CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 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

and

CAPE MENTAL HEALTH	Amicus Curiae

Neutral citation:	*De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others* [2015] ZACC 21
Coram:	Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J
Judgment:	Leeuw AJ (unanimous)

Heard on: 17 November 2014

Decided on: 26 June 2015

Summary: Criminal Procedure Act 51 of 1977 — section 77(6)(a)(i) — capacity of accused to understand proceedings — constitutionally invalid to the extent that it mandates the imprisonment of an adult accused person — and to the extent that it mandates the hospitalisation or imprisonment of children

Criminal Procedure Act 51 of 1977 — section 77(6)(a)(ii) — capacity of accused to understand proceedings — constitutionally invalid — to the extent that it mandates the institutionalisation of accused

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ORDER

This is an application for confirmation of the order of the Western Cape Division of the High Court, Cape Town:

1. The declaration of invalidity made by the Western Cape Division of the High Court, Cape Town, on 5 September 2014 is not confirmed.

2. Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid to the extent that it provides for:

   (a) compulsory imprisonment of an adult accused person; and

   (b) compulsory hospitalisation or imprisonment of children.

3. The declaration of invalidity is suspended for a period of 24 months from the date of this judgment in order to allow Parliament to correct the defects in light of this judgment.

4. Section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid. From the date of this order section 77(6)(a)(ii) is to read as follows:

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

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002;

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

(cc) be released unconditionally."

5. The orders in paragraphs 2 and 4 are not retrospective.

JUDGMENT

LEEUW AJ (Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an application for confirmation[1] of a declaration of constitutional invalidity of section 77(6)(a)(i) and (ii) of the Criminal Procedure Act.[2] These confirmation proceedings concern the constitutionality of the impugned provisions to the extent that a presiding officer is required to institutionalise, imprison or place a

[1] Section 167(5) of the Constitution provides that—

> "[t]he Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[2] 51 of 1977. See [15] for the full text of section 77(6)(a).

mentally ill or an intellectually disabled accused person in a psychiatric hospital. Griesel J, in the Western Cape Division of the High Court, Cape Town (High Court) held that the impugned section is peremptory and thus inconsistent with the Constitution in that it infringes a mentally ill or an intellectually disabled person's right to freedom and security of the person[3] as well as children's rights.[4]

[2] A three-stage process governs the treatment of an accused suspected of lacking the capacity to understand court proceedings. First, an accused person is referred for observation in terms of section 77(1).[5] Second, an investigation into the mental capacity of the accused is conducted and reported on as prescribed by section 79.[6] Thereafter, the court has wide discretionary powers in terms of section 79(2)(c).[7]

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[3] Section 12(1) provides:

> "Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
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> (c) to be free from all forms of violence from either public or private sources;
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> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[4] Section 28, in relevant part, provides:

> "(1) Every child has the right—
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> . . .
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time,
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> . . .
>
> (2) A child's best interests are of paramount importance in every matter concerning the child."

[5] It is a fundamental principle of our criminal justice system that an accused must be able to understand the court proceedings as well as give proper instructions to his or her legal representative to enable him or her to conduct a proper defence. If the presiding officer is under the impression that the accused cannot understand the court proceedings due to a mental illness or "mental defect", he or she must direct that the mental capacity of an accused be investigated and reported on in terms of section 79 – this can be done at any stage in the proceedings.

[6] For the more serious offences referred to in section 77(6)(a)(i) this observation and report is to be conducted by two psychiatrists (and a clinical psychologist if the court so directs) and for less serious offences referred to in section 77(6)(a)(ii) the court shall direct that the accused be examined by one psychiatrist. In most instances, a "finding" of mental illness or "defect" is left to mental health experts.

[7] Section 79(2)(c) provides:

> "The court may make the following orders after the enquiry referred to in subsection (1) has been conducted—

[3] Third, if there has been a request by a prosecutor that the accused person be dealt with in terms of section 77(6) and the court has exercised its discretion to refer the accused to a court having jurisdiction in terms of section 75, then the processes of section 77(6) will apply. A "trial of the facts" may follow.[8] This is in order to assess whether, on a balance of probabilities, the accused was involved in committing the offence. If found to have committed a serious offence contemplated in section 77(6)(a)(i) "the court shall direct that the accused . . . be detained in a psychiatric hospital or prison pending the decision of a judge in chambers". In terms of section 77(6)(a)(ii), if it is established, on a balance of probabilities, that the accused committed a minor offence or has not been found to have committed any offence, "the court shall direct that the accused . . . be admitted to and detained in an institution".

The Parties

[4] The first applicant, Ms De Vos N.O., is a *curator ad litem* appointed by the High Court to represent Mr Stuurman, who has an intellectual disability. The second applicant, Ms Stuurman, is the mother of Mr Stuurman. The fourth applicant, Mr Calitz N.O., was appointed as *curator ad litem* by the High Court to represent Mr Snyders who also has an intellectual disability. The third applicant, Ms Snyders, is the mother of Mr Snyders. The respondents are the Minister of Justice and Constitutional Development, the Minister of Health and the Director of Public

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(i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine;

(ii) refer the accused at the request of the prosecutor to the court referred to in section 77(6) which has jurisdiction to try the case;

(iii) make any other order it deems fit regarding the custody of the accused; or

(iv) any other order."

