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Reforming the right to bail for illegal/undocumented foreigners in South Africa.

by

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1. Introduction

Several studies have been conducted on the influx of illegal foreigners into economically stable nations,¹ but none have been conducted on the implications of granting bail to illegal foreigners, especially in a country with weak borders, such as South Africa. On the contrary, too much emphasis has always been on the reasons that prompts people to migrate to other countries. By way of example, Thomas states that illegal immigration can be attributed to globalisation.² For Shangquan, the primary cause of illegal immigration is economic globalisation coupled with technological advancements and investment opportunities.³ Dithebe opines that illegal immigration is a burning issue in Africa and that the sub-Saharan region of Africa is not immune to illegal immigration.⁴ Illegal immigration has the potential to weaken states and put the lives of the natives at risk.⁵ Zolberg opines that the issue of illegal immigration poses a threat to governance and the security of a country.⁶

Migration of persons to South Africa is happening at an alarming rate.⁷ Currently, South Africa houses more immigrants than any other country on the African continent,⁸ and with our porous ports of entry, migration may persist for the foreseeable future.⁹ This is so especially because the situation in most African countries is one characterised by economic and political instability.¹⁰ It is, by and large, the economic and political tensions that prompt residents of neighbouring countries to seek refuge and or, greener pastures in countries with the least political and economic instability.¹¹

¹ MV Dithebe & TT Makhuba 'Illegal Immigration and the Challenge of Border Control in South Africa' (2018) 15 *African Renaissance* 128; B Maharaj & R Rajkumar 'The 'Alien Invasion' in South Africa: Illegal Immigrants in Durban' (1997) 14 *Development Southern Africa*.

² T Pfister 'Citizenship and globalisation' (2005) 4 *Ethnopolitics* 107.

³ *United Nations Department of Economic and Social Affairs* 'Trends, Risks and Risk prevention'.

⁴ Dithebe & Makhuba (n 1 above) 128.

⁵ Dithebe & Makhuba (n 1 above) 129.

⁶ AR Zolberg *A nation by design: Immigration policy in the fashioning of America* (2006) 143.

⁷ A Segatti & B Landau *Contemporary migration to South Africa* (2011) 145.

⁸ 'South Africa reckons with its status as a top immigration destination, apartheid, history and economic challenges' *Migration Policy Institute* 18 November 2021.

⁹ A Minnaar *et al* 'Who Goes There? Illegals in South Africa' (1995) *Indicator South Africa* 35.

¹⁰ GT Dalyop 'Political Instability and Economic Growth in Africa' (2018) *International Journal of Economic Policy Studies* 217.

¹¹ Maharaj & Rajkumar (n 1 above) 255.

One of the consequences of being the country with the highest number of immigrants in Africa is having to contend with illegal foreigners who are involved in criminal activities. The involvement of illegal foreigners in criminal activities has become so glaring that it is hard to ignore. On one occasion, David Makhura, the Premier of Gauteng province, lambasted the involvement of foreign nationals in various crimes such as murder, dealing drugs, and cash-in-transit heists.¹² Therefore, the impact of granting bail to illegal foreigners needs to be investigated because illegal immigration appears to be one issue that is going to remain with us for some time.

2. Research Problem

According to the Deputy Minister of Justice and Correctional Services, John Jeffrey, there seems to be confusion as to how the courts should deal with illegal foreigners who are arrested for being in the country without the required documentation.¹³ In 2022, the Deputy Minister indicated that he plans to meet the NPA as well as the Chief Magistrates regarding this particular matter.¹⁴ Irrespective of their being in South Africa illegally, there have been cases where illegal or undocumented foreigners who are subject to criminal proceedings were released on bail.

Section 35(1)(f) of the Constitution of the Republic of South Africa states that every person who has been arrested for committing an offence is entitled to be released on bail if the interests of justice permit such release, subject to reasonable conditions.¹⁵ Section 60(1)(a) of the Criminal Procedure Act (hereafter 'CPA') provides that an accused person who is in custody in respect of an offence shall be entitled to be released on bail if the court is satisfied that the release of the accused is in the interests of justice.¹⁶ Seemingly, there is nothing from both the Constitution and the CPA that indicates if illegal foreigners can or cannot be released on bail. It could be

¹² 'Foreign nationals contribute to crime rate in SA: Makhura' *The South African Broadcasting Corporation* 07 March 2019.

¹³ "Legal confusion' over what to do with illegal immigrants brought before court' *News24* 31 May 2022.

¹⁴ "Legal confusion' over what to do with illegal immigrants brought before court' *News24* 31 May 2022.

¹⁵ 'Constitution of the Republic of South Africa, 1996'.

¹⁶ Act 51 of 1977.

argued that the perceived confusion by the Deputy Minister could stem from the limited law on bail that guides presiding officers when adjudicating on such matters. Apart from the Deputy Minister, leaders of opposing political parties have also voiced out their frustrations on this particular issue. Herman Mashaba, the leader of ActionSA, has criticised the courts for being lenient on illegal foreigners who are accused of committing crimes.¹⁷ The criticism by Herman came after an illegal foreigner from Nigeria, who remains accused of hijacking buildings, sexual offences, and intimidation was released on bail.¹⁸ The leader of the African Transformation Movement in Parliament, Vuyo Zungula, has also accused the courts of compounding and encouraging criminality by granting bail to undeserving illegal foreigners who become untraceable after being released.¹⁹

The release of illegal foreigners on bail is problematic on at least three fronts. Firstly, as will be demonstrated in the following chapter, it creates legal uncertainty in our law, since in some cases bail is granted while in other cases it is not. Secondly, after being released on bail, some accused may skip bail and evade trial.²⁰ In certain cases, some accused remain within the borders of the country but relocate to a different area and continue to further commit crimes. There have been cases where illegal foreigners, after incarceration, were found to be fugitives and were also linked to many other crimes.²¹ Thirdly, some may leave the country and return to their countries of origin to evade trial and prosecution.²²

In one study it was found that 9 reported cases were withdrawn because the suspects were illegal foreigners from Zimbabwe who could not be traced after they were granted bail.²³ The aforementioned study was conducted to analyse the

¹⁷ 'Mashaba slams Germiston court for delays and granting bail to alleged building hijackers and undocumented foreigner' *Independent Online* 23 June 2023.

¹⁸ 'Mashaba slams Germiston court for delays and granting bail to alleged building hijackers and undocumented foreigner' *Independent Online* 23 June 2023.

¹⁹ 'ATM leader slams justice system for granting bail to undocumented and illegal immigrants' *Independent Online* 22 February 2023.

²⁰ *Nhatumbo v S* 2023 JDR 1544 (MN).

²¹ 'Zimbabwean serial rapist and killer who operated in Polokwane handed hefty sentence' *TimesLIVE* 15 March 2023.

²² *S v Khan* 2003 (1) SACR 636 (T); 'Accused in Perlemoen case skips the country' *Independent Online* 09 April 2013.

²³ Z Makhada & C Roelofse 'Assessing Conviction Rates and Nationalities of Accused in Reported Burglary Cases in Musina Policing Precinct: The Zimbabwean Factor' (2013) 26 *Southern African Journal of Criminology* 98.

conviction rate on reported cases of burglary in the border town of Musina in the Limpopo province and, the results revealed that 76% of the cases were closed as undetected.²⁴ According to the study, of all the reported burglary cases, 21 suspects were South Africans and 29 arrested suspects were illegal foreigners from Zimbabwe.²⁵ When either of the three above scenarios occurs, justice is not served because the victims do not find closure as the perpetrator/s of the crime is/are not held accountable for their alleged criminal activities.

As a top immigration destination, the number of illegal foreigners in South Africa is estimated to be in the millions.²⁶ The practice of granting bail to illegal foreigners may also be an incentive for people with criminal intentions to take advantage of the country's bail laws by entering into the country illegally and committing crimes knowing that they might not be caught and if caught, that they may be released on bail.²⁷ This may also be seen as a loophole in our law and may give room to people with criminal intent to use illegal or undocumented foreigners to commit heinous crimes. In the long run, it may result in the erosion of the rule of law. Ultimately, citizens may lose confidence in the justice system and resort to taking the law into their own hands.²⁸

3. Research questions

The debate regarding bail, as a procedure in criminal law, has always existed and predates the Constitution.²⁹ The continuation of the debate on bail post-1994 is critical, especially in light of challenges plagued by illegal immigration and South Africa's porous borders. This research study aims to keep the bail debate alive by attempting to answer the following questions:

1. Is there legal uncertainty concerning the granting of bail to illegal foreigners who are accused of committing crimes in South Africa?
2. What is the position regarding the granting of bail to illegal foreigners in other comparable legal systems?

²⁴ Makhada & Roelofse (n 23 above) 98.

²⁵ Makhada & Roelofse (n 23 above) 98.

²⁶ *Migration Policy Institute* (n 8 above).

²⁷ *Migration Policy Institute* (n 8 above).

²⁸ *Migration Policy Institute* (n 8 above).

²⁹ *Dlamini v S; Dladla and others v S; S v Joubert; S v Schietekat* 1999 JOL 4944 (CC).

3. Are the existing laws that regulate the granting of bail to illegal foreigners in need of reform?

4. Motivation of the study

Having transitioned from parliamentary sovereignty to a constitutional state in 1994, South Africa is undoubtedly one of the youngest democracies in the African continent,³⁰ and arguably on the list of young democracies in the world. As a young and maturing democracy, our democratic systems and institutions are bound to experience many difficulties that we do not yet have answers to or solutions for. In her article titled 'Citizenship challenges for South Africa', Mamphela Ramphele rightly asserts that South Africa can benefit from the lessons learned by fellow African countries about what works and what doesn't.³¹

However, since South Africa is not only a part of the African continent but also a part of the international community, there is no doubt that South Africa can benefit greatly from following the pattern of certain foreign legal systems.³² The motive of this study is to educate the general public about how bail functions in South African courts, stimulate critical thinking about the laws that regulate the release of illegal foreigners on bail, assist law-makers by putting forward recommendations that can be made to the existing bail laws in order to better our bail laws.

5. Literature review

A broad reading of the available literature shows that legal provisions regarding bail have been amended many times in the past.³³ Following a submission of an LLM dissertation to the South African Law Commission (the Commission) in 1986, the Commission decided to investigate the lacunae which was said to exist concerning the laws of bail.³⁴ One of the burning issues raised in the LLM dissertation, which was investigated by the Commission, was whether a detainee should have a right to

³⁰ M Ramphele 'Citizenship Challenges for South Africa's Young Democracy (2001) 130 *Journal Storage* 5.

³¹ n 27 above, 16.

³² South African Law Commission 'Bail reform in South Africa' 1994 (Project 66) 26.

³³ V Karth *Between a rock and a hard place: bail decisions in three South African courts* (2008) 5.

