IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

31/10/2014

DATE SIGNATURE

CASE NO: A197/2013

DATE:

IN THE MATTER BETWEEN:

ISAAC MALUKA **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. The accused appeared in the Magistrate's Court for the district of Wonderboom, held at Pretoria North, on one count of assault, one of sexual assault and one of housebreaking with the intent to commit an offence unknown to the State.

2. During the course of the proceedings in the Magistrate's Court, it emerged that the accused is a schizophrenic who was apparently not receiving any medication at the time the alleged offences for which he was charged, were committed.

3. The Magistrate, having received two doctor's reports, then referred the accused for observation in terms of Section 78 of the Criminal Procedure Act 51 of 1977 ('the Act'). The accused was, after some delay, admitted to the Weskoppies Hospital for the purposes of being observed and assessed.

4. When the matter came before the Magistrate's Court again, the accused pleaded not guilty to all the charges and his attorney indicated in explanation of his plea of not guilty in terms of Section 115 of the Act, that at the time of the alleged offences, the accused was suffering from a mental illness that caused him to lack an appreciation of the wrongfulness of his actions, or to act in accordance with any appreciation of wrongfulness.

5. The State then tendered into evidence a psychiatric report prepared and signed by two psychiatrists at the Weskoppies Hospital, Dr C Kotze and Professor J L Roos, who conducted interviews with the accused as well as observed his general behaviour while he was at Weskoppies Hospital.

6. In their report the psychiatrists diagnosed the accused as schizophrenic and while they expressed the view that the accused was capable of understanding Court proceedings and capable of contributing meaningfully to his defence, they concluded however that he was 'at the time of the alleged offence, as a consequence of a mental illness, unable to appreciate the wrongfulness of his deeds or to act in accordance with any appreciation of wrongfulness'.

7. The report was duly proved and the accused was thereafter acquitted of the charges he was facing by reason of his mental illness. The Magistrate also

ordered the accused to be admitted to the Weskoppies Hospital in terms of Section 78(6)(a)(ii)(aa) of the Act to be treated as an involuntary mental health care user as contemplated in Section 37 of the Mental Health Act 17 of 2002.

8. The matter was then referred to the Registrar of this Court on special review in view of the sentiments expressed in the matter of ***S v RAMOKOKA* 2006 (2) SACR 57 (W)** where the Court expressed the view that as a matter of good practise, Magistrates should refer their orders made in terms of Section 77(6) to the High Court for review.

9. The matter then came before BERTELSMANN J, who in his judgment made reference to two review judgments in this Division which preceded ***RAMOKOKA*** and were directly in point but differed from the conclusion arrived at in ***RAMOKOKA***. They were ***S v VAN WYK* 2000 (1) SACR 79 (T)** and ***S v WILLS* 1996 (2) SACR 105 (T)**. It appears that the Court in ***RAMOKOKA*** was not made aware of the decisions in ***VAN WYK*** and ***WILLS***. BERTELSMANN J also made reference to the decision of the KwaZulu Natal Division in ***S v ZONDI* 2012 (2) SACR 445 KZP**, which declined to follow ***RAMOKOKA***.

10. BERTELSMANN J formed the view that given that different Courts of the same stature in this Division have come to opposite conclusions on the same issue, it would be appropriate to refer the matter to a Full Bench of this division to clarify the issue. Following a discussion with the Honourable Deputy Judge President of this Division, who gave his approval, an order was made by BERTELSMANN J referring the matter to the Full Bench to 'decide the issue whether an order in terms of Section 78(6)(a)(ii)(aa) of the Criminal Procedure Act 51 of 1977 read with Section 37 of the Mental Health Care Act 17 of 2002 should be reviewed by the High Court.'

11. It was on that basis and with this background that the matter then served before this Court and accordingly the issue for determination is whether orders made by a Magistrate in terms of Section 78(6)(ii)(aa) of the Act should as a matter of course be reviewed by the High Court.