[8] This assessment is about the act only and does not engage in any enquiry around the guilt of the accused. Section 77(6)(a) envisages two steps: (i) on the limited evidence available, whether it can be proved on a balance of probabilities that the accused committed the act in question; and (ii) taking into account the nature of the accused's incapacity, whether it would be in the interests of the accused to place information or evidence before the court to determine whether the accused has committed the act in question. See Kruger "Accused: Capacity to Understand Proceedings: Mental Illness and Criminal Responsibility" in *Heimstra's Criminal Procedure* Service 7 (2014) at 13-8 which characterises this process as a "trial of the facts".

Prosecutions, Western Cape (DPP). Cape Mental Health, a voluntary association and non-profit organisation working as a specialist organisation in the area of mental health, applied and was admitted as *amicus curiae* (a friend of the court).

Background

[5] Mr Stuurman and Mr Snyders face charges of murder and rape respectively. The proceedings in terms of section 77(6)(a) have been postponed pending the outcome of the constitutional challenge. Their matters commenced as separate applications that were subsequently consolidated and heard together in the High Court in light of the similarity of the relief sought. In the Stuurman matter, the accused was 14 years old when, in 2005, he allegedly stabbed a 14 year old girl to death. He was arraigned for murder in the Oudtshoorn Regional Court. He sustained a serious head injury at the age of five years which left him severely intellectually disabled. For this reason, the Magistrate referred him for observation in terms of sections 77(1)[9] and 78(2)[10] read with section 79[11] of the Criminal Procedure Act. He was evaluated by

[9] Section 77(1) provides:

> "If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79."

[10] Section 78(2) provides:

> "If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79."

[11] Section 79, in relevant part, provides:

> "(1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on—
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> (a) where the accused is charged with an offence other than one referred to in paragraph (b), 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; or
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> (b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—

three psychiatrists. They agreed that he would not be in a position to understand court proceedings, and could not appreciate the wrongfulness of his actions.

[6] In the Snyders matter, Mr Snyders, who is currently 35 years old, was charged with the rape of an 11 year old girl. When he appeared in the Magistrates' Court, he was referred for observation in terms of section 77(1) of the Criminal Procedure Act. He was assessed by three psychiatrists who unanimously found that he suffered from "moderate mental retardation". They found that he could not appreciate the wrongfulness of his conduct nor was he capable of understanding the court proceedings. They advised against an order declaring him a State patient because his cognition would never improve, given his intellectual disability. In this matter the Magistrate, without conducting the requisite factual enquiry, immediately issued a detention order in terms of section 77(6)(a)(i). This was then brought on special review before Griesel J and Henney J who referred the matter back to the Magistrate to comply with the procedure in terms of section 77(6)(a).

(i) 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;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.

. . .

(4) The report shall—

(a) include a description of the nature of the enquiry; and

(b) include a diagnosis of the mental condition of the accused; and

(c) if the enquiry is under section 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or

(d) if the enquiry is in terms of section 78(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause."

In the High Court

[7] In the Stuurman matter the constitutional validity of section 77(6)(a)(i) of the Criminal Procedure Act was challenged, and in the Snyders matter the challenge was to the constitutional validity of section 77(6)(a)(i) and (ii). The High Court held that in some circumstances it may be justified to detain a person with a mental illness or an intellectual disability, but further held that not every person with a mental illness or an intellectual disability is a danger to himself or to society. It held that section 77(6)(a) does not allow a presiding officer to: (i) determine whether an accused person continues to be a danger to society; (ii) evaluate the individual needs or circumstances of that person; or (iii) consider whether other options are more appropriate in the individual circumstances of the accused.

[8] The Court held that section 77(6)(a) operates in contrast to section 78(6). Section 78(6) deals with an accused who is found not to be criminally responsible for his actions at the time of the commission of the offence.[12] Further, where an accused

[12] Section 78(6) provides:

> "If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—
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> (a) the court shall find the accused not guilty; or
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> (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,
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> by reason of mental illness or intellectual disability, as the case may be, and direct—
>
> (i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—
>
> (aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;
>
> (bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
>
> (cc) . . .
>
> (dd) released subject to such conditions as the court considers appropriate; or
>
> (ee) released unconditionally;

is incapable of understanding court proceedings, section 77(6)(a) affords the presiding officer no discretion, whereas section 78(6) vests a discretion in a presiding officer to release the accused with or without conditions if the court deems it appropriate. No justification was found for this difference and for the absence of similar judicial discretion under section 77(6)(a). In reaching this conclusion, the High Court reasoned that the detention mandated by section 77(6)(a)(i) and (ii) could be arbitrary and lead to irrational results which amounts to an infringement of an accused's constitutional right to freedom and security of the person.

[9] The High Court also observed that section 77(6)(a) applies particularly harshly in respect of children. The detention requirements are invoked and the presiding officer has no discretion to consider alternative diversionary options available in terms of section 53 of the Child Justice Act.[13] The Court concluded that section 77(6)(a)(i) and (ii) unfairly discriminates against children with a mental illness or an intellectual disability. This discrimination, on the grounds of disability, is impermissible in terms of section 9(3) and (4) of the Constitution. This problem is compounded by the inadequacy of facilities for children in prisons and psychiatric hospitals.[14]

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

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

(bb) . . .

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

(dd) be released unconditionally."

[13] 75 of 2008.

[14] *De Vos NO and Another v Minister of Justice and Constitutional Development and Others* [2014] ZAWCHC 135; 2015 (1) SACR 18 (WCC) at para 62, where the Court held:

> "This infringement of the constitutional rights of children, bad as it is, is aggravated by the fact (as appears from the evidence placed before the court by [Cape Mental Health]) that both prisons and psychiatric hospitals have inadequate facilities for children. The results of [Cape Mental Health's] survey accord with the testimony of Prof Kaliski in [Mr Snyman's] criminal trial where he conceded: '[w]e don't have a hospital for juveniles who are mentally handicapped and out of control. We would like to have such places but we don't. . . . We don't actually have facilities.'"

