De Vos NO v Minister of Justice and Constitutional Development

The constitutionality of detaining persons unfit to stand trial

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Section 35 of the Constitution protects an accused's right to a fair trial. In order for an accused to make a substantial defence, both his physical and his mental presence is required in court. The incapacity of an accused person to understand criminal proceedings in a court will affect his right to a fair trial. Section 77 of the Criminal Procedure Act 51 of 1977 deals with the treatment of persons who are unable to stand trial because they suffer from a mental illness. In a recent Constitutional Court decision, the constitutionality of Section 77 was challenged by two accused persons who were incapable of understanding trial proceedings as result of the mental illnesses from which they suffered. The section was found to infringe an accused's right to freedom and security of the person. In the note that follows, the Constitutional Court decision of De Vos NO v Minister of Justice and Constitutional Development 2015 (1) SACR 18 (WCC) and (CCT 150/14) [2015] ZACC 21, pertaining to the Section 77 right of an accused, is discussed and analysed.

Section 12(1) of the Constitution of the Republic of South Africa 1996 protects the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause (Section 12(1)(a)), and the right not to be detained without trial (Section 12(1)(b)). The rights of arrested, detained and accused persons are in turn protected by Section 35 of the Constitution, which provides that every accused person has the right to a fair trial. This requires not only a physical presence in court but also a 'mental presence'. In particular, the person must be able to understand proceedings in order to adequately defend himself.[1] The accused may as a result of insanity, deafness or dumbness be unable to understand the proceedings, to hear them, or to answer them, either by speaking or writing.[2] In these cases the court has to determine whether the accused is 'fit' to be tried.

Section 77 of the Criminal Procedure Act[3] (CPA) deals with the treatment of an accused who is

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unfit to stand trial due to a mental illness or intellectual disability ('mental disability'). While such accused cannot be tried, they are not discharged, since Section 77(6) of the CPA enjoins the court to determine whether they committed the *actus reus* of the offence with which they are charged. If the court finds that the accused committed an act of murder, culpable homicide, rape, compelled rape, or other offence involving serious violence, or if the court considers it in the public interest, Section 77(6)(a)(i) of the CPA further enjoins it to order the accused's detention in a psychiatric hospital or prison, pending release by a judge in chambers, in terms of Section 47 of the Mental Health Care Act (MCHA).[4] If the court finds that the accused committed some other form of unlawful act, or no unlawful act at all, Section 77(6)(a)(ii) of the CPA enjoins it to commit the accused to an institution as an involuntary mental health care user, as contemplated in Section 37 of the MCHA.

The provisions of the section are peremptory in that, once the court has found the accused unfit to stand trial, it is left with no option but to order his or her detention. The provisions of Section 77(6)(a) differ from those of Section 78(6) of the CPA, which apply when an accused has been tried and found not guilty by reason of pathological criminal incapacity. In terms of Section 78(6)(b), the court, as an alternative to ordering the accused's detention, is empowered to order his or her release, either on appropriate conditions or even unconditionally. These options are not available in terms of Section 77(6)(a)(i) or (ii). Consequently, concern has been expressed regarding the constitutionality of these provisions.

In 2015 the constitutionality of Section 77(6)(a)(i) and (ii) was challenged in *De Vos NO v Minister of Justice and Constitutional Development* (hereafter '*De Vos*').[5]

The facts

The proceedings concerned two individuals, Stuurman and Snyders, who were charged in the magistrate's court with murder and rape, respectively. Both were found to suffer from permanent intellectual disabilities, which rendered them unfit to stand trial. Both accused therefore stood to be detained in terms of Section 77(6)(a) of the CPA. Before their matters could be finalised, however, the accused challenged the constitutional validity of sections 77(6)(a)(i) and (ii) of the CPA, on the grounds that the relevant provisions infringed their constitutionally protected rights to equality, dignity and freedom and security of the person.[6] Their consolidated applications were brought in the Western Cape Division of the High Court (WCC). The respondents were the Minister of Justice and Constitutional Development, the Minister of Health and the Director of Public Prosecutions for the Western Cape (DPP), all of whom opposed the applications. Two voluntary non-profit organisations, Cape Mental Health and Down Syndrome South Africa, were admitted as *amici curiae*. Both *amici* supported the relief sought by the applicants.