12. In argument before us the State contended that an order made in terms of Section 78(6) was not and should not be subject to automatic review, while it was argued on behalf of the accused that the Court should follow and endorse ***RAMOKOKA*** and that as a matter of good practise, all orders in terms of Section 77(6) should be referred to the High Court for review.

THE RELEVANT PROVISIONS OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

13. Section 78 (6)(a)(ii)(aa) of the Act provides as follows:

> *If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act –*
> *(a) the Court shall find the accused not guilty by reason of mental illness or intellectual disability, as the case may be, and direct*
> *(ii) in any other case than a case contemplated in subparagraph (i), that the accused –*
> *(aa) be admitted to or detained in an institution stated in the order and treated as if he or she or an involuntary health care user contemplated in section 37 of the Mental Health Care Act*
> *(cc) be released subject to such conditions as the court considers appropriate; or*
> *(dd) be released unconditionally .*

It is clear if regard is had exclusively to the wording of the section, that it does not purport to create a mechanism for the automatic review of orders made in terms of the section.

14. Section 302 of the Criminal Procedure Act provides as follows:

> *(1)(a) Any sentence imposed by a magistrate's court which, in the case of imprisonment contemplated in section 191(2)(j) of the Children's Act, 2005 (Act 32 of 2005), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.*

15. The mechanism of an automatic review created by Section 302 was meant to provide automatic protection to any unrepresented accused who was sentenced to a term of imprisonment in excess of three months. The trigger for activating the automatic review would be a combination of the following factors:

a) The duration of the sentence imposed – all sentences in excess of three months would be the subject of such a review subject to b) and c) below;
b) The period for which the judicial officer who imposed the sentence held the rank of Magistrate - in the case of a Magistrate who held the rank of Magistrate for seven years the sentence would have to exceed three months while in the case of a Magistrate who held rank for more than seven years the sentence would have to exceed six months;
c) The accused must have been unrepresented at the time sentence was imposed.

16. The factors mentioned above are formal in nature and do not traverse the merits of the trial or the fairness or otherwise of the proceedings. As I understand it, these automatic review provisions were not grounded on the assumption that lower Courts were prone to err and hence the need for such an automatic mechanism. On the contrary, if one departs from the assumption that all Courts act with integrity and in conformity with the law, then the provisions relating to automatic review are simply meant to provide an additional and important layer of protection to unrepresented accused persons in matters relating to their freedom and liberty.

17. This guarantee of protection in the form of an automatic review becomes even more relevant in the context of a constitutional order that recognises the right of freedom and security of a person. Section 12 in the Bill of Rights captures this right in the following terms:

> *'12(1) Everyone has the right to freedom and security of the person, which includes the right –*
>
> *(a) not to be deprived of freedom arbitrarily or without just cause;*
>
> *(b) not to be detained without trial;*
>
> *(c) to be free from all forms of violence from either public or private sources;*
>
> *(d) not to be tortured in any way;*
>
> *(e) not to be treated or punished in a cruel, inhuman or degrading way.*

18. In ***S v COETZEE*** **1997 (3) SA 527 (CC)** O'REGAN J described the two components of the right as follows:

'...two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom...our constitution recognises that both aspects are important in a democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. (at para 591G-H)

19. In ***DE LANGE v SMUTS NO* 1998 (3) SA 785 (CC)** Ackermann J confirmed that both components of the freedom right form part of s12 of the Constitution (at 769I to 797E):

'...S12(1), in entrenching the right to freedom and security of the person, entrenches the two different aspects of the right to freedom...The one that O'Regan J...called the right not to be deprived of liberty 'for reasons that are not acceptable' or what may also conveniently be described as the substantive aspect of the protection of freedom, is given express entrenchment in s12(1)(a) which protects individuals against deprivation of freedom 'arbitrarily or without just cause'. The other, which may be described as the procedural aspect of the protection of freedom, is implicit in s12(1) as it was in s11(1) of the interim Constitution...The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur 'arbitrarily'; there must in other words be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational

connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a just one...Although paragraph (b) of s12(1) only refers to the right 'not to be detained without trial' and no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a 'fair' trial, but not such that that trial must necessarily comply with all the requirements of s35(3).'

