IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. 150/14

In the matter between:

ANNA-MARIE DE VOS N.O.	**First Applicant**
MARIA STUURMAN	**Second Applicant**
SARAH SNYDERS	**Third Applicant**
MORNAY CALITZ N.O.	**Fourth Applicant**

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**First Respondent**
MINISTER OF HEALTH	**Second Respondent**
DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	**Third Respondent**

RESPONDENTS' SUBMISSIONS

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A. INTRODUCTION

1. For convenience, the Western Cape High Court is referred to as "the court a *quo*". [1]

2. The Respondents oppose confirmation of the declaration of constitutional invalidity of section 77(6) (a)(i) and (ii) of the Criminal Procedure Act 51 of 1977("CPA") issued by the court a *quo* and the Court *a quo's* order[2] of the, per Griesel J, delivered on 5 September 2014, in the two matters above.

3. For convenience, the first matter is referred to as "the Stuurman matter "and the second as "the Snyders matter".

4. In light of the fact that the issues in the Stuurman and Snyders Matters are similar, in the sense that Stuurman challenged only the provisions of section 77(6)(a)(i), whilst Snyders challenged both sections 77(6)(a)(i) and (ii), the Deputy Judge President consolidated both cases.

5. Both matters arise out of a prosecution in the lower courts; the Regional and Magistrate's Courts, for murder and statutory rape. In

[1] Record, Vol 1, p 6, Judgment
[2] Record, Vol 1, p 37, Order of the High Court

both instances, the presiding officers invoked the provisions of section 77 of the CPA due to the questionable mental state of the accused. In the final analysis the accused were detained in terms of section 77(6) (a)(i) and (ii) of the CPA which formed the basis of the constitutional challenge in the Court *a quo*.

6. Briefly, the impugned provisions relate to the mental capacity of a person accused of a violent crime in criminal proceedings. Essentially, the provisions regulate the procedure to be followed by a criminal court when faced with an accused person whose mental state is in question.

7. The Court is instructed to suspend, proceedings immediately, pending mental observation, by a panel of clinicians, for thirty days in a psychiatric institution as envisaged in section 79 of the CPA. The objective of the inquiry is to determine whether the accused person will be able to follow the criminal proceedings in order to mount a defence.

8. Upon receipt of the reports filed by the experts, the court **must** then determine, on a balance of probabilities, whether the accused committed the offence in question. In so doing, the court has discretion to determine its own procedure when conducting the

inquiry. The court may decide whether to call for oral evidence or simply make a finding based on the limited evidence before it.

9. The process to be followed depends on the court's finding:

9.1. If the court finds that on the basis of the expert reports, the accused person is unable to follow proceedings, and on the factual inquiry; that the accused committed the offence in question, section 77 (6) (a) (i) kicks in, making it mandatory for the court to send the person for detention in a psychiatric hospital or prison in terms of section 47 of the Mental Health Care Act 17 of 2002("MHCA").

9.2. However, in the event that the factual inquiry does not yield a finding that the accused committed the *actus rea*, section 77(6) (a)(ii) comes in, mandatorily requiring the court to issue an order for his/her detention in a psychiatric hospital in terms of section 37 of the MHCA, as an involuntary patient.

10. It is the latter part of the procedure outlined above that, in applicants' view, and with which the Court *a quo* agrees, is unconstitutional.

B.FACTUAL BACKGROUND

The Stuurman case

11. In 2005, Mr Stuurman, who was 14 years old at the time, was charged with the murder of a fourteen year old girl. He was referred for mental observation. In terms of sections 77(1) read with section 79(2) of the CPA the Magistrate issued a directive that an enquiry be conducted into his mental capacity.

12. The medical report filed in the Court *a quo* by two specialist psychiatrists and one clinical psychologist found that Llewellyn was/is mentally retarded and would not be able to follow the court proceedings. Two of the psychiatrists found that it would be inappropriate for Llewellyn to be committed to a mental institution in that there were no suitable institutions for juveniles.

13. As aforestated, the Magistrate is yet to complete the enquiry envisaged in Chapter 13 of the CPA and determine whether, on a balance of probabilities, Stuurman committed the act in question, and whether he should be detained in terms of section 77(6) (a) (i) or (ii).

14. At the behest of Stuurman, the criminal proceedings in the Magistrate's Court have been suspended pending finalisation of this matter.

15. Stuurman is currently at home, released into the care of his mother.

The case of Snyders

16. Snyders (who is being represented in these proceedings by his mother and a *curator ad litem*) is a 35 year old man who was charged with the rape of a girl who was 11 years old at the time. During court proceedings it transpired that Snyders had a history of mental illness called the Downs' Syndrome.

17. The Magistrate issued an order in terms of section 77 and 78 that he be detained in Valkenberg Hospital and reported on in terms of section 79 of the CPA for observation. The psychiatrist reports were unanimous in the conclusion that Snyders was not fit to stand trial, inasmuch as he lacked the ability to distinguish right from wrong, and to act in accordance therewith.

18. The Magistrate made an order in terms of section 77(6)(a)(i) of Act 51 of 1977, in terms whereof the applicant was to be detained pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act 17 of 2002. In so doing, the Magistrate skipped a vital part of the proceedings, namely, the evidential inquiry into whether Snyders had in fact committed the act in question. Having realised the irregularity, the Magistrate referred the matter to the High Court for special review.

19. The High Court, [per Griesel J] confirmed that an irregularity had occurred and sent the matter back for determination, in the Magistrates Court, of whether Mr Snyders had committed the act in question. Prior to the conclusion of those proceedings, the current constitutional challenge was launched.

