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SUMMARY AND ANALYSIS OF THE CRIMINAL PROCEDURE AMENDMENT BILL [B2B – 2017]

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1. INTRODUCTION

Chapter 13 of the Criminal Procedure Act 51 of 1977 (CPA) deals with the: ***Capacity of an Accused to Understand Proceedings: Mental Illness and Criminal Responsibility*** Sections 77, 78 and 79 of the CPA provide for procedures relating to the management of court processes and custody of remand detainees where mental illness affects the criminal proceedings.

When it appears to a court that due to a mental illness an accused person is: incapable of understanding the proceedings (section 77); or incapable of appreciating the wrongfulness of his or her actions (section 78); then the court is obliged to refer that person for observation. A panel of experts must be established to enquire and report on the mental condition of that person (section 79).

If the experts are unanimous in their findings and they are not contradicted by either the prosecutor or the accused, then the court can determine the matter on the basis of their reports without hearing further evidence.[2] On the other hand, where their findings are not unanimous or, if unanimous, are disputed by the prosecutor or the accused, 'the court shall determine the matter after hearing evidence'.[3]

- Where a court finds an accused is *incapable of understanding proceedings due to a mental illness* then in terms of section 77(6) the court ***must*** direct that:
  (i) in all cases where the charges are serious (murder, culpable homicide, rape or compelled rape, charges involving serious violence, or where the court considers

[1] Updated by P Whittle
[2] Section 77(2) of the CPA
[3] Section 77(3) of the CPA

it necessary in the public interest) and pending the decision of judge in chambers in terms of section 47 of the Mental Health Act[4] the accused **must** be detained, as a state patient,[5] in a psychiatric hospital **or correctional centre** (see section 77(6)(i)); and

(ii) for lesser offences (or no offence), the court must order the accused person be admitted to and detained in an institution and treated as an involuntary mental health care user in line with section 37 of the Mental Health Care Act[6] (see section 77(6)(ii)).

❖ Where a court finds that the accused person committed the offence but was *incapable of appreciating the wrongfulness of his or her actions due to mental illness* then the court, in terms of section 78(6), has ***a discretion*** to direct that:

(i) where the charges are serious (murder, culpable homicide, rape or compelled rape, charges involving serious violence, or where the court considers it necessary in the public interest) the accused should be (a) detained in a psychiatric hospital **or correctional centre** pending the decision of judge in chambers in terms of section 47 of the Mental Health Act; or (b) admitted and detained as an involuntary mental health care user in line with section 37 of the Mental Health Care Act; or (c) released (subject to conditions); or (d) released unconditionally.

(ii) for lesser offences; (a) the accused person be admitted to and detained in an institution and treated as an involuntary mental health care user in line with section 37 of the Mental Health Care Act; or (b) released (subject to conditions); or (c) released unconditionally.

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[4] Mental Health Act 17 of 2002 **– Section 47: Application for the Discharge of a State patient.** A person who is detained as a State patient remains in detention indefinitely until, on application made to a judge in chambers in terms of s 47 of the Mental Health Care Act, he or she is discharged. Such an application may be brought by the patient or by various other officials identified in s 47(1). The application must be accompanied by reasons for the application; by a report from a psychologist, if the patient has been assessed by such a person; and by the further information specified in s 47(2). Unless the application is made by an official curator ad litem, the application must be referred to such a curator to make the report specified in s 47(3). An application for discharge cannot be made within a period of 12 months from the dismissal of any prior application (s 47(4)(a)).

[5] According to the Mental Health a "State patient" is a person so classified by a court directive in terms of section 77(6)(a) or 78(6) of the Criminal Procedure Act.

[6] Mental Health Act 17 of 2002 – **Section 37: Periodic review and annual reports on involuntary mental health care users**:

(I) Six months after the commencement of care, treatment and rehabilitation services, and every 12 months thereafter, the head of the health establishment concerned must cause the mental health status of an involuntary mental health care user lo be reviewed.