The high court's judgement *(De Vos NO v Minister of Justice and Constitutional Development)*[7]

The WCC held that although valid justification exists for detaining a person with a mental disability, it must be recognised that most people are not necessarily a danger to themselves or to society. The court found that Section 77(6)(a) was flawed because it did not allow a presiding officer to evaluate and determine if an accused is a danger to himself or to society. It further found that it did not allow a presiding officer any discretion in determining whether accused persons ought to be detained, based on whether they were a danger to themselves or to society. Section 78(6) allows for such a discretion. The WCC

reasoned that detention as mandated by Section 77(6)(a) could therefore be arbitrary, and lead to an infringement of an accused's right to freedom and security of the person. The WCC consequently declared the provisions of sections 77(6)(a)(i) and (ii) to be invalid, but suspended the declaration of invalidity for a period of 24 months to give the legislature an opportunity to remedy the defect. In order to provide interim relief to persons affected by the relevant provisions, the WCC exercised its remedial powers of reading in and severance, in terms of Section 172(1)(b) of the Constitution, by amending the wording of Section 77(6)(a) of the CPA so as to mirror that of Section 78(6).

The applicants subsequently applied to the Constitutional Court for confirmation of the WCC's orders, in accordance with Section 167(5) of the Constitution.

The Constitutional Court's judgement *(De Vos NO v Minister of Justice and Constitutional Development)*[8]

The substantive issues to be determined were the same as in the WCC, namely, whether:

(1) Section 77(6)(a) is peremptory;

(2) Section 77(6)(a) violates the right to freedom and security of the person and, in particular, whether -

   a. Section 77(6)(a)(i) is constitutionally valid in respect of (1) hospitalisation; (2) imprisonment; and (3) children's rights;

   b. Section 77(6)(a)(ii) is constitutionally valid.

(3) Any infringement of rights is justified in terms of the general limitations clause.

Is Section 77(6)(a) peremptory?

The respondents contended that Section 77(6)(a) provides for compulsory detention, as evidenced by the use of the word 'shall'. They argued that 'shall' meant 'may', thus allowing the court discretion. The court held that the words in a statute must be given their ordinary grammatical meaning unless this would result in absurdity. It held that the word 'shall' in Section 77(6)(a) was obligatory, and that there was no justification for departing from its ordinary meaning. The section should not be interpreted as meaning 'may'.[9] It held further that the wording of Section 77(6)(a) clearly precluded the exercise of any discretion by a court.[10] It concluded that its provisions were peremptory.[11]

Does Section 77(6)(a) infringe the right to freedom and security of the person?

The court referred to the judgement of the European Court of Human Rights (ECHR) in *HL v United Kingdom*.[12] That judgement held that institutionalisation or hospitalisation constituted detention, because the healthcare professionals treating and managing a patient exercise 'complete and effective control over his care and movements'.[13] It held, consequently, that an order made in terms of Section 77(6)(a) constituted a deprivation of freedom.[14] The court then outlined the elements of the Section 12 constitutional right to freedom and security of the person. Citing the dicta of Justice O'Regan in *Bernstein v Bester NO* and *S v Coetzee*, the court reiterated that the right is aimed at protecting a person against the deprivation of his freedom, both in the absence of appropriate procedures (the procedural component of the right) or for unacceptable reasons (the substantive component).[15]

Regarding the substantive component, the court reiterated (citing the majority judgement of Justice Ackerman in *De Lange v Smuts NO*) that it was impossible to define in advance what would constitute 'just cause' for a deprivation of freedom in all cases, and that each case had to be decided on its merits.[16]

The court took cognisance of the United Nations Convention on the Rights of Persons with Disabilities, which reinforces the state's

constitutional obligation to promote the rights and freedoms of persons with disabilities.[17] It noted that Article 14 of the convention states that 'the existence of a disability shall in no case justify a deprivation of liberty'. It held that it was impermissible to remove a person from society purely on account of their mental disability.[18] Consequently, the decisive issue *in casu* was whether detention in terms of Section 77(6)(a) of the CPA is rationally connected with the objective of treating and caring for the accused, as well as securing their safety and/or that of the community, or whether the section mandates detention solely by reason of the accused's mental disability.[19] In order to determine this issue, the court dealt separately with the provisions of Section 77(6)(a)(i) and (ii).