[10] The Court dismissed the respondents' argument that any limitation of rights was justified. It ordered the suspension of the declaration of invalidity for 24 months in order to afford Parliament an opportunity to amend the legislation. In the interim, the Court read-in the relevant portions of section 78(6) into section 77(6)(a). This means that presiding officers have a discretion when deciding whether to detain an accused in a psychiatric hospital or prison, admit or detain a person in an institution or order the release of the person unconditionally or subject to certain conditions.

In this Court

[11] The applicants raise the same issues and grounds as they did in the High Court regarding the constitutional invalidity of the impugned provisions. The respondents submit that since the advent of the Constitution, an overhaul of mental health care policy was undertaken and a progressive policy that caters for the care, treatment and rehabilitation of a person with a mental illness or an intellectual disability was put in place. They contend that the impugned provisions are consistent with the Constitution in that they are rational and serve a legitimate government purpose. The respondents submit that a judicial discretion – in dealing with mentally ill or intellectually disabled persons who have been found, on a balance of probabilities, to have committed serious offences – could put society at risk.

[12] The crux of the difference between the parties is whether it is constitutionally permissible to deny a discretion to a presiding officer at the section 77(6)(a) stage.

The issues

[13] The issues to be determined are whether—

(a) this application is premature, as a result of pending Magistrates' Court proceedings;

(b) section 77(6)(a) is peremptory;

(c) section 77(6)(a) violates section 12 of the Constitution and, more specifically, whether—

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

(ii) section 77(6)(a)(ii) is constitutionally valid; and

(d) an infringement, if any, is justified.

Is the application premature?

[14] The respondents submitted that the application was premature because both matters were still pending in the lower courts. The High Court acknowledged that generally it is undesirable to adjudicate on constitutional issues before the conclusion of the relevant proceedings. It held that this is not, however, an inflexible rule and that the rule can be departed from where the interests of justice dictate. The determination of the constitutionality of the impugned section should not be an abstract exercise.[15] Rights have been threatened by section 77(6)(a) as the prospect of people being detained under this section is immediate. I cannot fault Griesel J for proceeding with the determination of the constitutional issues raised because it was in the interests of justice to do so.

Is section 77(6)(a) peremptory?

[15] Section 77(6)(a) provides as follows:

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

[15] *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 13.

whether the accused has committed the act in question and the court shall direct that the accused—

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

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

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

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

[16] The applicants contend that the impugned section provides for the compulsory incarceration or institutionalisation of accused persons who are found to be mentally unfit to stand trial and who have been found to have committed, on a balance of probabilities, the offence with which they are charged. This, they argue, is apparent from the word "shall" used in section 77(6)(a).

[17] The respondents submit that the impugned section is capable of being read in a manner that allows for discretion, in that "shall direct" can be read as "may direct".

[18] A principle of statutory interpretation is that "the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity".[16] In this instance, "shall" cannot be interpreted or rewritten to mean

[16] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

"may". "Shall" is an obligatory word and there is no justification for departing from the ordinary clear definition of "shall". Further, there are discreet and specified options available to a presiding officer and as a result, discretion is precluded.

[19] The ordinary meaning of section 77(6)(a) does not admit any ambiguity.[17] The impugned section provides for compulsory incarceration or institutionalisation of the accused person. I am of the view that section 77(6)(a) is peremptory.

Freedom and security of the person

[20] Having concluded that this section is peremptory, it is necessary to determine whether it offends the accused's right to freedom and security of the person. Accused persons dealt with under section 77(6)(a) require the protections guaranteed by section 12 of the Constitution because any possible institutionalisation or detention does not flow from the determination of their guilt by a court of law.

[21] Section 12(1), entitled "[f]reedom and security of the person", provides:

> "Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[22] Is an accused person who is admitted and detained in a psychiatric hospital, prison or institution, deprived of his freedom? In *H.L. v The United Kingdom*,[18] the European Court of Human Rights found that institutionalisation or hospitalisation constituted detention because "the health care professionals treating and managing the

[17] See generally *SATAWU and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 37.

[18] No 45508/99 ECHR 2004.

applicant exercised complete and effective control over his care and movements".[19] Yes, I agree, a court order in terms of section 77(6)(a) deprives a person of his freedom.[20]

[23] In *Bernstein*,[21] O'Regan J observed, in respect of the right to freedom and security of the person under section 11 of the interim Constitution,[22] that—

> "freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable."[23]

[24] O'Regan J, in her minority judgment, further held in *S v Coetzee*[24] that—

> "[there are] two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in [*Bernstein*], our Constitution recognises that both aspects are important in a

[19] Id at para 91.

[20] See also *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] ZACC 13; 2010 (6) SA 1 (CC); 2010 (11) BCLR 1116 (CC) at para 28 where the Court held:

> "An arrest and detention, by its nature, limits the freedom of a person. The right to freedom of the person is limited if the deprivation is done arbitrarily, or without just cause."

[21] *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein*).

[22] Section 11 provided:

> "(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
>
> (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

[23] *Bernstein* above n 21 at para 145.

[24] *S v Coetzee and Others* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) (*S v Coetzee*).

> democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the State wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair."[25]

[25] Thus, this right is aimed at protecting against the deprivation of a person's physical liberty without appropriate procedure (procedural aspect of the right)[26] and for reasons that are not acceptable (substantive aspect of the right).[27] As to what reasons are acceptable, depends on the circumstances of each case.[28]

[26] Ackerman J in *De Lange*[29] elaborated on the substantive component of the right, that there must be acceptable reasons for the deprivation. He held that the substantive component requires that the deprivation may not be arbitrary and that there must be just cause. Ackerman J explained that—

> "[t]he substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur 'arbitrarily'; there must, in other words, be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one."[30]

[27] This approach lays down a test that is clear, understandable and flows directly from the wording of section 12(1)(a). The deprivation of freedom must not be arbitrary and the reasons provided for the deprivation must be just. Each aspect of this

[25] Id at para 159.

[26] *Nel v Le Roux NO and Others* [1996] ZACC 6; 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 14.

[27] *S v Coetzee* above n 24 at para 159.

[28] *Nel* above n 26 at para 14.

[29] *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA (CC) 785; 1998 (7) BCLR 779 (CC).

[30] Id at para 23.

right serves a different purpose. Both aspects have to be satisfied in order for the impugned provisions to pass constitutional muster.[31]

[28] The courts have not pinned down what constitutes "just cause" in all cases: "[i]t is not possible to attempt, in advance, a comprehensive definition of what would constitute a 'just cause' for the deprivation of freedom in all imaginable circumstances".[32] In *De Lange* the Court held:

> "The law in this regard must be developed incrementally and on a case by case basis. Suffice it to say that the concept of 'just cause' must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole."[33] (Footnote omitted.)

[29] Section 39(1)(b) requires courts to interpret the Bill of Rights and our law in a way that complies with international law.[34] The United Nations Convention on the Rights of Persons with Disabilities[35] (United Nations Convention) reiterates and reinforces the constitutional obligation to ensure that the rights and freedoms of persons with disabilities are promoted.[36] The United Nations Convention requires that "the existence of a disability shall in no case justify a deprivation of liberty".[37]

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[31] Id.

[32] Id at para 30.

[33] Id.

[34] See *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 97 where Ngcobo J explained:

> "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."

[35] The United Nations Convention and its Optional Protocol were ratified by Parliament on 30 March 2007. Although the United Nations Convention has not been enacted into law in terms of section 231(4) of the Constitution, section 39(1)(b) still requires this Court to consider international law when interpreting the Bill of Rights.

[36] Article 4(1) provides:

> "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
>
> (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

[30] It is clear from article 14 that one cannot remove persons with mental illnesses or intellectual disabilities from society for the mere fact that they have mental illnesses or intellectual disabilities. Further, the protections available to other accused persons must equally be available to them.

[31] The question, in light of both section 12 and article 14, is then whether there is a rational connection between the deprivation and the objective to treat and care for

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(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights."

[37] Article 14 provides:

"1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation."

the accused as well as to secure the safety of the accused or the community and whether the provision mandates the deprivation of freedom based on the presence of mental illness or intellectual disability alone. In terms of section 77(6)(a)(i), I deal with alleged adult offenders and child offenders separately.

Section 77(6)(a)(i)

Hospitalisation

[32] The respondents submit that the objectives of the detention are to—

(a) protect members of the public from harm by the accused;

(b) protect the accused person from harming himself;

(c) prevent stigmatisation by other members of the community; and

(d) provide treatment, care and rehabilitation.

[33] The DPP before the High Court highlighted that the drafters of the Mental Health Care Act[38] were "painfully aware" of the balancing act between the rights of an accused person and the rights of the broader community. For this reason, the DPP contended that all accused persons with mental illnesses or intellectual disabilities who appear before a court must be referred for treatment irrespective of whether or not an offence has been committed.

[34] The theme of the Mental Health Care Act has commendably moved to a community care focus.[39] In addition, safeguards have been built in to the Criminal Procedure Act by having a "trial of the facts" under section 77(6). The purpose of section 77(6)(a)(i) is to ensure that a person who is found unable to understand court proceedings by reason of a mental illness or an intellectual disability and has been

[38] 17 of 2002.

[39] Section 8(2) provides:

> "Every 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*." (Emphasis added.)

found to have committed a serious offence of murder or rape is placed in a system that is specifically designed to care, treat and rehabilitate such persons as well as to protect the interests of the broader public. The safeguards also meet the requisite bar of procedural protections that are in place accompanying the deprivation of freedom.

[35] This Court in *Carmichele* found that the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights, includes the right of the public to have its safety and security protected.[40] The simple fact is that the accused has been found to have committed a serious offence and precautionary measures must be taken.

[36] An accused person can only be discharged after an application has been made to a judge in chambers in terms of section 47 of the Mental Health Care Act. The application process in terms of section 47 requires relevant and detailed information to be placed in front of a judge in chambers.[41] It is the judge in chambers that is then best placed to decide whether the continued detention of the accused is necessary either for the purposes of care, treatment and rehabilitation or for the accused's safety or for the safety of the community. This is because the judge in chambers will be apprised of extensive information as required under section 47 of the Mental Health Care Act. This is a practical way of ensuring that the rights of the public are balanced against the rights of people with mental illnesses or intellectual disabilities.

[37] Cape Mental Health drew this Court's attention to the jurisprudence of the European Court of Human Rights which has affirmed that persons with mental illnesses or intellectual disabilities ought not to be deprived of freedom unless—

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[40] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 57.