(2) Such review must state the capacity of the mental health care user to express himself or herself on the need for care, treatment and rehabilitation services; state whether the mental health care user is likely to inflict serious harm on himself or herself or other people; state whether there is other care, treatment and rehabilitation services that are less restrictive or intrusive the right of the mental health care user to movement, privacy and dignity; and make recommendations regarding a plan for further care, treatment or rehabilitation service. ..

(3) The head of the health establishment must submit a preliminary report of the review

(4) Within 30 days after receipt of the report, the Review Board must to the Review Board.

(a) consider the report including obtaining information from any relevant person;

b) send a written notice of its decision to the mental health care user, applicant, head of the health establishment concerned and head of the provincial department stating the reasons for the decision.

(5) (a) If the Review Board decides that the involuntary mental health care user be

(i) all care, treatment and rehabilitation services administered to the user must be stopped according to accepted clinical practices; and

(ii) the user, if admitted, must be discharged by the health establishment concerned, unless the user consents to the care, treatment and rehabilitation services.

(b) The head of the Health establishment must comply with the decision of the Review

(6) The Registrar of the High Court must be notified in writing of a discharge made - and discharged-- Board. in terms of this section.

The Courts have identified certain challenges with the sections of the CPA dealing with an accused person with a mental illness. The proposed amendments to sections 77, 78 and 79 which are set out in the Bill emanate largely from the judgements of **two** court cases as follows:

(a) The Constitutional Court in the case of ***De Vos N.O and Others v Minister of* Justice *And Constitutional Development and Others*** 2015 (2) SACR 217 (CC) which found sections 77(6)(a)(i) and (ii) to be invalid and unconstitutional.

The Constitutional Court gave Parliament 24 months from the date of the judgment (26 June 2015) to correct the defects in the legislation.

(b) The findings of the Western Cape High Court in the case of ***S v Pedro (B247/11) [2015] (1) SACR 41 (WCC)*** which identified certain challenges with the composition of the assessment panel in section 79.

Comment

- Parliament has until 26 June 2017 to correct the defects in section 77 and to comply with the Constitutional Court deadline emanating from *De Vos N.O and Others v Minister of Justice And Constitutional Development and Others* 2015 (2) SACR 217 (CC).

2. COURT CASES

This section provides a brief background to; (i) the De Vos case (the judgments in the Western Cape High Court and Constitutional Court); and (ii) the Pedro case (the judgment in the Western Cape High Court).

2.1 Western Cape High Court: *De Vos N.O and Another v Minister of Justice and Constitutional Development and Others; In Re: Snyders and Another v Minister of Justice And Constitutional Development and Others* 2015 (1) SACR 18 (WCC)

This matter involved two applications (which were consolidated) concerning two persons, Mr Llewellyn Stuurman and Mr Pieter Snyders both with mental disabilities who found themselves in conflict with the criminal justice system, facing charges of murder and rape respectively.

Mr Stuurman was charged with murder, having allegedly stabbed a 14-year-old girl to death on 10 June 2005 when he was also 14 years old. During the course of the trial in the regional court in Oudtshoorn, he was referred by the court for observation in terms of sections 77(1), 78(2) and 79(2) of the CPA. It appeared from the evidence that Mr Stuurman had sustained a serious head injury at the age of 5, which left him severely mentally handicapped. The three psychiatrists who examined him were unanimously of the view that he would be unable to understand basic court proceedings.

Mr Pieter Snyders was born with Down syndrome and as a result had cognitive challenges. In 2013, he was arrested and charged with the rape of an 11-year-old girl. When Mr Snyders appeared at the Blue Down's Magistrate's Court, he was referred in terms of s 77(1) of the Act to an enquiry to ascertain whether or not he had the capacity to understand the proceedings. The unanimous finding of the members of the panel were that Mr Snyders was born with Down syndrome with moderate mental developmental challenges. He was accordingly found to be 'not fit to stand trial' on the basis that he was 'not able to appreciate the wrongfulness of the alleged offence and act accordingly'.

