**The constitutionality of orders for the detention of persons unfit to stand trial: *De Vos NO v Minister of Justice and Constitutional Development***

**2015 (1) SACR 18 (WCC) and (CCT 150/14) [2015] ZACC 21**

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1. **INTRODUCTION**

Section 12(1) of the Constitution of the Republic of South Africa 1996 (‘the Constitution)’ protects the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause (s 12(1)(a)), and the right not to be detained without trial (s 12(1)(b)). The rights of arrested, detained and accused persons are in turn protected by s 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’ and, in particular, the person concerned must be able to understand the proceedings so as to be able to make a proper defence (E Du Toit et al *Commentary on the Criminal Procedure Act* Juta Publishers, 2015, ch13-p5 and further authorities cited therein). A person who cannot do this, is considered unfit to stand trial.

Section 77 of the Criminal Procedure (Act 51 of 1977 ) (‘the CPA’) deals with the treatment of an accused who is unfit to stand trial due to a mental illness or intellectual disability (the generic term ‘mental disability’ will be used to refer to both types of mental condition, except where it is necessary to distinguish). While such an accused cannot be tried, they are not acquitted and discharged, since s 77(6) of the CPA enjoins the court to determine whether the person concerned committed the actus reus of the offence with which he has been charged. If the court finds that the accused committed an act of murder, culpable homicide, rape, compelled rape, or some other offence involving serious violence, or if the court considers it in the public interest, s 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 s 47 of the Mental Health Care (Act 17 of 2002) (‘the MCHA’). If the court finds that the accused committed some other form of unlawful act, or no unlawful act at all, s 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 s 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 their detention in one form or another. The provisions of s 77(6)(a) differ from those of s 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 s 78(6)(b), the court, as an alternative to ordering the accused’s detention, is empowered to order his release, either on appropriate conditions, or even unconditionally. These options are not available in terms of s 77(6)(a)(i) or (ii). In essence therefore, s 77(6)(a) provides for detention without trial on the merits of the charge. There is only what could be termed a trial of the facts. Consequently, concern has been expressed regarding the constitutionality of these provisions.

The constitutionality of s 77(6)(a)(i) and (ii) was in fact recently challenged in *De Vos NO v Minister of Justice and Constitutional Development* CCT 150/14) [2015] ZACC 21 (26 JUNE 2015).

1. **THE FACTS**

The proceedings concerned two individuals, Stuurman and Snyders, who had been charged with murder and rape, respectively, in the Magistrates’ Court. Both were found to suffer from permanent intellectual disabilities (Down Syndrome in Snyders case), which rendered them unfit to stand trial. Both accused therefore stood to be detained in terms of s 77(6)(a) of the CPA. Before their matters could be finalised, however, the accused challenged the constitutional validity of ss 77(6)(a)(i) and (ii) of the CPA, on the grounds that the relevant provisions infringed their constitutionally protected rights to equality (s9 of the Constitution), dignity (s10), and freedom and security of the person (s12). Their consolidated applications were brought in the Western Cape Division of the High Court (‘WCC’). The respondents were the national Minister of Justice and Constitutional Development, the national 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.

1. **THE HIGH COURT’S JUDGEMENT *(De Vos NO v Minister of Justice and Constitutional Development* 2015 (1) SACR 18 (WCC))**

The WCC held that although valid justification exist for detaining a person with a mental disability, it must be recognised that not all such persons are necessarily a danger to themselves or to society. The Court found that s 77(6)(a) was flawed in that it didn’t allow a presiding officer the chance to evaluate and determine if an accused is in fact a danger to themselves or to society. The Court found that s 77(6)(a) was further flawed in that it did not allow a presiding officer any discretion in determining whether an accused ought to be detained, based on whether they were in fact a danger to themselves or to society. Section 78(6) allows for such a discretion. The WCC further reasoned that detention as mandated by s 77(6)(a) could therefore be arbitrary and lead to an infringement of an accused’s constitutional right to freedom and security of the person. The WCC consequently declared the provisions of ss 77(6)(a)(i) and (ii) to be constitutionally invalid. It then 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 s 172(1)(b) of the Constitution, by amending the wording of s 77(6)(a) of the CPA so as to mirror that of s 78(6).