C.GROUNDS UPON WHICH THE DECISION OF THE COURT A QUO IS DISPUTED

The Constitutional Mandate of the Respondents

20. The Court *a quo* failed to take into consideration the constitutional duty upon the State and its organs to provide protection to all people in South Africa (as the State would have ordinarily been

required to do in the case of any person suspected of having committed a violent crime in South Africa).

21. The Respondents contend that the provisions were/are constitutional. They maintain that the said provisions are rational and serve/d a legitimate governmental purpose. Protecting and securing the wellbeing of the people of South Africa are the primary functions of the National Executive. This duty has been recognised by this Court on several occasions.[3]

22. The consequences of the failure by the executive to take full responsibility should inhabitants of South Africa suffer at the hands of state patients who commit acts of violence are clearly set out *in Carmichele v Minister of Safety and Security*[4] that a duty rests on the State and its organs not to perform any act that infringes the rights to life, human dignity, and freedom and security of the person vested in the public in general and women in particular against violent crime; and in some circumstances there would also be a positive component obliging the State and its organs to provide

[3] *Mohamed and Another v President of the RSA and Others* 2001 (3) SA 893 (CC) at 957A/B – 958C paras 43-45;

[4] 2001 (4) SA 938 CC, Where, a person whom the state had reason to suspect of violent crime was allowed to remain at large.

appropriate protection to everyone through laws and structures designed to provide such protection.

23. To this end, each of the respondents is tasked with a constitutional mandate which it must fulfil in implementing the legislative scheme applicable herein.

24. The Minister of Justice and Correctional Services (formerly Minister of Justice and Constitutional Development,), exercises executive authority of the Republic which the President exercises, together with other members of the Cabinet, in terms of section 85(2) of the Constitution.

25. The Minister of Justice is the member of the Cabinet responsible for ensuring that national legislation that ensures the functioning of the prosecuting authority, without fear, favour or prejudice is enacted.. The Criminal Procedure Act, No. 55 of 1971 ("the CPA") is the legislation, referred to herein.

26. The Minister of Health is the Cabinet member responsible for the administration and the implementation of the MHCA, which gives effect to the constitutional imperative to ensure the progressive realisation of the right to health care referred to herein. The

Minister has the task of ensuring the health and well-being of everyone in the Republic of South African.[5]

27. The prosecuting authority derives its power to prosecute from section 179 of the Constitution. It has the power to institute criminal proceedings on behalf of the state, and to carry out the necessary functions incidental to instituting criminal proceedings.[6] It must exercise its duties without fear, favour or prejudice. [7]

28. The impugned provisions have been amended at various times over the past years,[8] a most recent amendment having been in 2002 and 2007, to align the section with consonant provisions in the Mental Health Care Act and the Sexual Offences Act 32 of 2007 respectively.[9]

29. The objective of the provisions is to provide an appropriate mechanism for the South African State to follow when it deals with persons with mental disability who find themselves in a collision course with the South African criminal justice system. The impugned provisions, *read together with sections 42 and* 47 *of the*

[5]Section 27 of the Constitution
[6] Section 179(2)
[7] Section 179(4)
[8] Record, Vol 1, p 86-87, para 5, Affidavit of Lawrence Bassett dated 30 April 2010
[9] Record, Vol 1, p 86-87, para 5, Affidavit of Lawrence Bassett dated 30 April 2010

MHCA, are primarily designed to afford a State Patient[the Accused in both matters herein]an opportunity to be cared for, treated and rehabilitated, whereafter, the Accused can be discharged pursuant to an application therefor to a judge in Chambers, in terms of s 47 of the MHCA.

30. The purpose of the detention, therefore, is –

30.1. to protect members of the public from harm by the accused;[10]

30.2. to protect the accused person with a mental disability from harm to himself;[11]

30.3. by virtue of being exposed to the criminal justice system, the accused person with mental disability may be vulnerable to stigmatisation by other members of the community;

30.4. The treatment care and rehabilitation of the person with mental disability.[12]

[10] Record, Vol 1, p103, para 24, Affidavit of Rodney de Kock dated 28 April 2010
[11] Ibid
[12] Para 50, Affidavit of Precious Malebone Matsoso dated See the long title and preamble of the MHCA

31. The potential danger posed by an accused person who has committed a serious and violent crime cannot be disputed and was recognised by Rogers J in *S v Pedro.*[13]

32. This objective seems lost on the applicants who, in spite of the Respondents' assertions to the contrary, persist with the view that the object of the detention is single-mindedly to imprison the person with mental disability.[14]

33. From the above, it is evident that the objectives of detention are manifold: and yet, the judgment of the Court *a quo*, failed to recognise the above objectives. The judgment seems to have completely ignored the respondents' contentions further, namely, that the referral is intended to assist the accused--*for their care, treatment and rehabilitation*.

34. The Court *a quo*, totally ignored the fact that section 47 of the MHCA provides both the rationale for detention, but more importantly, and thereby, captures the remedies cited by the Court *a quo* relative to section 78 of the CPA, with which the Court

[13] [2014] ZAWCHC Case No. B247/11, at para 100

[14] Para 74, Answering Affidavit of Precious Malebone Matsoso dated

compared the provisions of the impugned section of the CPA. .At paragraph 47 of the judgment, the Court *a quo*, stated, erroneously, respectfully submitted, that the respondents only mentioned the first two objectives.[15].