The applicants had approached the court to question the constitutionality of sections 77(6)(a)(i) and (ii) of the CPA on the basis that the '*compulsory detention'* provided for in those sections was unconstitutional because it infringed or threatened the rights of the accused persons in question to equality (section 9), dignity (section 10), freedom and security of the person (section 12), as well as the rights of children, as contained in section 28(1)(g), read with section 28(2) of the Constitution.

In the words of the court, '*in a nutshell, the problem concerns the fate of persons who, by reason of mental illness or intellectual disability, are unfit to be tried*.'[7] The High Court noted while in some circumstances it may be justifiable to detain a person with a mental illness or an intellectual disability, *not every person with a mental illness or an intellectual disability is a danger to himself/herself or to society*.[8] The Court held that:

- Section 77(6)(a) does not allow a Presiding Officer to:[9] (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.
- There was no justification for the differences between section 77(6) and section 78(6). For instance, section 78(6)(i) and (ii) provide that a judicial officer has the ***discretion*** to release an accused (with or without conditions) if such release is deemed appropriate by the court.
- Section 77(6)(a) has a particularly harsh impact on children because the presiding officer has no discretion to consider alternative options such as the range of diversionary options set out in section 53 of the Child Justice Act.[10] This amounted to discrimination against children on grounds of disability. The situation was compounded by the inadequacy of facilities for children in prisons and psychiatric hospitals.

Ultimately, the Court found that the provisions of section 76(a)(i) and (ii) of the CPA were inconsistent with the Constitution and invalid on the basis that they infringed a mentally ill or

[7] De Vos N.O and Another v Minister of Justice and Constitutional Development and Others; In Re: Snyders and Another v minister of Justice and Constitutional Development and Others (4502/10, 5825/14) 2015 (1) SACR 18 (WCC); (Accessed at http://www.saflii.org/za/cases/ZAWCHC/2014/135.pdf) para [2]
[8] *De Vos N.O and Another v Minister of Justice and Constitutional Development and Others; In Re: Snyders and Another v Minister of Justice And Constitutional Development and Others* 2015 (1) SACR 18 (WCC)
[9] De Vos N.O and Others v Minister of Justice And Constitutional Development and Others 2015 (2) SACR 217 (CC) para [7]
[10] De Vos N.O and Another v Minister of Justice And Constitutional Development and Others; In Re: Snyders and Another v Minister of Justice And Constitutional Development and Others 2015 (1) SACR 18 (WCC) para [62]

intellectually disabled persons right to freedom and security of the person as well as children's rights.[11]

Although the Court felt that it would be appropriate to suspend the declaration of invalidity for 24 months so as to afford Parliament an opportunity to correct the defect it was also concerned that leaving the sections unchanged in the interim would mean that an unsatisfactory and unconstitutional state of affairs would persist. Therefore, the Court decided, in the short term, during the period of suspension, to order '*a temporary reading-in*' so as to afford judicial officers dealing with a section 77(6) situation the same discretionary options available under section 78(6)(i) and (ii) of the CPA.[12]

2.2 Constitutional Court: *De Vos N.O and Others v Minister of Justice And Constitutional Development and Others 2015 (2) SACR 217 (CC)*

In its judgement on the application for confirmation of the Western Cape High Courts declaration of constitutional invalidity of section 77(6)(a)(i) and (ii) of the Criminal Procedure Act the Constitutional Court found that:[13]

- **There is no discretion for the presiding officer**: The ordinary meaning of section 77(6)(a) does not admit any ambiguity. It provides for compulsory incarceration or institutionalisation of the accused person in in a psychiatric hospital or correctional centre.
- **It amounts to an arbitrary deprivation of freedom**: A court order in terms of section 77(6)(a) deprives a person of his or her freedom. Section 12(1)(a) of the Constitution is clear. Any deprivation of freedom must not be arbitrary and the reasons provided for the deprivation must be just.