³⁴ Project 66 (n 32 above) 2.

bail.³⁵ To that end, the report shows that the Commission recommended that, unless it is evident that it is against the public interest, every person arrested for allegedly committing an offence should be entitled to bail.³⁶

The conclusions and recommendations made by the Commission were published in a working paper in 1990 and, the Commission's report culminated in legislation,³⁷ the Criminal Procedure Amendment Act.³⁸ According to Du Toit, the objective of the 1995 amendment was twofold: Firstly, it was to codify factors that ought to be taken into account by a court when considering a bail application.³⁹ Secondly, it was to strike a balance between the interests of the accused and the interests of justice.⁴⁰

A further reading of the existing literature on this subject matter shows that further amendments to bail laws were made again in 1997,⁴¹ with the enactment of the Criminal Procedure Second Amendment Act.⁴² These amendments were aimed at making it reasonably difficult for people charged with serious offences to be granted bail.⁴³ More changes to the bail provisions were introduced in 2000 by the Judicial Matters Amendment Act,⁴⁴ and later the introduction of Judicial Matters Second Amendment Act.⁴⁵

It has been argued that the past various amendments to the bail provisions had the effect of making it relatively difficult for accused persons to be released on bail.⁴⁶ However, the changes to bail laws were aimed at addressing the existing challenges at the time. The past amendments and changes to bail provisions do not seem to sufficiently address situations where the courts have to adjudicate on bail matters involving illegal foreigners who are accused of having committed a crime or crimes.

³⁵ Project 66 (n 32 above) 5.

³⁶ Project 66 (n 32 above) 15.

³⁷ Project 66 (n 32 above) 15.

³⁸ Act 75 of 1995.

³⁹ Du Toit *et al* *Commentary on the Criminal Procedure Act* (2006) 9-12.

⁴⁰ Du Toit *et al* (n 39 above) 9-12.

⁴¹ Karth (n 33 above) 5.

⁴² Act 85 of 1997.

⁴³ Karth (n 33 above) 5.

⁴⁴ Act 62 of 2000.

⁴⁵ Act 55 of 2003.

⁴⁶ Karth (n 33 above) 6.

This could be because the existing bail laws were enacted at a time when illegal immigration was not as much of an issue as it is presently.

However, illegal immigration is a reality now, and, in the absence of clear guidelines, it has become difficult to determine what the legal position is when illegal foreigners are brought before the courts for bail purposes. It then becomes the responsibility of the courts to determine what the legal position ought to be in the form of precedents. When courts seem to be at variance as to what the position should be, legal uncertainty is created. Therefore, this study seeks, among other things, to investigate whether the courts of South Africa agree with each other on this subject matter or, whether there's legal uncertainty that exists.

6. Research methodology

A desktop-based methodology was followed in this research. Extensive reliance was placed on authoritative sources of law such as legislation, judicial precedent, and international instruments. Secondary sources of law such as textbooks, journal articles, dissertations, research reports, etc. were also consulted to support this research study.

7. Limitation of study

Although cases involving legal foreigners may be quoted from time to time in this research, this study is going to focus mainly on the granting of bail to illegal foreigners. This is because illegal foreigners, once released on bail, cannot be traced and may end up disappearing without accounting for their alleged criminal acts. However, with legal foreigners, it is different in the sense that they are documented and can be traced in instances where they are alleged of wrongdoing. In the event legal foreigners skip the country through illegal channels, there are mechanisms that can be used to bring them back to stand trial, such as extradition.

8. Structure Outline

This research study will follow a coherent structure and, in the end, every chapter will attempt to answer the scholarly question being raised in the study. This study is divided into 4 chapters. Chapter 1 (this chapter) comprises the research problem, motivation, structure outline, literature review as well as the methodology. Chapter 1 is followed by two more substantive chapters which are outlined below, and the last chapter comprises recommendations.

Chapter 2: Is there legal uncertainty regarding the granting of bail to illegal foreigners in South Africa?

Following the utterances by the Deputy Minister, this chapter will investigate whether there exists legal uncertainty on whether or not illegal foreigners who are arrested for committing crimes can be admitted to bail. There have been instances where the courts have held that illegal foreigners who have been arrested for breaking the law cannot be granted bail mainly because of being a potential flight risk. However, it has also been held that the mere fact that the applicant in bail proceedings is a foreign national does not warrant an inference that the applicant is a flight risk.⁴⁷

This chapter will revisit a number of cases where the courts seem to be divided on this matter. By way of example, In *Ali and Another v S*, two accused were denied bail by the Magistrates' Court mainly because they were in the country illegally and posed a serious risk of flight.⁴⁸ In the case of *S v Hudson*, the court held that an accused might be motivated to leave the country in a case where there is a likelihood that a sentence would be imposed should such an accused be found guilty.⁴⁹

However, in *Ali and Another v State*, the appeal court held that the Magistrates' Court was wrong for refusing two illegal foreigners bail.⁵⁰ The two illegal foreigners were accused of contravening the Firearms Control Act for being in unlawful possession of a firearm. The appeal court held that the Magistrates' Court should

⁴⁷ *Faquir v S* 2013 (1) JDR 1351 (GP).

⁴⁸ *Ali & Another v S* 2022 (1) SACR (WCC).

⁴⁹ *S v Hudson* 1980 (4) SA 145 (D).

⁵⁰ *Ali & Another* (n 48 above) para 14.

have considered more than just denying the applicants bail on the ground that they are illegal foreigners.⁵¹ It has also been held that foreigners who are applying for bail do not bear an increased onus of proof to be released on bail.⁵²

Chapter 3: What is the position regarding the granting of bail to illegal foreigners in other jurisdictions?

The issue of illegal immigration is a concern not only to South Africa but to many other countries all over the world.⁵³ According to Dithebe, illegal immigration has become a global phenomenon and raises, among other things, political and legal issues.⁵⁴ The assertions by Dithebe are a confirmation that many other countries, especially those that are seen as immigrant destinations, are grappling with this challenge.⁵⁵ It is also an indication that many other countries have been dealing with this problem long before South Africa was confronted by it.

To find an effective and long-term solution, it might be necessary for South Africa to look at how other countries that were once or are still confronted by the same problem have dealt with or are dealing with the issue. Therefore, this chapter will look at how countries such as Namibia, India, and the United States of America (hereafter 'USA') are handling and dealing with the issue of bail for illegal foreigners who are accused of committing crimes.

The USA was chosen because it is one of the countries around the world that has been battling with this issue for an extended period.⁵⁶ According to the 2019 United Nations International Migration Report, the USA housed the largest number of international immigrants than any other country in the whole world.⁵⁷ It is reasonable to assume that the USA would have encountered or dealt with cases where some illegal foreigners were accused of committing crimes. Having been described as a

⁵¹ *Ali & Another* (n 48 above) para 14.

⁵² *S v Hudson* 1996 (1) SACR 431 (W).

⁵³ ML Cook *et al* 'Introduction to a Special Issue on the Impact of Immigrant Legislation Initiatives: International Perspectives on Immigration and the World of Work' (2018) 71 *Industrial and Labour Relations Review* 807.

⁵⁴ Dithebe & Makhuba (n 1 above) 128.

⁵⁵ Cook *et al* (n 53 above) 807.

⁵⁶ Cook *et al* (n 53 above) 807.

⁵⁷ *United Nations International Migration Report* (2019) iv.

magnet for regional migration in Africa,⁵⁸ It would be of great benefit for South Africa to draw some lessons on what the approach to bail is when it comes to illegal foreigners who are accused of committing crimes in countries such as the USA.

Chapter 4: Are the existing South African laws that regulate the release of illegal foreigners on bail in need of reform?

This chapter will attempt to answer the question of whether the current laws regulating the release of illegal or undocumented foreigners on bail need reform. In answering this question, the current laws permitting the release of illegal foreigners on bail are visited and discussed extensively. These will include the various sections of legislation that are normally quoted by the courts when granting bail to illegal foreigners. The first of these is section 35 of the Constitution of the Republic of South Africa.

The second piece of legislation governing the release of illegal or undocumented foreigners on bail is the Criminal Procedure Act,⁵⁹ specifically, section 60 of the Act. This section confers on all accused persons who have been arrested and are in custody, the right to be released on bail. Other than case law, there isn't a single piece of legislation in our law that provides that illegal or undocumented foreigners are entitled to be released on bail. Even the immigration Act⁶⁰ does not provide for the release of foreigners on bail. Since the law regarding bail is not only found in legislation but also decisions of the courts,⁶¹ some of these decisions regarding this matter will also be revisited.

⁵⁸ 'South Africa reckons with its status as a top immigration destination, apartheid, history and economic challenges' *Migration Policy Institute* 18 November 2021.

⁵⁹ Act 51 of 1977.

⁶⁰ Act 13 of 2002.

⁶¹ Project 66 (n 32 above) 14.

Chapter 2: Legal uncertainty regarding the granting of bail to illegal foreigners in South Africa.

1. Introduction

The main problem giving rise to this research study is the perceived lack of uniformity among the courts when adjudicating on matters of bail involving illegal foreigners. Section 35(1)(f) of the Constitution guarantees anyone who stands accused of having committed a criminal offence, the right to be released from detention, provided it is in the interests of justice.⁶² This section does not explicitly state that an accused has the right to bail. The word ‘bail’ does not appear anywhere in the Constitution. Be that as it may, it is generally accepted during the course of criminal proceedings that the section permits persons who are accused of having committed a crime to be released on bail.⁶³ De Villiers refers to this section as the right to bail section.⁶⁴

Section 60(1) of the CPA provides that anyone who is accused of an offence shall be entitled to be released on bail if the interests of justice permit.⁶⁵ One writer opines that the word ‘entitle’ refers to the right that an accused has under the CPA.⁶⁶ The right to bail is not unlimited and depends on whether the interests of justice permit the release of the accused.⁶⁷

That there seems to be legal uncertainty on whether illegal foreigners should be granted bail was pointed out by the Deputy Minister of Justice and Constitutional Development, John Jeffrey.⁶⁸ If the Deputy Minister is correct, then this possible uncertainty could result in confusion to the legal fraternity and the broader public.

⁶² MT Mokoena *A guide to bail applications* (2018) 59.

⁶³ W de Villiers ‘Problematic Aspects with Regard to Bail Under South African Law: The Reverse Onus Provisions and the Admission of the Evidence of the Applicant for Bail at the Later Criminal Trial (2015) 43 *International Journal of Law* 23.

⁶⁴ de Villiers (n 63 above) 23.

⁶⁵ Act 51 of 1977.

⁶⁶ Mokoena (n 62 above) 59.

⁶⁷ Mokoena (n 62 above) 60.

⁶⁸ “‘Legal confusion’ over what to do with illegal immigrants brought before court’ *News24* 31 May 2022.