Constitutional validity of Section 77(6)(a)(i) in respect of hospitalisation

The respondents argued that the objectives of detention in terms of Section 77(6)(a) were fourfold: to (1) protect the public against harm inflicted by the accused; (2) protect the accused against self-harm; (3) prevent stigmatisation of the accused; and (4) provide the accused with treatment, care and rehabilitation.[20] The court observed that the MHCA had adopted a community care focus, in that Section 8(2) thereof provides that '[e]very mental health care user must be provided with care, treatment and rehabilitation services that improve the mental capacity of the user to develop to their full potential and to facilitate his or her integration into community life'.[21] It further observed that the purpose of Section 77(6)(a)(i) of the CPA was to ensure that persons unfit to stand trial by reason of mental disability, and who have allegedly committed the serious offences of murder or rape, are placed in a system specifically designed for their care, rehabilitation and treatment, as well as to protect the general public.[22] The court noted that procedural safeguards had been built into Section 77(6), in that a court is required to hold a 'trial of the facts' before issuing a detention order. It held that this procedure satisfied the procedural component of the right to freedom and security of the person.[23]

The court further noted that the MCHA creates a specific regime for persons hospitalised in terms of Section 77(6)(a)(i) ('state patients'),in that a state patient may only be discharged upon application to a judge in terms of Section 47 of the MHCA.[24] This procedure requires extensive information in order to decide if the patient's continued detention is necessary for his care, treatment, rehabilitation or safety, or the safety of the public.[25] It further held that this regime more than satisfied the substantive requirements for detention laid down by the ECHR in *Winterwerp v Netherlands*,in that an accused may only be hospitalised in terms of Section 77(6)(a)(i) if they are found to have committed a serious offence and are not detained for longer than is necessary.[26] The court pointed out that if the trial court believed that a particular accused did not pose a threat to society, it could expedite his release by ordering that a Section 47 application be brought on his behalf within a specified period.[27]

Constitutional validity of Section 77(6)(a)(i) in respect of imprisonment

The *amicus curiae* urged the court to rule that imprisonment (as opposed to hospitalisation) in terms of Section 77(6)(a)(i) is constitutionally impermissible, since it must inevitably violate the right not to be subjected to cruel, inhuman or degrading punishment (Section 12(e)). The respondents argued that the aim of the provision was to facilitate the accused's access to therapeutic remedies.[28] The court accepted that the provision was not intended to be punitive, but took cognisance of the fact that, in reality, prisons lack the necessary facilities to provide appropriate treatment and care.[29] It held that the only apparent reason for imprisonment was the lack of resources in the public health sector.[30] However, since Section 12 of the Constitution merely imposes a

negative obligation on the state (not to deprive a person of liberty), the court was not required to take such resource constraints into account in determining the matter.[31] It further held that accommodating mentally disabled people in prison perpetuates hurtful stereotypes, i.e. that all accused persons are dangerous, despite being cognisant of their mental illness. This reinforces the stigmatisation and marginalisation they are already subjected to and impairs their human dignity.[32] It concluded that imprisonment is permissible only when the accused is likely to cause serious harm to himself or herself or others, since this would be justified by the state's obligation to protect the public from harm.[33] The court therefore held that Section 77(6)(a)(i) was unconstitutional to the extent that it mandated the imprisonment of mentally disabled persons who were not dangerous, purely on account of resource constraints.[34] It further held that, where such a person could not be hospitalised immediately, the court ought to have the latitude to craft an order for his interim treatment as an outpatient.[35] The court accordingly declared Section 77(6) constitutionally invalid to the extent that it mandates imprisonment based on resource considerations alone.[36]

Constitutional validity of Section 77(6)(a)(ii)

