### ***The Criminal Procedure Act***

The Criminal Procedure Act<sup>73</sup> (CPA) makes provision for criminal matters and their procedures.<sup>74</sup> Chapter 9 of the CPA sets out provisions that relate to bail hearings.<sup>75</sup>

Section 60(1)(a) of the CPA, which emanates from section 35 of the Constitution, provides that ‘an accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit’.<sup>76</sup> Section 60(4)(b) provides that ‘the interests of justice do not permit the release from detention of an accused where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial’.<sup>77</sup>

Section 60(6) further provides that

[i]n considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely –

- (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.<sup>78</sup>

None of the detailed set of factors set out in section 60(6) to guide a judicial officer when adjudicating bail specifically states that the accused must have a fixed address or ownership of assets. However, section 60(6)(a) and section 60(6)(b) may be interpreted to mean a fixed address and/or ownership of assets, although such an interpretation must still be in line with the constitutional rights (liberty, equality, the presumption of innocence etc.). Further, as provided for by the Constitution, such an assessment has to be uniform and predictable and done in a manner that does not violate international human rights law.

### ***Other domestic instruments***

The Protocol on the Procedure to be followed in applying Section 63A of the Criminal Procedure Act (the Bail Protocol) contains no information, process or procedure regarding the requirement of a fixed address and/or ownership of assets. It also does not set out the mechanisms through

which the addresses of accused persons in detention ought to be verified when the head of a correctional centre applies for bail on behalf of the accused.<sup>79</sup>

The *National Instruction 3 of 2016: Bail and the Release of Persons (NI3)*<sup>80</sup> acknowledges that detention is a serious infringement of the detained person's rights to liberty and freedom and security of the person. The instruction makes reference to police officers having to complete a SAPS 3M(k) form when verifying addresses of accused persons.<sup>81</sup> The instruction requires the investigating officer to verify the correctness of the name, address and personal details of the accused by visiting the address that they have provided, contacting the accused's family members or other contact persons they have nominated, and conducting enquiries on available state electronic systems (such as the fingerprint database or the traffic system, and by contacting the Department of Home Affairs).<sup>82</sup>

The instruction does not provide guidance on what to do if the accused person does not have a fixed address or an address that is formal and verifiable, and who does not have family, friends or neighbours who are able or willing to confirm any such address. In the absence of clarity on what to do in such cases, accused persons can remain in detention indefinitely, pending the finalisation of their trial. This is unconstitutional and a violation of international human rights law.

Section 10 of NI3 explains that in terms of section 50(6)(d) of the CPA, the investigating officer may request the prosecutor to ask the court to postpone any bail proceedings or bail applications where the investigating officer has not managed to get the required information (for example, not having completed the SAPS 3M(k) form). These cases may be postponed for seven days at a time. The instruction does not provide any insight into what constitutes legitimate reasons to justify why the investigating officer failed to procure the required information.

It also does not set out what process should be followed to ensure protection of the accused's constitutional and human rights in cases of repeated postponements or indefinite detention. The lacunas in the bail protocol and the National Instruction therefore have the effect of violating the equality of accused persons living in poverty.

## **Bail and the interests of justice**

In *S v Dlamini*, the courts grappled with questions of the constitutional validity of the provisions relating to bail and the interests of justice.<sup>83</sup> The decision in this case established that all bail laws must be measured against section 35(1)(f) of the Constitution, which provides for the release of arrestees where the interests of justice permit, subject to setting reasonable conditions that aim to facilitate the person's arrest and not curtail it, where the interests of justice so require.<sup>84</sup> The court clarified that this should apply to all instances where there is a deprivation of liberty, including postponements of bail proceedings.