This chapter investigates whether there is legal uncertainty by the courts in so far as granting bail to illegal foreigners who stand accused of crime is concerned. It may prove useful to look at the meaning of some of the legal terms that are contained in the above question before proceeding with the investigation. Therefore, the section that follows attempts to provide a short description of these legal terms.

2. Legal uncertainty

Legal certainty is a vital hallmark of the rule of law.⁶⁹ According to the Court of Justice of the European Union (CJEU), legal certainty means that the rules should be clear and precise so that individuals can, without a doubt, be able to ascertain what their rights and obligations are and, act differently.⁷⁰ In terms of the European Court of Human Rights (ECtHR), legal certainty entails that the law should be formulated with enough precision to enable the persons concerned to foresee the consequences that a given action may entail.⁷¹ For O'Regan, legal certainty seeks to ensure that citizens can arrange their affairs following a predictable set of legal rules.⁷²

It can be deduced from the above that legal uncertainty exists when citizens do not know or are unsure of the legal ramifications or consequences that may flow from their actions. Alexander opines that where there appears to be legal uncertainty, it becomes the duty of the courts to provide clarity and bring legal certainty through interpretation.⁷³

⁶⁹ A Paterson 'Mining in Nature Reserves- Providing Legal Certainty where Ambiguity Prevailed' (2018) 29 *Stellenbosch Law Review* 218.

⁷⁰ M Fenwick *et al* *The State of the Art and Shifting Meaning of Legal Certainty* (2017) 1.

⁷¹ Fenwick (n 70 above) 1.

⁷² O'regan K 'Change v certainty: Precedent under the Constitution' (2001) *Sabinet African Journals* 31.

⁷³ Paterson (n 69 above) 218.

3. Illegal foreigners

Since this chapter is concerned with reforming the right to bail for illegal foreigners who stand accused of having committed a crime in the Republic, it is worthwhile to consider who exactly illegal foreigners are. In terms of section 1 of the Immigration Act⁷⁴, a foreigner who is in the Republic in contravention of this Act, including a prohibited person, is regarded as an illegal foreigner. Therefore, an illegal foreigner is either a person who comes into the Republic or, attempts to enter the Republic without any permit, consent, or authorisation.⁷⁵

4. Bail

The word bail is not defined in the CPA.⁷⁶ It has been held that bail is a measure employed by the courts to ensure the attendance of an accused person.⁷⁷ Bail has also been defined as a method of securing a compromise between the right to be presumed innocent and the deprivation of liberty pending a verdict by a court of law.⁷⁸ Karth defines bail as a legal mechanism that is used to release an accused person from detention before the finalisation of their case.⁷⁹ The main objective of bail is firstly, to protect the accused's personal liberty as far as possible.⁸⁰ The second main purpose for bail is securing the attendance of the bail applicant in court to allow the accused to play an active role in their defence for the next hearing pending the finalisation of the matter.⁸¹

⁷⁴ Act 13 of 2002.

⁷⁵ *Lawyers for Human Rights & Other v Minister of Home Affairs and Other* 2004 (4) SA 125 (CC).

⁷⁶ Act 51 of 1977.

⁷⁷ *Lin & Another v S* 2021 (2) SACR 505 (WCC).

⁷⁸ JJ Joubert *et al Criminal Procedure Handbook* (2020) 220.

⁷⁹ Karth (n 33 above) 5.

⁸⁰ *McCarthy v R* 1906 TS 657.

⁸¹ *Abbas v S* 2021 JDR 2578 (GP).

5. Are illegal foreigners who stand accused of crime entitled to bail in South Africa?

Now that the meaning of the words 'legal uncertainty, illegal foreigner, and bail' has been explained, the next section of this chapter will investigate whether illegal foreigners who stand accused of committing a crime or crimes are entitled to be released on bail. In answering this question, regard will be given to case law where illegal foreigners who stood accused of committing crimes were brought before the South African courts to see what the determination of the courts was. The section that follows, therefore, revisits selected cases where illegal foreigners were either denied or granted bail, beginning with cases where bail was denied.

5.1 An overview of some cases where illegal foreigners accused of an offence were denied bail.

One recent case in which bail was denied to an illegal foreigner for allegedly committing various crimes is the case of *Goba v State*.⁸² In this case, the appellant was accused of various crimes including fraud and theft, the latter falling within the category of offences listed in Schedule 5 of the CPA.⁸³ He applied for bail in the Magistrates' Court. The Magistrates' Court dismissed the bail application, holding among other things, that there is a likelihood that the accused, as an illegal foreigner, will evade trial if released on bail.⁸⁴

Goba appealed the decision of the Magistrate's Court for refusing him bail on five grounds. The first ground of appeal advanced by the appellant in the High Court was that the magistrate in the *court a quo* misdirected herself by finding that the appellant was a flight risk and might evade his trial because he was an illegal foreigner.⁸⁵ In deciding the appeal, the High Court considered section 60(4)(b) of the Act, which provides that the interests of justice do not permit the release of an accused in a

⁸² *Goba v S* 2023 SA 245 (GP).

⁸³ Act 51 of 1977.

⁸⁴ *Goba* (n 82 above) para 5.

⁸⁵ *Goba* (n 82 above) para 6.

case where there is a likelihood that the accused will attempt to evade his or her trial if he or she were to be released.⁸⁶

The High Court also observed that the appellant has been in and out of the country using fraudulent documents and that if he is released on bail, there is a probability that he may leave the Republic undetected.⁸⁷ After considering the grounds of appeal, the High Court held that the appellant has been in and out of the country whilst being a prohibited person and that there is nothing that is stopping him from leaving again. The High Court concluded that the *court a quo* had no choice but to refuse bail as releasing the accused on bail might jeopardise the proper functioning of the criminal justice system, including the bail system.⁸⁸ The appeal was accordingly dismissed.

Another case where an illegal foreigner was denied bail for allegedly committing a crime is the case of *Abbas v State*.⁸⁹ The facts of this case are, briefly, as follows. The accused was arrested together with two other people and charged with multiple offences, including fraud and the possession of suspected stolen property (crimes that fall within the purview of Schedule 5).⁹⁰ At the bail hearing, the accused was denied bail by the Magistrates' Court. However, two of his co-accused were released on warning and eventually pleaded guilty.

As a result of differences in their plea, the trial of the accused was separated from his co-accused. One of the grounds for denying the accused bail was that he would not stand trial if he were granted bail as he was an illegal foreigner.⁹¹ He arrived in the country on a visitor's visa which had expired and he failed to renew it after the expiry date. The accused was regarded as a flight risk by the Magistrates' Court.

Aggrieved by the decision of the court of first instance, the accused decided to appeal the decision. When considering his appeal, the High Court conceded that the status of a bail applicant as to whether he is a foreigner is a factor, albeit not the only factor, that ought to be taken into account in the course of exercising a judicial

⁸⁶ Act 51 of 1977.

⁸⁷ *Goba* (n 82 above) para 21.

⁸⁸ *Goba* (n 82 above) para 30.

⁸⁹ *Abbas* (n 81 above).

⁹⁰ *Abbas* (n 81 above) para 2.

⁹¹ *Abbas* (n 81 above) para 9.

discretion of whether to grant or refuse a bail application.⁹² The High Court went further to state that if the court is of the opinion that an applicant for bail poses a flight risk, then the court may exercise its judicial discretion and deny the applicant bail.⁹³

Ultimately, the High Court held that if the appellant is released on bail, then it might be difficult to monitor or trace him given the fact that he was an illegal foreigner and had no place to stay in South Africa.⁹⁴ After considering the appeal, the High Court upheld the decision of the *court a quo* and refused the appeal.

In the case of *Lin and Another v State*,⁹⁵ two illegal foreigners were arrested and charged with multiple crimes which included landing, selling, receiving, or possession of fish in contravention of section 44 of the Marine Living Resources Act (MLRA) 18 of 1998,⁹⁶ and transporting or possession of Abalone in violation of the regulation 36 of the MLRA. Following their arrest, they went on to apply for bail in the Magistrates' Court, which was denied. The grounds for refusing to release the accused on bail included (among others) the fact that the two accused are a flight risk as they are undocumented and are in the country illegally.⁹⁷

Both accused decided to appeal the decision of the magistrate to the High Court. In the High Court, the presiding officer considered the status of the appellants in the country paying particular attention to the provisions of the Immigration Act, specifically, sections 1 and 34, and held that the two accused comply with the definition of an 'illegal foreigner' as defined in the Act.⁹⁸ The court confirmed that the two appellants were indeed in the country illegally.⁹⁹

After having considered the merits of the appeal, the High Court concluded that the factors considered by the magistrate, including the fact that the appellants were in

⁹² *Abbas* (n 81 above) para 12.

⁹³ *Abbas* (n 81 above) para 12.

⁹⁴ *Abbas* (n 81 above) para 23.

⁹⁵ *Lin & Another* (n 77 above) para 1.

⁹⁶ Act 18 of 1998.

⁹⁷ *Lin & Another* (n 77 above) para 8.

⁹⁸ Act 13 of 2002.

⁹⁹ *Lin & Another* (n 77 above) para 61.

the country illegally, cannot be faulted, and the finding of the magistrate in the *court a quo* were correct.¹⁰⁰ Consequently, the court dismissed the appeal.

In *Kambamba v S*,¹⁰¹ an illegal foreigner from Uganda stood trial on multiple charges including theft and contravening section 34(1)(d) of the South African Reserve Bank Act.¹⁰² He applied for bail in the Magistrate's Court and the application was refused. He then appealed to the High Court. The appeal court dismissed the appeal holding that the *court a quo* was correct in refusing the bail application of the appellant. One of the reasons stated by the appeal court was that the appellant was a flight risk because he did not have the correct documents to remain in the Republic.¹⁰³

In the case of *S v Seisa*,¹⁰⁴ the accused was an illegal foreigner from Lesotho. He was charged, together with his co-accused who were South African nationals, with multiple crimes including murder, attempted murder, and assault with intent to do grievous bodily harm.¹⁰⁵ All the accused applied for bail and it was refused by the *court a quo*. They decided to appeal the matter. The accused, except the illegal immigrant, were successfully released on bail. The illegal immigrant later appealed the refusal to be admitted to bail by the Magistrate's Court.

One of the grounds advanced by the appellant on appeal was that the magistrate unfairly discriminated against the appellant compared to the other accused of South African nationality who were in the same position as the appellant.¹⁰⁶ The court of appeal noted that the primary ground of appeal by the appellant was that the Magistrates' Court discriminated against the appellant based on nationality.¹⁰⁷ The appeal court found that the Magistrates' Court indeed differentiated between the appellant (being an undocumented foreign national) and his co-accused (being South African citizens). However, the court held that the differentiation was necessary and justified in the circumstances of this nature.¹⁰⁸ The court held that the

¹⁰⁰ *Lin & Another* (n 77 above) para 66.

