Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 4502/10

In the matter between:

ANNA-MARIE DE VOS N O	First Applicant
(*Curator ad litem* to LLEWELLYN STUURMAN)	
MARIA STUURMAN	Second Applicant

And

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS (WESTERN CAPE)	Second Respondent
MINISTER OF HEALTH	Third Respondent
DOWN SYNDROME SOUTH AFRICA	First *amicus curiae*
CAPE MENTAL HEALTH	Second *amicus curiae*

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And in the matter between:

Case No 5825/14

SARAH SNYDERS	First Applicant
MORNAY CALITZ N O (*curator ad litem* to PIETER SNYDERS)	Second Applicant

And

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
MINISTER OF HEALTH	Second Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS (WESTERN CAPE)	Third Respondent

Court: GRIESEL J
Heard: 13 August 2014
Delivered: 5 September 2014

JUDGMENT

GRIESEL J:

[1] These two applications have been consolidated and were heard together in the light of the similarity in the relief claimed herein as well as the applicable legal principles on which the claims are based. Both applications concern persons, Mr Llewellyn Stuurman and Mr Pieter Snyders respectively, with mental disabilities who find themselves in conflict with the criminal justice system, facing charges of murder and rape respectively. They are represented in these proceedings by their respective mothers as well as the curators' *ad litem* appointed for them by this court.

[2] The relief sought in both applications is an order declaring s 77(6) (a) of the Criminal Procedure Act, 51 of 1977 ('CPA') to be unconstitutional, together with ancillary relief. In the *Stuurman* matter, the attack is confined to s 77(6) (a)(i), whereas the applicants in the *Snyders* matter are assailing both sub-paragraphs (i) and (ii).[1] In a nutshell, the problem concerns the fate of persons who, by reason of mental illness or mental defect, are unfit to be tried.

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[1] The relevant portions of the sub-section are quoted in full in para [9] below.

[3] The respondents cited herein, all of whom oppose the relief claimed, are the Minister of Justice and Constitutional Development (as the Department was formerly called), the Minister of Health in the National Government and the Director of Public Prosecutions, Western Cape ('DPP'). All three respondents were represented before me by Mr *Ntsebeza* SC, with him Ms *Poswa-Lerotholi*, while Ms *Pillay* SC appeared with Ms *Karachi* for the applicants in the *Stuurman* matter and Mr *Katz* SC, with Mr *Klopper*, appeared for the applicants in the *Snyders* matter.

[4] In addition, two organisations have applied for and have been granted leave to join the application as *amici curiae*, namely Cape Mental Health ('CMH') and Down Syndrome South Africa ('DSSA'). Both *amici* align themselves, broadly, with the relief claimed by the applicants herein. Helpful written as well as oral submissions were also submitted to this court by Ms *Goodman*, together with Mr *Kelly*, on behalf of CMH and Ms *Fourie* on behalf of DSSA.

Legislative framework

[5] The issues of mental illness and criminal responsibility are regulated in Chapter 13, comprising ss 77–79 of the CPA, headed 'Accused: Capacity to Understand Proceedings: Mental Illness and Criminal Responsibility'. These sections 'form an integrated unit.' [2]

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[2] Du Toit *et al, Commentary on the Criminal Procedure Act*, 13–1 (Service 51, 2013).

[6] Section 77 deals with an accused person's fitness to stand trial. The criterion for an accused's fitness to stand trial, as expressed in s 77(1), is whether the accused by reason of 'mental illness or mental defect [is] not capable of understanding the proceedings so as to make a proper defence'. If it appears to the court at any stage in the proceedings that the accused may be unable to understand the proceedings due to a mental illness or defect, the court must direct that the accused be referred for observation in terms of s 79 of the CPA.[3]

[7] Section 78 deals with the situation where the accused is found, by reason of mental illness or mental defect, not to be criminally liable for an act or omission which would otherwise have been punishable as a crime. *Hiemstra*[4] conveniently summarises the difference between ss 77 and 78 by explaining that the sections deal with two questions that can arise, namely the 'now' and the 'then' questions:

'1. The accused is suffering from a mental illness the effect of which is that he or she cannot be put on trial: section 77 – the "now" question. In the adjudication of this question the condition of the accused when the conduct in question was committed is not considered.

2. Responsibility for the alleged offence cannot be placed at the door of the accused because of his or her mental condition at the time of the conduct: section 78 – the "then" question. According to subsection (1) this is a dual question, namely whether the accused was able to (i) appreciate the wrongfulness of the conduct and (ii) act accordingly.'

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[3] Section 77(1).

[4] Albert Kruger *Hiemstra's Criminal Procedure* (Service 7, May 2014) at 13-3. See also *S v Mabena* 2007 (1) SACR 482 (SCA) para 12.