[11] Ibid
[12] The Western Cape High Court issued the following order:
(a) It is declared that sub-paragraphs 77(6)(a)(i) and (ii) of the Criminal Procedure Act, 1977, are unconstitutional.
(b) The declaration in para (a) above is not retrospective and its effect is suspended for 24 months to afford the legislature an opportunity to cure the invalidity.
(c) During the period of suspension, section 77(6)(a)(i) is deemed to read as follows (words inserted by this order are underlined and words omitted are deleted):
'(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~~
(aa) detained in a psychiatric hospital or prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;
(bb) 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;
(cc) released subject to such conditions as the court considers appropriate; or
(dd) released unconditionally.'
(d) During the period of suspension, sub-paragraph 77(6)(a)(ii) is deemed to read as follows (words inserted by this order are underlined):
'(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;
(bb) released subject to such conditions as the court considers appropriate; or
(cc) released unconditionally.'
[13] De Vos N.O and Others v Minister of Justice And Constitutional Development and Others 2015 (2) SACR 217 (CC)

- **Resource constraints are not a justification**: 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. The court queried whether imprisonment could be justified in the face of resource constraints. The tenets of the Constitution dictate that accused persons, who are not considered dangerous, should not have their freedom curtailed; (i) in a manner that is tantamount to inhuman and degrading punishment; (ii) in a way that impinges on their dignity; and (iii) breaches their right not to be deprived of their freedom without just cause.[14]
- **Imprisonment is only viable as a "stop-gap" measure in certain circumstances**: For instance, if the presiding officer is of the opinion that the accused is likely to cause serious harm to himself/herself or others. These instances are permissible as they serve the constitutionally mandated purpose of protecting the public. 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 have the discretion to craft an appropriate order for the State patient, pending the availability of a bed in a psychiatric hospital.[15]
- **The application of the section to children is of particular concern.** The Court was perturbed that section 77(6)(a) applies particularly harshly in respect of children. This was because the presiding officer has no discretion to consider alternative diversionary options which are available in terms of section 53 of the Child Justice Act.[16]
- **Safeguards in the Mental Health Act are lacking in the CPA.** The Mental Health Act provides that a person who has a mental disability is to be institutionalised only 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*." 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. 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. Imprisonment should only be available to accused persons who pose a serious danger to society or themselves.[17]

However, unlike the High Court the Constitutional Court was of the view that it was rational and constitutionally permissible for the Criminal Procedure Act to treat accused persons under sections 77(6)(a) and 78(6) differently. Consequently, the Court did not agree with the High Court's order that the options provided in section 78(6) be 'read in' to section 77(6)(a)(i).

The Constitutional Court held that in engaging the powers afforded to it under section 172 of the Constitution, it must weigh up a number of considerations when crafting an order that is just and equitable. This Court was conscious that the remedy must not unduly trespass on the terrain of the Legislature. The Court found that:[18]

[14] Ibid
[15] Ibid
[16] Ibid
[17] Ibid
[18] Ibid

- 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*.[19] 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. On this basis the court found that section 77(6)(a)(i) was invalid to the extent that it permitted imprisonment based on resource considerations only and mandated the detention of children. No order was made for the interim period.[20] The court held that the issue was complex and polycentric and best handled by the Legislature.

- 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. The mere fact that an accused person brushes shoulders with the criminal justice system is not a just cause for institutionalisation and this renders the provision constitutionally invalid in respect of such persons.[21] However unlike with section 77(6)(a)(i) the Court found that in the case of section 77(6)(a)(ii) 'reading in' was appropriate to extend the number of options available to a presiding officer where the accused has committed either no offence or a minor offence. In the Courts view 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.'[22]

[19] Ibid
[20] 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] 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.
(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."
[21] Para [66]
[22] Ibid para [67]

ORDER OF THE CONSTITUTIONAL COURT

(i) Section **77(6)(a)(i)** of the Criminal Procedure Act 51 of 1977 is 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.

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.

(ii) Section **77(6)(a)(ii)** of the Criminal Procedure Act 51 of 1977 is 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*."