[41] If an accused has been imprisoned or placed in a psychiatric hospital in terms of section 77(6)(a)(i) then section 47 of the Mental Health Care Act governs that accused's release. The Mental Health Care Act has a specific regime that operates in respect of State patients. An application may be made by the State patient; an official *curator ad litem*; an administrator, if appointed; the head of the health establishment at which a State patient is admitted; the medical practitioner responsible for administering care, treatment and rehabilitation services to a State patient; a spouse, an associate or a next of kin; or any other person authorised to act on behalf of the State patient, to a judge in chambers for the discharge of the State patient. An application can ostensibly be made straight after the court's pronouncement that the accused be admitted and detained in terms of section 77(6)(a)(i). However, only one application can be made every 12 months.

(a) the person can reliably be shown, upon objective medical evidence, to be suffering from a "true mental disorder";

(b) the "mental disorder" is of a kind or degree warranting compulsory confinement; and

(c) the validity of the continued confinement depends on the persistence of the "disorder".[42]

[38] The legislative scheme, as it applies to hospitalisation under section 77(6)(a)(i), meets these three substantive requirements and goes even further. The accused is properly and extensively evaluated in terms of section 79 of the Criminal Procedure Act. Once an accused is found not to understand court proceedings due to a mental illness or an intellectual disability, and a prosecutor requests that the accused be dealt with in terms of section 77(6)(a), and a court so directs, then a trial into the facts is undertaken. Only once the accused person is found to have committed a serious offence is he admitted to a psychiatric hospital. This precautionary measure is constitutionally permissible and any admission into a hospital will subsist no longer than is necessary.[43]

[39] Finally, the fact that section 78 provides for a wider discretion when dealing with accused persons, who at the time of the commission of the offence are found not to have had capacity, is of no moment. The distinction made between the options provided for under section 77(6)(a)(i) of the Criminal Procedure Act on the one hand, and section 78(6) on the other, is not irrational. They deal with different enquiries and different possible outcomes. Section 78 deals with a person who commits an offence and who, by reason of a mental illness or an intellectual disability, was incapable of appreciating the wrongfulness of the act or of acting in accordance with an

[42] *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 at para 39.

[43] In exceptional circumstances where the presiding officer is of the view that a person who has been found to have committed a serious crime on a balance of probabilities, but appears that he may not necessarily pose a threat to society, the presiding officer may order the particular case to be dealt with expeditiously by requiring that an application in terms of section 47 be brought before a judge in chambers within a particular time frame. This can be done, for example, by the legal representative on behalf of the family or the DPP as official *curator ad litem*.

appreciation of the wrongfulness of the act. If it is established that at the time of the offence the person did not have the requisite appreciation or ability to act in accordance therewith, the accused must, for that reason, be found not guilty. It is only then that the several options in section 78(6) become available. Sections 77 and 78 serve different purposes and that is why section 78(6) provides a wider range of options. An accused, dealt with in terms of section 78(6), may have no mental illness at the time of the court proceedings, in which case mandating hospitalisation would be patently irrational. Thus the different prescripts of the provision are but a red herring.

Imprisonment

[40] The finding that hospitalisation is arbitrary is not the end of the matter. The *amicus curiae* urges this Court to go further than the High Court and rule that imprisonment under this regime is constitutionally invalid. It emphasises that imprisonment (as opposed to institutionalisation) in these circumstances always violates a person's right not to be subjected to cruel, inhuman or degrading punishment and that the reasons provided to justify the deprivation do not constitute just cause.[44]

[41] Evaluating the "just cause" component requires an interrogation of the objectives of the provision. Committing someone to prison can be for numerous purposes: it can be to punish or to serve important public objectives.[45] In this instance, the purpose of the provision is not to punish.[46]

[44] Section 12 of the Constitution is provided in full at [21].

[45] In *De Lange* above n 29 the Court held that there was just cause in placing recalcitrant witnesses in prison under section 66(3) of the Insolvency Act. The Court held that there was an important public objective served, namely, to guarantee that insolvents and other persons who are in a position to provide essential information relating to an insolvency, do not evade supplying it.

[46] This is evidenced by the fact that if the accused has pleaded to the charge prior to his referral for mental observation in terms of section 79, and the finding is that he is not capable of following the proceedings so as to make a proper defence, the court shall neither acquit nor convict the accused in terms of section 106(4) of the Criminal Procedure Act. If the accused was convicted before the referral for mental observation, the conviction will be set aside. See section 77(6)(a) and (b).

[42] The respondents were at pains to emphasise that the purpose of the referral is to "assist the accused— for their care, treatment and rehabilitation." This was said to be the primary objective by the respondents. The aim of the provision is to facilitate therapeutic remedies.

[43] It should be noted that the Correctional Services Act[47] behoves the Department of Correctional Services to provide psychological services to detainees with mental illnesses or intellectual disabilities. However, the uncontested evidence presented by Cape Mental Health is that prisons do not have the facilities to provide appropriate treatment and care. This evidence appears to have been accepted by the Minister of Health before the High Court.[48]

[44] The only reason imprisonment may be necessary appears to be due to resource constraints; for example due to the shortage of beds in psychiatric hospitals which is equally common cause.[49] Is imprisonment then justified in the face of resource constraints?

[45] South Africa is a developmental State and certainly has vast resource constraints in making the rights in the Constitution a reality for all. In this instance, however, the State has a negative obligation not to deprive an accused person of his freedom arbitrarily and without just cause.[50] There is no internal limitation clause in section 12 of the Constitution which requires this Court to take cognisance of available resources.

[46] Further, accused persons with mental illnesses or intellectual disabilities have been historically disadvantaged and unfairly discriminated against. The use of prisons

[47] 111 of 1998.

[48] See also the Department of Correctional Services's 2012/2013 Annual Report at 73 which discloses that only 24% of inmates in South Africa's prisons who require psychological treatment in fact receive it.

