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

Review No: 69/2020

In the matter between:

J D

Accused

And

The State

Respondent

JUDGMENT DELIVERED ON 25 MARCH 2020

BAARTMAN, J

[1] The regional magistrate at Parow referred this matter in terms of section 47 of the Mental Health Care Act, 17 of 2002 (**the Mental Health Act**).

- [2] The background to the referral is as follows. Mr D was charged with one count of murder; his legal representative persuaded the trial court to enquire into his capacity to understand the proceedings.
- [3] The court received a unanimous report from 3 practitioners indicating that Mr D 'suffered from an intellectual disability and is certifiable in terms of the Mental Health Act and that he is not fit to stand trial.' The defence and the state agreed with the finding. The trial court ruled that Mr D was 'not fit to stand trial in terms of section 77(1) of the Criminal Procedure Act, 51 of 1977 (**the CPA**).
- [4] The state led the evidence of Sergeant September, the investigating officer in the criminal investigation. It is apparent from his evidence that a witness, a relative of the deceased who knew Mr D, witnessed him shooting the deceased. The defence agreed with the evidence and elected to lead no evidence. The post-mortem report, indicating multiple gunshot wounds as the cause of death, as well as an identification statement confirming the deceased's identity as indicated in the charge sheet, were handed in by agreement between the state and the defence. Mr D was legally represented throughout. Consequently, the court accepted that there was evidence indicating that Mr D had in fact committed the offence¹.
- [5] Valkenberg Hospital was able to admit Mr D immediately, therefore the court ordered that Mr D be admitted as a State Patient to that facility. The order was pending final determination by a judge in chambers in terms of section 47 of the Act. The section provides as follows:

'47 Application for discharge of State patient

(1) Any of the following persons may apply to a judge in chambers for the discharge of a State patient:

¹ Section 77 of the CPA.

- (a) *The State patient;*
- (b) *An official curator ad litem;*
- (c) *An administrator, if appointed;*
- (d) *The head of the health establishment at which a State patient is admitted;*
- (e) *The medical practitioner responsible for administering care, treatment and rehabilitation services to a State patient;*
- (f) *A spouse, an associate or next of kin of a State patient; or any other person authorised to act on behalf of a State patient....*

(6) *On considering the application, the judge in chambers may order that the State patient –*

- (a) *remain a State patient;*
- (b) *be reclassified and dealt with as a voluntary, assisted or involuntary mental health care user in terms of Chapter V;*
- (c) *be discharged unconditionally;*
- (d) *be discharged conditionally.'*

[6] No application for the patient's discharge is before me and this is not a review. Nevertheless, I am persuaded that the proceedings are substantially in accordance with justice.

[7] I approached the offices of the Western Cape Director of Public Prosecutions and the Legal Aid Board at Cape Town, which represented Mr D in the trial court, and requested an update in respect of Mr D. The Director of Public Prosecutions secured a medical note from Dr de Clercq, a consulting psychiatrist at Valkenberg hospital, from which the following appears:

‘...Since his admission as a State Patient he has been irritable, provocative and abusive to staff and patients. As a result we have started him on certain medication in an attempt to reduce his impulsivity and his interfering behaviours. Although we have seen some improvement in the last few weeks, his limited cognitive reserve and his particular personality structure will most probably remain a significant risk factor for future violence, especially as he was accused of a serious offence in the context of a long history of personal impulsive aggression and gang involvement. Therefore his prognosis is currently guarded and longer term institutionalization seems like the safest diversion strategy in his case.’

- [8] Mr Brand, on behalf of the Legal Aid Board, canvassed the medical note with Mr D’ family. He reported that Mr D’ mother reported that she had been to visit him and was very pleased with his placing and condition. I appreciate the assistance from the Office of the Director of Public Prosecutions and the Legal Aid Board.
- [9] The trial court erroneously referred this matter for ‘final determination’ in terms of section 47 of the Mental Health Act. The section deals with an application for discharge of a State Patient. The trial court did not intend Mr D to be discharged. Nevertheless, in the exercise of this court’s inherent jurisdiction, I have made the above enquiry.

Conclusion

- [10] There is no legal basis for sending a matter on automatic review when an accused person has been declared a State Patient in terms of the Mental Health Act². However, there may be specific reasons for sending the matter on review; in which case, those reasons should be indicated and the matter sent on review. If the trial court is

² *S v Ramokoka* 2006 (2) SACR 57 (W) at paragraph 11 ‘...In other words, an order made in terms of s 77(6) of the Criminal Procedure Act does not have the automatic consequence that it is put before a Judge in Chambers for confirmation...’

satisfied that its decision is in accordance with justice, the matter should not be referred for review ³.

[11] This matter was erroneously referred to the High Court.

BAARTMAN J

³ *State v Lucky Msimango* Review Case No. R18/2017, delivered on 18 August 2018, Gauteng Division, Pretoria.