The DPP contended that the detention of mentally disabled people who committed less serious offences, or no offence at all, was justifiable on the grounds that such a person nevertheless requires treatment. The court noted that, in the absence of a court order, Section 9(1)(c) of the MHCA allows the involuntary hospitalisation of mentally disabled persons only if a delay in their admission, care, treatment and rehabilitation could result in (1) their death or irreversible harm to their health; (2) their inflicting serious harm on themselves or others; or (3) their causing serious damage to, or loss of, property. It held that, because of the complexity of mental illness and the variety of types and degrees of intellectual disability, some of which are untreatable, the objective of providing treatment was on its own insufficient to justify hospitalisation.[37]

The court accepted the applicant's contention that such a formulaic approach infringes the right to equality and human dignity, since it perpetuates harmful stereotypes and the misperception that all mentally disabled persons are necessarily dangerous. It referred to the state's constitutional obligation to promote equality and to eradicate stereotypes and prejudice, and reiterated that the mere existence of a disability could not justify detention.[38] It held that there was insufficient connection between the purported objective of the section (providing treatment) and the means for achieving it (compulsory detention). It accordingly found that Section 77(6)(a)(ii) breaches the substantive component of the right to freedom.[39]

The court accepted, however, that the provision operates rationally in respect of accused persons who are likely to inflict harm on themselves or others, or who require care, treatment and rehabilitation.[40] It therefore declined to strike the section down in its entirety.[41] The court declared Section 77(6)(a)(ii) constitutionally invalid in its present form and ordered that, with immediate effect, the wording of the provision be amended to extend the range of orders that a court may make pursuant to a finding that the accused committed an offence other than those contemplated in Section 77(6)(a)(i), or no offence. Moreover, the court found that there was no satisfactory justification for the section's infringement of the right to freedom in the instances previously described. It held that such infringement is not reasonable and justifiable in a democratic society based on human dignity, equality and freedom, in terms of Section 36.

Comment

On the whole, the Constitutional Court's rulings on the constitutionality of Section 77(6)(a) of the CPA are to be welcomed. In as much as the section mandates compulsory detention without trial, its provisions have long been ripe for re-evaluation and reform. Nevertheless, there are certain aspects of the judgement that are not satisfactory, in particular the court's reluctance to extend the range of options available to a trial court when dealing with an adult accused in terms of Section 77(6)(a)(i). With respect, the logic behind the court's reasoning on this point is dubious. While readily acknowledging there are only two valid justifications for the detention of a mentally disabled person who has not been convicted of a crime – (1) providing treatment and care and (2) securing their safety and/or that of society – the court gave insufficient consideration to the fact that there will invariably be cases where these justifications do not apply.

Regarding the need to provide treatment and care, it is acknowledged that not all mental disabilities are susceptible to medical treatment.[42] Nor can it safely be assumed that a person suffering from such a disability necessarily requires any greater degree of care than he may already be receiving. These points were argued on behalf of the applicants *in casu*, both of whom were suffering from permanent mental disabilities. In such cases, it is impossible to justify compulsory hospitalisation on the grounds of treatment and care.

This, then, leaves only the second ground of justification, the need to secure the safety of the mentally disabled person and/or that of society. Here we are faced with another truism; that not all mentally disabled people are a danger to themselves or to society, as emphasised by the WCC. Even though the Constitutional Court acknowledged that a formulaic approach perpetuates the harmful stereotype that all mentally disabled people are dangerous, it appears to have fallen into this trap itself when it reasoned that mandatory hospitalisation in terms of Section 77(6)(a)(i) is warranted because the provision applies only to an accused who has 'committed a serious offence'. In other words, the court accepted that all persons falling within the ambit of Section 77(6)(a)(i) are presumptively dangerous. This, with respect, is flawed reasoning. The common thread running through the offences specified in Section 77(6)(a)(i) – murder, culpable homicide, rape and compelled rape – is that they are examples of violent crimes, as confirmed by the phrase 'or some other offence involving serious violence'. It is therefore not the *seriousness* of the offence that is relevant, but rather the *violence* involved in its commission.[43] It can thus be concluded that the specified offences represent instances where the legislature considered that, based on a prior record of violence, the accused posed a danger to society. However, there need not be a criminal record for Section 77(6)(a)(i) to operate if one is only considering a current criminal charge. With a current criminal charge only two points are relevant: 1) this violent behaviour has not been proven; and 2) whether one alleged act of criminality makes an accused 'dangerous'. Predicting future risk based on prior behaviour is a matter for debate, but it is probably not inherently objectionable. However, it fails to give regard to expert evidence before the court when an accused does not pose a threat to society. Such evidence would suggest that it is untenable for incarceration in terms of the impugned provision to be warranted, because society must be protected from people who have committed serious crimes. There is no rational connection between the need to ensure certainty and clarity, and the statutory provision that allows for the detention of a person who has committed a serious crime, irrespective of the circumstances of the individual or the nature of the crime.