¹⁰¹ *Kambamba v S* 2021 JDR 0430 (FB).

¹⁰² Act 90 of 1989.

¹⁰³ *Kambamba v S* (n 101 above) para 11.

¹⁰⁴ *Seisa v S* 2020 JDR 2749 (FB).

¹⁰⁵ *Seisa* (n 104 above) para 2.

¹⁰⁶ *Seisa* (n 104 above) para 7.

¹⁰⁷ *Seisa* (n 104 above) para 9.

¹⁰⁸ *Seisa* (n 104 above) para 15.

differentiation by the magistrate did not amount to unfair discrimination.¹⁰⁹ The appeal was subsequently dismissed by the High Court.

In *Shaibu v State*,¹¹⁰ a Ghanaian illegal foreigner was being tried on charges of contravening the provisions of sections 5 and 64 of the Drug Trafficking Act.¹¹¹ He applied for bail in the Magistrates' Court. The Magistrates' Court refused to admit the accused on bail, holding among other things, that the accused was a flight risk.¹¹² The accused appealed the decision of the Magistrates' Court. On appeal, the court was of the view that the main question for determination in the matter was whether the appellant posed any flight risk.¹¹³ The appeal court held that the appellant was indeed a flight risk given that he is not a citizen of the country, that his travel visa had already expired, and that the charge against him was of a serious nature.¹¹⁴ The appeal was accordingly dismissed.

The cases mentioned above demonstrate that the status of an accused whether he is a citizen or an illegal foreigner, is a relevant and important factor that should be taken into account by presiding officers when exercising the judicial discretion of whether to grant or refuse bail. However, there have been cases where applicants who are illegally in the country were admitted to bail and, the section that follows will attempt to revisit some of those cases.

5.2 An overview of some cases where illegal foreigners accused of an offence were released on bail.

An example of a case where an illegal foreigner who was accused of committing an offence was released on bail is the case of *Phale v Minister of Home Affairs*.¹¹⁵ In this case, the accused was an illegal foreigner from Botswana. He was arrested and charged with several crimes including the crime of fraud. He applied for bail in the Magistrates' Court and the investigating officer in charge of the case did not object to

¹⁰⁹ *Seisa* (n 104 above) para 15.

¹¹⁰ *Shaibu v S* 2018 JDR 1645 (GP).

¹¹¹ Act 140 of 1992.

¹¹² *Shaibu* (n 110 above) para 8.

¹¹³ *Shaibu* (n 110 above) para 17.

¹¹⁴ *Shaibu* (n 110 above) para 19.

¹¹⁵ *Phale v Minister of Home Affairs and Others* 2011 (4) All SA 103 (GNP).

the accused being released on bail¹¹⁶. However, the director general of Home Affairs, who was the second respondent in the case, objected to the release of the accused on bail.¹¹⁷ The basis for the objection was that the applicant should be considered a flight risk as he is an illegal foreigner.¹¹⁸ Despite the objection by the second respondent, bail to the amount of R3000 was granted by the magistrate. On the same day, the applicant was informed that he would be re-arrested immediately upon being released on bail for being in the country illegally.

Being privy to the imminent arrest, the applicant decided not to pay bail and instead, launched an application in which he sought to interdict the officials of the Department of Home Affairs from re-arresting him on the basis that he was an illegal foreigner and, therefore, in the country illegally.¹¹⁹ The court ruled in favour of the accused and the applicant was able to interdict the officials of the Home Affairs Department from re-arresting him.¹²⁰ The applicant was subsequently released on bail.

Perhaps an example of one case that possibly indicates the legal uncertainty as to whether illegal foreigners who are accused of having committed an offence can be released on bail is the case of *Ali and Another v State*.¹²¹ This case involved two illegal foreigners from Ethiopia who were arrested and charged with the crimes of unlawful possession of a firearm and unlawful possession of ammunition in contravention of the Firearms Control Act, a crime that falls within the purview of Schedule 5.¹²² They applied to be released on bail in the Magistrates' Court and bail was refused.

The applicants decided to appeal the refusal of bail to the High Court. The High Court noted that one of the factors considered by the magistrate in denying the two accused bail was that they were in the country without proper documentation and were therefore in the country illegally.¹²³ The High Court was of the view that the Magistrates' Court placed undue weight on the status of the applicants as illegal

¹¹⁶ *Phale* (n 115 above) para 1.

¹¹⁷ *Phale* (n 115 above) para 1.

¹¹⁸ *Phale* (n 115 above) para 3.

¹¹⁹ *Phale* (n 115 above) para 1.

¹²⁰ *Phale* (n 115 above) para 12.

¹²¹ *Ali & Another* (n 48 above).

¹²² Act 60 of 2000.

¹²³ *Ali & Another* (n 48 above) para 6.

foreigners,¹²⁴ without first determining their statuses in the Republic following the prescripts of the Refugees Act.¹²⁵ In the end, the High Court upheld the appeal and remitted the matter to the Magistrates' Court to consider the bail application afresh.

In the case of *Faquir*,¹²⁶ two accused, one a South African and the other a Mozambican national, were arrested on charges of contravening section 13(f) of the Drugs and Drug Trafficking Act.¹²⁷ They applied for bail and, the Magistrates' Court released the South African citizen on bail.¹²⁸ However, the Mozambican national was refused bail. Unhappy with the decision, the Mozambican accused appealed the decision. The appeal court upheld the appeal, holding that the appellant was denied bail by the magistrate court simply because she was a foreigner.¹²⁹

5.3 Analysis of the cases

It could be said that the cases discussed above reveal an inconsistency as far as granting bail to illegal foreigners who are accused of crime is concerned. The first ground for appeal in the case of *Goba* was the factor that the Magistrates' Court misdirected itself by finding that the accused may abscond if he were to be released on bail as he was an illegal foreigner.¹³⁰ It could be that this factor was prioritised on appeal because of the perception that it was afforded too much weight by the Magistrates' Court.

In the case of *Abbas*, one of the factors advanced by the Magistrates' Court was that the accused may not stand trial if granted bail because he was wilfully in the country illegally.¹³¹ It is also important to mention that in the case of *Abbas*, the status of the accused was one of the three grounds to be considered during a bail hearing and it was mentioned as the last ground by the magistrate. However, when discussing and analysing the grounds upon which bail was refused, the High Court in *Abbas* began first by discussing the status of the accused.

¹²⁴ *Ali & Another* (n 48 above) para 11.

¹²⁵ Act 130 of 1998.

¹²⁶ *Faquir* (n 47 above) para 5.

¹²⁷ Act 140 of 1992.

¹²⁸ *Faquir* (n 47 above) para 25.

¹²⁹ *Faquir* (n 47 above) para 52.

¹³⁰ *Goba* (n 82 above).

¹³¹ *Abbas* (n 81 above).

It may be fit at this stage to pause and enquire as to whether the fact that the applicant is an illegal immigrant is a good enough reason or ground that may justify the refusal of bail. Although the answer to this question cannot be ascertained sufficiently at this stage, it could be said that the judgments of the courts seem not to be consonant on whether an accused can be denied bail on the basis that he or she is in the country illegally.

This is because in some cases, like in the case of the Magistrates' Court in *Ali* and the High Court in *Abbas*, the consideration that an accused is an illegal foreigner was given much weight and, in other cases, like *Phale*, it was not. Although there is consensus among the courts that the mere fact that an accused in bail proceedings is an illegal foreigner is a factor that ought to be taken into account, there seems to be a disconnect or disagreement about how much weight should be given to this factor in bail proceedings.

Be that as it may, if one were to attempt to answer the question above, then the answer would be in the affirmative. It may be presumed that the reason why the High Court in *Abbas* deemed it necessary to first investigate the status of the accused in the Republic was the mere fact that an accused is in the country illegally is, on its own, a good enough reason to refuse bail.

Returning to the analysis of the case law, the High Court in *Abbas*, after dealing extensively with the status of the accused (and the two other grounds) expressed the view that the appellant cannot be monitored as he was an illegal foreigner, Thereby agreeing with the decision of the Magistrates' Court that the accused will not stand trial if granted bail because he was in the country illegally. Essentially, the High Court deemed the appellant a flight risk.

There are at least two common factors in the cases of *Goba*, *Ali*, and *Abbas*. The first is that in *Ali*, the first ground listed by the magistrate for refusing the bail application is the ground that the applicants were illegal foreigners. Furthermore, in *Abbas* and *Goba*, the High courts, when considering the appeal, prioritised the status

of the accused in the Republic. So, it can be said that the courts in *Goba*, *Ali* and *Abbas*, adopted a similar approach when deciding to refuse the applicants' bail.

The second common factor is that in *Goba*, *Ali* and *Abbas*, some of the crimes with which the accused were charged fell within the purview of Schedule 5 of the CPA. In terms of section 60(11) of the Act, the requirements for being granted bail are onerous in that the burden of proof shifts from the state to the accused, and it is the accused who bears the responsibility of convincing the court that the interests of justice permit his or her release on bail.¹³² Accordingly, to be granted bail for an offence falling within offences listed in Schedule 5 of the Act, an applicant needs to go further and prove, on a balance of probabilities, that bail is in the interests of justice.¹³³

However, the approach of the High Court in *Ali* and the Magistrates' Court in *Phale* seems to be in complete contrast to the approach adopted by the Magistrates' Court in *Ali* and the High Courts in *Goba* and *Abbas*. The High Court in *Ali* expressed the view that the mere fact that the applicants were illegal foreigners should not have troubled the magistrate, stating that the independence of the magistrate could have potentially been impaired as a result of paying too much attention to the status of the accused.¹³⁴

In holding that the magistrate was wrong to refuse bail, the High Court cited the case of *Lawyers for Human Rights v Minister of Home Affairs*. The Constitutional Court held that the preservation of our national integrity should not violate the freedom and dignity of illegal foreigners.¹³⁵ Similarly, in *Phale*, the court granted bail to the applicant while fully aware that the applicant was an illegal foreigner and did not have the correct documentation to be in the Republic.¹³⁶ The court in *Phale* seemingly disregarded the ground that the applicant was an illegal foreigner, a ground which was possibly a deciding factor in the refusal of the bail application by the Magistrates' Court in *Ali* and, the High Courts in *Goba* and *Abbas*.

¹³² *Dlamini* (n 29 above) para 65.

¹³³ *Mathebula v S* 2010 (1) SACR 55 (SCA).

¹³⁴ *Ali & Another* (n 48 above) para 11.

¹³⁵ *Lawyers for Human Rights* (n 75 above) para 20.

¹³⁶ *Phale* (n 115 above).