[49] Muntingh M L *An Analytical Study of South African Prison Reform After 1994* (PhD Thesis, University of the Western Cape, 2011) at 375-6.

[50] As opposed to sections 26(2), 27(2) and 29(1)(b) of the Constitution which impose positive obligations on the State.

to "house" these vulnerable members of our society perpetuates hurtful and dangerous stereotypes. The right to dignity is not only a basic tenet of our Constitution; it is a value that is central to the interpretation of the section 12 right to freedom and security of the person. Imprisonment reinforces the stigma and marginalisation that people, like the accused in this matter, are subjected to on a routine basis. This impairs the human dignity of persons with mental illnesses or intellectual disabilities. The tenets of our Constitution dictate that accused persons, who are not considered dangerous, should not have their freedom curtailed in a manner that is tantamount to inhuman and degrading punishment in a way that impinges on their dignity and breaches their right not to be deprived of their freedom without just cause.

[47] Thus imprisonment is only viable as a "stop-gap" measure if the presiding officer is of the opinion that the State patient is likely to cause serious harm to himself or others. These instances are permissible as they serve the constitutionally mandated purpose of protecting the public.

[48] However, in instances where the evidence illustrates that the accused person is unlikely to cause severe harm to himself or others, a presiding officer should be able to craft an appropriate order for the State patient, pending the availability of a bed in a psychiatric hospital. The order could be akin to section 35(1)(f) of the Constitution[51] or the discretion in section 79(2)(c).[52] These safeguards will ensure that the procedural component of the right to freedom is not violated.

[51] Section 35(1)(f), entitled "[a]rrested, detained and accused persons", provides:

> "Everyone who is arrested for allegedly committing an offence has the right—
>
> . . .
>
> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

[52] Above n 7.

Children

[49] The Child Justice Act stipulates that the provisions of the Criminal Procedure Act apply "with the necessary changes as may be required by the context . . . except in so far as this Act provides for amended, additional or different provisions or procedures in respect of that person".[53]

[50] The Child Justice Act makes provision for preliminary inquiries.[54] The preliminary inquiry may be postponed for a period determined by the inquiry magistrate in the case where "the child has been referred for a decision relating to mental illness or defect in terms of section 77 or 78 of the Criminal Procedure Act".[55] These inquiries are pre-trial procedures, the purpose of which, amongst other things, is to establish whether the matter can be diverted before a plea or to identify a suitable diversionary option. In order for diversionary options to be considered, section 47(2)(b)(i) requires the inquiry magistrate to determine whether the child acknowledges responsibility for the alleged offence. The child, given the presence of a mental illness or an intellectual disability and the inability to understand court proceedings, cannot reasonably be expected to acknowledge responsibility. This means that diversionary options under the Child Justice Act – which are a form of punishment, albeit with a more rehabilitative emphasis – cannot apply.

[51] In terms of the Child Justice Act, the inquiry magistrate is then enjoined to refer the child to the child justice court.[56] However, the Child Justice Act makes it clear that the provisions of the Criminal Procedure Act apply unless stated otherwise. The Child Justice Act is however silent as to how to proceed once a child is found

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

[54] See chapter 7.

[55] Section 48(5)(b).

[56] Section 47(9)(c) provides:

> "If the prosecutor indicates that the matter may not be diverted, the inquiry magistrate must—
>
> . . .
>
> (c) inform the child that the matter is being referred to the child justice court to be dealt with in accordance with Chapter 9."

unable to understand court proceedings.[57] Thus, it seems that if the child is found unable to understand court proceedings, the Criminal Procedure Act applies, and the court will then make a decision in terms of section 79(2)(c). Here, a court has a wide discretion. The discretion exercised by the presiding officer in terms of section 79(2)(c)(ii), at that point, must be informed by (1) *prima facie* evidence presented by the prosecutor and (2) the best interests of the child. Section 28 of the Constitution mandates this.[58]

[52] However, if a child should find himself in a section 77(6)(a)(i) process, then the prescripts of the provision apply. The presiding officer will have no discretion to deal with the child appropriately.[59] Once engaged in a section 77(6)(a) process, the "trial of the facts" may reveal that the child did nothing at all or may reveal other important information that the presiding officer, under the current circumstances, would be unable to take into account. I, therefore, cannot conclude that detention – which must follow – is being used as a last resort as required by section 28(g) of the

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[57] Only section 48 refers to the possibility of postponing an inquiry for the purposes of evaluating the child's mental health in terms of section 77 or 78 of the Criminal Procedure Act.

[58] Section 28(1)(g) and 28(2) of the Constitution requires that children be detained only as a measure of last resort and the best interests of the child must be treated as "paramount". This Court found in *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at paras 25, 29 and 31 that—

> "[a]mongst other things section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.
>
> . . .
>
> The children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that '(a) child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail. It means that the child's interests are 'more important than anything else', but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment.
>
> . . .
>
> Detention must be a last, not a first, or even intermediate, resort; and when the child is detained, detention must be 'only for the shortest appropriate period of time'." (Footnote omitted.)

[59] See *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* [2007] ZACC (27); 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) at para 55 where this Court held: "Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case."

Constitution. Section 77(6)(a)(i) deprives courts of a discretion to deal appropriately with children who fall within the ambit of the impugned section. Thus, to the extent that section 77(6)(a)(i) applies to children, it is unconstitutional.