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

1. **THE CONSTITUTIONAL COURT’S JUDGEMENT *(De Vos NO v Minister of Justice and Constitutional Development* (CCT 150/14) [2015] ZACC 21 (26 JUNE 2015))**

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:-
   1. Section 77(6)(a)(i) is constitutionally valid in respect of (1) hospitalisation; (2) imprisonment; and (3) children’s rights;
   2. Section 77(6)(a)(ii) is constitutionally valid.
3. Any infringement of rights is justified in terms of the general limitations clause.
   1. **Is s 77(6)(a) peremptory**

The respondents contended that s 77(6)(a) provides for compulsory detention, as evidenced by the use of the word ‘shall’. The respondents argued that ‘shall’ meant ‘may’, thus allowing the court a 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 s 77(6)(a) was obligatory, and that there is no justification for departing from its ordinary meaning. The section should not be interpreted as meaning ‘may’ (para [18]). It held further that the wording of s 77(6)(a) clearly precluded the exercise of any discretion by a court (ibid). It concluded that its provisions were peremptory (ibid).

* 1. **Does s 77(6)(a) infringes the right to freedom and security of the person?**

The Court referred to the judgment of the European Court of Human Rights (‘ECHR’) in *HL v United Kingdom* (No 45508/99 ECHR 2004 at para 91), in which it was held that institutionalisation or hospitalisation constituted detention, because the health care professionals treating and managing a patient exercise ‘complete and effective control over his care and movements’. It held, consequently, that an order made in terms of s 77(6)(a) constituted a deprivation of freedom (para [22]). The Court then outlined the elements of the s12 constitutional right to freedom and security of the person. Citing the dicta of O’Regan J in *Bernstein v Bester NO* (1996 (2) SA (CC) at para 145)and *S v Coetzee* (1997 (3) SA 527 (CC) at 159)*,* 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) (para [25]).

Regarding the substantive component of the right, the court reiterated (citing the majority judgment of Ackerman J in *De Lange v Smuts NO* supra at para 23) that it is 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. The court took cognisance of the United Nations Convention on the Rights of Persons with Disabilities (‘the Convention’), which reinforces the state’s constitutional obligation to promote the rights and freedoms of persons with disabilities. 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 (para [29]). Consequently, the decisive issue *in casu* was whether detention in terms of s 77(6)(a) of the CPA is rationally connected with the objective of treating and caring for the accused, as well as for securing their safety and/or that of the community, or whether the section mandates detention solely by reason of the accused’s mental disability (para [31]). In order to determine this issue, the court dealt separately with the provisions of s 77(6)(a)(i) and (ii):-

* + 1. ***Constitutional validity of s 77(6)(a)(i) in respect of hospitalisation***

The respondents argued that the objectives of detention in terms of s 77(6)(a) were fourfold: (1) protect the public against harm by the accused; (2) protect the accused against self-harm; (3) prevent the stigmatisation of the accused; and (4) provide the accused with treatment, care and rehabilitation (para [32]).The court observed that the MHCA had adopted a community care focus, in that s 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 full potential and to facilitate his or her integration into community life’ (para [34] and n 39). It further observed that the purpose of s 77(6)(a)(i) of the CPA was to ensure that persons unfit to stand trial by reason of mental disability, who have 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 (ibid). It noted that procedural safeguards had been built into s 77(6), in that a court is required to hold a ‘trial of the facts’ before making a detention order. It held that this procedure satisfied the procedural component of the right to freedom and security of the person (ibid).

The court noted further that the MCHA creates a specific regime for persons hospitalised in terms of s 77(6)(a)(i) (‘State patients’) (para [36] n 41), in that a state patient may only be discharged upon application to a judge in chambers in terms of s 47 of the MHCA, a procedure requiring extensive information to be placed before the judge, who is then best placed to decide whether the patient’s continued detention is necessary for their care, treatment, rehabilitation, or safety, or for the safety of the public (para [36]). It held further that this regime more than satisfied the substantive requirements for detention laid down by the ECHR in *Winterwerp v Netherlands* (supra), in that an accused may only be hospitalised in terms of s 77(6)(a)(i) if they are found to have committed a serious offence and are not then detained for any longer than is necessary (para [38]). 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 s 47 application be brought on their behalf within a specified period (para [38] n 43).

Lastly, the court held that the disparity between the options available in terms of s 77(6)(a)(i) and s 78(6) was not irrational, because the two sets of provisions deal with different enquiries and different possible outcomes (para [39]). In particular, s 78(6) needs to cater for persons who lacked criminal capacity at the time of the offence, but who are not mentally ill at the time of trial. It is to this end that s 78(6) offers a wider range of options than s 77(6)(a)(i) (ibid). Furthermore, the court observed that the WCC’s judgment failed to take account of the way in which the provisions of the CPA articulated with those of the MHCA (para 62). The court consequently declined to confirm the WCC’s declaration of constitutional invalidity in respect of s 77(6)(a)(i), except in the specific circumstances discussed below.