2.3 Western Cape High Court: *S v Pedro* [2015] (1) SACR 41 (WCC)

In terms of section 77(1) and 78(2) of the CPA, a court can refer an accused at any stage of the trial for a psychiatric assessment of his or her mental state. The accused is usually admitted to a state psychiatric hospital under a warrant for a period of observation of 30 days. Section 79 of the Criminal Procedure Act deals with the constitution of the panel which is established for this assessment. According to the CPA:[23]

- In section 79(1)(a) which provides for cases involving 'less serious offences', the court shall appoint a single psychiatrist to perform the observation on behalf of the state. These cases include all non-violent or less violent/minor violent cases, including common assault, as well as property offences such as theft, common robbery, housebreaking, trespassing and malicious damage to property.[24]

- In section 79(1)(b), which provides for all cases where the accused is charged with '*murder, culpable homicide, rape or another charge involving serious violence or if the court considers it necessary in the public interest*', there is a need for a 'full panel' enquiry consisting of:

[23] Schutte T, (2013). 'Single' v. 'panel' appointed forensic mental observations: Is the referral process ethically justifiable? The South African Journal of bioethics and Law (Accessed at http://www.sajbl.org.za/index.php/sajbl/article/view/286/317)

[24] Swanepoel M 2015 Legal Aspects with Regard to Mentally Ill Offenders in South Africa (Accessed at http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/pper/issuepages/2015volume18no1/PERSwanepoelNote2015(18)1.pdf)

- A psychiatrist acting on behalf of the state (either the medical superintendent of the hospital where the accused is under observation or a psychiatrist appointment by the medical superintendent at the request of the court) (section 79(1)(b)(i))
- A psychiatrist (who is not in the fulltime service of the state) who is appointed by the court (***unless the court directs otherwise upon application by the prosecutor in accordance with directives issued under s79(13)***) (section 79(1)(b)(ii))
- A psychiatrist appointed for the accused by the court (section 79(1)(b)(iii)); and
- where the court directs by a clinical psychologist (section 79(1)(b)(iv)).

The matter before the High Court in the *Pedro* case involved the establishment of a psychiatric panel to report on the mental health of the accused. The court of first instance in the matter, the Outsdhoorn Magistrate Court, had not appointed a psychiatrist for the accused (who in most cases would be a state psychologist) nor was a private psychologist appointed. Section 79(1)(b)(ii) states that the court must appoint a (private) psychiatrist, unless directed otherwise by the prosecutor.

The Court noted that prior to the amendment of section 79(1)(b) by the Judicial Matters Amendment Act 66 of 2008, the section provided that the appointment of a private psychiatrist by the court was *mandatory*. However, in 2008 the Justice Department tabled legislation which amended this section on the basis that it was almost impossible to apply in some parts of the country (mainly Gauteng) due to the non-availability of private psychiatrists willing to do observations.[25] The amendments provided for in Act 66 of 2008 were intended to:

- Allow the courts to do away with the appointment of a psychiatrist by the court, but only **at the request of the prosecutor. The prosecutor would be permitted to make such a request only in accordance with directives issued by the National Director of Public Prosecutions**. The NDPP must issue these directives, setting out the cases and circumstances in which a prosecutor may make such a request.[26]

However, as the Court pointed out due to poor drafting **something went wrong in the formulation of the directives provided for in section 79(13).** [27] Instead of empowering the NDPP to issue directives regarding the cases and circumstances in which a prosecutor must apply to court ***'to dispense with'***, the appointment of a psychiatrist the directives provide for circumstances where. the prosecutor can apply '***for the appointment of a third psychiatrist'***:[28]

[25] The memorandum to the Bill makes it perfectly clear that the promoters of the bill, which was adopted unchanged, intended the amendments to have the effect of empowering the prosecutor to request the court to do away with psychiatrist and empowering the NDPP to issued directives setting out the circumstances in which prosecutors should make such requests.
[26] De Vos N.O and Another v Minister of Justice and Constitutional Development and Others; In Re: Snyders and Another v minister of Justice and Constitutional Development and Others (4502/10, 5825/14) 2015 (1) SACR 18 (WCC)Para [38]
[27] Para [45] The Court was told that these directives were duly made in consultation with the Minister and were duly submitted to Parliament.
[28] Para [60] 4. Factors that may be considered by a DPP in using his/her discretion to authorise or direct a prosecutor to apply for the appointment of a third psychiatrist for observation purposes include –
(a) the seriousness of the offence;
(b) the complexity of the evidence;
(c) whether the accused person wishes the court to appoint a psychiatrist of his or her choice; and