The appeal court in the case of *Ali*, noted that the first ground that was mentioned by the Magistrates' Court in denying the applicants bail is that they are in the country illegally.¹³⁷ However, the High Court did not address the question of whether the court was correct in denying the applicants bail solely on the basis that they were in the country illegally. The High Court only stated that the *court a quo* was wrong to deny the applicants bail "without more."¹³⁸

A comparison of *Goba*, *Ali*, and *Abbas*, together with *Phale* and *Ali* in the High Court, leaves one with a bit of confusion as to what the legal position is regarding the release on bail of illegal foreigners who stand accused of committing a crime in the Republic. This apparent confusion brings legal uncertainty and may leave legal practitioners and the broader public unsure of what the law is.

The cases of *Seisa* and *Faquir* lays bare the legal uncertainty on whether illegal immigrants accused of an offence can be released on bail. This is because the two cases have a lot of similarities but the outcomes were different. In *Seisa*, the accused were South African citizens and an illegal foreigner from Lesotho.¹³⁹ In *Faquir*, one accused was a South African citizen and the other was a Mozambican national. In both cases, the crimes the accused were charged with fell within the purview of Schedule 5.

In both cases, the South African citizens were granted bail and, the co-accused who were non-citizens were refused bail.¹⁴⁰ The High Court in *Faquir* held that the Mozambican national was denied bail simply because she was a foreigner. The court held that the Magistrates' Court was wrong in treating non-citizens differently and, it reversed the decision of the Magistrates' Court by granting the accused bail.

However, in *Seisa*, the High Court held that differentiating between citizens and non-citizens does not amount to unfair discrimination in matters pertaining to bail. Whether the court in *Seisa* was bound to follow the decision of the court in *Faquir* falls beyond the scope of this study. Suffice to mention that the decision of the court

¹³⁷ *Ali & Another* (n 48 above) para 6.

¹³⁸ *Ali & Another* (n 48 above) para 14.

¹³⁹ *Seisa* (n 104 above).

¹⁴⁰ *Seisa* (n 104 above); *Faquir* (n 47 above).

in *Seisa* is, for all intents and purposes, at variance with the decision of the court in *Faquir*.

6. Conclusion

It is true that the courts have discretion as to whether to grant bail or not. However, such discretion should be exercised judicially, and not arbitrarily. On the strength of the cases that have been discussed in detail above, it would appear that there is indeed legal uncertainty as to whether illegal foreigners who stand accused of having committed a crime can be released on bail. The comments by the Deputy Minister are justified if the inconsistencies that stem from the judgements of the courts of the Republic regarding the granting of bail to illegal foreigners are anything to go by.

Chapter 3: The position in other legal systems regarding the granting of bail to illegal foreigners who are accused of a crime.

1. Introduction

This chapter investigates how other countries around the world deal with the issue of illegal foreigners who are accused of having committed a crime or crimes, specifically about the issue of bail.

South Africa is still a developing country.¹⁴¹ As a developing state, South Africa's legal system is bound to be seized with new challenges from time to time.¹⁴² Some of these challenges may be challenges of a legal nature that we do not necessarily have answers to. In such cases, it might prove helpful to cast our attention to other countries for solutions, especially countries that might have already dealt with similar legal challenges that we may encounter from time to time. South Africa's jurisprudence can be greatly enriched by learning from other developed jurisdictions around the world.

The learning process could entail observing how other countries deal with some of the matters that may seem to be posing a challenge to our country and, ultimately, importing such legal principles into our legal system as borrowing laws has always been a way of improving one's legal system.¹⁴³ As a developing State, we can learn a lot from other developed countries, with old, tried, and tested legal systems from around the world. Therefore, this chapter will conduct a legal comparative study to ascertain how similar problems are dealt with in other comparable legal systems.

This study starts by examining the Namibian laws that regulate the granting of bail to illegal foreigners accused of having committed a crime. South Africa and Namibia make for a good comparison because both countries have a lot in common. Firstly, it is a historical fact that Namibia was once a part of South Africa before it got its

¹⁴¹ C Manerwick & G Bekker 'Projectification Within a Developing Country: The Case of South Africa' (2022) 19 *Journal of Contemporary Management* 6.

¹⁴² K O'regan 'Cultivating a Constitution: Challenges Facing the Constitutional Court in South Africa' (2000) 22 *Dublin University Law Journal* 7.

¹⁴³ J Husa 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 6 *The Chinese Journal of Comparative Law* 130.

independence.¹⁴⁴ Secondly, both countries make use of almost the same Criminal Procedure Act.¹⁴⁵ Thirdly, Namibia is one of the countries on the African continent and it could prove quite helpful to see how other countries within the SADC region are dealing with this matter before turning attention to countries located outside the continent, further from South Africa.

The second country whose position shall be examined on the issue of bail to illegal foreigners who are accused of an offence is the USA. The USA is selected for two reasons. Firstly, it is the only country that houses more foreigners than any other country in the world.¹⁴⁶ According to the 2022 World Migration Report, the USA has been the primary destination for migrants, having an approximate number of 51 million international migrants.¹⁴⁷ For this reason, it is more likely that it might have dealt with or might be dealing with the influx of foreigners, including illegal foreigners. This makes it worthwhile to look into how they might have addressed or are addressing the issue of illegal foreigners who commit crimes while on their shores.

Secondly, the USA achieved independence around 1776, making it one of the oldest democracies in the world.¹⁴⁸ Therefore, it could be assumed that it has an advanced legal system compared to countries with young democracies such as South Africa, which attained its liberation 30 years ago.¹⁴⁹ Lastly, it is one of the most developed countries around the world that other emerging economies can look up to.

¹⁴⁴ J Pitsoane 'Namibia and South Africa: Towards Cooperation and Peaceful Coexistence (1994) 24 *Africa Insight* 73; Unpublished: MR Matshoba 'Bail and the presumption of innocence: A critical analysis of section 60(1 - 11) of the Criminal Procedure Act 51 of 1997 as amended' unpublished master's thesis, University of the Western Cape 2012 84.

¹⁴⁵ Unpublished: MR Matshoba 'Bail and the presumption of innocence: A critical analysis of section 60(1 - 11) of the Criminal Procedure Act 51 of 1997 as amended' unpublished master's thesis, University of the Western Cape 2012 84.

¹⁴⁶ <https://worldpopulationreview.com> (accessed 05 July 2023).

¹⁴⁷ M McAuliffe & A Triandafyllidou *World Migration Report 2022* (2021) 09.

¹⁴⁸ C Lock *et al* *History in the Making: A History of the People of the United States of America to 1877* (2013) 336.

¹⁴⁹ J Wassermann 'The Historical Significance of African Liberation- the Views of South African History Education Students' (2017) 20 *Revista Electronica Interuniversitaria de Formacion Del Profesorado* 19.

2. The position regarding the granting of bail to illegal foreigners who are accused of a crime in Namibia.

The Namibian Constitution does not make any provision regarding the right to be released on bail.¹⁵⁰ Section 63(a) of the Namibian Criminal Procedure Act provides that any person who has been accused of an offence is entitled to be released on bail if the court is of the view that the interests of justice permit release.¹⁵¹ Section 63(4)(b) prohibits the release of an accused on bail where there is a likelihood that such an accused will attempt to evade his or her trial if released on bail.¹⁵² The Namibian Criminal Procedure Act is not entirely clear on how the courts should deal with the issue of bail in criminal matters involving illegal foreigners who are accused of having committed an offence.

It has been held that there is no authority that the Namibian courts should adopt a different approach when deciding whether or not to grant bail to any foreign national who is subject to criminal proceedings.¹⁵³ However, an examination and an extensive analysis of the case law involving illegal foreigners who are accused of crime reveals that the Namibian courts are slow to allow bail to illegal foreigners who are subject to criminal proceedings. The section that follows reviews some of the Namibian case law involving illegal immigrants who appeared before the Namibian courts.

2.1 Analysis of Namibian case law.

One recent Namibian case law that dealt with the issue of bail involving an illegal immigrant who was accused of a crime is the case of *Egerer v State*.¹⁵⁴ Here the appellant was charged with the crime of fabricating, forging, or falsifying a permit.¹⁵⁵ He applied for bail in the Magistrates' Court and his bail application was dismissed.¹⁵⁶ He then appealed the decision to the High Court. The High Court held

¹⁵⁰ The Constitution of the Republic of Namibia, 1990.

¹⁵¹ Unpublished: BS Konga 'Bail refusal on the basis of public interest and administration of justice in Namibia: A critical appraisal of section 61 of the Criminal Procedure Act 5 of 1991' unpublished master's dissertation, the University of Namibia, 2019 97.

¹⁵² Act 25 of 2004.

¹⁵³ *Miguel v S* NAHCMD 175 HC.

¹⁵⁴ *Egerer v S* 2023 NAHCMD 276.

¹⁵⁵ *Egerer* (n 154 above) para 1.

¹⁵⁶ *Egerer* (n 154 above) para 3.

that, on a preponderance of probabilities, the appellant failed to convince the court that the interests of justice warrant his release on bail and his appeal was dismissed.¹⁵⁷

One of the reasons by the High Court for refusing to uphold the appeal was the fact that the appellant was an illegal foreigner and the 'fact that parts of the Namibian borders were unmanned'.¹⁵⁸ The court was of the view that since parts of the Namibian borders were unguarded, the appellant, being an illegal foreigner, posed a flight risk and, that if released on bail he may use the unguarded borders to leave the country in order to evade his trial.¹⁵⁹ This is not the only case where the court cited the 'unguarded borders' as one of the reasons for refusing to release an illegal foreigner who was accused of a crime on bail.

In the case of *Queta v S*, the court also dismissed an appeal against the refusal of bail by one appellant who was an illegal foreigner.¹⁶⁰ One of the reasons cited by the court for dismissing the appeal was that Namibia has borders that can be penetrated with relative ease.¹⁶¹ The appellant and, his two co-accused were charged with the contravention of section 4 of the Wildlife Products Act,¹⁶² and sections 1,78 and 11 of the Prevention of Organised Crime Act,¹⁶³ among other crimes.

In *Miguel v State*,¹⁶⁴ the accused were foreign nationals from Angola. They were charged with various crimes including the contravention of sections 4, 5, and 6 of the Prevention of Organised Crime Act.¹⁶⁵ Their application for bail in the Magistrates' Court was dismissed on the ground that they were a flight risk and may abscond if released on bail.¹⁶⁶ They appealed the Magistrates' Court decision to the High Court. The High Court stated that the evidence before it shows that the appellants had previously crossed the border between Namibia and Angola with ease and

¹⁵⁷ *Egerer* (n 154 above) para 40.

¹⁵⁸ *Egerer* (n 154 above) para 40.

¹⁵⁹ *Egerer* (n 154 above) para 40.

¹⁶⁰ *Queta v S* 2020 NAHCMD 328.

¹⁶¹ *Queta* (n 160 above) para 26.

¹⁶² Act 9 of 2008.

¹⁶³ Act 29 of 2004.

¹⁶⁴ *Miguel* (n 153 above).

¹⁶⁵ Act 29 of 2004.