(See also generally **Currie, I., and de Waal J. (2005)** ***The Bill of Rights Handbook.*** **5th ed. Juta and Co Ltd: Wetton** at chapter 12).

THE PROCEEDINGS IN TERMS OF SECTION 78 OF THE ACT AND THE PROCEEDINGS CONTEMPLATED BY SECTION 302

19. While it is clear that the proceedings contemplated by Section 302 deal with and relate to sentenced persons only, the question arises whether if regard is had to the object the section seeks to achieve, the deprivation of liberty under different circumstances, and in particular, circumstances contemplated by Section 78(6)(ii)(aa), should also not be accompanied by similar guarantees and layers of protection. It is certainly arguable that what is at stake ultimately is the deprivation of the freedom of the individual and as a matter of broad principle there should be sufficient safeguards that exist both in respect of cause as well as in respect of procedure.

20. The legal question of whether the law recognised an automatic right of review in respect of orders made in terms of Section 77 and 78 of the Act and the related question of whether it was, as a matter of policy, desirable to have such a right came before the Courts in numerous matters and they include ***S v BLAAUW*** **1980 (1) SA 536 (C),** ***S v VAN WYK*** **2000 (1) SACR 79(T),** ***S v WILLS*** **1996 (2) SACR 105 T,** ***S v RAMOKOKA*** **2006 (2) SACR 57 (WLD)** and ***S v ZONDI*** **2012 (2) SACR 445 (KZP).**

21. In all of the above matters, the Court accepted that there was no automatic review in respect of an order made in terms of Section 77 or 78 of the Criminal Procedure Act 51 of 1977 but it affirmed that the High Court has wide powers to review the proceedings of all lower Courts that came before it. The principle that emerged was that on the one hand while there was no automatic right of review, on the other hand in those instances when the matter came before a high Court by way of review, the Court had wide powers of review.

22. In ***ZONDI*** (*supra*), the Court said (at 447f-g):

> '*In* Davids and Others v Van Straaten and Others *Erasmus J said the high court has jurisdiction beyond the confines of the grounds of review set out in s24 of the Supreme Court Act, to review a decision of an inferior court which is alleged to be an infringement of a fundamental right entrenched in the Constitution. It is a review of the third category identified by Innes CJ in* Johannesburg Consolidated Investment Co v Johannesburg Town Council.'

23. ***RAMOKOKA*** however took a different approach and even though the Court recognised that the Legislature did not create an automatic right of review in respect of orders made in terms of section 77(6) of the Act, it took the position that 'in view of the potential for serious prejudice to an accused person where an order is made in terms of s 77(6), some kind of review mechanism seems desirable.' On that basis the Court concluded that as 'a matter of good practise, magistrates should refer their orders made in terms of section 77 (6) to the High Court for review.'

    This, it would appear, has the effect of at least *de facto* making such orders automatically reviewable.

24. The Court in coming to the conclusion it did, did not make any reference to the decisions in ***VAN WYK*** and ***WILLS*** (both decided by Courts of similar stature

and in the same division) that held that such orders were not automatically reviewable. When one has regard to the judgments in ***VAN WYK*** and ***WILLS*** it is apparent that the Court in both instances took the view, regard being had to the wording of the Act that there was no right to an automatic review created by Section 77(6). What was not canvassed in those matters was whether such a mechanism should exist and it was in ***RAMOKOKA*** and ***ZONDI*** that there was a substantial canvassing of the issue resulting in the divergent conclusions to which reference has already been made.

25. In ***ZONDI,*** which was decided after ***RAMOKOKA***, the Court had the opportunity to consider the various judgments referred to above and while it concluded that indeed the power of review of a high Court was extensive and would include the power to review orders made in terms of section 77(6), it disagreed with the stance taken in ***RAMOKOKA*** that such orders should be submitted for review as a matter of good practice.