35. The tenor of, the Western Cape Director of Public Prosecutions, Rodney De Kock's averments, in various paragraphs in his Answering Affidavit in the *Stuurman* matter, for example, is to similar effect.[16]

36. From the above references, [and there are many], which were replicated by the Respondents in one form or another in the *Snyder's* case, it is respectfully submitted that the Court *a quo* misdirected itself in the findings it made in Para 47 of its judgment. The Court ought to have mentioned, and should have held, that the objective of detention is also, if not primarily**,** to provide care., treatment and rehabilitation of the Accused, who, on application to a judge in Chambers in terms of section 47 of the MHCA, could be discharged conditionally, or unconditionally, or be further

[15] Vol. 1 p 26, para 47 of the judgment compare to Vol. 1 p 94, para 10.2, Answering Affidavit, Lawrence Bassett dated 30 April 2010

[16] Vol. 1 p 117, para 65.3, Answering Affidavit, Rodney de Kock dated 28 April 2010

detained as a State Patient, or be reclassified and dealt with as a voluntary, assisted or involuntary mental health care user— options which a judge in Chambers has in terms of s47(6) of the MHCA. The provisions of s.47 (6) of the MHCA are strikingly similar[arguably having the same nuanced intention]as the provisions of s.78(6)(b)(i) and (ii) of the CPA, which the Court *a quo* seemed to hold up as a model provision of the CPA, that passes constitutional muster. It appears that the impugned provision is being struck down by the Court a quo simply because it does not have in its body, options which the Legislature has located in s.47(6) of the MHCA, to which the impugned provision expressly refers.. The reasoning of the Court *a quo* seems to be that the Legislature acted irrationally, and therefore unconstitutionally, in locating, in s,47(6) of the MHCA, options available to a judge in Chambers, even if they are virtually the same as those which the Court holds should be available to a presiding officer in the impugned section, [as they are in s.78(6) of the CPA.

37. We respectfully disagree and we argue that, the provisions in their current form, read together, give effect to the Respondents' constitutional mandate.

Statutory interpretation

38. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others,*[17] this Court pointed out that the Constitution requires that judicial officers should read legislation, where possible, in ways which give effect to its fundamental values.

39. In *Daniels v Campbell and Others* [18] this court further stated that the requirement the interpretive injunction in section 39(2) of the Constitution to *'promote the spirit, purport and objects of the Bill of Rights'* includes aligning the legislation to the constitutional bounds.

40. In *Zondi v MEC for Traditional and Local Government Affairs and Others*,[19] this Court stated that when there is a constitutional challenge to statutory provision, the approach to be followed is firstly to consider whether the provisions in question can be read in a manner that is consistent with the Constitution.

41. In *Zondi*, the High Court purported to issue an order similar to the one issued by the Court *a quo* with insertions and deletions of portions of the impugned provisions it found to be unconstitutional.

[17] 2001 (1) SA 545 (CC) at para 22.

[18] 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at para 45

[19] 2005 (3) SA 589 (CC) at para [102]

42. This court warned against this practice on the basis that it militates against the doctrine of separation of powers.

43. The learned Judge was obliged to view the provisions through the prism of the Constitution, as was laid down in *Hyundai*. In addition, he was obliged to give proper consideration to what the Court in *S v Pedro* said about section 77(6)(a). It is submitted that the learned Judge did not comply with either of the obligations.

44. The learned Judge's approach to the interpretation of the provisions in question was the opposite of what this Court laid down in *Hyundai and S v Pedro,* instead of considering whether the provisions were capable of being interpreted in a manner that rendered them constitutional, the focus was on what was wrong with them. Thus a finding of constitutional invalidity was inevitable.

45. Further, and more importantly, Prof JR de Ville opines that an interpretation of a provision in an Act of Parliament may require, under certain circumstances, reference to other statutes in the

interpretation of such a provision. This is expressly required, he argues, when the provision to be interpreted refers to, (or incorporates by reference), a provision in some other statute, as is the case herein. In other instances, this might also be appropriate, or even obligatory, particularly if the statute to be interpreted is in *pari materia* with another statue or statutes. The learned author further states that conflicts with statutes *in pari materia* should, in as far as possible, be avoided.

46. We are in respectful agreement with the learned author, and argue that his stated views find application to the case/s at hand.[20]

47. In the circumstances, we submit that this Court should not confirm the Court *a quo's* declaration of invalidity of the impugned provision in that, in the process of attempting to improve the provisions, the insertions and deletions unduly strain the wording.[21] In any event, the declaration of invalidity was, with respect, unwarranted, especially in the light of Prof de Ville's well considered and compelling views on statutory interpretation in a constitutional order

[20] JR de Ville:*Constitutional and Statutory Interpretation*, 2000, pp 162-163, and the authorities collected in footnotes 120-124]
[21] *Hyundai at para 24*

The comparison between sections 77(6) and 78(6)

48. The Court *a quo*, respectfully submitted, misdirected itself in arriving at the conclusion that the impugned provisions are unconstitutional. The Court *a quo'*s mind-set seems to have been informed by it placing undue emphasis on the comparison between the provisions of sections 77(6) and 78(6) of the CPA.