¹⁶⁶ *Miguel* (n 153 above) para 3.

undetected.¹⁶⁷ Their appeal was dismissed by the High Court, holding that the border between the two countries, Namibia and Angola, is porous and could be crossed undetected by the authorities.¹⁶⁸

In *Matali v S*,¹⁶⁹ a Namibian national applied to be released on bail, and his bail application was refused by the Magistrates' Court. One of the grounds mentioned by the court was that the accused was a flight risk as he was married to a foreigner.¹⁷⁰ The accused appealed the decision of the Magistrates' Court to the High Court. The High Court confirmed that the magistrate was correct in drawing an inference that the accused may leave the country if released.¹⁷¹

One case that arguably demonstrates that the courts in Namibia are hesitant to grant bail to foreigners is the case of *Butkus v S*.¹⁷² In this case, four accused, a Namibian national, a British national with South African permanent residence, a South African national, and, a German national were arrested and charged with multiple crimes including the crime of dealing with or possession of potentially dependence-producing substances.¹⁷³ They all applied for bail in the Magistrates' Court. After hearing the evidence presented by the accused in support of their release on bail, the Magistrates' Court found that all the accused but the Namibian national were a flight risk as they were foreign nationals with no familial ties in Namibia.¹⁷⁴ They subsequently appealed to the High Court. The High Court dismissed the appeal for the 2nd and 3rd appellants because they were a flight risk.¹⁷⁵ The appeal for the Namibian national was also dismissed on the ground that it was neither in the interest of the administration of justice nor in the interests of the public that he be released on bail. He had been convicted before of similar charges.¹⁷⁶

¹⁶⁷ *Miguel* (n 153 above) para 32.

¹⁶⁸ *Miguel* (n 153 above) para 40.

¹⁶⁹ *Matali v S* 2016 (7) NAHCMD 181.

¹⁷⁰ *Matali* (n 169 above) para 7.

¹⁷¹ *Matali* (n 169 above) para 18.

¹⁷² *Butkus v S* NAHCMD 173.

¹⁷³ *Butkus* (n 172 above) para 2.

¹⁷⁴ *Butkus* (n 172 above) para 5.

¹⁷⁵ *Butkus* (n 172 above) para 12.

¹⁷⁶ *Butkus* (n 172 above) para 16.

The appeal by the fourth accused was upheld on the basis that the case against her was not as strong as it was against the other appellants. The German national was the girlfriend of the first appellant and was found sleeping in the residence of the first appellant when the police took the three other appellants to search the residence.¹⁷⁷

The porous borders of Namibia were recognised by the judiciary thereof as early as 2005 in the case of *S v Yugin*.¹⁷⁸ In that case, the court said,

“Common sense dictates that an accused who has been born and bred in Namibia, whose home and family are in Namibia and who has no refuge elsewhere, is less likely to abscond than an accused who is a foreign national resident here solely or mainly for business reasons”

In the very same judgement, the court went on to say,

“Another factor to be brought into the equation is the ability of the accused to abscond. It is said that the appellants lack such ability because their travel documents have been surrendered, their country of origin is far away and, in the case of the first appellant, he is seriously incapacitated. I do not regard such matters to be insurmountable obstacles for a person who has a real incentive to evade trial by leaving Namibia and returning to his home country. We have many borders and, as experience has shown, they can be penetrated with relative ease.”¹⁷⁹

3. The position regarding the granting of bail to illegal foreigners who are accused of crime in the United States of America.

Bail in the USA is regulated by the Bail Reform Act of 1984 (BRA) which was codified in the United States Code, Title 18, Sections 3141-3150.¹⁸⁰ Section 3142 of Title 18 of the United States Code regulates the release or detention of defendants pending trial.¹⁸¹ Section 3142 of title 18(a) of the Code provides that upon appearing

¹⁷⁷ *Butkus* (n 172 above) para 13.

¹⁷⁸ *S v Yugin & Others* 2005 NR 196 HC.

¹⁷⁹ *S v Yugin & Others* 2005 NR 196 HC.

¹⁸⁰ DN Adair *The Bail Reform Act* (2006) vii.

¹⁸¹ U.S Code title 18, section 3142.

before a judicial officer, the person charged with an offence shall, either be released on personal recognizance or, be released on condition or a combination of conditions or, be detained temporarily to allow for revocation of conditional release, deportation or exclusion.¹⁸²

Section 3142 of title 18(d) of the Code provides that if it has been determined by the judicial officer that the person or an accused is not a citizen of the United States or, not a permanent resident of the United States and, that such a person is a flight risk or may pose a danger to the community, the judicial officer shall make an order for the detention of such accused person for not more than 10 days.¹⁸³

The judicial officer shall also direct the attorney of the government to inform the appropriate probation, state, or immigration officials.¹⁸⁴ The Code further provides that if temporary detention is sought, such an accused person bears the burden of proving to the court his or her US citizenship or permanent residency.¹⁸⁵

If the immigration officials do not take the accused into their custody within the 10-day period, then a section 3142(f) hearing is held by a judicial officer.¹⁸⁶ Section 3142(f) provides that the judicial officer shall hold a hearing in order to determine whether, if released, a condition or a combination thereof, will ascertain the appearance of such accused person in the next court sitting.¹⁸⁷

3.1 Analysis of the United State bail laws

The pretrial detention rate of illegal foreigners in the United States continues to rise and it is said to be nearing 100%.¹⁸⁸ It has been argued that pretrial release is more difficult to achieve for illegal foreigners than for any other defendant.¹⁸⁹ A view has been expressed that many illegal foreigners surrender their pretrial release rights

¹⁸² U.S Code title 18, section 3142.

¹⁸³ U.S Code title 18, section 3142.

¹⁸⁴ U.S Code title 18, section 3142.

¹⁸⁵ U.S Code title 18, section 3142.

¹⁸⁶ Adair (n 158 above) 20.

¹⁸⁷ U.S Code title 18, section 3142.

¹⁸⁸ M Neal 'Zero Tolerance for Pretrial Release of Undocumented Immigrants (2021) 30 *Public Interest Law Journal* 2.

¹⁸⁹ Neal (n 188 above) 2.

due to the realisation that the prospects of release are slim.¹⁹⁰ Neal opines that the primary reason illegal foreigners are rarely admitted to pretrial release is the lack of community ties to the United States, which is regarded as an important factor in determining whether a defendant is a flight risk or not.¹⁹¹

The United States also makes use of what is referred to as pretrial officers, which are employees of the judicial agencies and derive their mandate from the Pretrial Services Act.¹⁹² Pretrial services programs are used in the early stages of the criminal case.¹⁹³ The responsibilities of pretrial services officers include the collection and verification of information relating to the risk of flight or dangerousness of the newly arrested defendants, monitoring defendants who have been released from custody by tracing and checking their compliance with release conditions, and assisting in ensuring that the released defendants appear for scheduled court events.¹⁹⁴ Once collected and verified, this information is presented to the judicial officers promptly.¹⁹⁵

4. Comparing the laws regulating the release of criminally accused illegal foreigners on bail between South Africa and Namibia.

Although South Africa and Namibia use the same Criminal Procedure Act, there is no doubt that Namibia's approach to bail regarding illegal immigrants is vastly different from that of South Africa.

The first noticeable difference between Namibia and South Africa is that there is uniformity in the Namibian courts on the issue of not admitting illegal foreigners to bail. The Namibian courts acknowledge that the country has borders that can be penetrated without any difficulty.

In *Egerer*, the court stated that parts of the Namibian borders are unmanned, and illegal foreigners who want to evade trial could escape using the unmanned

¹⁹⁰ Neal (n 188 above) 2.

¹⁹¹ Neal (n 188 above) 3.

¹⁹² Act of 1982.

¹⁹³ B Mahoney *et al Pretrial Services Programs: Responsibilities and Potential* (2001) 1.

¹⁹⁴ Mahoney *et al* (n 193 above) 1.

¹⁹⁵ Neal (n 188 above) 4.

borders.¹⁹⁶ In *Queta*, the court refused the appeal by an illegal foreigner on the same ground that Namibia has borders that can be penetrated with relative ease.¹⁹⁷ In *Miguel*, the appeal court refused to grant bail, holding that the appellants had previously crossed the border without being detected, implying that if they were granted bail, then they may cross the border again without being detected.¹⁹⁸

It is well known that South Africa, like Namibia, has porous borders.¹⁹⁹ However, not all South African courts seem to acknowledge that illegal foreigners who are subject to legal proceedings may use these porous borders to escape in order to evade trial if they are granted bail. In one case, the court granted bail to an appellant who was a foreign national even though there was evidence that the appellant left the borders of South Africa on at least two occasions.²⁰⁰ In that case, the appellant was a Nigerian national who was allegedly a member of an organisation called the *Black Axe*, which is known for conducting criminal activities by scamming romance victims in the United States through mobile phones and the Internet.²⁰¹

That some courts do not acknowledge that South Africa has porous borders is reflected in the wording of the judgement of the court in which it was stated “the alleged porous nature of the South African borders are therefore in my view, irrelevant as the appellant has shown good faith in travels beyond South Africa.”²⁰² The usage of the word ‘alleged porous’ seems to indicate that the court was not prepared to acknowledge that South Africa has borders that can be penetrated with relative ease.

However, not all South African courts deem irrelevant the fact that the country has porous borders. In *S v Mwaka*,²⁰³ an illegal immigrant from Tanzania was charged with multiple offences which included the contravention of section 5 of the Drugs and

¹⁹⁶ *Egerer* (n 154 above).

¹⁹⁷ *Queta* (n 160 above).

¹⁹⁸ *Miguel* (n 153 above).

¹⁹⁹ *S v Mwaka* 2015 (2) SACR 306 (WCC); ‘Economy, porous border makes SA a hub for human trafficking- new study reports’ *City Press* 19 March 2020.

²⁰⁰ *Otubu v Director of Public Prosecutions, Western Cape* 2022 (2) SACR 311 (WCC).

²⁰¹ *Otubu* (n 200 above).

²⁰² *Otubu* (n 200 above).

²⁰³ *S v Mwaka* 2015 (2) SACR 306 (WCC).

Drug Trafficking Act,²⁰⁴ and the contravention of sections 1,2,25, and 26 of the Prevention and Combating of Corrupt Activities Act.²⁰⁵ He applied for bail in the Magistrates' Court and the application was refused. He then challenged the decision to refuse him bail in the High Court.²⁰⁶

In the High Court, it was stated that the appellant was a fugitive from justice in that he had four different matters pending against him before his disappearance, and, in all those pending cases he was granted bail.²⁰⁷ The appeal court commented that the ease with which the appellant was able to cross South Africa's borders is a cause for concern.²⁰⁸ This was stated by the court after it heard that the accused was able to travel to Tanzania and back to South Africa whilst a fugitive and, without being detected.²⁰⁹ The court eventually dismissed the appeal.