> 'Paragraph 1 of the directives records that the amended section 79 'provides for the appointment of a panel of only two psychiatrists, unless the prosecutor applies for the appointment of a third psychiatrist'.
>
> Paragraph 2 states that prosecutors may only apply for the appointment of a 'third psychiatrist', in accordance with s 79(1)(b)(ii), in terms of the written authority or directive from the relevant DPP.'

In light of the confusion over the interpretation of sections 79(1)(b)(ii) and 79(13) the High court's interpretation was that the following should apply - ***three psychiatrists, including a private psychiatrist, must be appointed when the case falls within s 79(1)(b) unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed***, in which case there must be two psychiatrists. In either event, the court may also appoint a clinical psychologist. The directives contemplated in s 79(13) are directives setting out the cases and circumstances in which prosecutors must request the court to dispense with the appointment of a private psychiatrist.[29]

The Court expressed the view that while State psychiatrists undoubtedly attempt to assist the court with what they regard as their independent expert views, the legislative requirement for a private psychiatrist must have been premised on the notion that the presence of such a psychiatrist on the panel would provide greater protection for the rights of the accused. In a broad sense, there is an institutional connection between the prosecution and the State psychiatrists, all being public servants. Where two State psychiatrists are on the panel, they will often be employed at the same psychiatric hospital. Considerations of collegiality might tend, subconsciously, towards consensus; or differences in seniority might result in one psychiatrist displaying some deference to the other. There is even danger that, due to the great pressure on State psychiatric resources, the primary assessment in respect of a particular accused will be left to one of the State psychiatrists, with the other providing more of a supporting role.[30]

There is nothing to indicate that the policy considerations in favour of appointing a private psychiatrist have disappeared. What can be accepted, though is that the appointment of a private psychiatrist will always entail expense for the State; and that it may not always be easy to find a private psychiatrist willing to accept appointment. The Court acknowledged that it could well understand that, in the circumstances, the judicial officer should be vested with a discretion to dispense with the appointment of a private psychiatrist if such a request were properly motivated.

(d) the history of the particular accused person (e.g. previous observations of the accused person).
5. Where an application is brought for the appointment of a third psychiatrist and the accused person is not legally represented, the prosecutor must request the court to consider the appointment of a legal representative for the accused person in terms of section 77(1A) of the Criminal Procedure Act, 1977.

[29] Para [69]
[30] Para [52]

> 'However, the effect of the interpretation advanced on behalf of the Minister and DPP is that the court does not have the power to appoint a private psychiatrist unless the prosecutor makes application for such appointment. I cannot conceive that the lawmaker intended to place it in within the power of the prosecutor to determine, unilaterally, that there should be no private psychiatrist. The decision as to whether a private psychiatrist should be appointed would ultimately be in the hands of the court.'[31]

In its conclusions the court in the *Pedro* case identified a number of challenges with section, 79, namely:[32]

(i) The term 'medical superintendent' is out dated no longer exists in psychiatric hospitals and should be amended to conform with current terminology at psychiatric hospitals.

(ii) In respect of section 79(1)(b)(ii), the appointment of a private psychiatrist is mandatory, unless the court upon application from the prosecutor, directs that the appointment of a private psychiatrist may be dispensed with.

(iii) The directives contemplated in section 79(1)(b)(ii) read with section 79(13) are directives regarding the cases and circumstances in which the prosecutor must apply to the court ***to dispense with*** the appointment of a private psychiatrist.