49. It is respectfully submitted that a comparison of the two sections, without more, was not material to the issue at hand. Two judges[22] understood the rationale for the distinction; however, the court *a quo* was not convinced.[23]

50. In so doing, the Court *a quo* also ignored the case of *S v Pedro*,[24] a Full Bench judgment of the High Court in the same division and, in a sense, ignored also the doctrine of precedent which compels it to follow a Full Bench decision.[25]

51. Whilst the Court *a quo* laments the "incongruence" of the difference between section 77(6) and 78(6) to justify the absence of judicial

[22] Rogers J wrote the judgment with which Binns-Ward J concurred.
[23] Pedro's Case at para 97
[24] ZAWCHC 2014
[25] *Makhanya v University Of Zululand* 2010 (1) SA 62 (SCA) at 66 para 6

discretion. The court in *S v Pedro*[26] understood the difference, and accepted the fact that there is an irrational differentiation between the two provisions. Due to the significance of the analysis it is important to quote it at length. The Court analysed the provisions and made the following observations:

52. The court also understood the potential danger posed by an accused person with mental disability.

53. The two provisions serve different purposes. Section 78(6) applies to a person who, due to a temporary mental affliction, which does not exist at the time of the trial, was lacking criminal capacity at the time of commission of the offence. Section 77(6) on the other hand, applies to persons who, due to an ongoing mental affliction, lack criminal capacity, and are unable to follow criminal proceedings.

54. Section 77(6) (a) refers to specific offences. The need for detention contemplated in Section 77(6) (a)(i) arises out of the Legislature's understanding that an accused person who lacks the capacity to follow criminal proceedings requires a stricter mental health care regime if he or she has committed serious violent offences.

[26] See para 97-100

55. This stricter health care regime is consistent with the discretion for an extended period of detention which, discretion a judge in chambers has. The concerns raised by the Court *a quo*, namely, that there are deficiencies in the impugned s 77(6) provisions, inasmuch as the Court, acting in terms of section 77(6) does not have the options that a Court has when it acts in terms of section 78(6) must be answered by stating that the options available to a judicial officer, acting in terms of 78(6) of the CPA,, as stated already, are virtually the same kinds of options which are available to a judge in Chambers, contemplated in section 47(6)of the Mental Health Care Act. The provisions in 78(6) of the CPA and the ones in section 47(6) of the MHCA are almost identical, if not in wording, certainly in the remedies/options that the two sections provide to a judicial officer confronted with an Accused person with a form of mental illness or defect..

56. The Legislature, in its wisdom, in section 77(6) mandates the Magistrate to refer the matter to a judge, like the Court *a quo*, , who, in terms of s 47 (6) is empowered by that section to make the following orders:

56.1. The State Patient may remain a State Patient;

56.2. The State Patient may be reclassified and dealt with as a voluntary, assisted or involuntary mental health care user in terms of Chapter 5 in the Act ;

56.3. The State patient may be discharged unconditionally;

56.4. The State Patient may be discharged conditionally.

57. Consequently, in terms of section 47 of the MHCA, the Judge in Chambers can release an Accused unconditionally as one of his options. The Judge can also order that the Accused be detained in terms of section 37 of the MHCA. Everything the Court *a quo* says is absent in s 77(6), but present in section 78(6), has been provided for by the Legislation in section 47(6) of the MHCA. The Court a quo is misdirected in apparently holding that the reason for its declaration of the impugned section of the CPA is simply because the Legislature provided options which the Court a quo reasons should have been provided for in the body of section 77 of the CPA[, as is the case in s.78], when it is clear that there is a direct link between section 77(6) of the CPA(in terms whereof the Accused gets referred to a psychiatric hospital or prison) and section 47(6) of the MHCA, where, in the latter provision, one finds, arguably, the same kinds of options that section 78(6) of the

CPA provides to a judicial officer. It is splitting of hairs that the remedy provided in s.47 (6) of the MHCA should have been provided in the impugned section for it to read like s.78(6) of the CPA, in the circumstances of statutory interpretation, hardly justifies the striking down of the impugned section, as was held by the Court below.

58. An Accused dealt with in terms of section 77(6) of the CPA as it stands, read with section 47(6), the MHCA, with which it has a direct link, can suffer no prejudice merely because remedy options available to a judicial officer acting in terms of section 77(6) are available to a judge in Chambers acting in terms of section 47(6) of the MHCA. We argue, humbly, that the Court *a quo* misdirected itself if the import of its judgment is to the effect that the impugned section does not pass constitutional muster merely because the options open to a judicial officer in terms of section 78(6) of the CPA, are not stated as options in the impugned provision, even though it is manifestly clear that those self-same options are available to a judge in Chambers, acting in terms of section 47(6) of the MHCA, with which the impugned section is directly linked.

59. A finding that the legislature should have placed the safeguards in one statute in stead of another would virtually offend against the doctrine of separation of powers [which arm of government does what], and the concomitant comity that ordinarily must be observed by all the three branches of government.[27]

60. It is sufficient that the provision is rational.

61. The decision to make laws is, with respect, the preserve of the two other branches of government, the Executive and Parliament, not the Judiciary. Thus the Court *a quo* is in breach of the fundamental principle of the separation of powers doctrine.

62. It follows that it would not be appropriate for the Court to intervene in the drafting of legislation, which is the preserve of the

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[27] The relevant authorities that give guidance on this perspective include *Doctors for Life International v President of the Republic of South Africa* 2006 (6) SA 416 (CC) at paras 68 – 69; 2006 (12) BCLR 1399 (CC) at 1425A-D; *Glenister v President of the Republic of South Africa* 2009 (2) BCLR 136 (CC) at para [33]; *International Trade Administration Commission v SCAW* SA 2012 (4) SA 618 (CC) at p. 652 – 654 para [90] - [95]; *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at p. 240 para [63] – [64]; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para [45];*Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) para [56] – [57].