[8] Although dealing with different situations, there is a close correlation between the two sections. Thus, the provisions of ss 77(1) to (4) are reproduced verbatim in ss 78(2) to (5): both sections contemplate an enquiry in terms of s 79, in terms of which an accused person must be assessed by suitably qualified medical experts. The experts must diagnose the 'mental condition' of the accused and report their findings to the court. If the experts are unanimous in their findings as to the accused's capacity, and their findings are not contradicted by either the prosecutor or the accused, then the court can determine the matter on the basis of their reports without hearing further evidence.[5] On the other hand, where their findings are not unanimous or, if unanimous, are disputed by the prosecutor or the accused, 'the court shall determine the matter after hearing evidence'.[6]

[9] When it comes to ss 77(6) and 78(6), the two sections diverge: as noted earlier, the former deals with the 'now' question, whereas the latter deals with the 'then' question. Nonetheless, the similarities continue, because in both situations, the court is enjoined to deal with persons suffering from mental illness or mental defect who are charged with the same serious offences. However, the ways in which the court may deal with the accused persons differ markedly: in terms of s 77(6), where a court finds that an accused is incapable of understanding the proceedings so as to make a proper defence, it is enjoined to follow one of two particular avenues provided for in ss 77(6)(a)(i) and (ii), respectively:

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[5] Sections 77(2) and 78(3).
[6] Sections 77(3) and 78(4).

'(6)(a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused –

(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence[7] or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002.['MHCA'][8]

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence –

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002,[9]

(bb) . . .

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[7] For the sake of brevity, these offences will collectively be referred to hereafter as 'the listed offences'.

[8] Section 47(1) of the MHCA Act provides for an application to a Judge in Chambers for the discharge of the State patient and reads: 'Any of the following persons may apply to a Judge in Chambers for the discharge of a State Patient' and then enumerates the various persons, including the State Patient, who may do so.

[9] Section 37 of the MHCA provides for the periodic review, annual reports and discharge of involuntary mental health care users. In terms of s 37(3) to (6) it is the Health Review Board that can discharge the involuntary mental health care user.

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.'

[10] Section 78(6), on the other hand, provides:

'(6) 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; or

(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or intellectual disability, as the case may be, and direct—

(i) in a case where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—

(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc) . . . . . .

(dd) released subject to such conditions as the court considers appropriate; or

(ee) released unconditionally;

(ii) in any other case than a case contemplated in subparagraph (i), that the accused—

(aa) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(bb) . . . . . .

(cc) be released subject to such conditions as the court considers appropriate; or

(dd) be released unconditionally.'

[11] Thus, the most conspicuous difference between ss 77(6) and 78(6) is that the court in terms of the latter provision has a fairly wide discretion as to a range of orders that can be made, whereas the court under the former provision has no discretion.

Interpretation

[12] In *S v Sithole*,[10] EM du Toit AJ undertook a detailed analysis of 'the rather obscure provisions of s 77(6)(a)', as he labelled them,[11] and with which description I respectfully agree. In that case, the accused was charged with two counts of murder involving a firearm and one of attempted murder. The accused was referred in terms of s 79 of the CPA to be examined by a panel of psychiatrists so as to enquire into whether he, by reason of mental illness or mental defect (a) was capable of understanding the court proceedings so as to make a proper defence; and/or (b) was at the time of the commission of the offence criminally responsible for the offence charged. The panel unanimously answered both questions in the negative.

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[10] 2005 (1) SACR 311 (W). See also the thorough analysis of the section by Rogers J (Binns-Ward J concurring) in *S v Pedro* [2014] ZAWCHC 106 paras 83-104.
[11] At 313*g*-*h*.

[13] In applying the provisions of the sub-section to the case before him, Du Toit AJ held:

'The phrase "has committed the act in question" obviously carries no connotation of *mens rea* or criminal responsibility and is intended to refer purely to the physical commission of the *actus reus*.

Furthermore, the subsection in my view does not envisage any enquiry in the nature of a trial or a "determination" or "finding" in the sense of a verdict or a judgment. Any such procedure would be completely inappropriate since the person who allegedly committed the act by definition is incapable of understanding the proceedings. All that appears to be required is that, before directing that an accused be detained and/or treated in terms of the appropriate provisions of the Mental Health Act the court should satisfy itself as to what *actus reus*, if any, he or she has committed.

The first proviso pertaining to an order that information or evidence be placed before a court is that, taking the nature of the accused's "incapacity", ie his "mental illness or mental defect", into account, the court must be of the opinion that it is in the accused's interests that such information or evidence be placed before it. This proviso would, inter alia, tend to exclude, and protect the accused from, prejudicial information and evidence even where it is highly relevant to a determination or finding.