26. It concluded that any prejudice that could arise out of an order made in terms of Section 77(6) could be dealt with in a number of ways, including an appeal against the order or an application in terms of the Mental Health Act for the discharge of the person involved. Finally it indicated that 'the potential for serious prejudice does not seem to justify the creation of a new category of automatic review.'

DISCUSSION

27. The provisions of Section 77 of the Act relate to the criterion for fitness to stand trial, while the provisions of Section 78 of the Act relate to the question of criminal responsibility. Thus in the context of the matter before us it appears from the report of the psychiatrists that while the accused was found to be capable of understanding court proceedings and to contribute meaningfully to his defence, they conclude however that at the time of the alleged offence he

was, as a consequence of a mental illness, unable to appreciate the wrongfulness of his actions or to act in accordance with an appreciation of wrongfulness.

28. Orders made in terms of Section 77 and 78 have a significant impact on, and consequences for, the freedom and the liberty of an individual. There can be little argument that the potential for serious prejudice is alive and indeed real. The deprivation of liberty that follows such an order, while subject to some checks and balances, may well be of indefinite effect and may well exceed the three month or six month period provided for in the Act as activating an automatic review for sentenced, unrepresented persons.

29. From this the obvious question must then arise – if persons whose rights of freedom and liberty have been curtailed for a defined period under the circumstances contemplated in Section 302 of the Act, enjoy an automatic right of review, why not those whose rights and freedoms have been curtailed for an unspecified and potentially indefinite period in terms of Section 78(6)(ii)(aa)?

30. While it may be so that the persons contemplated in Section 302 are sentenced persons and those in Section 77 are un-sentenced, there is with respect no difference in the effect of the orders made in so far as they make inroads into the liberty of the individual. It must certainly be arguable that the inroads made by an order in terms of Section 77 has the potential to be considerably more extensive and invasive when compared to those made in terms of Section 302.

31. Thus from the perspective of providing a layer of judicial protection when there is a deprivation of liberty, the approach found in Section 302 differs quite fundamentally from that found in Section 77. In the former instance the right of review is automatic, while in the latter instance it would largely depend on the approach and stance of an individual Magistrate who may elect or not elect, as the case may be, to submit the matter for review. I can find no substantial

justification for such a wide difference in approach to the same fundamental question – how do Courts protect the interests of freedom and liberty of those who are the subject of its order and in particular the poor and the vulnerable?

32. In the matter of ***De Vos N.O. and another v the Minister of Justice and others heard under Case Number 4502/2010*** in the Western Cape Division of the High Court , the Court in a judgement delivered on the 5th September 2014 declared the provisions of Section 77(6)(a)(i) and (ii) unconstitutional. While *in casu* the Court is dealing with the question of Section 78(6) (ii)(aa), the judgment of the Western Cape High Court is relevant in the following respects:

a) It affirmed the stance taken in ***Ex parte G and Sixty Six others 2009 [JOL] 222950 (KZN)*** that 'it goes without saying and is self evident that the detention of a person in a mental institution on an involuntary basis is far reaching, involving as it does the deprivation of that person's liberty.'
b) It made reference to an illuminating article (**Bonthuys, E. (2001) Involutary Civil Commitment and the New Mental Health Bill 118 *South African Law Journal.*118. p.667-687**).

33. In her article Ms Bonthuys describes the effects of institutionalisation as follows:

> *'Confining a person to a mental health institution results in a serious curtailment of her civil liberties. The patient loses her privacy, her ability to decide issues of daily routine and her ability to move about freely, sometimes to the extent of being physically restrained. The patient may be forced to undergo medical treatment to which she objects, including the administration of psychotropic medicine, invasive surgery and other procedures like electro-convulsive therapy (shock treatment). Moreover, the mere classification of someone as mentally ill necessarily entails a negative value judgement in a society where*

humanity is defined as the ability to interact rationally with the environment and with other people.' (at p671)