(iv) Pending the revision of the directives which have been issued by the NDPP in terms of section 79(13), the directives currently in existence should be construed as determining the circumstances in which the prosecutor should apply to the court to dispense with the appointment of a private psychiatrist. ***It is, however, desirable, to avoid confusion, that the directives issued by the NDPP be revised to conform with the declared meaning of s 79(1)(b)(ii) as soon as may be expedient***.

Comment

- The Court in the *Pedro* case expressed concern over the absence of a legislative procedure to ensure the DPP receive periodic reports as to the mental health status of a person who has been referred for detention in terms of section 77(6)(a)(ii) of the CPA.[33] The prosecution of such a person should ordinarily proceed if the accused recovers sufficiently to be able to understand the proceedings. *The Department of Justice and Constitutional Development, however, assured the Portfolio Committee during deliberations on the bill that there are protocols in place between the DPP and the mental health care authorities regarding to ensure the prosecution service is timeously informed of relevant developments in the accused's mental health status.*

[31] Para [53].
[32] Para [116]
[33] Para [114]

3. ANALYSING THE CPA BILL [B2B – 2017]

Essentially, the key amendments proposed by the CPA Bill [B2B – 2017] seek to address the:

- Use of the term 'mental defect' which is offensive and inappropriate.
- Lack of discretion for a presiding officer when applying section 77 of the CPA.[34]
- Unconstitutionality of the compulsory incarceration or institutionalisation of an accused person in a prison which amounts to an arbitrary deprivation of freedom.
- Need to provide the courts with a wider range of options in respect of orders to be issued in terms of section 77 in cases of findings that accused persons are not capable of understanding criminal proceedings.
- Challenges with the composition of the panel of experts that must be established in terms of section 79 to assess the mental health of an accused.

3.1 Section 77 – Capacity of accused to understand proceedings

The proposed amendments to section 77:

- Delete the reference in section 77(1) to 'mental defect' and replace it with 'intellectual disability'.
- Introduce judicial discretion in section 77(6)(a) by providing that the court **MAY** direct that the accused be detained.
- In those cases, where the charges against the accused are serious (murder, rape etc):
  - Delete the reference in section 77(6)(i)(aa) to 'prison' and provide instead in section 77(6)(ii)(bb) that a presiding officer may order '*temporary detention'* in a correctional health facility of a prison if a bed is not available for that person in a psychiatric hospital (to which the accused should be to be transferred when a bed does become available) in those cases where the accused poses a serious threat to him or herself or members of the public. The detention in a psychiatric hospital or prison is only until a judge in chambers makes a decision in terms of section 47 of the Mental Health Care Act.
  - Insert additional options to provide that a presiding officer may direct that an accused person be admitted and detained in a designated health establishment as if he or she were an involuntary health care user (section 77(6)(i)(cc)); or be released subject to such conditions as the Court considers appropriate (section 77(6)(i)(dd)).

- In those cases, where the charges are less serious provide additional options in section 77(6)(ii) for the presiding officer to order the accused is:
  - Released subject to such conditions as the court considers appropriate (section 77(6)(ii)(bb))
  - Released unconditionally where the court has found the accused has not committed any offence (section 77(6)(ii) (cc)).

[34]Rickard C, A case for the mentally disabled, 14 November 2014 (Accessed at http://mg.co.za/article/2014-11-13-a-case-for-the-mentally-disabled)

- Provide in section 77(9) that, in the case of a successful appeal against a finding that an accused person is capable of understanding the proceedings, the matter must be referred back to the court that made the finding for that court to deal with.