The second proviso is more obscure, viz the court may order the information or evidence to be placed before it "unless *it can be proved* on a balance of probabilities that, on the limited evidence available the accused committed the act in question" (my emphasis). The proviso is framed in the subjunctive mood and appears to envisage the availability of such proof, or an ability to furnish it, rather than the actual adducing or disclosure thereof to the court. The latter interpretation in my opinion would be virtually indistinguishable from the placing of "information or evidence" before the court, and therefore tautologous, and could hardly have been intended by the Legislature. I further point out that the onus mentioned is proof on a balance of probabilities, and not the criminal burden of proof beyond reasonable doubt. The subsection then further provides that a court finding an accused to be

incapable of understanding the proceedings so as to make a proper defence, "shall direct" that the accused be detained as provided in para (a)(i) if he is charged with an offence involving serious violence, or if the court considers it necessary in the public interest, "where the court finds that the accused has committed the act in question or any other offence involving serious violence". In the premises the second proviso, in my view, enables a court to make a finding that the accused committed an act on the strength of a reliable assurance that there is available evidence to justify such a finding on a balance of probabilities.

It follows that, in my view, the two provisos in effect severely restrict the exercise of a court's discretion to order that information or evidence be placed before it.'[12]

[14] As regards the second proviso, the learned judge accepted the assurance by the prosecutor, after consulting with the investigating officer, that there was evidence that the accused had committed the acts in question and that a witness was available to testify to such commission. This assurance, which was not queried on behalf of the accused, was sufficient for the court to find, for purposes of the sub-section, 'that the accused probably committed the aforesaid acts'.[13] The learned judge accordingly proceeded to issue the necessary detention order, as dictated by the provisions of sub-para (i).

[15] To summarise, the effect of s 77(6)(*a*)(i) is that where an accused person is found –

- by virtue of his or her mental condition to be incapable of understanding the proceedings so as to make a proper defence; and

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[12] At 314*h*–315*g*.
[13] At 315*h*–*i*.

- on a balance of probabilities, to have committed the *act* (ie *actus reus*) of murder, culpable homicide, rape or compelled rape, or an offence involving serious violence;

then the court is obliged, automatically and in every case, to order that the accused be detained in a psychiatric hospital or prison for an indefinite period until otherwise directed by a judge in chambers in terms of s 47 of the MHCA.[14]

Factual background

[16] In order to contextualise the relief sought, it is necessary to refer briefly to the factual background in respect of both applications, although it needs to be emphasised that the present enquiry is not fact-bound.

Stuurman matter

[17] Mr Stuurman is charged with murder, having allegedly stabbed a 14-year-old girl to death on 10 June 2005 when he was also 14 years old. During the course of the trial in the regional court in Oudtshoorn, he was referred by the court for observation in terms of ss 77(1), 78(2) and 79(2) of the CPA.

[18] It appeared from the evidence that Mr Stuurman had sustained a serious head injury at the age of 5, which left him severely mentally handicapped.

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[14] See also A Kruger *Mental Health* 17(2) *Lawsa* (2ed) para 256 for a synopsis of the subsection.

[19] The three psychiatrists who examined him expressed differing opinions on certain aspects, but were unanimously of the view that he would be unable to understand basic court proceedings.

Snyders matter

[20] In the second application, Mr Pieter Snyders is 35 years of age and resides with his family. He was born with Down syndrome and as a result he has cognitive deficits.

[21] In 2013, Mr Snyders was arrested and charged with the rape of an 11-year-old girl. According to the complainant, the rape took place some five to six years previously.

[22] On 26 April 2013, when Mr Snyders appeared at the Blue Down's Magistrate's Court, he was referred in terms of s 77(1) of the Act to an enquiry in order to ascertain whether or not he has the capacity to understand the proceedings. The unanimous finding of the members of the panel was that Mr Snyders was born with Down syndrome with moderate grade mental retardation. Their clinical diagnosis of him was one of 'moderate mental retardation'. In terms of s 79(4)(c), he was accordingly found to be 'not fit to stand trial in terms of s 77(i)' [sic] and in terms of s 79(4)(d), he was found to be 'not able to appreciate the wrongfulness of the alleged offence and act accordingly'. It was also their unanimous view that Mr Snyders would not be able to stand trial as his cognition would never improve. In addition, the panel raised a note of concern in their report:

'As the alleged offence occurred some 5 years ago it does raise the possibility that he may not be dealt with fairly with respect to the facts of the case. The court should be advised that consequently to declare him a state patient [as contemplated by s 77(6)(a)(i)] will consign him to indefinite institutionalisation as his cognition will never improve. Unless there are other reports of inappropriate behaviour committed by him in the community this may not be a fair or appropriate disposal.'

[23] The magistrate thereupon issued an order in terms of s 77(6)(a)(i) to the effect that the accused be detained in a psychiatric hospital or prison pending the decision of a judge in terms of s 47 of the MHCA. The matter subsequently came before me on special review after it became apparent that the magistrate had issued the order in question without the second leg of the enquiry having been duly complied with; in other words, there was insufficient evidence to satisfy the court on a balance of probability that the accused had committed the act that he had been charged with.

[24] On 16 September 2013, Henney J and I accordingly set aside the order and remitted the matter to the regional court to be dealt with in terms of s 77(6).[15] The matter has subsequently been postponed pending the outcome of these proceedings and the accused has been released on bail.