The *Dlamini* case underlines three important principles. The first is that it accepts that people can be arrested even before it has been proven that they committed a crime and they are convicted. The second is that arrested persons have a right to be released on bail, subject to reasonable conditions, and third, that such release is assessed in terms of the interests of justice in each case.<sup>85</sup> Bail is intended to maximise liberty through a weighing up of factors by the court.<sup>86</sup> Arrests are meant to be a way to ensure that the accused attends trial,<sup>87</sup> and a court must decide whether continued detention is necessary to achieve that end.<sup>88</sup>

The interests of justice criterion found both in section 35(1)(f) of the Constitution and section 60 of the Criminal Procedure Act seeks to balance what is fair and just for the interested parties.<sup>89</sup> Section 60(4) of the Criminal Procedure Act establishes a guideline for how

this ought to be determined and it is settled law that none of these factors should be given undue weight so as to deny bail even when it should be granted.<sup>90</sup> There is also no reason to presuppose that an accused must be denied bail purely because there was a failure to verify his or her address, or because s/he possesses very few assets (given that this fact alone does not make the accused a flight risk).<sup>91</sup> Pre-trial detention can severely limit the rights of accused persons before their guilt has been determined. Adequately weighing and balancing the interest of justice is therefore critically important.

We are also particularly concerned about the use of section 50(d)(i) of the Criminal Procedure Act in order to postpone bail hearings. Although this section provides that a court can postpone a matter for up to seven days where there is insufficient information for considering bail (like failure to verify an address), the overburdened court rolls in the magistrates' courts mean that remands are often longer than seven days in practice. Such delays are in violation of the accused's right to a speedy decision.<sup>92</sup>

Section 50(d)(i) also introduces wide discretion and sees prosecutors' requests for postponement accepted without further inquiry. In *Majali v S*,<sup>93</sup> the state sought a postponement in terms of section 50(d)(i), as there were parts of the investigation into the accused's past convictions that were incomplete for the purposes of bail. The court held that the prosecution ought to provide cogent reasons why they had not sought a postponement before the day of the bail hearing,<sup>94</sup> and held that the court should balance the reasons put forward in support of the request for a postponement against considerations of the liberty of the accused.<sup>95</sup> In addition, where the prosecution has not shown good cause for postponement, the court must rely on the information provided by

the applicant for bail, where this has not been disputed.<sup>96</sup>

We have seen from our own observations in practice that bail applications are either not heard or are postponed for verification when, on the basis of the information provided by the applicant, bail should in fact be granted. Where applicants have been denied bail because of the absence of a fixed address, the investigating officer has stated that the informal settlement was too convoluted to navigate, or that they were unable to find the house, or that no police cars were available. Often, as we have seen from our own observations, these reasons were not even interrogated by the magistrate. In our experience, the postponements in these cases are missed opportunities: the court would have sight of the applicant/accused's evidence, and in the absence of good reasons for not having verified this information, or doubting its veracity, it should be considered by the court. Balancing the need to limit the deprivation of liberty of the accused against ensuring that s/he attends trial requires that the accused is released where the other factors under section 60(6) call for it. There are any number of interventions less extreme than imprisonment that can, and should, be considered.

## Recommendations

The South African state should consider rolling out an electronic monitoring system, a system that is used to track and record an accused person's movements and location while s/he is out on bail.<sup>97</sup> Although this kind of electronic system will require sufficient state resources to ensure that it is efficient and effective, its advantages may include increased public confidence in the criminal justice system, reduced harm associated with detention for arrestees, and a decrease in the numbers of remand detainees.<sup>98</sup>

Judges, magistrates, attorneys, advocates and other officers of the court need further training or learning exchanges on the intersection of poverty, race and the criminal justice system. Increased emphasis should be placed on the use of the conditions under which an accused can be released (pending trial, instead of detention), and matters should be stood down rather than postponed while the investigating officer goes to look for the address, or gets assistance from the accused's family. Further research ought to be done on the prevalence of the practice of placing more weight on certain bail factors than others. Such research should be done in collaboration with legal aid attorneys, who are already in courts across the country on a daily basis.

It is important that we explore less extreme measures than remand, where appropriate. Cases where the only reason for postponing or denying bail is that the address verification is missing should ordinarily use less restrictive means. Finally, there should also be widespread education campaigns for the general public on the importance of the concept of innocence until proven guilty, and the protections in law around bail.