Legislature, other than to ensure that the provision is consistent with the Constitution and the law.

63. The "incongruences" between section 77(6) and section 78(6) of the CPA must be read in the light of the provisions of section 47(6) of the MHCA, which the impugned provision specifically singles out as the relevant section in terms whereof even a Magistrate's Court may have to deal with a State Patient.

64. In the circumstances, the Court[which may be a High Court], then has the same discretionary powers to deal with the situation in the same way that a judge in Chambers has in terms of s 47 of the MHCA, functioning in terms of a referral to it by section 77(6) of the CPA.

65. The detention of persons with mental disabilities is consistent with the provisions of the MHCA which authorise the detention in the normal course. The person may be detained either as a voluntary or involuntary care user in terms of section 34 of the MHCA.[See also the provisions of section 37 of the MHCA]

The individual circumstances of the accused

66. At paragraph 49 of the judgment, the cour*t a quo* states that section 77(6) (a) 'does not require, or even permit the court to enquire' into whether the accused person is a potential danger to society. This is a further misdirection
by the Court *a quo*.

67. It is important to highlight that the person before court is accused of committing a serious and violent crime. Thus, by virtue of prior conduct, the likelihood that the accused person may in future pose a danger to society already exists.[28]

68. An inquiry into whether the accused person poses a potential danger to society involves a risk assessment, which has to be conducted by the psychiatrists. Section 79 of the CPA makes provision for the process to be employed in compiling medical reports, for presentation to the court, pending a determination in terms of section 77(6)(a). This includes: the information to be furnished by the public prosecutor to the psychiatric hospital; the

[28] At para 100

composition of the panel of specialists to examine the accused person; and the content of the report to be furnished to the court.

69. The risk assessment requires medical expertise, and cannot be conducted by the magistrate. Section 79(3) of the CPA which deals with the content of the medical reports does not prohibit a risk assessment and is not exhaustive, so as to be perceived to exclude a risk assessment.

70. The Court a quo misdirected itself in that it disregarded the submissions by the Respondents that the detention is not only for purposes of protection of society, but also for the treatment, care and rehabilitation of the accused person. Consequently, the detention is mandatory. The provisions of section 77(6) (a) are designed to ensure that an accused person with a mental disability who has an encounter with the criminal justice system is not simply released back into society without appropriate treatment.

71. The suggestion that there is a better way in which the Legislature could have couched the statute constitutes an interference with the principle of separation of powers. In any event there are, in place, safeguards to ensure that the accused person does not stay in the

hospital for an extended period unduly. It is also incorrect that an accused dealt with in terms of the impugned provision, would never be able to be released if his/her condition, whilst in detention, in prison or psychiatric hospital, is determined to be "incurable". The Judge in Chambers could release him/her conditionally, depending on the application, and facts put before the judge.

Judicial discretion and the right to fair trial

72. In *Momentum Life Assurers Ltd v Thirion ("the Momentum Case")* [29] Van Zyl J described the manner in which judicial discretion is to be exercised reasonably and in a judicial manner.

73. Section 77 of the CPA provides for the procedure to be followed when the accused's capacity to understand the proceedings is in question.

74. Judicial discretion is informed by medical expertise as occurs in section 77(1) of the CPA, in this instance the court has no discretion-

[29] [2001] JOL 9094 (C) at para 16

… *<u>the court shall direct</u> that the matter be enquired into and be reported on in accordance with the provisions of section 79."* (our emphasis).

75. The enquiry in terms of section 79 is conducted by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court. The Applicants seemingly accept that the legitimacy of court having no discretion in this regard, because it is not qualified to do so.

76. The same is true with section 78(2). it is also peremptory; if there is an allegation of mental defect, the accused <u>must</u> be assessed. There is an opportunity for the court to exercise its discretion as "*In any other case…"*

77. Section 77(6) contemplates an accused person who has been mentally observed in terms of section 77(1). The court does so once the enquiry in terms of section 77 has been conducted. The court, having assessed the report is satisfied that the person has a mental incapacity. At this juncture, the court may, on the

limited evidence available, conduct a factual enquiry into whether the accused has committed the offence and ask that the evidence be placed before court. The court must make a finding based on the available evidence and the expert reports.

78. The discretion of the presiding officer is only taken away once there is proof, on a balance of probabilities, that the accused committed the act, however, due to mental disability he or she cannot follow proceedings.

79. The wording of the impugned provisions grants the presiding officer an unfettered discretion in determining the following issues:

79.1. the presiding officer may order for the provision of the services of a legal practitioner in terms of section 3B of the Legal Aid Amendment Act, 1996 (Act No. 20 of 1996);[30]

79.2. where the reports by the clinicians in terms of section 79 of the CPA are unanimous and are not disputed by

[30] Section 77(1A) of the CPA

the State, the court may determine the matter on such report without hearing further evidence.[31]

79.3. On the other hand, if the reports are not unanimous and the State disputes the finding, the Court must permit the accused and the state to make representations and call witnesses, including the reports made in terms of section 79 of the CPA.[32]

79.4. The court should then make a finding based on the evidence presented and in so doing it exercises a discretion. [33]

80. Consequently, a presiding officer faced with an accused person such as Mr Stuurman and Mr Snyders, described in section 77, must depart from the normal criminal trial procedure and follow that which is prescribed in section 77 of the CPA, the objective of which is to protect the interests of the accused person.