In limine - ripeness

[25] Before considering the applicants' contentions regarding the constitutionality of the impugned provisions, it is necessary to consider an objection *in limine* raised on behalf of the respondents. They pointed out that the proceedings in the magistrate's courts in both matters are in-

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[15] *Peter Snyders v The State* (High Court Case No 13656, 16 September 2013).

complete, with the result (according to them) that the present applications have been brought prematurely. In this context, the respondents relied, *inter alia*, on cases such as *Motsepe v Commissioner for Inland Revenue,*[16] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs,*[17] *Lawyers for Human Rights v Minister of Home Affairs*[18] and *DPP, Transvaal v Minister of Justice and Constitutional Development*.[19]

[26] I am aware of the undesirability, in general, of adjudicating on constitutional issues that may arise in criminal proceedings prior to the conclusion of such proceedings. I have accordingly given serious consideration to the objection raised on behalf of the respondents, which is by no means without merit. Having done so, however, I have decided not to uphold the objection *in limine* for the reasons that follow.

[27] First, it is not an inflexible rule and the court may depart from it where the interests of justice so require, depending on the circumstances of the individual case. Thus eg, s 38 of the Constitution provides that persons like the applicants herein have the right to approach a competent court 'alleging that a right in the Bill of Rights has been *infringed* or *threatened'*.[20] In the case of *Abahlali baseMjondolo Movement of SA*,[21] the Constitutional Court confirmed that where a law *threatens* constitutional rights, it is not necessary for the applicants to wait until the law has been implemented and the accused person is detained before

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[16] 1997 (2) SA 898 (CC) para 23.
[17] 2000 (2) SA 1 (CC) para 21.
[18] 2004 (4) SA 125 (CC).
[19] 2009 (4) SA 222 (CC).
[20] Emphasis added.
[21] *Abahlali baseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) para 13.

approaching a court.[22] This principle is also applicable in the present matter as s 77(6)(a) of the CPA at the very least *threatens* the constitutional rights of the accused persons in these two matters, in as much as the result in their criminal cases is predetermined, ie they will be detained, even if they are found not to have committed any offence.

[28] Secondly, as correctly pointed out by the applicants, their complaint is directed against the scheme of s 77(6)(a) and not against the conduct or findings of the individual judicial officers involved.[23]

[29] Thirdly, in *Ferreira v Levin; Vryenhoek v Powell NO*,[24] the Constitutional Court confirmed that the enquiry into the constitutionality of a statute is an objective one:

> 'The answer to the first question is that the enquiry is an objective one. A statute is either valid or "of no force and effect to the extent of its inconsistency". The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.'

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[22] A similar approach was followed by the Namibian Supreme Court in *Alexander v Minister of Justice* [2010] NASC 2; 2010 (1) NR 328 (SC) para 70.
[23] Cf *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) paras 40 and 41. See also *Geuking v President of the RSA* 2003 (3) SA 34 (CC) at para 33.
[24] 1996 (1) SA 984 (CC) para 26.

This part of Ackermann J's minority judgment was concurred in by the majority.[25] Kriegler J, in a separate minority judgment, would have declined to hear the matter based on considerations of 'ripeness'.[26] Significantly, however, his views in this regard did not find favour with the rest of the court.

[30] Fourthly, and in any event, the present matter has been fully and extensively argued before me on behalf of all interested parties. It would therefore amount to an awful waste of time and resources if the whole exercise had to be repeated on another day before another court, once the final hurdles had been cleared in the lower courts.

[31] Finally, for the reasons set out below, I have come to a firm view regarding the unconstitutionality of the impugned provisions. In the circumstances, it is my duty to declare them to be such, subject to confirmation by the Constitutional Court, instead of allowing them to remain on the statute book indefinitely until some litigant may in future have cause to bring a similar application in suitable circumstances.

[32] With that prelude, I now turn to the applicants' constitutional challenge of the provisions of s 77(6)(a)(i) and (ii).

Applicants' case

[33] The applicants have assailed the constitutionality of ss 77(6)(a)(i) and (ii) of the CPA across a broad front: they submitted that those provisions infringe or threaten the rights of the accused persons in question, *inter alia*, to equality (s 9), dignity (s 10), freedom and security

[25] Per Chaskalson P in para 158.
[26] Para 199.

of the person (s 12) as well as the rights of children, as contained in s 28(1)(g), read with s 28(2) of the Constitution.

[34] Of these rights, the most directly implicated is the right to freedom and security of the person in terms of s 12(1)(a) of the Constitution. During oral argument before me, this was also the right that received most attention.

Right to freedom and security of the person – s 12(1)(a)

[35] Section 12(1)(a) of the Constitution provides that '[e]veryone 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'.