Section 77(6)(a)(ii)

[53] Section 77(6)(a)(ii) requires that if after the "trial of the facts" the presiding officer is of the view that the accused person committed no act or committed a minor offence, the presiding officer must order that he be institutionalised as an involuntary mental health care user. In the High Court, the DPP submitted that this is rational on the basis that the accused person still needs treatment.

[54] In terms of the Mental Health Care Act, a person who has a mental disability is able to be institutionalised only in discreet circumstances: (1) by consent; (2) by court order or Review Board; or (3) involuntarily. If the accused person is committed involuntarily, he may only be institutionalised if—

> "any delay in providing care, treatment and rehabilitation services or admission may result in the—
>
> (i) death or irreversible harm to the health of the user;
>
> (ii) user inflicting serious harm to himself or herself or others; or
>
> (iii) user causing serious damage to or loss of property belonging to him or her or others."[60]

Accordingly, without a court order, the accused would not be able to be institutionalised involuntarily unless (i), (ii) or (iii) above can be established. Thus, absent one of the above criteria, if an accused has committed no offence, institutionalisation cannot follow under the Mental Health Care Act. In effect, then, accused persons are more readily institutionalised under the Criminal Procedure Act without the ordinary safeguards prescribed by the Mental Health Care Act.

[60] Section 9(1)(c) of the Mental Health Care Act.

[55] The objective of treatment cannot alone justify institutionalisation as this fails to appreciate that mental illness is complex.[61] There are varying types and degrees of mental disability such that institutionalisation and treatment are not always required or appropriate. For example, an intellectual disability such as Down syndrome cannot be treated and institutionalisation or treatment will never improve such a cognitive condition.

[56] The applicants argue that this formula-based approach breaches the right to equality[62] and human dignity[63] in that it perpetuates harmful stereotypes and the assumption that all people with a mental illness or an intellectual disability are dangerous. Section 7 of the Constitution obligates the State to promote the right to equality, especially the rights of persons previously disadvantaged by past practices.[64] This includes persons with disabilities. In *Hoffmann* Ngcobo J held:

> "Our constitutional democracy has ushered in a new era – it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of

[61] Section 77 only applies to persons who are thought to have a mental illness or "mental defect". Mental illness is defined in section 1 of the Mental Health Care Act as meaning "a positive diagnosis of a mental health related illness in terms of accepted diagnosis criteria made by a mental health care practitioner authorised to make such diagnosis". Interestingly Professor Kaliski, in Kaliski "Does the Insanity Defence Lead to an Abuse of Human Rights?" *Afr J Psychiatry* 2012 (15) 83 at 85, notes that there is very little international consensus on what types of psychiatric disorders would constitute mental illness. It is also not clear from the Mental Health Care Act what is meant by persons with a "mental defect" as it is undefined. The difference between "mental defect" and mental illness is uncertain but psychiatrists seem to be in general agreement that the former refers to a "disorder characterised by cognitive impairment" (intellectual disabilities), while the latter refers to "psychotic or severe mood disorders". In addition, Down Syndrome South Africa was an *amicus curiae* before the High Court. They gave extensive evidence on the concept of a "mental defect" or intellectual disability. Intellectual disability is commonly associated with mental illness but people with an intellectual disability are not by virtue of that alone, ill. People with intellectual disabilities display difficulties in learning and understanding and are considered to have "an incomplete development of intelligence". An intellectual disability is the impairment of what are considered "general mental abilities" in the social domain, conceptual domain and/or the practical domain. Treatment options also vary extensively but are generally aimed at impulsivity, poor social learning-skills, low self-esteem, lack of education and occupational skills and limiting socialisation. Down Syndrome South Africa submits that the best option for an accused with an intellectual disability is to be placed in a rehabilitation centre and not in a psychiatric centre.

[62] Section 9.

[63] Section 10.

[64] Section 7(2) provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

> equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly."[65]

Evidently, this Court's equality jurisprudence illustrates that the existence of a disability alone cannot justify a deprivation of liberty.

[57] The "trial of the facts" does not provide for an appropriate procedural safeguard accompanying the deprivation, as the deprivation in section 77(6)(a)(ii) happens regardless of the outcome. The provision thus breaches the procedural component of the right. Further, the gulf between the automatic application of the provision and the objectives of treatment and safety is too wide. One cannot conclude that the objective behind the detention meets the purpose proffered. Section 77(6)(a)(ii), therefore, also breaches the substantive component of the section 12 right and is constitutionally invalid. Of course, in some circumstances it may be necessary to institutionalise the accused person, but the presiding officer must be able to decide this based on the evidence before him or her.

[58] If the person has been found to have committed no offence, the mere fact of coming into contact with the criminal justice system, cannot alone warrant institutionalisation. The dearth of reasons or justifications for mandating institutionalisation means that the only conclusion to draw from this is that the accused is being institutionalised because of the presence of a mental illness or an intellectual disability. Article 14 of the United Nations Convention requires states parties to ensure that "the existence of a disability shall in no case justify a deprivation of liberty".[66] Section 12 of the Constitution must be interpreted in light of this provision. Section 77(6)(a)(ii) therefore amounts to an arbitrary deprivation of freedom under section 12.

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[65] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 37.

[66] Above n 37.

Justification

[59] The Minister sought to justify the impugned provisions under section 36 of the Constitution. I could not, however, find any satisfactory justification for the infringement. The limitation on section 12 is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Remedy

[60] The High Court declared section 77(6)(a)(i) and (ii) of the Criminal Procedure Act constitutionally invalid. It limited the retrospective effect of that order and suspended the order of invalidity for 24 months in order to provide the Legislature with an opportunity to cure the defect. The High Court also read-in the discretionary options available to a presiding officer under section 78(6) into the impugned provisions of the Criminal Procedure Act.