Comments / Questions

- ***Consultation by the Department of Justice and Constitutional Development***
  - According to the Department it had consulted with the Department of Health and other experts in the mental health field about the use of the term 'intellectual disability'.
  - A task team consisting of the Departments of Justice, Health Correctional Services, the NPA and South African Police Services worked together in drafting a Bill. Cape Mental Health and the Commission on Gender Equality submitted comments during public consultation process. The Constitutional Court held that the issues around section 77(6)(a)(i) were complex and polycentric and best handled by the Legislature.
  - No comments were received on the proposed amendments from members of the judiciary/magistracy.
- ***Temporary detention of an accused in a correctional health facility***. The amendments to section 77(6)(a)(i) and 78(6)(b)(i) provide that the court may, in the case of an accused who has committed a serious offence, order '*temporary detention*' in a correctional health facility (presumably because of resource constraints and limited capacity at psychiatric hospitals) until a bed becomes available in a psychiatric hospital.
  - The DCS White paper on Remand Detention notes that some remand detainees wait in a detention facility for more than two years for a bed in a mental health establishment.[35]
  - According to the DOJCD there are (i) protocols in place between the DCS and Department of Health to ensure the transfer of such persons once a bed in a psychiatric hospital does become available and (ii) established processes / protocols in place for the management of an accused who is 'temporarily detained' in a correctional health facility.
  - How effective is section 49D of the Correctional Services Act 111 of 1998 in providing that detained persons suspected of having a mental illness receive mental health care services?

3.2 Section 78 – Mental Illness or mental defect and criminal capacity

The proposed amendments to section 78:

- Delete the reference in the heading, sections 78(1), 78(1A) and 78(2) to 'mental defect' and replace it with 'intellectual disability.'

[35] DCS White Paper on Remand Detention Management in South Africa (March 2014) (Accessed at http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf)

- Delete the reference to the term prison in section 78(6)(i)(aa) and insert a new clause in 78(6)(i)(bb) to enable a presiding officer to order 'temporary detention' in a correctional health facility of a prison if a bed is not available for that person in a psychiatric hospital (to which the accused should be to be transferred when a bed does become available) in those cases where the accused poses a serious threat to him or herself or members of the public. The detention in a psychiatric hospital or prison is only until a judge in chambers makes a decision in terms of section 47 of the Mental Health Care Act.

3.3 Section 79 - Panel for purposes of enquiry and report under sections 77 and 78

The proposed amendments to section 79:

- Delete the reference in sections 79(1)(a), 79 (b)(i) and 79(4)(d) to '*medical superintendent of a psychiatric hospita*l' and replace it with '*head of the designated health establishment*.'
- Provide for a reference in section 79(1)(b)(ii) only to a 'psychiatrist appointed by the court' by deleting the proviso that such a psychiatrist '*is not in the fulltime service of the state unless the court directs otherwise upon the application of the prosecutor in accordance with directives issued under subsection 13 by the by the NDPP.'*
- Insert in section 79(1)(b)(iii) the proviso that any psychiatrist appointed by the court for the accused must only be appointed *on good cause shown and by application by the accused,*
- Insert in section 79(1A) the term '*mental condition*.'
- Delete in its entirety section 79(13) which provides for the directives that must be produced by the National Director of Public Prosecutions.

Comment

- In the *Pedro* case the Court noted a response from the Western Cape Director of Public Prosecutions (DPP) which highlighted the '*irreconcilable difference of opinion within the Western Cape office regarding the composition of psychiatric panels'*.[36] Apparently guidance was being sought from the National Director of Public Prosecutions. Perhaps some information could be provided on what these 'irreconcilable differences' were and whether these will be resolved by these amendments.
- In respect of the amendments to section 79(1)(b)(ii) which will now refer to 'a psychiatrist appointed by the court':
  - What is the reasoning for the removal of the role of the prosecutor from section 79(1)(b)(ii)? *The court in the Pedro case did not object to the role played by the prosecutor but stated that there was problem with the interpretation of the section and the drafting of the directives in section 79(13).* ***The Court held that it was desirable, in order to avoid confusion, that the directives issued by the NDPP be revised to conform with the declared meaning of s 79(1)(b)(ii).***

[36] S v Pedro [2015] (1) SACR 41 (WCC) para [9]

4. SOURCES

Criminal Procedure Act 51 of 1977

De Vos N.O and Another v Minister of Justice and Constitutional Development and Others; In Re: Snyders and Another v Minister of Justice And Constitutional Development and Others 2015 (1) SACR 18 (WCC)

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S v Pedro (B247/11) [2015] (1) SACR 41 (WCC)

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