[36] There can be no doubt that a detention order in terms of either sub-para (i) or (ii) of s 77(6)(a) amounts to a deprivation of freedom, as contemplated by s 12(1)(a). As was stated by the KZN court, with specific reference to detention in a mental institution:[27]

> '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.'

[37] Bonthuys, commenting on the provisions of the Mental Health Care Bill (before its enactment as the MHCA), described the effects of institutionalisation in graphic detail as follows:[28]

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[27] *Ex parte G & Sixty-six others* 2009 [JOL] 22950 (KZN) para 19 (per Levinsohn DJP and Van der Reyden J).

[28] Elsje Bonthuys 'Involuntary Civil Commitment and the new Mental Health Bill' (2001) 118 *SALJ* 667 at 671.

'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 even 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 judgment in a society where humanity is defined as the ability to interact rationally with the environment and with other people.'

[38] It follows *a fortiori* that the alternative remedy, namely of committing such an accused person to prison, as the court is empowered to do in terms of sub-para (i), is even more far-reaching.[29] It is thus not necessary to embark on a philosophical or jurisprudential analysis of the meaning of the concepts of 'freedom' and 'deprivation' in this context.[30] Instead, the more fundamental enquiry is into the question whether the deprivation of freedom sanctioned by s 77(6)(a)(i) of the CPA is 'arbitrary' or 'without just cause'. This question will be considered below, after briefly dealing with the position in terms of sub-para (ii) of s 77(6)(a).

Section 77(6)(a)(ii)

[39] This sub-paragraph applies where the accused is found to have committed a less serious offence than one of the listed offences contemplated in subpara (i) or even where he or she has not committed *any* offence. In that case, the court must order that the accused be admitted to

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[29] See also *Malachi v Cape Dance Academy International* 2010 (6) SA 1 (CC) para 28.

[30] For an in-depth discussion of these terms, see Woolman et al *Constitutional Law of South Africa* (2ed, Original Service: 07-06) Vol 3 para 40.3.

and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in s 37 of the MHCA.

[40] Similar arguments as those referred to above with reference to sub-para (i) were advanced by counsel in the *Snyders* matter in respect of this sub-paragraph. Counsel also drew attention to the difference in approach between sub-para (ii) of s 77(6)(a) of the CPA, on the one hand, and s 32(b) of the MHCA, on the other, in so far as the requirements for admission are concerned: before a mental health care user is admitted to a health establishment for care, treatment and rehabilitation services without his or her consent on an outpatient or inpatient basis, s 32(b) requires it to be established at the time of making the application –

> '[that] there is reasonable belief that the mental health care user has a mental illness of such a nature that –
>
> (i) the user is likely to inflict serious harm to himself or herself or others; or
>
> (ii) care, treatment and rehabilitation of the user is necessary for the protection of the financial interests or reputation of the user'.

[41] By contrast, no similar enquiry is required before a court orders an accused person to be admitted and detained as an involuntary user in terms of sub-para (ii) of s 77(6)(a), nor is any provision made for his or her treatment as an outpatient.

[42] Thus, a person must be detained in terms of sub-para (ii) even when it is apparent –

(a) that he or she does not have a 'mental illness', eg where the user is intellectually disabled due to causes other than mental illness; or

(b) he or she is not a danger to society or him- or herself; or

(c) that his/her mental condition cannot be treated and that his or her condition will not improve, as in the case of both Messrs Stuurman and Snyders *in casu*.

Not arbitrarily and for just cause

[43] It is a fundamental principle of our law that when there is an interference with physical liberty of a person, the party causing the interference bear 'the burden to justify the deprivation of liberty, whatever form it may have taken', that is, to convince the court that the deprivation of liberty is not arbitrary and for a just cause.[31]

[44] In *De Lange v Smuts NO*,[32] the court held:

'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.'
(Emphasis added)

[31] *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) paras 24-25.
[32] 1998 (3) SA 785 (CC) para 23.

[45] The focus of the enquiry accordingly shifts to a consideration of the objectives or purposes advanced on behalf of the respondents in support of the deprivation of liberty of persons in the positions of Mr Stuurman and Mr Snyders *in casu* in order to determine whether the respondents have discharged the burden resting on them of justifying the deprivation of freedom in terms of s 77(6)(a).

Respondents' stance

[46] The respondents denied that any of the fundamental rights of the respective accused have been infringed or threatened, as claimed by the applicants. More particularly, with regard to the right to freedom, they denied that the deprivation of freedom authorised by s 77(6)(a) is arbitrary or without just cause. According to them, the policies under-lying the impugned provisions give effect to legitimate governmental objectives, which were identified by the respondents as being the following:

(a) An accused person with a mental illness, who is found to have committed a serious or violent act, poses a potential danger to society. The community must accordingly be protected from such persons and the State must fulfill its obligation to provide safety and security for the people of South Africa.

(b) The DPP further contended that s 77(6)(a) is 'designed primarily to protect the interest of the accused person' and that it is necessary 'to protect the mentally ill person from danger to him/her, as well as the public from possible danger from the accused person'.