The result is that the mentally ill accused face incarceration for an indeterminate period. To

mandate that such accused persons be detained because they suffer a mental illness is constitutionally unacceptable.[44] The failure to grant the presiding officer the discretion to determine whether or not to exercise the power to detain, results in the arbitrary deprivation of freedom.[45] Similarly, in *R v Swain*,the Supreme Court of Canada found that the duty on a judicial officer to order the detention of a person who had been acquitted on the basis of insanity, to be unconstitutional.[46] Having a presiding officer determining whether an accused poses a danger to himself or society would be inconsistent with notions of substantive justice or individualised justice. The importance of the discretion afforded to a judicial officer to appoint an intermediary in terms of Section 170 of the CPA was highlighted by Justice Ncgobo in *DPP v Minister of Justice and Constitutional Development*.[47] However, while it may be difficult to envisage the commission of an act of murder or compelled rape without an element of serious violence, culpable homicide and, to some extent, rape are the odd men out.[48] Culpable homicide can be committed in a variety of ways that need not involve violence, for example through cases of negligent driving, as demonstrated in the cases of *S v Mkwanazi* and *S v Maritz*.[49] A person who is involved in negligent driving where there was no element of violence cannot be said to represent a sufficient threat to society. It would not justify their mandatory hospitalisation on that basis alone, especially where such an accused is guaranteed rights to a fair trial in terms of Section 35 of the Constitution.[50]

The court was evidently aware that there would be cases where hospitalisation could not be justified. It pointed out that if the court making the mandatory order for hospitalisation believed that the accused did not pose a threat to society, it could simultaneously make an order expediting his or her release. It did not explain, however, why the courts should be obliged to resort to such a circuitous remedy when they could have been granted the discretion to order the accused's release in the first place. It is imperative that the court provide some directive in this respect, as at the heart of the constitutional order is the establishment of a society in which all people are accorded equal dignity and respect, regardless of their membership of groups; as demonstrated in *President of the RSA v Hugo*.[51]

The court's finding that a rational basis exists for the different options available in terms of Section 77(6)(a)(i) and Section 78(6)(b), respectively, should also be criticised. It is correct that Section 77(6) and Section 78(6) deal with different enquiries and possible outcomes. It is also correct that Section 78(6) needs to cater for people who lack criminal capacity at the time of the offence, but who are not mentally disabled at the time of trial. It is conceivable that Section 77(6) might be called into question where an accused arguably lacked capacity at the time of the commission of the offence as well as at the time of trial. An example would be a person accused of culpable homicide after causing a motor vehicle accident, but who sustained serious brain damage in that accident. Since such an accused may not benefit from treatment or represent a danger to themselves and/or society, there is no logical reason why the range of options available to the court should be any less extensive than those available to it in terms of Section 78(6).

The most likely response to these criticisms is that, despite the evident deficiencies of Section 77(6)(a)(i), the court considered that none of them gave rise to a sufficiently clear or serious violation of rights to warrant the court's interference. It is therefore hoped that, when the legislature addresses the defects in Section 77(6)(a)(i) in respect of the compulsory imprisonment of adults and the compulsory imprisonment or hospitalisation of children, it will

use the opportunity to revise the provisions of Section 77(6)(a)(i) in their entirety.