[61] I have already detailed why I think it is rational and constitutionally permissible for the Criminal Procedure Act to treat accused persons under sections 77(6)(a) and 78(6) differently. Thus, I do not agree with the High Court's order that the provisions in section 78(6) be adopted verbatim.

[62] The High Court judgment does not deal with the interplay between the Mental Health Care Act and the Criminal Procedure Act. The Constitution does not prohibit Parliament from effectively dealing with potentially dangerous people who have a mental illness or an intellectual disability. This Court recognises that the interests of society are also at play. In recognising both, the appropriate remedy in this case requires a pragmatic approach.

[63] Section 77(6)(a)(i) operates rationally subject to certain qualifications. Imprisonment should only be available to accused persons who pose a serious danger to society or themselves. If an accused person does not pose a serious danger to society or themselves, then resources alone cannot dictate that an accused person be

placed in prison. If resources alone require an accused person to be kept in prison, then to this extent, section 77(6)(a)(i) is inconsistent with the Constitution and is invalid. If resources are significantly constrained such that a bed in a psychiatric hospital is unavailable, then a presiding officer should be able to craft an appropriate order that encompasses treating the accused as an outpatient, for example, by extending the bail conditions, or any other appropriate order pending the availability of a bed in a psychiatric hospital.

[64] In relation to children, a presiding officer must be afforded a discretion so as to ensure that detention is undertaken as a last resort and for the shortest possible period. In engaging the powers afforded to it under section 172, this Court must weigh up a number of considerations when crafting an order that is just and equitable. This Court is conscious that the remedy must not unduly trespass on the terrain of the Legislature.[67] It is also aware of the consequences and the impact violations will have on the right to freedom and security of an accused person with a mental illness or an intellectual disability.

[65] Section 77(6)(a)(i) is invalid to the extent that it mandates the detention of children and permits imprisonment based on resource considerations only. This order of declaration of invalidity will be suspended for a period of 24 months in order to allow the Legislature to remedy this defect. No order will be made for the interim period. The issue is complex and polycentric and is best handled by the Legislature. In the interim, section 49D of the Correctional Services Act gives some solace in that it requires that detained persons suspected of having a mental illness receive mental health care services.[68]

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[67] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 66.

[68] Section 49D, entitled "[m]entally ill remand detainees", provides:

> "(1) The National Commissioner may detain a person suspected to be mentally ill, in terms of section 77(1) of the Criminal Procedure Act or a person showing signs of mental health care problems, in a single cell or correctional health facility for purposes of observation by a medical practitioner.
>
> (2) The Department must provide, within its available resources, adequate health care services for the prescribed care and treatment of the mentally ill remand detainee.

[66] Section 77(6)(a)(ii) also operates rationally only in respect of an accused person who is likely to inflict harm to himself or others or requires care, treatment and rehabilitation. To the extent that section 77(6)(a)(ii) prescribes that *all* accused persons must be institutionalised, regardless of whether they are likely to inflict harm to themselves or others and do not require care, treatment and rehabilitation in an institution, it is inconsistent with the Constitution and stands to be invalidated. The mere fact that an accused person brushes shoulders with the criminal justice system is not a just cause for institutionalisation and renders the provision constitutionally invalid in respect of such persons.

[67] Thus, in respect of section 77(6)(a)(ii), unlike subparagraph (i), reading-in is appropriate. The provision can be remedied by extending the number of options available to a presiding officer after the "trial of the facts" reveals that the accused has committed either no offence or a minor offence. As was stated in *Manamela*, the purpose of the reading-in is to narrow the reach of the provision in order to avoid any undue breach of a right.[69] I heed the caution made in *Dawood* that where there are a number of options available to cure a constitutional defect, the courts should defer to the Legislature.[70] A reading-in, in this instance, accords firmly with the purpose of the legislation. It is also always available for the Legislature to amend the provision as it deems fit at a later stage, provided such amendment complies with this judgment and the Constitution.

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(3) The Department must, within its available resources, provide social and psychological services in order to support mentally ill remand detainees and promote their mental health."

[69] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) (*Manamela*) at para 56.

[70] *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 64 where this Court held:

> "Where, as in the present case, a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature."

Costs

[68] The applicants have succeeded in vindicating constitutional rights against the government. *Biowatch* applies.[71] The applicants are entitled to their costs. There should be no order as to costs in respect of the *amicus curiae*.

Order

[69] The following order is made:

1. The declaration of invalidity made by the Western Cape Division of the High Court, Cape Town, on 5 September 2014 is not confirmed.

2. Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid to the extent that it provides for:

   (a) compulsory imprisonment of an adult accused person; and

   (b) compulsory hospitalisation or imprisonment of children.

3. The declaration of invalidity is suspended for a period of 24 months from the date of this judgment in order to allow Parliament to correct the defects in light of this judgment.

4. Section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid. From the date of this order section 77(6)(a)(ii) is to read as follows:

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

      (aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002;

[71] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

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

(cc) be released unconditionally."

5. The orders in paragraphs 2 and 4 are not retrospective.

For the First and Second Applicants:	K Pillay SC and F Karachi instructed by Legal Aid South Africa.
For the Third and Fourth Applicants:	A Katz SC, K J Klopper and J Wilke instructed by Legal Aid South Africa.
For the Respondents:	D B Ntsebeza SC and S Poswa-Lerotholi instructed by the State Attorney.
For the Amicus Curiae:	I Goodman and L Kelly instructed by Webber Wentzel.