[47] The objectives of detention, according to the respondents, are thus two-fold: to protect the accused person from harm to himself and to members of the community.

Discussion

[48] It is universally recognised that persons of unsound mind may, in suitable circumstances, be detained involuntarily.[33] This can be justified either on the grounds of the protection of society or for the treatment of the individual patient, or both. It may be accepted, therefore, that *in principle* detention of persons with mental defects serves a legitimate purpose.

[49] It is equally well-recognised, however, that not every person with a mental illness or mental defect is a danger to society or requires to be detained in an institution. This is so because there are varying degrees of mental illness and various types of mental disability, and institutionalisation is not invariably required or indeed appropriate. And herein lies the rub, because s 77(6)(a) does not require, or even permit, the court to enquire into either the potential danger to society posed by the accused person or the individual needs or circumstances of such person. Although medical experts are required to assess the accused person's mental capacity, they are not called upon to express any view as to whether or not he or she constitutes a danger to society or whether involuntary hospitalisation is an appropriate or proportionate treatment option.[34] Instead, s 77(6)(a) dictates a pre-determined and mandatory

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[33] This appears conclusively from the wealth of international and foreign law to which the parties have referred in their heads of argument.

[34] The panel in the case of Mr Snyders have nonetheless *mero motu* expressed concern at the potential harm faced by him as a result of an inappropriate order, as noted earlier. See para [22] above.

outcome and deprives the presiding judicial officer of his or her judicial discretion to consider the specific facts of each case and, in appropriate cases, to order the unconditional release, or the release of the person, subject to conditions as the court may consider appropriate. As submitted on behalf of the applicants, a process that excludes material information cannot be fair as this is contrary to notions of individualised justice.

[50] It is precisely this absence of discretion in the court that formed the cornerstone of the applicants' attack against the unconstitutionality of both sub-paras 77(6)(a)(i) and (ii). In this regard, reliance was placed, *inter alia*, on the judgment of Ngcobo J, writing for the majority in *Director Of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*:[35]

'The importance of judicial discretion cannot be gainsaid. Discretion permits judicial officers to take into account the need for tailoring their decisions to the unique facts and circumstances of particular cases. There are many circumstances where the mechanical application of a rule may result in an injustice. What is required is individualised justice, that is, justice which is appropriately tailored to the needs of the individual case. It is only through discretion that the goal of individualised justice can be achieved. Individualised justice is essential to the proper administration of justice. As Dean Pound pointed out some 50 years ago:

> "(I)n no legal system, however minute and detailed its body of rules, is justice administered wholly by rule and without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the case before him."'

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[35] 2009 (4) SA 222 (CC) para 120.

[51] Moreover, the absence of a judicial discretion in s 77(6)(a) is accentuated when its provisions are compared with the parallel provisions of s 78(6): as discussed earlier, these two sub-sections deal with similar situations and persons. In fact, *both* sections are often applicable to the same individual. Thus, the panel appointed in terms of s 79 in the case of Mr Snyders found that he is unable to follow the proceedings (as contemplated by s 77(6)), *and* that he is also not criminally responsible, as contemplated by s 78(6).[36] If his case had to be dealt with under the latter section, detention would not have been inevitable, because the court would have had a range of options available to it, as set out in sub-paras (aa) to (ee). But because he is unable to follow the proceedings, the court cannot consider any of those alternatives and can only act in terms of the first option by committing the accused to be detained.

[52] None of the respondents have attempted to explain the incongruous difference between ss 77(6) and 78(6) or to justify the absence of a similar judicial discretion in the former section as is available in the case of the latter. I am unable to find a rational explanation for the difference and I regret to say that, unlike my colleagues in *S v Pedro, supra,*[37] I do not find it 'understandable' that a person falling within the ambit of s 77(6)(a)(i) should compulsorily be subject to an order of detention in accordance with s 47 of the MHCA. In my view, such an order can give rise to an arbitrary and irrational result, thus amounting to an infringement of the accused's constitutional right to freedom and security of the person.

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[36] This was also the position in the case of *Sithole, supra*.

[37] Fn 10 above at para 98 of the judgment.

Children – s 28(1)(g) read with s 28(2)

[53] CMH submitted that the provisions of s 77(6)(a) are unconstitutional for a further reason, namely because they infringe the rights of children, as protected by s 28(1)(g), read with s 28(2) of the Constitution. In terms of s 28(1)(g), every child has the right –

> 'not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
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> (i) kept separately from detained persons over the age of 18 years; and
>
> (ii) treated in a manner, and kept in conditions, that take account of the child's age.'

[54] Section 28(2), of course, is the general overarching provision which provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.

[55] These provisions are particularly relevant in the case of Mr Stuurman, who was a 14-year-old child when he allegedly committed the act in question.

[56] The constitutional provisions in s 28 have been given further statutory content in the form of the Child Justice Act, 75 of 2008 ('CJA'), which commenced on 1 April 2010. One of the aims of the CJA, according to the long title thereof, is 'to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system'.