* + 1. ***Constitutional validity of s77(6)(a)(i) in respect of imprisonment***

The *amicus curiae* urged the court to rule that imprisonment (as opposed to hospitalisation) in terms of s 77(6)(a)(i) is constitutionally impermissible, since it must inevitably violate the right not to be subjected to cruel, inhuman or degrading punishment (s12(e)). The respondents argued that the aim of the provision was to facilitate the accused’s access to therapeutic remedies (para [42]). The court accepted that the provision was not intended to be punitive (para [41]), but took cognisance of the fact that, in reality, prisons lack the necessary facilities to provide appropriate treatment and care (para [43]). It held that the only apparent reason for imprisonment was lack of resources in the public health sector (para [44]). However, since s 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 (para [45]). It held further that accommodating mentally disabled persons in prison perpetuates hurtful and dangerous stereotypes, reinforces the stigmatisation and marginalisation to which they are already subject and impairs their human dignity (para [46]). It concluded that imprisonment is permissible only when the accused is likely to cause serious harm to themself or others, since this would then be justifiable in terms of the state’s constitutional obligation to protect the public (para [47]). The court therefore held that s 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 (para [63]). It held further 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 on an outpatient basis (paras [48] and [63]). The court accordingly declared s 77(6) constitutionally invalid to the extent that it mandates imprisonment based on resource considerations alone (para [65]). This declaration of invalidity was suspended for a period of 24 months, to allow parliament to remedy the defects in the section. The court made no order for any interim remedy, because it considered that the issue was a complex one and was best left to the legislature.

* + 1. ***Constitutional validity of s77(6)(a)(i) in respect of children***

The court confirmed the WCC’s finding that diversionary options in terms of the CJA are not available to a child who is unfit to be tried due to mental disability (para [50]). The court further confirmed that, since s 77(6)(a)(i) is peremptory, it deprives a court of the discretion to deal appropriately with children falling within its ambit (para [51]). The court concluded that detention in terms of s 77(6)(a)(i) could therefore not be regarded as a measure of last resort, as required by s28(g) of the Constitution (para [52]). The court accordingly declared s 77(6)(a)(i) constitutionally invalid to the extent that it mandates the detention of children, irrespective of the facility in which they are detained (para [65]). The declaration of invalidity was also suspended for a period of 24 months, without any interim remedy.

* + 1. ***Constitutional validity of s77(6)(a)(ii)***

The DPP contended that the detention of mentally disabled persons 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, s 9(1)(c) of the MHCA allows the involuntary hospitalisation of a mentally disabled person only if any delay in their admission, care, treatment and rehabilitation could result in (1) their death or irreversible harm to their health; (2) inflicting serious harm on themself or others; or (3) him 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 insufficient on its own to justify hospitalisation (para [55]).

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 (paras [56]). It held that there was an insufficient connection between the purported objective of the section (providing treatment) and the means for achieving it (compulsory detention). It accordingly found that s 77(6)(a)(ii) breaches the substantive component of the right to freedom (para [57]). It held that the inescapable conclusion was that the section mandate hospitalisation purely on account of the individual’s mental disability, contrary to article 14 of the Convention. It held that, since s12 of the Constitution must be interpreted in light of the said article, s 77(6)(a)(ii) amounts to an arbitrary deprivation of freedom (para [58]). It held, further, that in this case, the ‘trial of facts’ does not offer an appropriate procedural safeguard against deprivation of freedom, since detention follows irrespective of the outcome. Consequently, the section does not satisfy the procedural component of the right (ibid).

The court accepted, however, that the provision does operate rationally in respect of accused persons who are likely to inflict harm on themselves or others, or who do fact require care, treatment and rehabilitation (para [66]). It therefore declined to strike the section down in its entirety (para [67]). The court declared s 77(6)(a)(ii) constitutionally invalid in its present form and ordered that, with immediate effect , the wording of the provision be amended, so as 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 s 77(6)(a)(i), or no offence. Thus, in addition to ordering the accused’s hospitalisation, a court may now order the accused’s release on such condition as it deems appropriate, or even his unconditional release on such conditions as it deems appropriate, or even his unconditional release. Consequently, the wording of s 77(6)(a)(ii) now mirrors that of s 78(6)(b), as intended by the WCC.

* 1. **Justification in terms of s 36 of the Constitution**

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.