Conclusion

Despite the judgement's shortcomings, it is also commendable. The provisions of Section 77 have long been ripe for reassessment, as this section left the courts with no option but to order the detention of those accused who were found unfit to stand trial. It is now up to the legislature to revise the provision of Section 77(6)(a)(i), bearing in mind the constitutional rights of mentally ill accused persons. To allow members of a group to be stigmatised fragments society, and is a grave violation of their constitutional rights.[52]

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Notes

1 E du Toit et al., *Commentary on the Criminal Procedure Act,* Cape Town: Juta Publishers, 2015, ch. 13.

2 F Cassim, 'The accused person's competency to stand trial: a comparative perspective', *Codicillus,* 45:1, 2004, 17–27.

3 Criminal Procedure Act (CPA) 1977 (Act 51 of 1977).

4 Mental Health Care Act 2002 (Act 17 of 2002).

5 *De Vos NO v Minister of Justice and Constitutional Development* (CCT 150/14) [2015a] ZACC 21.

6 CPA, sections 9, 10, 12.

7 *De Vos NO v Minister of Justice and Constitutional Development* 2015b (1) SACR 18 (WCC).

8 *De Vos,* 2015a.

9 Ibid., para 18.

10 Ibid.

11 Ibid., 2015a, para 18.

12 *HL v United Kingdom* No 45508/99 ECHR 2004, para 91.

13 Ibid.

14 *De Vos,* 2015a, para 22.

15 *Bernstein v Bester NO* 1996 (2) SA (CC), para 145; *S v Coetzee* 1997 (3) SA 527 (CC), para 159; *De Vos,* 2015a, para 25.

16 *De Lange v Smuts NO and Others* (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998), para 23.

17 The United Nations Convention on the Rights of Persons with Disabilities (A/RES/61/106) was adopted on 13 December 2006 and entered into force on 3 May 2008.

18 *De Vos,* 2015a, para 29.

19 Ibid., para 31.

20 Ibid., para 32.

21 Ibid., para 34, 39.

22 Ibid.

23 Ibid., para 34, 39.

24 Ibid., para 36, 41.

25 Ibid., para 36.

26 *Winterwerp v Netherlands* 6301/73 [1979] ECHR 4. *De Vos,* 2015a, para 38.

27 Ibid., para 38, 43.

28 Ibid., para 42.

29 Ibid., para 41, 43.

30 Ibid., para 44.

31 Ibid., para 45.

32 Ibid., para 46.

33 Ibid., para 47.

34 Ibid., para 63.

35 Ibid., para 48, 63.

36 Ibid., para 65.

37 Ibid., para 55.

38 Ibid., para 56.

39 Ibid., para 57.

40 Ibid., para 66.

41 Ibid., para 67.

42 Although advances in treatment continue to be made with regard to persons who are mentally ill, medical treatment in children who, for example, suffer from a mental illness is not always recommended. Studies have found that developing brains can be very sensitive to medications and have suggested alternate treatment such as family therapy, educational classes and behavioural management techniques be utilised. See WK Silverman and SP Hinshaw, The second special issue on evidence based psychosocial treatments for children and adolescents: a ten-year update, *J Clin Child Adolesc Psychol,* 37:1, 2008. See also National Institute of Mental Health, Treatment of children with mental illness, http://www.nimh.nih.gov (accessed 23 February 2016).

43 Although not all 'serious offences' are dangerous, it does seem logical that 'violent offences' are dangerous.

44 N Steytler, *Constitutional criminal procedure: a commentary on the Constitution of the Republic of South Africa*, Durban: Butterworths, 1996, 58.

45 Ibid., 59, para 7.2.

46 *R v Swain* 1991 (1) SCR 933.

47 *DPP v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC), para 120.

48 J Burchell, *Principles of criminal law* (5th ed.), Cape Town: Juta Publishers, 2016.

49 *S v Mkwanazi* 1967 (2) SA 593 (N). *S v Maritz* 1996 (1) SACR 227 (A).

50 See also *S v Sithole* 2005 (1) SACR 311 (W).

51 *President of the RSA v Hugo* 1997 (4) SA 1 (CC), para 41.

52 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000), para 37.