[57] The Act contains elaborate provisions, *inter alia*, in respect of preliminary inquiries to be held prior to any trial (chapter 7) and for diversion of the matter (chapter 8). The diversion options set out in s 53 of the CJA are available even in the case of children who are found to have committed crimes that fall within Schedule 2 to the CJA, which includes murder, culpable homicide, rape and compelled rape. Through s 53 of the CJA, the legislature has afforded courts a wide discretion to deal with child offenders in many different ways that give effect to the right in s 28(1)(g) of the Constitution to resort to incarceration only as a means of last resort, and in so doing enable courts to give effect to the injunction in s 28(2) to act at all times in the best interests of the child. The diversion options include, by way of example –

(a) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence;[38]

(b) referral to intensive therapy to treat or manage problems that have been identified as a cause of the child coming into conflict with the law, which may include a period or periods of temporary residence;[39] and

(c) placement under the supervision of a probation officer on conditions which may include restriction of the child's movement outside the magisterial district in which the child usually resides without the prior written approval of the probation officer.[40]

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[38] Section 53(3)(k).
[39] Section 53(4)(c).
[40] Section 53(4)(d).

[58] However, the CPA continues to apply to children except in so far as the CJA 'provides for amended, additional or different provisions or procedures in respect of that person'.[41]

[59] Section 48(5)(b) of the CJA provides that the preliminary inquiry that takes place prior to the hearing into the charges against a child accused may be postponed where 'the child has been referred for a decision relating to mental illness or defect in terms of ss 77 or 78 of the [CPA]'. The CJA is, however, silent as to what happens in the event that the child in question is found to be unable to follow the proceedings or who is found not to be criminally responsible. The result is that the various diversion options provided for in s 53 of the CJA for child offenders cannot be invoked by the court and the provisions of ss 77 or 78 of the CPA must be applied in all their rigour to such a child. This is the pre-ordained result, irrespective of the child's individual circumstances, even where there is evidence available to the court that suggests that detention would be detrimental to his or her interests.

[60] It is thus apparent that the legislature, when promulgating the CJA, has failed to bring the provisions of ss 77(6) of the CPA into line with the more enlightened provisions of the CJA. In the result, I am of the view that the provisions of s 77(6)(a)(i) and (ii) in their present form unfairly discriminate against children with a mental illness or mental defect when compared to child offenders who do not suffer from the same mental illness or defect and in respect of whom courts are empowered to make a variety of diversionary orders based on their individual circumstances. Such discrimination occurs on the grounds of

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[41] Section 4(3)(a).

their disability, which is impermissible in terms of the provisions of s 9(3) and (4) of the Constitution.

[61] Section 77(6)(a) also impermissibly infringes the rights of children not to be detained except as a measure of last resort, contrary to s 28(1)(g) of the Constitution. Moreover, the section flies in the face of the remarks of Ngcobo J in *Director Of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*,[42] where he held:

'What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must "be treated in a caring and sensitive manner". This requires "taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity". In short, "(e)very child should be treated as an individual with his or her own individual needs, wishes and feelings". Sensitivity requires the child's individual needs and views to be taken into account.'

[62] This infringement of the constitutional rights of children, bad as it is, is aggravated by the fact (as appears from the evidence placed before the court by CMH) that both prisons and psychiatric hospitals have inadequate facilities for children. The results of CMH's survey accords with the testimony of Professor Kaliski in Mr Stuurman's criminal trial where he conceded:

'We don't have a hospital for juveniles who are mentally handicapped and out of control. We would like to have such places but we don't. The only places we have got that can actually accommodate someone like him would be something like a

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[42] 2009 (4) SA 222 (CC) para 123 (footnotes omitted).

school of industries or a comparable sort of thing for juveniles. We don't actually have facilities.'

Limitation

[63] The respondents, as a final fall-back position, invoked the provisions of s 36(1) of the Constitution. They submitted that, to the extent that any rights are infringed or threatened by the impugned provisions, the limitation of the fundamental rights as claimed by the applicants is justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

[64] To satisfy the limitation, it must be shown that the law in question serves a constitutionally acceptable purpose *and* that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law).

[65] In the case of children, the respondents have not advanced any justification for the limitation of their rights. As regards the infringement of the s 12 rights, the respondents have failed to persuade me of the proportionality between the harm done by the impugned provisions and the purpose sought to be achieved. From what has been stated earlier, it is apparent that there are less restrictive means available to achieve the purpose:

- In the case of s 77(6)(a)(i), there is no reason why the court should not have the same discretion enjoyed by a court under s 78(6)(i).

- In the case of s 77(6)(a)(ii), there is a less restrictive alternative before detaining a person as an involuntary health care user by utilising the provisions of s 32 of the MHCA.

- In the case of children falling under the impugned provisions, there is no reason why the provisions of s 53(4) of the CJA should not be available.