81. It is the extent to which the legislation is prescriptive. It is acknowledged that the more prescriptive the legislation is with

[31] Section 77(2)
[32] Section 77(3)
[33] Section 77(4)

regard to the rights of the parties, the less room for the exercise of discretion is left.

82. The Courts however recognize that discretion must be confined, structured and checked by the Constitution and the law.[34]

83. It is therefore a misnomer to speak of unfettered discretion as the discretion conferred on the judicial officer is circumscribed.

83.1. Section 39(2) of the Constitution enjoins the courts , when interpreting legislation, to "*promote the spirit purport and objects of the Bill of Rights*";

83.2. In conjunction with this command, where possible legislation must be read in a manner that gives effect to the values of our constitutional democracy. Where legislation is capable of more than one interpretation, the one which is line with the Constitution must prevail.[35]

83.3. The Constitutional Court has held that the "reading in" exercise should be exercised with caution, in

[34] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* 2009(4) SA 222 at 268C-D para 121

[35] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd And Others In Re Hyundai Motor Distributors v Smith NO (Pty) Ltd and Others (Hyundai case)*2001(1) SA 545 (CC) at paras 22 and 24

cognizance of the principle of separation of powers between the judiciary and the legislature. [36]

84. This Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* 2009(4) SA 222 (CC) at 268C-D para 121 ("*DPP, Transvaal*") whilst recognising the importance of judicial discretion, held that such discretion is not unfettered. The Court noted that *"... discretion must be confined, structured and checked. This is the function of the Constitution and the law."*

85. It is submitted that if the court had taken into consideration the above as well as the submissions made by the Respondents on this issue, it wold never have reached the conclusion that the provisions are unconstitutional.

D. INTERNATIONAL LAW

86. It is submitted that in determining the constitutionality of the impugned provisions, it is imperative that the Courts, in interpreting rights entrenched in the Bill of Rights, must consider international law, and may consider foreign law.

[36] Ibid at para 24

87. Save for a cursory reference to one Canadian case, the Court *a quo* did not consider whether the legislative scheme regulating the detention of persons with mental disability fell short of international norms. The respondents argued that the legislation met the international standards.[37]

88. The court a quo expressed no view as to whether the scheme of the legislation was *in tandem* with the foreign law and international obligations on the treatment, care and rehabilitation of persons with mental disability.

89. The detention of persons with mental disabilities will occur in the normal course within and outside of the criminal justice system. Thus the detention envisaged in section 77(6) is no more than that which occurs in terms of the MHCA, and sanctioned by international conventions on the treatment of persons with mental disability.

[37] The Respondents referred the Court a quo to a plethora of international law and international conventions, not least of which is the *United Nations Principles for the Protection of Persons with Mental Illness.*

90. The constitutional imperative on interpretation of statutes should favour that which is consistent with international law over any alternative interpretation that is inconsistent with such law.[38]

91. The above provision must be read together with section 39, which provides that a court, tribunal or forum must consider international laws and foreign law, when interpreting the Bill of Rights.[39] In so far as it is clear that in its judgment, the Court *a quo*, does not seem to have considered the foreign case law and relevant instruments it was referred to, we argue that this was a misdirection.

92. The Court *a quo* erred, in so doing, as it would have been persuaded by international law, foreign case law and other international instruments which would have shaped its reasoning, and the outcome.

93. The Respondents contend that the impugned provisions are in line with international law. [40]

[38] Section 233 of the Constitution. of the Republic of SA 108 of 1996 s 233:
[39] Section 39(1)(a) and (b)
[40] Paras 11-13, Answering Affidavit, Precious Malebone Matsoso

94. In *Ex Parte G [*2009] JOL 22950 (KZN) par [19] the provisions of the MHCA which regulate the detention of the accused person were found to be consistent with South Africa's international obligations and international conventions.[41]

United Nations Principles for the Protection of Persons with Mental Illness

95. The MHC Act complies with the United Nations Principles for the Protection of Persons with Mental Illness, ("the UN Principles"). The Applicants do not allege otherwise. Actually, the Applicants do not claim that the conditions for treatment of involuntary patients offend against the principles laid down in the United Nations Principles.

96. Regarding involuntary admission, principle 16 provides for detention in certain circumstances.

97. Principle 17 enjoins domestic legislation to establish review bodies. Which-

    97.1. may either be a judicial or other independent or impartial body, working *in tandem* with qualified and independent mental health practitioners as advisors (principle 17.1);

[41] Ex Parte G at para [42]

97.2. take a decision to admit or retain an involuntary patient, a decision that must be taken as soon as possible, employing simple and expeditious procedures (principle 17.2);

97.3. shall periodically review the case of an involuntary patient, and failure to follow the prescribed procedure for involuntary admission shall result in the discharge of the patient (principle 17.3).

98. In terms of the UN Principles, it is not necessary for the review to convene before an involuntary patient is discharged. The principles also give authority to a health practitioner treating the patient to discharge an involuntary patient at any time if he or she believes it is no longer necessary to retain the patient (principle 17.6). The MCH Act, has limited the power to discharge an involuntary patient to the head of the health establishment treating the patient.

99. The right to appeal a decision of the review board is granted to the patient, or his representative before a higher court (principles 17.4 and 17.6).

100. Before the advent of the Constitution, our courts were acutely aware of the drastic consequences of involuntary detention

order issued pursuant to section 77(6)(ii) of the MCH Act. In 1957, the Supreme Court of Appeals, with reference to reception orders for the compulsory detention of mental patients.[42]

101. Obviously, the legislation relating to compulsory detention has changed fundamentally since 1957; where it was sufficient for a police office to haul a suspected mentally ill patient before a Magistrate for an order for involuntary detention; today, the provisions are more sensitive and measured. A member of the family or health care worker may, by way of an application, seek an order for involuntary detention from the court.