34. In addition she makes the following telling observation:

'Because of its invasive nature, civil commitment is often compared to criminal incarceration and commentators often argue that the same procedural and evidential safeguards available to the criminal suspect should also extend to person who has not engaged in any criminal activity'

35. In passing but simply in order to emphasise the point, in both ***RAMOKOKA*** and ***ZONDI*** and notwithstanding the difference in approach with regard to whether such orders should be referred for review as a matter of good practise, the Court set aside the orders made by the Magistrate for want of compliance with the peremptory requirements of the Act in making the order detaining the accused. What both judgments demonstrate is indeed that the risk of prejudice associated with the powers exercised in terms of Section 76 and Section 77 is real and not illusive.

36. In ***ZONDI***, the Court while seeming to accept in principle the potential of serious prejudice took the view that there were sufficient mechanisms to ameliorate such prejudice including an appeal or an application in terms of Section 47. I am not sure if these alternate options operate effectively to moderate such prejudice. An appeal is a costly process which can take a few months, if not longer, to reach finality. Given the difficulties many people experience in accessing justice and the Courts as well as the time factor involved, it may not be effective in addressing the potentially prejudicial effects of an order made in terms of Section 77 and 78.

37. On the other hand while the provisions of the Mental Health Care Act 17 of 2002 provides for an application to a Judge in chambers, which if successful may result in the discharge of a patient, it is important to point out the following:

    a) The application deals with current status, not the correctness or the justness of the original decision;

    b) It requires an application by a person or an institution. For an indigent person, who is not supported by the doctors or the institution, this might become a formidable hurdle to overcome.

38. In any event Section 37 of the Act, which is the applicable section in these proceedings, provides for an administrative review and is different from Section 47 in substantial terms. There is no mechanism provided for in Section 37 for an application to a Judge in chambers as Section 47 contemplates. The remedy provided for in Section 47 is only available to a State patient and when one has regard to the definition of a State patient in the Mental Health Care Act, then in the context of Section 78, it is a person classified by a Court directive in terms of Section 78(6)(i)(aa). It does not extend to persons dealt with in terms of Section 78(6)(ii)(aa) as the accused before us was dealt with. Thus even the protection afforded by Section 47 of the Act is not available to the category of persons in which the accused falls.

39. In conclusion , I am in agreement with the stance taken in ***RAMOKOKA*** that the potential of serious prejudice which has been demonstrated in both theory and practice in the cases cited, does indeed make it desirable for some form of automatic review mechanism to be considered. This is a matter for the Legislature to consider and the Court should carefully guard against the usurping of the legislative function. It is a matter best left to the Executive and the Legislature in terms of their policy-making and legislative functions. I intend to refer the matter to the Minister of Justice and Correctional Services as well as to the Speaker of the Legislature for their further attention.

40. Given that such matters usually require careful consideration, research and extensive consultation, it may take some time before a final position is adopted. In the interim and pending that process and in order to avoid prejudice to those affected, I do believe that as a matter of good practise Magistrates should refer orders made in terms of Section 78 (6)(ii)(aa) to the High Court for review.

ORDER

41. I make the following order:

i. The order of the magistrate is found to be in accordance with justice and is confirmed;

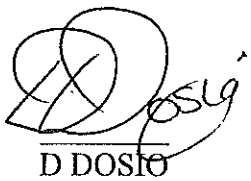
ii. The Registrar of this Court is directed to forward a copy of this judgement to the Minister of Justice as well as the Speaker of the National Assembly for their consideration and further attention.

N KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE,

S THOBANE
ACTING JUDGE OF THE HIGH COURT

I AGREE,



D DOSIO
ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A197/2013

HEARD ON: 28 MAY 2014

FOR THE APPELLANT: MR H L ALBERTS

INSTRUCTED BY: LEGAL AID SOUTH AFRICA (PRETORIA JUSTICE CENTRE)

FOR THE RESPONDENT: ADV S J NTULI

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS (ref:VOLBANK 44/2013 (28/5/MS)