International & foreign law

[66] As mentioned earlier, I have been furnished with extensive references to international and foreign law in order to demonstrate what type of measures are acceptable in other open and democratic societies. Although it is universally accepted that persons of unsound mind may, in suitable circumstances, be detained involuntarily, this is invariably done with proper consideration for the rights of the individual and the circumstances of the case. As an example, the absence of a judicial discretion in those situations has been roundly condemned by the Supreme Court of Canada, where Lamer CJ held in a similar context:

> 'The detention order is automatic, without any rational standard for determining which individual insanity acquittees should be detained and which should be released. . . . The duty of the trial judge to detain is unqualified by any standards whatsoever. I cannot imagine a detention order on a more arbitrary basis.' [43]

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[43] *R v Swain* [1991] 1 SCR 933.

Conclusion

[67] I conclude that s 77(6)(a), in limiting or threatening the rights to freedom of the person and the rights of children, cannot be saved by the limitations clause. In short, the respondents have failed to persuade me that the deficiencies in s 77(6)(a) as outlined above are reasonable and justifiable in an open and democratic society. It is overbroad. An accused person with a mental disability may be detained for an indefinite period in unwarranted circumstances. The impugned provisions consequently fall to be declared inconsistent with the Constitution and invalid.

Remedy

[68] It follows that the applicants are, in the circumstances, entitled, first of all, to a declaratory order to the effect that the provisions of s 77(6)(a) are unconstitutional. It was common cause, if this were to be the conclusion of the court, that it would be appropriate for this court to suspend the declaration of invalidity for 24 months so as to afford Parliament an opportunity to correct the defect.[44]

[69] However, if a mere suspension were to be ordered, the current unsatisfactory and unconstitutional state of affairs would persist. Messrs Stuurman and Snyders, and many others in similar positions, might be unfairly detained. Such persons are clearly entitled to temporary constitutional relief. The simplest and most appropriate means of achieving this in the short term, as suggested by counsel in the *Snyders* matter, is for a reading-in so as to afford judicial officers dealing with a s 77(6) situation during the period of suspension a discretion, similar in terms to

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[44] *Estate Agency Affairs Board v Auction Alliance* 2014 (3) SA 106 (CC) paras 55–61. See also the discussion by Rogers J in *Gaertner v Minister of Finance* 2013 (4) SA 87 (WCC) at paras 112–116.

those of a court confronted with an accused person who is not guilty by reason of mental illness or intellectual disability under s 78(6)(i) and (ii) of the CPA. The Constitutional Court has confirmed, in *Johncom Media Investments Ltd v M & others*,[45] that such a temporary reading-in is permissible.

[70] I wish to emphasise that the reading-in which I propose is an interim measure and is not intended to be prescriptive as to the remedial steps that the legislature should adopt in order to cure the unconstitutionality of the impugned provisions. From the arguments addressed to me by the parties it appeared that the whole situation concerning persons with mental illness or mental defects may well require a more thorough overhaul than the mere 'cosmetic' reading-in proposed by me. However, it is neither necessary nor desirable for me, as a judge of first instance, to go further for purposes of this judgment.

Costs

[71] It was not seriously contested that, should the applications succeed, the respondents would be liable jointly and severally for the applicants' costs herein.[46] Such costs should include the costs of two counsel, where employed, as well as the costs pursuant to the appointment of the two *curators ad litem*.

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[45] 2009 (4) SA 7 (CC) para 40. See also *Gaertner v Minister of Finance* 2013 (4) SA 87 (WCC) para 116.

[46] See eg *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) para 23; *Malachi v Cape Dance Academy International* 2011 (3) BCLR 276 (CC) para 8.

Order

[72] For the reasons stated above, the following order is issued:

(a) It is declared that sub-paragraphs 77(6)(a)(i) and (ii) of the Criminal Procedure Act, 1977, are unconstitutional.

(b) The declaration in para (a) above is not retrospective and its effect is suspended for 24 months to afford the legislature an opportunity to cure the invalidity.

(c) During the period of suspension, section 77(6)(a)(i) is deemed to read as follows (words inserted by this order are underlined and words omitted are deleted):

> **'(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be ~~detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002~~**

(aa) detained in a psychiatric hospital or prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(bb) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc) released subject to such conditions as the court considers appropriate; or

(dd) released unconditionally.'

(d) During the period of suspension, sub-paragraph 77(6)(a)(ii) is deemed to read as follows (words inserted by this order are underlined):

'(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence –

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(bb) released subject to such conditions as the court considers appropriate; or

(cc) released unconditionally.'

(e) The prosecutions against Mr Llewellyn Stuurman and Mr Pieter Snyders are stayed pending confirmation of this order by the Constitutional Court.

(f) The respondents are ordered jointly and severally to pay the applicants' costs, including the costs of two counsel, where employed, and the costs of the curators *ad litem*.

B M GRIESEL
Judge of the High Court