It could also be said that in Namibia, illegal foreigners and non-citizens of Namibia are deemed flight risks when it comes to the issue of bail. This view finds support from the judgement of *Butkus*, where the court refused to admit bail to the accused who were arrested together with a Namibian national on the ground that they posed a flight risk since they were not Namibians. However, in South Africa, it is not clear whether illegal foreigners who are subject to criminal proceedings are regarded as flight risk. This uncertainty stems from the cases of *Faquir* and *Seisa*. In *Faquir*, the appeal court admitted an appellant who was arrested with a South African national to bail. The court went further to state that the magistrate denied the appellant bail solely on the ground that she was a foreign national which was unacceptable. However, in *Seisa*, the court held that differentiating between a citizen and an illegal immigrant in bail proceedings is justified and cannot be regarded as unfair discrimination.

²⁰⁴ Act 140 of 1992.

²⁰⁵ Act 12 of 2004.

²⁰⁶ *Mwaka* (n 199 above) para 5.

²⁰⁷ *Mwaka* (n 199 above) para 7.

²⁰⁸ *Mwaka* (n 199 above) para 20.

²⁰⁹ *Mwaka* (n 199 above) para 20.

5. Comparing the laws regulating the release of criminally accused illegal foreigners on bail between South Africa and the United States of America.

Unlike in South Africa, the United States has an Act of Parliament that is solely dedicated to regulating the issue of bail, the Bail Reform Act.²¹⁰ The Act stipulates that where it has been determined that an accused is neither a citizen nor a permanent resident of the United States and is also a flight risk, then such an accused person shall be detained for 10 days before being considered for bail. Accordingly, this provision was included to allow other law enforcement or immigration officials sufficient time to take the accused into their custody.²¹¹

Unlike in South Africa where bail entails the exercise of discretion on the part of the presiding officer,²¹² the usage of the word 'shall' in the Bail Reform Act suggests that the court does not have discretion and must detain such a person. The Act further provides that the judicial officer shall direct the attorney of the government to notify the relevant state or immigration officials.²¹³ The immigration officials are given 10 days to decide whether or not to take such accused persons into their custody.

One other major difference between South Africa and the United States is the usage of pretrial officers by the United States, which are employed to gather and verify relevant information that will be used by the judicial officer in determining whether or not to release the accused on bail.²¹⁴ It could be said that the ten-day period also serves to afford pretrial service officers enough opportunity to gather and verify relevant information relating to the risk of flight of the newly arrested defendants.

²¹⁰ Act of 1984.

²¹¹ Neal (n 188 above) 2.

²¹² *S v Barber* 1979 (4) SA 218 (D).

²¹³ Act of 1984.

²¹⁴ Mahoney *et al* (n 193 above) 1.

In South Africa, except where the 48 hour period expires outside ordinary court hours, an accused must be brought before a court of law within 48 hours after the arrest or, at the end of the first court day after the expiry of 48 hours, in line with section 35(1)(d) of the Constitution.²¹⁵ In terms of section 60(1) of the CPA, an accused can be released on bail if the interests of justice permit.²¹⁶ If the issue of bail is not raised by either the accused or the prosecutor, the court must of its own accord and during the first appearance of the accused, inquire from the prosecution whether there is an objection to bail being granted.²¹⁷

This effectively means anyone, including illegal foreigners, accused of an offence can be released on bail within 48 hours after his or her arrest, provided there is no objection by the prosecution and, the court deems it in the interests of justice to release the accused to bail.²¹⁸ In the event that the court remands the accused in custody pending further investigations for bail purposes, it can do so for up to seven days at a time in line with section 50(6)(d) of the CPA.²¹⁹

South Africa does not have pretrial services, with (Gqeberha) being an exception.²²⁰ Interestingly, section 60(2A) of the CPA provides that the court must take into account any pretrial report before deciding on the bail application, provided that such a report is available.²²¹ It has been argued that, in the absence of pretrial services, this provision doesn't have any impact.²²²

In terms of section 60(2)(c) of the CPA, when exercising its discretion on bail applications, the court may informally enquire from both the accused and the prosecutor, the relevant information the court needs to decide whether or not to release the accused on bail.²²³ Thus, the court is required to rely either on the oral evidence or sworn statement of the accused to decide on bail.²²⁴

²¹⁵ Constitution of the Republic of South Africa, 1996.

²¹⁶ Act 51 of 1977.

²¹⁷ Mokoena (n 62 above) 65.

²¹⁸ Joubert *et al* (n 78 above) 215.

²¹⁹ Act 51 of 1977.

²²⁰ Karth (n 33 above) 12.

²²¹ Act 51 of 1977.

²²² Karth (n 33 above) 9.

²²³ Act 51 of 1977.

²²⁴ Mokoena (n 62 above) 44.

Evidence may be led orally or, presented by way of affidavits.²²⁵ Hearsay evidence is admissible during bail applications and, the court may grant bail using hearsay evidence presented by a witness from the witness dock.²²⁶ There seems to be no formal report or even an extensive investigation required before an accused can be released on bail. The court need only enquire summarily from both the applicant and the prosecutor the information which the court deems necessary and, based on the information elicited from the applicant or the prosecutor, decide whether to grant or refuse bail.²²⁷ However, there is no way at this stage of ascertaining whether the evidence or information tendered by the accused is correct or incorrect.

6. Conclusion.

Based on judicial precedent emanating from Namibia, it could be said that the practice by the courts of granting bail to illegal foreigners who are subject to criminal proceedings is an exception rather than a norm. It is also clear from the cases that have been considered above that the courts can refuse to release an illegal foreigner on bail solely on the ground that the applicant to bail is an illegal foreigner. What appears to be clear in Namibia is that the law treats illegal foreigners as flight risks that should not be released on bail.

Another important consideration that the courts in Namibia mention without fail in almost all cases involving illegal foreigners is the issue of unmanned borders. It would appear that the existence of porous borders is not a factor that is taken into consideration by the South African courts when deciding whether or not to release illegal foreigners who are accused of crime on bail. When compared to the USA, the presence of pretrial officers in the United States seems to be one of the effective ways of ensuring that the necessary information that the courts need when deciding the issue of bail involving an illegal foreigner is available.

²²⁵ *S v Nichas* 1977 (1) SA 257 (C).

²²⁶ *Mokoena* (n 62 above) 40.

²²⁷ R du Plessis 'Step by Step Bail Applications' (2000) *De Rebus* 30.

Chapter 4: The need to reform the existing laws that regulate the granting of bail to illegal foreigners in South Africa.

1 Introduction

This chapter attempts to answer the question of whether the current South African bail laws require reform. Bail reform is not an anomaly and bail laws have been subjected to various changes in the past.²²⁸ Some of the well-known amendments to bail laws were made in the years 1995, 1997, 1998, 2000, and 2003²²⁹. Although the nature and extent of these amendments fall beyond the scope of this research study, a view has been expressed that the various changes to the legal provisions regarding bail have progressively moved to make it more difficult for a bail applicant to be granted bail.²³⁰

Following the author's perceived legal uncertainty that was extensively discussed in chapter 2 of this study, this chapter makes proposals that seek to curb and possibly bring an end to the legal uncertainty. The section that follows briefly revisits the laws governing the granting of bail in South Africa. This is followed by a discussion of the need by the South African courts to regard porous borders as a ground to always refuse illegal foreigners bail under the auspices of a flight risk and the interests of justice. Finally, the chapter discusses pretrial services in South Africa before concluding with the recommendations.

2 Bail laws in South Africa.

As previously stated in the preceding chapters of this research study, the South African bail law is contained mostly in legislation and is subject to various constitutional provisions.²³¹ Section 35(1)(f) of the Constitution allows the release of an accused on bail subject to reasonable conditions, provided that the release of such an accused is in the interests of justice.²³² The CPA is the principal source of

²²⁸ C Ballard & R Subramanian "Lessons from the Past: Remand Detention and Pretrial Services" 2013 (44) *South African Crime Quarterly* 18.

²²⁹ Karth (n 33 above) 6.

²³⁰ Karth (n 33 above) 6.

²³¹ Karth (n 33 above) 6.

²³² 'Constitution of the Republic of South Africa, 1996'.

South African bail law.²³³ Section 60(1) of the CPA provides that an accused person shall be entitled to be released on bail if the court before which such accused is appearing views the release of the accused permissible in the interests of justice.²³⁴

There is also an abundance of case law on the issue of bail and some cases have been thoroughly discussed in the preceding chapters of this research study. As it has been shown in chapter 2 of this study, some court decisions seem to overlap and others blatantly contradict each other. The section that follows below seeks to put forward an argument that illegal and undocumented foreigners who are subject to criminal proceedings on bail should at all times be denied bail on two grounds 1) that they are a flight risk and 2), it is in the interests of justice to do so.

3 The need for reform of South African bail laws.

Chapter 2 of this research study demonstrated through various South African case laws that the courts are at variance on the issue of whether illegal foreigners who are subject to criminal proceedings can be admitted to bail. The aforementioned chapter has also highlighted that conflicting decisions create legal uncertainty.

The extensive amendments to bail laws happened around 1995 and, at that time, the law handed down heavy penalties for illegal immigration.²³⁵ Also during that time, immigration was well regulated and land borders were secured with electric fences, coupled with regular army patrols and auxiliary civilian commando units.²³⁶ It could be said that, because of the above-mentioned reasons, there was no need for the Commission to factor in the element of illegal immigration when it undertook its investigation.

²³³ J van der Berg *Bail- a practitioner's guide* (2012) vii.

²³⁴ Act 51 of 1977.

²³⁵ 'South Africa reckons with its status as a top immigration destination, apartheid, history and economic challenges' *Migration Policy Institute* 18 November 2021.

²³⁶ Dithebe & Mukhuba (n 1 above) 129.

The present sustained inflow of illegal foreigners stems from weak border control.²³⁷ Corruption by border officials is also another cause that results in an inflow of illegal foreigners.²³⁸ Weak border management and corruption coupled with illegal entry channels could be blamed for the huge number of illegal foreigners in South Africa. The CPA, especially Chapter 9, has not kept pace with systemic changes in order to address the current challenges relating to bail.²³⁹ It is submitted, therefore, that South Africa needs an overhaul of bail laws that will sufficiently address illegal foreigners who commit crimes in South Africa.

It may be said that the matter of granting bail to illegal foreigners who are subject to criminal proceedings could be resolved once the Constitutional Court has had occasion to adjudicate on it. Even though it is not certain whether the matter might end up in the Constitutional Court or how long it may take for the matter to reach the highest court in the land, it is clear that legal certainty on this aspect of South African law is required. While we wait with bated breaths for the highest court in the land to pronounce its position on the matter, the rest of this chapter focuses on what can possibly be done in the interim in order to achieve legal certainty, beginning with the discussion of pretrial services in South Africa.