102. The mental condition of assisted and involuntary mental health care users is reviewed periodically, six months after the commencement of care, treatment and rehabilitation services, and every 12 months thereafter.

[42] *Rutland v Engelbrecht* 1957 2 SA 338 (A) at 339G

103. The head of the health establishment concerned must cause the mental health status of an assisted and involuntary mental health care user to be reviewed.[43]

104. Where the accused has been referred for observation, delays can occur due to a shortage of hospital beds. In *S v Joseph* 2007(1) SACR 496 the delay was eight months, but the court found, in the light of the reasons advanced, that this systemic delay was not unreasonable.

105. Risk management is a more realistic goal. Risk assessment is about comparing persisting states in which the patient committed violence to future states. The aim of risk assessment is to improve the quality of care. In order to assess risks, the psychiatrist has to know the patient. Second opinions can be very useful. Therefore, detention for purposes of observation is unavoidable.

106. There is conflict between the state's *parens patriae* capacity and police powers to maintain public order and the rights of

[43] Section 19 of MCH Act

individuals. The MCH Act strives to create an equilibrium between the two; for example section 77(6)(b)(ii), directs the Court to change the plea of guilty to not guilty once a finding is made in terms of section 77(6)(a) is set aside. Where the procedure for the inquiry has not been followed, the order can be set aside in the High Court by way of special review.[44]

107. South Africa is also signatory to the United Nations Convention on the Rights of Persons with Disabilities ("the CRPD") and its Optional Protocol concluded on 30 March 2007. In Article 1 the CRPD the objective of which is the realisation of full and unfettered rights for persons with disabilities.

108. It is submitted that the above Conventions are consonant with Government's commitment to its progressive culture of respect and protection of persons with mental disabilities.

Foreign Cases

[44] *S v Dewhurst* [2012] JOL 28786

109. The United States Supreme Court in *Jones v. United States*, 463 U.S. 354 (1983) upheld more draconian provisions than those under discussion in the present matter. In short, both the majority and minority judgments found that mandatory detention provisions following a finding that a criminal defendant is mentally incompetent, yet committed a criminal offence, are constitutional. The only difference in approach was in regards to the adequacy of review after mandatory detention was ordered.

110. The judgment of the Supreme Court of Canada in *R v. Swain* [1991] 1 S.C.R. 933 also dealt with a similar question, namely the *automatic detention* of a person who was acquitted due to mental illness. However, in that case, the statute in question did not provide for judicial review, and permitted the Lieutenant-General to decide whether to release the person. In fact, the law was so broad that the Lieutenant-General was not even obliged to ever consider the person for release, following their mandatory detention.

111. The judgment found that mandatory detention following a finding that a criminal defendant is mentally incompetent, yet committed a criminal offence, is constitutional, provided a proper opportunity

for review is provided thereafter. This argument was put before the Court a quo, but it was evidently not taken into account.

E. A JUSTIFIABLE LIMITATION

112. The Respondents pleaded in the alternative that the effect of the provisions constituted a justifiable limitation we have dealt with it in our affidavit. [45]

113. The state undertakes this obligation by enacting legislation and empowering the courts to adjudicate the protection of rights. A person who has been found to have committed a violent offence, even on a balance of probabilities such as the accused herein. The community must be protected from such persons.

114. Furthermore, it is in the public interest that a person with mentally disability who goes through the judicial process is detained order to determine firstly the extent of his disability and criminal liability as well as the proper administration of treatment if needs be.

[45] Vol 1, p117-118, paras 65-67, Answering Affidavit, Rodney De Kock: *The relevant authorities are the following: Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (11) BCLR 1116 (CC) at 1125, para 28 ; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para 23 and 31

115. It is significant that the UN Principles envisage detention of persons with mental disability as involuntary patients for treatment and care; the detention of persons with mental disability who go through the criminal judicial system is not considered constitutionally or otherwise objectionable in an open and democratic societies based on dignity, equality and freedom.

116. Where the deprivation of the right to freedom occurs, it is important that the following safeguards are in place:[46]

116.1. an unrestricted reconsideration of the grounds for the detention and continued detention;

116.2. the conditions for the deprivation is very closely tailored to the purpose it is intended to serve and goes no further than is absolutely necessary to achieve its objective.

117. Consequently, the important public objective sought to be achieved by the deprivation mechanism under consideration, in relation to

[46] *De Lange's* Case at paras 39 -41

its narrow formulation and in-built safeguards constitutes "just cause" under section 12(1)(a) of the 1996 Constitution.

118. The European Court of Human Rights indicates that any detention imposed to protect public health must a) comply with the principle of proportionality; b) demonstrate a lack of arbitrariness; c) be the measure of last resort; and d) have as its objective not only protection of the healthy but also care of the ill.

119. Article 5.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,("the Convention"), inter alia excludes the following forms of detention, from the "right to liberty and security of person" for certain circumstances where the person is in contempt of court, to ensure compliance with prescribed legislation and inter alia the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.[47]

120. Principle 20 of the United Nations Principles envisages the detention of persons who are detained in the course of criminal

[47] Article 5.1 (b) and Article 5.1(e)

proceedings who have a mental illness or who may have a mental illness. [48]

121. The UN Principles also envisage the detention of a person with mental disability. [49]

122. In *Coetzee v Government of the RSA*,[50] the Constitutional Court acknowledged that, the court referred to the following examples: detention of illegal immigrants; segregation of persons with highly infectious diseases; custodial orders in terms of mental health legislation; and arrest in order to establish or confirm jurisdiction of a person seeking to flee the country so as to avoid civil liability.