## Conclusion

Our limited research in South African magistrates' courts suggests that presiding officers place too much weight on whether an accused owns assets and/or has a fixed address when determining flight risk during bail hearings. This practice exacerbates conditions in South African prisons, where the remand detainee population is still unacceptably high. This article has considered this practice in light of international and domestic human rights law instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the Constitution, the Correctional Services Act and the Criminal

Procedure Act. These instruments all protect the rights of detainees, including the right to liberty, the right to be presumed innocent, the right to equality and the right to be detained only as a measure of last resort. We argue that relying too heavily on asset ownership and fixed address to determine an accused's flight risk during bail hearings is a violation of all the rights discussed above, and is not in line with international human rights law.



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## Notes

- 1 J Omar, Penalised for poverty: the unfair assessment of 'flight risk' in bail hearings, *South African Crime Quarterly*, 57, September 2016, 1.
- 2 Ibid.
- 3 Ibid.
- 4 Ibid.
- 5 Ibid.
- 6 Ibid., 16.
- 7 Ibid.
- 8 Ibid., 10.
- 9 Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, March 2014, 53, [https://www.gov.za/sites/default/files/gcis\\_document/201607/white-paper-remand-detention-management-south-africa.pdf](https://www.gov.za/sites/default/files/gcis_document/201607/white-paper-remand-detention-management-south-africa.pdf)
- 10 M Stevenson and SG Mayson, Pretrial detention and bail, in E Luna (ed.), *Academy for justice: a report on scholarship and criminal justice reform*, Public Law Research Paper 17-18, Philadelphia: University of Pennsylvania, 2017, 26–27, 28.
- 11 Ibid.; American Bar Association (ABA), *ABA standards for criminal justice: pretrial release*, 3<sup>rd</sup> edition, Washington DC: ABA, 2007.
- 12 A Serrao, Show proof of address and you get bail, *IOL News*, 24 July 2013, <http://www.iol.co.za/news/crime-courts/show-proof-of-address-and-you-get-bail-1551803>
- 13 Criminal Procedure Act 1977 (Act 51 of 1977), section 50(6)(d) (i).
- 14 Omar, Penalised for poverty, 30.
- 15 Ibid.
- 16 Ibid.
- 17 N de Ruiter and K Hardy, Study on the use of bail in South Africa, African Policing Civilian Oversight Forum (APCOF), Research Paper 23, May 2018, 23, <http://apcof.org/wp-content/uploads/023-apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf>
- 18 *S v Diale and Another* 2013 (2) SACR 85 (GNP), 18; Omar, Penalised for poverty, 30.
- 19 R Leslie, Bail and remand detention: entry points into evaluation of Gauteng stakeholders, Centre for Applied Legal Studies, November 2012, 12, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/A%20measure%20of%20last%20>