4 Pretrial Services in South Africa.

Following public concerns about crime increment and the perceptions of bail law being inadequate, amendments to the CPA were effected in the 1990s which made it difficult to be granted bail.²⁴⁰ However, the harsher bail provisions adopted led to overcrowding in South African prisons.²⁴¹ Responding to the overcrowding in prisons, a demonstration Pretrial services (PTS) project, which was aimed at reducing the number of admissions into remand detentions, was implemented by the Bureau of Justice Assistance (BJA) at the invitation of Abdul Omar, the then Minister of the Department of Justice and Constitutional Development.²⁴²

²³⁷ Dithebe & Mukhuba (n 1 above) 129.

²³⁸ 'Tempers flare as bribes block border crossing between SA and Zimbabwe' *City Press* 01 August 2020.

²³⁹ van der Berg (n 233 above) vii.

²⁴⁰ Karth (n 33 above) 11.

²⁴¹ Karth (n 33 above) 11.

²⁴² Ballard & Subramanian (n above 228) 15.

The project was stationed at various courts in the country and, the purpose of the demonstration project was to help presiding officers in making more informed decisions on bail.²⁴³ It was hoped that the project would help presiding officers by providing them with what Karth refers to as a 'bail recommendation report' at the first appearance of the accused.²⁴⁴ The bail recommendation report essentially contained relevant information about an accused person and, it included information about the accused's community ties, previous convictions, employment, residential address, and other relevant information.²⁴⁵ It was hoped that this independent and verified information about the bail applicant would allow presiding officers to make more appropriate bail decisions.²⁴⁶

The PTS office was electronically linked to the SAPS criminal record database which detailed information about previous convictions of the accused. Such information may take up to eight weeks to obtain without the assistance of the PTS office.²⁴⁷ With the assistance of the bail recommendation report, high-risk and repeat offenders were more likely to be detained while awaiting trial, and low-risk and first-time offenders or accused charged with trivial or petty crimes could be released on bail.²⁴⁸

However, the PTS was not fully welcomed by the Department of Justice and Constitutional Development beyond the demonstration phase.²⁴⁹ It has been argued that some of the reasons the project could not survive beyond the demonstration phase included the following:

- The project's success relied on the then Minister of Justice and Constitutional Development who presided over the implementation of the project;
- The project required people with technical skills and knowledge to help with the implementation of the project,²⁵⁰ and less recruitment of support staff and other qualified personnel was done to ensure the project continues to run after the minister's term in office;

²⁴³ Karth (n 33 above) 11.

²⁴⁴ Karth (n 33 above) 11.

²⁴⁵ M Schönteich *Making courts work: a review of the IJS court centre in Port Elizabeth* (2002) 53.

²⁴⁶ Ballard & Subramanian (n 228 above) 15.

²⁴⁷ Karth (n 33 above) 11.

²⁴⁸ Karth (n 33 above) 11.

²⁴⁹ Ballard & Subramanian (n 228 above) 15.

²⁵⁰ Schönteich (n 245 above) 15.

- Weak communication and collaboration among the departments of Justice, Correctional Service, Police, and Safety and Security;
- The project funding relied heavily on donor funds and, after the project was handed over to the Department of Justice and Constitutional Development, funding the project became a challenge for the national government;
- Lack of guidelines to ensure the continued support and participation of partner agencies after handing the project over to the Department of Justice.²⁵¹

5 Recommendations

5.1 Reimplementation of the PTS in South African courts.

The reimplementation of the PTS could be a possible panacea to some of the challenges raised in the study. It may be worthwhile to revisit the performance of the Gqeberha Magistrate court (as it is the only court in which the PTS is still functional) to gauge whether PTS can be of any help if it were to be rolled out nationally. The Gqeberha Magistrate Court, although not part of the original demonstration phase, set up a PTS office as part of their Integrated Justice System Court Centre Project (IJSCCP).²⁵²

The staff at the PTS centre in Gqeberha compiles a bail recommendation report and attaches it to the charge sheet.²⁵³ Prior to compiling the report, the staff at the PTS centre in Gqeberha will first interview the accused and verify the address given by the accused.²⁵⁴ A 2001 review of the Gqeberha court centre revealed some positive outcomes, including:

- Improved docket quality;
- Facilitation of bail applications and;
- Led to better bail decisions.²⁵⁵

Today the Gqeberha court centre, partly due to PTS, is regarded as a beacon of hope for South Africa's poorly performing criminal justice system.²⁵⁶ It is submitted

²⁵¹ Schönreich (n 245 above) 15.

²⁵² Schönreich (n 245 above) 15.

²⁵³ Schönreich (n 245 above) 65.

²⁵⁴ Schönreich (n 245 above) 65.

²⁵⁵ Schönreich (n 245 above) 65.

²⁵⁶ Schönreich (n 245 above) 16.

that a national rollout of PTS can be of great help in alleviating the uncertainty that exists when courts have to adjudicate bail matters involving illegal foreigners. The implementation of PTS could help the South African criminal justice system to reach a world-class status.²⁵⁷ It has been argued that the social, political, and legal context in which the project operated during the demonstration phase might have contributed to the ultimate demise of the project.²⁵⁸ Given the present social and political climate in South Africa, PTS could possibly be a remedy now.²⁵⁹

Apart from the Gqeberha Magistrate court, the reason the PTS system is still functional today in the USA is simply because it is working. The pilot phase that was carried out by the BJA in New York demonstrated that accused persons with strong and verifiable ties to their communities that could not afford bail, could be released before trial.²⁶⁰ The system has been in existence for decades in the United States and has proven to yield positive results. Evidence has also shown that the implementation of the PTS in the United States influenced the way judges make bail decisions.²⁶¹ It is one system that has been tried and tested and has stood the test of time. Just like in America, the system can work in South Africa. It is submitted that the Department of Justice and Correctional Services should look into re-introducing the system in South African courts and roll it out nationally.

5.2 Denying illegal foreigners bail in the interests of justice in terms of section 60(1) of the CPA.

As has been shown in Chapter 3 of this study, illegal foreigners in Namibia are denied bail mainly because of the presence of unmanned borders in Namibia. If regard is had to case law, then it's correct to conclude that the courts in Namibia deem all illegal foreigners a flight risk and, almost always refuse to grant illegal foreigners bail on the basis that it is not in the interests of justice to release them on bail. For instance, when denying an illegal foreigner who was accused of a crime, the

²⁵⁷ Schönreich (n 245 above) 37.

²⁵⁸ Ballard & Subramanian (n 228 above) 15.

²⁵⁹ Ballard & Subramanian (n 228 above) 21.

²⁶⁰ Schönreich (n 245 above) 42.

²⁶¹ Schönreich (n 245 above) 42.

court in *Egerer* held that the interests of justice could be prejudiced if the accused were to be released on bail.²⁶²

The court in *Miguel* also held that, on the facts before it, it was not in the interest of justice to release the appellant on bail.²⁶³ In the case of *Queta*, the court also held that the accused was a flight risk and, that the *court a quo* was correct in denying him bail on that ground.²⁶⁴ In the case of *Yugin and Others*, the court equally refused to release illegal foreigners on bail, holding that experience has shown that the many unmanned borders in Namibia can be penetrated with relative ease, which essentially meant that the accused, by being in the country illegally, posed a flight risk.²⁶⁵

Namibia and South Africa have deep historical ties as the two countries were once one. It has also been mentioned that the Namibian courts use the same Criminal Procedure Act as the South African courts.

Therefore, the second recommendation that this study puts forward is that illegal foreigners who are subject to legal proceedings should not be released on bail as they are a flight risk. This study is merely recommending that only those illegal foreigners who face criminal charges or are accused of a crime be denied bail. In other countries such as India, the law is clear that a foreign national who is in the country without valid travel documents cannot be granted bail.²⁶⁶ In one instance, the High Court of India held that the courts cannot grant bail to a foreigner who is accused of entering India without valid travel documents.²⁶⁷ The court further stated that releasing an illegal foreigner on bail would set a wrong precedent as any illegal foreigner would disregard or flout the legal provisions relating to immigration and simply apply for bail when arrested.²⁶⁸ It is clear that in such countries, the question of whether illegal immigrants who are subject to criminal proceedings can be admitted to bail does not even arise.

²⁶² *Egerer* (n 154 above) para 41.

²⁶³ *Miguel* (n 153 above) para 52.

²⁶⁴ *Queta* (n 160 above) para 25.

²⁶⁵ *S v Yugin & Others* 2005 NR 196 HC.

²⁶⁶ 'No bail for foreigners without centre's nod: HC' *The Times of India* 17 July 2013.

²⁶⁷ *Momin Mulla v Sub Inspector of Police* (2013) 07 LK CK 0127.

²⁶⁸ *Momin* (n 266 above) para 9.

There seems to be no reason why the South African courts cannot place much emphasis on the element of porous borders when adjudicating on bail matters involving illegal foreigners who are accused of having committed a crime. This is the most viable approach given that South Africa has porous borders.²⁶⁹ This is important in order to safeguard and protect our sovereignty. Even countries with stronger and tighter borders in the world, like the United States, have adopted zero tolerance for the pretrial release of illegal foreigners.

As much as it is not the responsibility of the South African judiciary to ensure that the ports of entry are not porous, it is just as important for the courts to be aware of the reality that some borders can be penetrated with ease, like the courts in Namibia. This is a factor that ought to be given due consideration to ensure that those who break the law without the correct documentation to be in the country, do not escape the might of the law on the basis that they are not in the system and, cannot be traced.

The South African courts should follow suit to safeguard the country's national interest and put the safety of South African citizens at the forefront. The South African judiciary should, in the process of interpreting the law, adopt a patriotic stance that aims to put South Africans first.

Of course, the position can always be assessed after the country's ports of entry have been secured. As it has been said, the law is not rigid and should be flexible and be able to adapt to the changing circumstances of our society.²⁷⁰

The practice of releasing illegal foreigners on bail might be seen as an act of condoning illegality. It might send a wrong message to the general public that the courts side with criminality.²⁷¹ If not remedied, this practice of releasing unknown people on bail might be seen as a loophole for international criminals of the world and, they might take advantage of it. It may also be an incentive for the general

²⁶⁹ Minnaar *et al* (n 9 above) 35.

²⁷⁰ *Ex parte Tlotlego* 2017 SA 376 (JHC).

²⁷¹ A Loqani & T O Magadze "Exploratory Analysis of Underlying Factors Contributing Towards Mob Justice: A Case Study of Gqebhera, Eastern Cape, South Africa" (2022) 35 *African Journal of Criminology & Victimology* 42.

public to resort to mob justice.²⁷² Therefore, South African courts should take the cue from the Namibian courts and deny illegal foreigners bail on the ground that doing so is in the interests of justice.

²⁷² Loqani & Magadze (n 223 above) 40.

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