123. With regard to the fair procedure aspect of the right to freedom: the "(fair) trial" prescribed by section 12(1)(b) requires, a hearing presided over or conducted by a judicial officer in the court structure established by the 1996 Constitution which section 165(1) has vested the judicial authority of the Republic.

[48] Principle 20.1
[49] Principle 16 and 17 discussed in detail above
[50] 1995 10 BCLR 1382 (CC), 1995 4 SA 631 (CC) par [48]

124. The magistrate or presiding officer enjoys the judicial independence which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law is expressed thus in section 165 of the Constitution.

125. Due to its independence, it is understood that the judiciary is free from influence by any officers of state: only judicial officers may, consistent with the proper separation of government powers, commit recalcitrant witnesses to prison. Judicial officers enjoy complete independence from the prosecutorial arm of the state, and are therefore well-placed to curb possible abuse of prosecutorial power.

126. In *Nel v Le Roux* this Court held that the "trial" envisaged by the right not to be detained without trial did not "in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in section 25(3) of the [interim] Constitution" but in most cases required "the interposition of an

impartial entity, independent of the executive and the legislature to act as arbiter between the individual and the state". [51]

127. Considerations of public interest and the countervailing claims of other constitutional values are capable of serving as a basis for limiting dignity rights. It must be borne in mind, however, that, in any limitations analysis, dignity is considered in the balancing, proportionality test. Section 36(1) requires that limitations, including those of the right to dignity, be "justifiable in an open and democratic society based on human dignity".

128. The important purpose served by the law and the adverse consequences that may flow if the law is set aside. There can be no doubt that the legislation serves an important purpose.

129. Consequently, it is contended that the Respondents who have special knowledge of the administration of the legislation are in the best position to explain away the limitation. The above argument in support of the limitation should weigh heavily in the Respondents favour.

[51] The child is diverted from the normal criminal trial and merely counselled

F. POINTS IN LIMINE

130. Unfortunately, the Court *a quo* treated the points *in limine* raised by the respondents with the same lightness. The Respondents had raised two points *in limine*, to wit, ripeness and no cause of action.[52] The judgment of the Court *a quo* only dealt with the issue of ripeness, and ignored the second point *in limine*. Although acknowledging that the point *in limine* raised were of a serious nature, the Honourable Court, however, concluded, *inter alia*, that the issues having been ventilated fully before it on the merits of the applications, it would be a waste of time to deal with the *in limine* points in its judgement.

131. The court, exercising its inherent right to regulate its own procedure[53] has often considered preliminary points in applications together with the substantive issues. This however should not prejudice any of the parties.

132. As a general proposition, it is true that an enquiry into a constitutional issue is objective. However, as a matter of procedure,

[52] Vol. 1 p 98- 100, paras 7 and 8, Answering Affidavit, Rodney de Kock dated 28 April 2010; Snyders Matter: paras 31- 35, Answering Affidavit, Rodney de Kock dated 28 April 2010

[53] Mukaddam v Pioneer Foods (Pty) Ltd and 2 Others (Legal Resources Centre as amicus curiae), 2013 (5) SA 89 (CC)

there must be a live issue between the parties, before the constitutional issue is raised.[54]

133. We submit that the court erred in its conclusion that it was in the interests of justice for the High Court, to decide the constitutional issues before the process in section 77(6)(a) of the CPA was concluded.

G. CONCLUSION

134. The Judgment of the Court *a quo* is mainly based on the perceived incongruity between sections 77(6) and 78(6) of the CPA. We submit that the interpretation and application of these provisions is inextricably linked with the provisions of the Mental Health Care Act. In determining the constitutionality of the impugned provisions in the CPA, it was imperative for the Court *a quo* to look at the legislative framework that governs the treatment of mentally disabled persons. Had the Court taken heed of the fact that Courts

[54] Ibid at para 42

are enjoined to contextualise their interpretation of provisions in an Act of Parliament, particularly in a constitutional dispensation, it would have found that it is inconsequential that the remedies which it feels ought to have been incorporated in the body of the impugned provision, were actually provided for, virtually in so many words, in section 47(6) of the MHCA. By failing to do the contextualisation exercise, the court *a quo* wrongly concluded that the legislation is unconstitutional and therefore invalid. Respectfully, we disagree.

135. The impugned provisions properly construed, are constitutional and serve a legitimate government purpose. The provisions give effect to the constitutional imperative of the Government of South Africa to protect the accused person, who has been found to have a mental disability, from: harm to himself or herself; from harming other people; from being harmed by others and in order to provide, care treatment and rehabilitation at a facility designed for that purpose.

136. The Court *a quo* failed to address fully the legal issues raised by the respondents. Both applications are premature as none of the

Magistrates had made an order for the detention of either Mr Stuurman or Mr Snyders, in terms of the impugned provisions.

137. Having considered the issues that were raised in the matter and having studied the judgment of the Court *a quo*, the Respondents are of the respectful view that the provisions in question are not unconstitutional.

138. In light of the aforegoing, it is submitted that the declarations of invalidity ought not to be confirmed.

D B Ntsebeza SC

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S Poswa-Lerotholi

Chambers, Sandton

26 October 2014