- resort%20Research%20report%20on%20remand%20detention%20in%20South%20Africa.pdf
- 20 Omar, Penalised for poverty, 30.
- 21 Ibid.
- 22 Ibid.
- 23 Ibid., 30–31.
- 24 *S v Letaoana* 1997 (11) BCLR 1581 (W), 1594.
- 25 Omar, Penalised for poverty, 30–31.
- 26 Constitution of the Republic of South Africa, 1996, section 231; *Glenister v President of the Republic of South Africa and Others* (CCT48/10) [2011] ZACC 6, para 92.
- 27 *Glenister*, para 96.
- 28 United Nations (UN), The foundation of international human rights law, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>
- 29 Ibid.
- 30 Ibid.
- 31 Ibid.
- 32 UN, Universal Declaration of Human Rights (UDHR), Article 3, <https://www.un.org/en/universal-declaration-human-rights/>
- 33 Ibid.
- 34 Ibid., article 11.
- 35 Ibid., article 9.
- 36 South Africa ratified the International Covenant on Civil and Political Rights (ICCPR) on 10 December 1998.
- 37 ICCPR, article 9(1), <https://treaties.un.org/doc/publication/units/volume%20999/volume-999-i-14668-english.pdf>
- 38 Ibid., article 9; M Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary*, Kehl am Rhein: Engel, 1993, 173.
- 39 Omar, Penalised for poverty, 32–33; *S v Letaoana* (11) BCLR 1581 (W).
- 40 *Van Alphen v the Netherlands*, Human Rights Committee, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990), para 5.8.
- 41 Ibid.
- 42 ICCPR, article 9(3).
- 43 Communication No. 526/1993, *M and B Hill v Spain* (views adopted on 2 April 1997), in UN doc. GAOR, A/52/40 (vol. II), 17, para 12.3.
- 44 *S v Masoanganye* 2012 SACR 292 (SCA).
- 45 UN, United Nations standard minimum rules for non-custodial measures (The Tokyo Rules), adopted by General Assembly Resolution 45/110 of 14 December 1990, <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>
- 46 See *ibid.*, clause 6; De Ruiter and Hardy, Study on the use of bail in South Africa, 6.
- 47 Nowak, *UN Covenant on Civil and Political Rights*, 458.
- 48 ICCPR, article 26.
- 49 ICCPR, article 2(1) states: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
- 50 Adopted by the Organization of African Unity (OAU) at the 18<sup>th</sup> Assembly of Heads of State and Government on 27 June 1981, Nairobi, Kenya.
- 51 South Africa ratified the charter in 1996.
- 52 MC Nicol-Wilson, The realisation of the right to bail in the Special Court for Sierra Leone: problems and prospects, *AHRLJ*, 2, 2007, 496–521.
- 53 African Commission on Human and Peoples' Rights (ACHPR), African Charter on Human and Peoples' Rights, article 6, <http://www.achpr.org/instruments/achpr/>
- 54 Ibid.
- 55 Ibid.
- 56 Ibid. Also see ACHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 1 (b), 7, 10–11, 31, 32 (a), [http://www.achpr.org/instruments/guidelines\\_arrest\\_detention/](http://www.achpr.org/instruments/guidelines_arrest_detention/)
- 57 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>
- 58 Ibid.
- 59 Ibid.
- 60 ACHPR, Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, <http://www.achpr.org/instruments/ouagadougou-planofaction/>
- 61 De Ruiter and Hardy, Study on the use of bail in South Africa, 6.
- 62 Ibid., 7.
- 63 ACHPR, *Organisation Contre la Torture and Others v Rwanda, Communications* 27/89, 46/91, 49/91, and 99/93, decision adopted during the 20<sup>th</sup> Ordinary Session, October 1996, para 28.
- 64 Constitution.
- 65 *S v Coetzee* 1997 (3) SA 527 (CC), para 159, quoted in *De Lange v Smuts* NO 1998 (3) SA 785 (CC), para 18.
- 66 Omar, Penalised for poverty, 32–33.
- 67 Constitution, section 35 (1) (f).
- 68 Ibid., section 1 (c).
- 69 *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC), para 62.
- 70 Ibid.
- 71 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8.
- 72 Constitution, section 9(3).
- 73 Criminal Procedure Act.
- 74 Ibid.
- 75 Ibid., chapter 9.
- 76 Ibid., section 60 (1) (a).
- 77 Ibid., section 60(4)(b).
- 78 Ibid., section 60 (6).
- 79 The Protocol on the Procedure to be followed in Applying Section 63A of the Criminal Procedure Act; De Ruiter and Hardy, Study on the use of bail in South Africa, 24.
- 80 South African Police Service (SAPS), National Instruction 3 of 2016: Bail and the release of persons.
- 81 Ibid.
- 82 Ibid.
- 83 *S v Dlamini; S v Dladla and Others, S v Joubert, S v Schieteket* 1992 (2) SACR 51 (CC).
- 84 Ibid., para 5.
- 85 Ibid., para 6.
- 86 Ibid.
- 87 Ibid., para 10.
- 88 Ibid.

89 Ibid., para 46.

90 Omar, Penalised for poverty.

91 Ibid.

92 *Magistrate Stutterheim vs Mashiya* 2003 2 SACR 106 SCA.

93 *Majali v S* [2011] ZAGPJHC 74.

94 Ibid., para 24.

95 Ibid., para 26.

96 Ibid., para 36.

97 De Ruiter and Hardy, Study on the use of bail in South Africa,  
10.

98 Ibid.