1. **COMMENT**

On the whole, the Constitutional Court’s rulings on the constitutionality of s 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 judgment that are rather less 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 s 77(6)(a)(i). With respect, the logic behind the Court’s reasoning on this point is dubious. While readily acknowledged that there are only two valid justifications for the detention of a mentally disabled person who has not been convicted of a crime, (1) provide treatment and care and (2) to secure their safety and/or that of society, the court gave insufficient consideration to the fact that there will invariably be cases to which these justifications do not apply.

As far as the first ground of justification is concerned the need to provide treatment and care it is common knowledge that not all mental disabilities are susceptible to treatment. A permanent intellectual disability is a prime example of a mental disability that is neither susceptible to treatment, nor capable of improvement. Nor can it safely be assumed that a person suffering from such a disability necessarily requires any greater degree of care than they may already be receiving in their existing environment. These exact points were argued on behalf of the applicants *in casu*, both of whom were suffering from permanent mental disabilities, which were neither susceptible to treatment, not capable of improvement. In such cases, it is clearly impossible to justify compulsory hospitalisation on the grounds of the need for 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, however, we are faced with another truism; not all mentally disabled persons are necessarily a danger to themselves or to society, was emphasised by the WCC at the commencement of its judgment. Even though the Constitutional Court, for its part, acknowledged that a formulaic approach perpetuates harmful stereotypes and the misperception that all mentally disabled persons are necessarily dangerous, it does appear to have fallen into this trap itself, when it reasoned that mandatory hospitalisation in terms of s 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 appears to have accepted that all persons falling within the ambit of s 77(6)(a)(i) are presumptively dangerous. This, with respect, is faulty reasoning. The common thread running through the offences specified in s 77(6)(a)(i) murder, culpable homicide, rape and compelled rape is that they are intended to be examples of crimes involving serious violence. This is confirmed by the addition of the catch-all phrase ‘or some other offence involving serious violence’ immediately afterwards. It is therefore not the *seriousness* of the offence that is relevant, but rather the element of *violence* involved in its commission. It can thus be concluded that the specified offences all represent instances where the legislature considered that, based on past violent behaviour, the accused posed a danger to society. Although the wisdom of predicting future dangerousness on the basis of past behaviour is a matter for debate, there is probably nothing inherently objectionable in doing so. However, the problem is that, 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. Culpable homicide can be committed in a wide variety of ways, which need not involve violence; for example, through negligent driving and unlawful omissions. Rape, too, is not necessarily committed by means of violence. Apparently consensual sex with a person who lacked consensual capacity on account of their own mental disability would also constitute rape. It is doubtful, however, whether a person who committed such an act can be said to represent a sufficient threat to society as to justify their mandatory hospitalisation on that basis alone.

The Court was evidently aware that there would be cases where such hospitalisation cannot be justified, when it pointed out that, if the court making the mandatory order for hospitalisation believed that the accused in question did not pose a threat to society, it could simultaneously make an order expediting their release. It never explained, however, why the courts should be obliged to resort to such a circuitous remedy, when they could simply have been granted the necessary discretion to order the accused’s release in the first place. Lastly, the Court’s finding that a rational basis exists for the difference in options available in terms of s 77(6)(a)(i) and s 78(6)(b), respectively, is also open to criticism. It is of course correct that s 77(6) and s 78(6) deal with different enquiries and different possible outcomes. It is also correct that s 78(6) needs to cater for persons who lacked criminal capacity at the time of the offence, but who are not mentally disabled at the time of trial. On the other hand, s 77(6) needs to deal with the converse situation, persons who had criminal capacity at the time of the offence, but who are mentally disabled at the time of trial. A prime example of this would be a person accused of culpable homicide arising from a motor vehicle accident, in which they sustained serious brain damage. Since such an accused may neither benefit from treatment, nor represent a danger themselves and/or society, there is no logical reason why the range of options available to the court that determines their fate should be any less extensive than those available to it in terms of s 78(6).

The most likely answer to the above criticisms is probably that, despite the evident deficiencies of s 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. However, this is not the same as saying that s 77(6)(a)(i) is good law, even when applied solely in respect of the mandatory hospitalisation of adults. This highlights that, while the Constitution may afford protection against the worst excesses of bad law, constitutionality alone is no guarantee of good law. It is therefore to be hoped that, when the legislature addresses the defects in s 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 s 77(6)(a)(i) in their entirety.

1. **CONLUSION**

The Constitutional Court judgment comes at a time when s 77(6)(a) of the CPA had to be re-evaluated. Despite certain shortcomings of the judgment, it is commendable. The legislature is now tasked with revising the provision of s 77(6)(a)(i) in its entirety. This revision would advance an accused’s constitutional rights.